ALTERNATIVE DISPUTE RESOLUTION

ISSUE TEAM REPORT

TABLE OF CONTENTS

I. EXECUTIVE SUMMARY AND RECOMMENDATIONS

The charge of the Alternative Dispute Resolution Issue Team was to explore alternative processes as a way of minimizing the complexity, time, and cost associated with litigation and other formal administrative hearing processes. Discussions about these alternative processes, the need for them, their possible applications and how they should be made available ensued. Out of these discussions came a summary statement of agreements reached:

1. Alternative dispute resolution means employing the use of arbitration/mediation, negotiation, conciliation and fact finding to help disputing parties resolve conflicts through negotiation, rather than litigation or administrative hearing.

2. Some disputes are better settled using ADR as opposed to pursuing resolution through more adversarial means. Concurrently, some types of disputes are better settled in court and with adminstrative hearings. ADR should be considered as an additional dispute resolving tool as opposed to an "alternative to" existing methods in all cases.

3. ADR must be entered into voluntarily by all parties and proceedings should be confidential.

4. Real incentives exist today for disputing parties to use alternative dispute resolution.

5. ADR can be applied to a wide variety of disputes including but not limited to: environment, energy, transportation, economic development, cases involving discrimination, housing, schools, funding, human services and local government.

6. ADR services should be made available at a variety of junctures on the continuum of a dispute's process.

7. Agencies should retain administrative control over mediation programs located within their agencies and should not be "required" to be locked into any specific ADR program or project.

8. Minnesota presently lacks the ability to properly identify those disputes which may benefit from ADR and to make ADR services systematically available (with the exception of the Department of Human Rights and the Department of Labor and Industry).

9. Use of services available in the private sector, such as trained mediators, arbitrators etc., should be encouraged rather than creating similar capacity within government.

10. Experimentation with ADR should be encouraged both within government and outside with institutions such as the University of Minnesota and the Humphrey Institute.

The final recommendations, in addition to reiterating and re-affirming the forementioned summary statements, came to essentially four recommendations:

1. To support continued discussion efforts to advance the availability of Alternative Dispute Resolution (ADR) for use in state government as a way of avoiding costly litigation and administrative hearings. The likely vehicle for this discussion was the proposed Office of Conflict Management. It was recognized, however, that the use of litigation and administrative hearings is an appropriate and preferred method of dispute resolution in many cases.

2. That the Office of Conflict Management serve in the role of facilitator linking outside mediators/arbitrators with disputing parties as opposed to "hiring" mediators. It was thought that this would help to heighten the sense of neutrality that is essential to the success of mediation.

3. That the Office of Conflict Management, along with an advisory board, be created by executive order and be placed temporarily with the State Planning Agency until such time as its worth is better established and documented. The State Planing Agency would then be responsible for making a recommendation as to where the function should eventually reside within state government, keeping in mind the reservations about attorney dominated offices controlling the ADR effort in state government.

4. That the Legislative Audit Commission audit the Office of Conflict Management program after a two-year period of time.

II. BACKGROUND

For about two years, the Governor has utilized an "Issue Team" approach for developing policy recommendations in several key issue areas. The charge of the Administrative Procedures Act/Alternative Dispute Resolution Issue Team was to explore alternative processes as a way of minimizing the complexity, time and cost associated with the Administrative Procedures Act (APA). With the legislative passage of recommended changes to the APA last session, and in anticipation of the acceptance of rules proposing the use of mediation services within the Office of Administrative Hearings, the focus of the APA/ADR Issue Team shifted to a broader discussion of Alternative Dispute Resolution. This shift in focus reflected an interest in the application of ADR processes by state agencies and its relationships with other governmental units. In response to this newly reconstituted ADR Issue Team, agency heads appointed/re-appointed their representatives to serve on the team.

In addition, participation was actively sought from persons in both the public and private sector as well as from the legislative branch who were knowledgeable and interested in ADR and environmental issues [Membership list-Appendix A].

Partially because of the limited time available before the start of the legislative session, the effort to explore the usefulness and applicability of mediation (with an emphasis on environmental issues) by the ADR Issue Team was a short but intense exchange conducted over the course of seven meetings.

Mr. James Hetland, Senior Vice President of First Bank Minneapolis and Ms. Terry Hoffman from the Public Utilities Commission, co-chaired the meetings. Organizationally, the first two ADR Issue Team meetings were attended by a subcommittee of the ADR Issue Team created specifically to address the subject of environmental mediation. When discussion turned to the proposed Office of Conflict Management (third meeting), the entire ADR Issue Team membership participated as a whole.

III. DEFINITIONS, MISSION STATEMENT AND PROCESS

Early on, concern was expressed about the direction of the Issue Team and about definition of terms. A mission statement was requested [Appendix B], and clarification was sought about what had become interchangeable use of mediation, negotiation and alternative dispute resolution. [Lexicon of "primary" and "hybrid" dispute resolution processes-Appendix C] For purposes of this report, alternative dispute resolution is the use of negotiation, conciliation, mediation, arbitration, mini-trials etc., as a means of avoiding traditional adversarial adjudication of a dispute. Mediation is a process which involves a neutral third party (mediator) in an effort to assist two or more disputing parties to reach voluntary, mutual resolution of a dispute. Mediation can also be used as a planning tool as well.

Over the course of approximately three months, the ADR Issue Team was asked to determine if: 1) there was an interest and/or need to have alternative dispute resolution processes available (in addition to the existing dispute resolution processes); and 2) should these tools (ADR) and/or information about them be provided centrally by an Office of Conflict Management, and more importantly, what kinds of services should the Office make available, how and where should it be located? Discussion centered on essentially three themes or issue areas; environmental mediation/arbitration, regulatory negotiation and the proposed Office of Conflict Management. In order to document the need for ADR, an examination of the existing dispute resolving processes was undertaken. Members were asked to respond to questions related to their agency or issue area. What kind of disputes or conflicts are dealt with? How are they resolved? What are the mandates? The costs? And finally, what are the problems associated with them and/or what are the barriers to successful resolution?

In answer to the first question, the disputes/conflicts mentioned were quite broad - ranging from permitting licensing, setting standards, promulgating rules, to fishing, land and water rights.

Methods of resolution mentioned were:

1. Use of the Administrative Procedures Act i.e. rule-making, contested hearings and public hearings.
2. Adjudication i.e. court orders, decrees, stipulations etc., and
3. Adherence to laws, regulations, standards and policy.

Negotiation and conciliation were used routinely as part of the aforementioned processes. Mediation and arbitration were rarely if ever used.

The problems/barriers to successful dispute resolution mentioned most frequently were:

1. The expenditure of too much time and funds.
2. Inflexibility and ineffectiveness of laws, standards, rules, regulation and policy.
3. Fear, distrust and misunderstanding.
4. Using a particular process for the sole purpose of delay, and
5. Having a process which was either too open, too closed, or too awkward.

When looking at the information in terms of adversarial vs. non-adversarial, it was clear that adversarial dispute resolving processes were predominantly used after an impasse was reached. Prior to reaching impasse, however, it was emphasized that almost all attempted to negotiate a settlement.

IV. ENVIRONMENTAL DISPUTE RESOLUTION

With the groundwork laid, discussion then turned to ADR (emphasis on environmental), its history, the process, and its applications. The first point made and stressed was that ADR should be a complimentary tool and not a replacement to the existing processes.

Historically, ADR is a relatively new field, being approximately 10 years old. It emerged as a result of attempts to apply labor dispute resolution techniques to citizen and environmental disputes. There is as yet very little case history. Program support came from the Ford, Hewlett, Atlantic Richfield Foundations and growth was mostly seen in the Northwest, Colorado and the East Coast.

In the beginning, there was very little funding available, and a more rigid definition existed as to what constituted an environmental dispute. Since then, an effort has been made to more carefully define the process and its uses. As a consequence, there is growing discussion about institution-alizing the process in order to provide an ongoing source of funding and about quality control i.e. who is the mediator, how are they selected, and how much and what kind of training is needed?

Recent developments include the issuance of a Ford Foundation funded publication (RESOLVE) which tracks various ADR programs nationwide. They also provided initial funding for the purpose of establishing the National Institute for Dispute Resolution (NIDR). Initial focus was on environmental and other multi-party dispute resolution. This focus has since expanded to include other kinds of alternative dispute resolution.

An analysis of ADR programs shows that they can be characterized by asking two basic questions:

1. What is the nature of the conflicts an ADR program focuses on? i.e. Is it site specific or generic?
2. At what stage in the conflict are ADR services made available? Some programs get involved before the problem exists, others wait until the filing of a lawsuit.

Beyond this analysis, there are four major organizational categories:

1. Conflict anticipators get involved before the issues and parties are known. Major corporations and some governmental units attempt to identify emerging conflicts. (A kind of future scanning if you will.) A good example of government anticipation of a potential conflict was the legislatively mandated copper-nickel study.

2. Collaborative problem-solving (also known as concensus building) deals with conflicts that are emerging. This method tends to use a neutral third person to get the parties together in order to negotiate a specific set of goals and participant responsibilities.

3. Policy dialogue tries to deal with general (non site-specific) problems in order to identify common ground and mutually shared goals among natural adversaries before a more specific problem develops.

4. Mediation. The provision of mediation services is indicated when the conflict is site-specific, the dispute is well defined, and when all interests have been identified. Again, the purpose of mediation is to make available a neutral third party to assist disputing parties in reaching a voluntary, mutually agreed upon solution.

A listing of existing programs demonstrative of these four major organizational categories [Appendix D]. Another area of growing interest is the notion of negotiated rulemaking or regulatory negotiation. The setting of standards and the promulgation of rules has become an adversarial process which may benefit in some instances from the use of a neutral third party. This will be discussed further later on.

Beyond the scope of "environmental disputes" the use of mediation is being increasingly applied to other areas i.e. community or neighborhood disputes. The fastest growing usage of mediation is with divorce and family-related disputes.

All of these methodologies have several things in common. The mediator's expertise is procedural, not substantive. Intervention by the mediator is designed solely to achieve a mutually acceptable outcome and not just to reach a solution. There are certain recognizable pre-conditions which need to be present if a particular dispute is to be referred for mediation. 1) The parties must want to settle, to resolve the dispute. 2) There needs to be a deadline for settling, otherwise people will delay making a decision until they finally believe there is a deadline (i.e. court-date, actual site selection etc.). 3) There must be something negotiable. Disputes become "non-negotiable", for example, when the prospect of having a hazardous waste site in their back yard is imminent. Also, some would argue that as long as elected officials are involved in these discussions, the option of a hoped for "no site" will always be present.

In proposing or designing a dispute resolution program, three ingredients are essential: 1) neutrality preceived or real, 2) the need for qualified practitioners, and 3) the need to look at and to study ADR history and to learn what works or doesn't work.

Also, the study of ADR should not be limited only to mediation services, but should involve discussion of the full range of participatory, concensus-reaching dispute resolving and policy planning processes as well.

The resource material relating to environmental or public sector dispute resolution can be found in Appendix E.

A listing of the advantages to using ADR (as opposed to litigating), barriers or hindrances to implementing ADR and some suggested requirements for successful application as well as case histories and specific examples of successfully mediated disputes are set forth in Appendix F.

V. NEGOTIATED RULEMAKING

Continued experimentation with ADR will result in more variations on the theme. One of those variations mentioned briefly earlier is regulatory negotiation. The Legislative Commission to Review Administrative Rules (LCRAR) and the State Planning Agency co-sponsored an ADR Issue Team workshop given b Phil Harter, attorney author of "Negotiating Regulations: A Cure for Malaise." In his presentation, Mr. Harter explained that this process, derived from the Kettering Foundation's Negotiated Investment Strategy (NIS) model, advocates the use of mediation in multi-party negotiations for the purpose of doing planning and policy development. The mediated negotiation process meets the policy dialogue criterion defined earlier.

There are several steps in the present rule-making process; an internal memorandum describing the proposed rule, advance notice of proposed rulemaking, notice of proposed rulemaking and final rulemaking. Frequently, upon notification, bitter adversarial activity ensues. Negotiation subsequently occurs, but it is sequential negotiation and it takes place after the rule has been proposed. Typically, each party with a vested interest meets with the agency individually and attempts to persuade them to alter the rules in their favor.

Phil Harter, in his article "Negotiating Regulations: A Cure for Malaise", noted that "such negotiation is merely one form of the adversarial process itself; each party attempts to sway the decision maker to a favorable disposition" and in the process, opposing parties "tend to take extreme positions expecting that they may be pushed toward the middle." At no point in the process do the competing parties face one another. Rather, each makes his individual presentation to the rulemaker and as in the courtroom, the parties predictably feel reluctant to reveal weaknesses in their positions and refuse to reveal data or results that do not support their position.

Regulatory negotiation is a process by which representatives of the interests that would be substantially affected by a regulation meet together to develop the initial draft of the regulation through direct negotiations. The process is primarily being tested by federal regulatory agencies, but it is also applicable at the state and local levels.

The process assumes that a neutral convener will make a concerted effort to identify the interests affected by the potential regulation and to identify the issues likely to be raised in negotiations.

The conditions favoring the use of direct negotiations in rulemaking are similar to those favoring the use of negotiations to resolve other types of issues. However, because the outcome of the discussions will be a proposed rule to be issued by a government agency, a few special twists do arise: the need for broad notice, the possibility of an agency feeling its "sovereignty" threatened, and the difficulties posed by traditional administrative procedures.

A few main rules of thumb determine the appropriateness of this approach:

* The number of interest groups should be limited so the parties can participate effectively. Each of these groups needs to be sufficiently well-organized so that it can select individuals to represent it in the discussions.

* The issues should be mature and ripe for decision. It is also helpful if there is a realistic deadline for issuing the rule.

* The issues involved should not require any interest to compromise a fundamental tenet.

* Each of the interested parties should have sufficient power so that the outcome of a traditional rulemaking process is in doubt. This power could come from facts that support a party's position, political influence, or favorable precedent.

* The agency itself should be interested in developing the rule through direct negotiations and be willing to appoint a senior staff member as its representative in the discussion.

* The parties should be willing to negotiate in good faith.

If after preliminary discussions, a convener determines that these conditions were met, he or she would recommend that the agency use the regulatory negotiation process for developing the rule. The agency then would, based on the convener's report, publish a notice in the Register announcing its plans to use regulatory negotiation and listing the issues to be addressed and the parties to be represented in the discussions. The notice would also invite parties that are interested in the rule, but not otherwise represented, to participate.

The group would then meet and attempt to develop a consensus on a proposed rule, along with a supporting explanation of the basis and purpose of the rule, which it would recommend to the agency. It is also likely that the convener, who would have met with the parties and explored their interests, would carry over and serve as a mediator/facilitator.

If the parties reached an agreement, the agency would be expected to publish the team's recommendation as a proposed rule unless it had good cause for not doing so. It could, of course, comment on the proposal in the notice of proposed rule making. The agency would then modify the proposal after considering comments made in response to the notice. The agency would likely submit such comments to the negotiating group for its reactions before issuing the final rule.*

* Phil Harter, "Negotiating Regulations: A Cure for Malaise."

Case histories of the pilot negotiated rule-making efforts involving EPA, the Federal Avaiation Administration, and OSHA are contained in Appendix G.

While the sample is small, the results of the "reg-neg" experiments to date, have been successful.

The Issue Team devoted the rest of its time to discussion of both the ADR related efforts in and by the state and the proposed Office of Conflict Management.

VI. MINNESOTA'S ADR HISTORY

A briefing outlining the history and current status of the "broader ADR picture" in Minnesota was given (Appendix H). To highlight: considerable advancement of a range of ADR programming has occurred in recent years both locally and at the state level. In 1981, Minnesota became the second state in the country to appropriate money to establish Community Dispute Resolution Settlement Programs (2). Mediation projects were started within the Department of Human Rights and the Departmer of Labor and Industry. In 1983, the Alternative Dispute Resolution Program within the State Planning Agency accepted as its charge, to research and pilot efforts to make ADR processes available for use within and by state government. Several initiatives were started by the ADR program:

* A legislatively mandated study was begun by the Legislative Commission for the Review of Administrative Rules to determine the feasibility of making ADR processes available within the Office of Administrative Hearings to serve as alternatives to the sometimes lengthly and costly contested case hearings.

* Administrative Law Judges received training in mediation and began to mediate in some pilot cases.

* Legislation was drafted and passed which created a Community Dispute Settlement Center Program to be administered by the State Court Administrator's Office.

* Conflict asssessments and informal briefings about mediation were conducted with disputing parties involved in two randomly selected lawsuits that had been filed against two state agencies. Upon receipt of the consent of the parties, both were referred for mediation and were subsequently successfully mediated.

* Discussions were begun with the Humphrey Institute and the University of Minnesota about the possibility of conducting research and developing curriculum in the area of negotiation and more specifically ADR. (Out of these discussions came a jointly proposed Conflict Analysis Project which was presented to the Issue Team by its author, Dr. Tom Fiutak.

At some point, it is expected that there would be a co-operative contractual agreement between the state and the University of Minnesota to provide research and evaluation services for state ADR related projects.)

* Finally, the ADR program was responsible for drafting a proposal to "create" a Statewide Office of Conflict Management. It was this preliminary proposal dated September 1984 which was presented to the ADR Issue Team for review, comment, input and approval. [Appendix I]

avMr. Jim Hetland
Sr. Vice President
1st National Bank
120 South 6th Street
Minneapolis, Minnesota 55402
vMr. Hetlandv

avMr. Jay Heffern
Deputy Director
Pollution Control Agency
1935 West County Road B-2
Roseville, Minnesota
vJayv

avThe Honorable Gordon Voss
Representative
174 State Office Building
St. Paul, Minnesota 55155
vRepresentative Vossv

avMr. Gene Hollenstein
Department of Natural Resources
3rd Floor Space Center
444 Lafayette Road
St. Paul, Minnesota 55101
vGenev

avThe Honorable Gene Merriam
Senator
24G State Capitol
St. Paul, Minnesota 55155
vSenator Merriamv

avMr. Tom Balcom
Department of Natural Resources
3rd Floor Centennial Building
St. Paul, Minnesota 55155
vTomv

avMr. Mike Sullivan
Executive Director
Environmental Quality Board
100 Capitol Square Building
550 Cedar Street
St. Paul, Minnesota 55101
vMikev

avThe Honorable Willard Munger
Representative
House Environment Committee
297 State Office Building
St. Paul, Minnesota 55155
vRepresentative Mungerv

avMr. Gregg Downing
State Planning Agency
Environmental Division
100 Capitol Square Building
550 Cedar Street
St. Paul, Minnesota 55101
vGreggv

avMr. Paul Burns
Department of Agriculture
90 West Plato Boulevard
St. Paul, Minnesota 55107
vPaulv

avMs. Cheryl Heide
Department of Transportation
704 Transportation Building
John Ireland Boulevard
St. Paul, Minnesota 55155
vCherylv

avMr. Jim Newland/Mr. Tom Johnson
Waste Management Board
7323 58th Avenue North
Crystal, Minnesota 55428
vJim and Tomv

avMs. Sue Robertson
Director
Legislative Commission on
Waste Management
B46 State Capitol
St. Paul, Minnesota 55155
vSuev

avMr. Allan Klein
Administrative Hearings Office
4th Floor Summit Bank Building
310 4th Avenue South
Minneapolis, Minnesota 55415
vAllanv

avMr. Will Hartfeldt
Hartfeldt, Hedges and Grant
2850 Metro Drive
Bloomington, Minnesota 55420
vWillv

avMr. Jim Payne
Popham, Haik, Schnobrich, Kaufman & Doty, Ltd.
4344 IDS Center
Minneapolis, Minnesota 55402
vJimv

avMr. Nelson French
Sierra Club
2929 4th Avenue South
Minneapolis, Minnesota 55408
vNelsonv

avMs. Carol Lee Baudler
The Nature Conservancy
328 Hennepin Avenue East
Minneapolis, Minnesota 55414
vCarolv

avMr. Eric Bauman
Director of Environmental Planning
Cooperative Power Association
14615 Lone Oak Road
Eden Prairie, Minnesota 55344
vEricv

avMr. Bob Buckler
Minnesota Forest Industry Association
Pioneer Building
336 North Robert Street
St. Paul, Minnesota 55101
vBobv

avProfessor David Printz
William Mitchell College of Law
875 Summit Avenue
St. Paul, Minnesota 55105
vProfessor Printzv

avMr. Edwin Holmes/James D. Miller
Legal Services
Control Data
8100 34th Avenue South
Minneapolis, Minnesota 55420
vEd and Jimv

avMr. Marcel Jouseau
Metropolitan Council
300 Metro Square Building
7th & Robert Streets
St. Paul, Minnesota 55101
vMarcelv

avMr. Pete Meintsma
Metropolitan Waste Control Commission
350 Metro Square Building
7th and Robert Streets
St. Paul, Minnesota 55101
vPetev

avMs. Terry Hoffman
Commissioner
Public Utilities Commission
780 American Center Building
160 East Kellogg Boulevard
St. Paul, Minnesota 55101
vTerryv

avMr. Lee Paddock
Assistant Attorney General
1935 West County Road B-2
Roseville, Minnesota 55113
vLeev

avMs. Ronnie Brooks, Manager
Community Development and
Policy Planning
Dayton-Hudson Corporation
777 Nicollet Mall
Minneapolis, Minnesota 55402
vRonnieV

avMr. Robert S. Burk
Popham, Haik, Schnobrich, Kaufman
and Doty, Ltd.
4344 IDS Center
Minneapolis, Minnesota 55402
vRobertv

avMr. Mac Hyde
Bassford, Heckt, Lockhart and Mullin
Pillsbury Center
Minneapolis, Minnesota 55402
vMacv

avMs. Erika Sitz
Izaac Walton League
6521 154th Lane N.W.
Anoka, Minnesota 55303
vErikav

avMs. Julie Smendzvik O'Brien
Department of Natural Resources
2nd Flood, Space Center Building
444 Lafayette Road
St. Paul, MN 55101
vJuliev

avRepresentative Dan Knuth
1106 Rockstone Lane
New Brighton, MN 55112
vDanv

avMr. Paul Goldberg, Director
Bureau of Mediation Services
2nd Floor, Summit National Bank Building
205 Aurora Avenue
St. Paul, MN 55155
vPaulv

avMs. Gloria Sonnen and Ms. Elaine DaFrensa
Department of Public Welfare
4th Floor Centennial Office Building
658 Cedar Street
St. Paul, MN 55155
vGloria and Elainev

avMs. Patricia Lien
Department of Revenue
Office of the Commissioner
Centennial Office Building
658 Cedar Street
St. Paul, MN 55155
vPatv

avMs. Joan Volz
Department of Labor and Industry
5th Floor Space Center Building
444 Lafayette Road
St. Paul, MN 55101
vJoanv

avMs. Marsha Macauley and Mr. John Greco
Department of Human Rights
5th Floor Bremer Tower
7th and Minnesota Streets
St. Paul, MN 55101
vMarsha and Johnv

avMr. Robert Gramstad
Department of Education
Community and Adult Education Section
7th Floor Capitol Square Building
550 Cedar Street
St. Paul, MN 55101
vMr. Gramstadv

avMr. Roger Wangen
Department of Education
Elementary and Secondary Education Section
7th Floor Capitol Square Building
550 Cedar Street
St. Paul, MN 55101
vRogerv

avMichael Hatch
Commissioner
Department of Commerce
5th Floor Metro Square Building
7th and Robert Streets
St. Paul, MN 55101
vCommissioner Hatchv

avMr. Mark Sundquist and Ms. Linda Giesen
Department of Employee Relations
Training and Development Division
3rd Floor Space Center Building
444 Lafayette Road
St. Paul, MN 55101
vMark and Lindav

avMr. Greg Hubinger
Department of Energy and
Economic Development
980 American Center Building
150 East Kellogg Boulevard
St. Paul, MN 55101
vGregv

avMs. Suzanne Zorn
Department of Administration
Administration Building
50 Sherburne Avenue
St. Paul, MN 55155
vSuzannev

avMr. Kent Harbison
Deputy Attorney General
Attorney General's Office
State Capitol
St. Paul, MN 55155
vKentv

avMs. Sue Dosal
State Court Administrator
40 N. Milton
Room 300
St. Paul, MN 55104
vSuev

avMs. Kathy Burek
LCRAR
B46 Capitol
St. Paul, MN 55155
vKathyv

avMr. Tom Todd
House Research
State Capitol
St. Paul, MN 55155
vTomv

avMr. John Wolf
Mediation Center
300 Commercial Building
256 - 1st Avenue N.
Minneapolis, MN 55401
vJohnv

avDr. Tom Fiutak
Student Org. Dev. Center
340 Coffman Memorial
University of Minnesota
Minneapolis, MN 55455
vTomv

avMs. Maggie Arzdorf
430 Metro Square Building
7th & Robert Streets
St. Paul, MN 55101
vMaggiev

avMr. Larry Commers
State Bar Association
MacIntosh & Commers
430 Marquette Ave. S., Suite 410
Minneapolis, MN 55401
vLarryv

Minnesota
STATE PLANNING AGENCY

Room 100 Capitol Square Building
550 Cedar Street St. Paul, MN 55101

MISSION STATEMENT

There is presently limited information about alternative dispute resolution in state government. We presently lack the capacity to make informed decisions about how and when to use alternative dispute resolution and with what kind of disputes. It is the charge of the Environmental Mediation Task Force and in part the broader ADR Issue Team to research and study alternative disputes resolution processes and existing programs in order to determine: #1. if there is an interest/ or a need to have these tools available (in addition to the existing methods) and #2. whether those tools and/or information about them should be provided centrally by the proposed Office of Conflict Management.

"PRIMARY" DISPUTE RESOLUTION PROCESSES

ADJUDICATION	ARBITRATION	MEDIATION/ CONCILIATION	TRADITIONAL NEGOTIATION
Non-voluntary	Voluntary unless contractual or court centered	Voluntary	Voluntary
Binding, subject to appeal	Binding (usually), no appeal	Non-binding	Non-binding (except through use of adjudication to enforce agreement
Imposed, third-party neutral decision-maker, with no specialized expertise in dispute subject	Party-selected third-party decision-maker, usually with specialized subject expertise	Party-selected outside facilitator, often with specialized subject expertise	No third-party facilitator
Highly procedural; formalized and highly structured by predetermined, rigid rules	Procedurally less formal; procedural rules and substantive law may be set by parties	Usually informal, unstructured	Usually informal, unstructured
Opportunity for each party to present proofs supporting decision in its favor	Opportunity for each party to present proofs supporting decision in its favor	Presentation of proofs less important than attitudes of each party; may include principled agrument	Presentation of proofs usually indirect or non-existent; may include principled argument
Win/Lose result	Compromise result possible (probable?)	Mutually acceptable agreement sought	Mutually acceptable agreement sought
Expectation of reasoned statement	Reason for result not usually required	Agreement usually embodied in contract or release	Agreement usually embodied in contract or release
Process emphasizes attaining substantive consistency and predictability of results	Consistency and predictability balanced against concern for disputants' relationship	Emphasis on disputants' relationship, not on adherence to or development of consistent rules	Emphasis on disputants' relationship, not on adherence to or development of consistent rules
Public process; lack of privacy of submissions	Private process unless judicial enforcement sought	Private process	Highly private process

"HYBRID" DISPUTE RESOLUTION PROCESSES

PRIVATE JUDGING	NEUTRAL EXPERT FACT-FINDING	MINI-TRIAL	SETTLEMENT CONFERENCE
Voluntary	Voluntary or nonvoluntary under FRE 706	Voluntary	Voluntary or mandatory
Binding but subject to appeal and possibly review by trial court	Non-binding but results may be admissable	Non-binding (except through use of adjudication to enforce agreement)	Binding or non-binding
Party-selected third-party decision-maker; may have to be former judge or lawyer	Third-party neutral with specialized subject matter expertise may be selected by the parties	Third-party neutral advisor often with specialized subject expertise	Judge, other judge, or third-party neut selected by parties
Statutory procedure (see, e.g. Cal. Code Civ. Proc. § 638 et seq.) but highly flexible as to timing, place and procedures	Informal	Less formal than adjudication and arbitration but procedural rules and scope of issues may be set by the parties and implemented by neutral advisor	Informal, off-the-record
Opportunity for each party to present proofs supporting decision in its favor	Investigatory	Opportunity and responsibility to present proofs supporting result in its favor	Presentation o proofs may or y n be allowed
Win/lose result (judgement of court)	Report or testimony	Mutually acceptable agreement sought	Mutually acceptable ment sought; bindir ference is similar arbitration
Findings of fact and conclusions of law possible but not required	May influence result or settlement	Agreement usually embodied in contract or release	Agreement usually embodied in contrac or release
Adherence to norms, laws and precedent	Emphasis on reliable fact determination	Emphasis on sound, cost-effective and fair resolution satisfactory to both parties	Emphasis on resolv the dispute
Private process unless judicial enforcement sought	May be highly private or disclosed in court	Highly private process	Private process bu may be discovered

SOURCE: Green, Eric D., Speech to Rocky Mountain Mineral Law Foundation Sem. r, March, 1984

ENVIRONMENTAL DISPUTE RESOLUTION PROGRAMS

1. Conflict Anticipators

   The Metwork in Santa Fe attempts to anticipate water-related disputes

2. Collaborative Problem-solving

   Two examples of programs which have been very successful in bringing people together for consensus building are FORUM in Palo Alto, California, and ACCORD (formerly ROMCOE), in Denver.

3. Policy Dialogue

   Examples of existing programs include the Keystone Center which managed the National Coal Policy Project, the Conservation Foundation, and the Kettering Foundation, which created the Negotiated Investment Strategy (NIS).

4. Mediation

   Three major programs in the country mentioned which successfully provide direct mediation services are the Institute for Environmental Mediation, the New England Mediation Project and Environmental Mediation International

RESOURCE MATERIAL:

Mediated Negotiation In The Public Sector, by Lawrence Susskind and Connie Ozawa

Mediation: A New Approach To Environmental Dispute, by Jane McCarthy

Six Innovations In The Process Of Public Sector Dispute Resolution, by Larry Susskind and Denise Madigan

The Conservation Foundation: The Process Of Dialogue On Environmental Policy Issues, by Gail Bingham

The Myth, The Reality And The Future Of Environmental Mediation, by Gerald W. Cormick

State of New York's Draft Of New York State Environmental Mediation Center

"Primary" And "Hybrid" Dispute Resolution Processes, from Eric D. Green's speech to Rocky Mountain Mineral Law Foundation Seminar - March 1984

Background Information From Conflict Resolution: Prospects For The Future, from Ford Foundation 1980

Environmental Mediation As An Alternative To Litigation, by Howard Bellman - Reprinted from Wisconsin Bar Bulletin

Environmental Conflict Management Part Two, by Pat Bidol/Michael Lesnick. Reprinted from Focus on Great Lakes Water Quality Volume 9, Issue 2

Environmental Dispute Resolution, by Bette Hileman. Reprinted from Environmental Science Technology, Volume 17, #4, 1983

Creative Conflict Resolution Of Land Use Disputes, by Philip Marcus - August 5, 1984 presentation to Annual Meeting of American Bar Association

* Negotiating Regulations: A Cure For Malaise, Georgetown Law Journal 1983 by Phil J. Harter

Resolve's Winter 1981 Issue On Environmental Concensus

Resolve, Winter 1984 Newsletter

Advantages of Mediating a Dispute over an Adversarial Approach:

1. Mediation allows for tailoring the mediation procedure and schedule by the players and to the specific situation.

2. Mediation increases the outcome choices available to parties and promotes creative resolutions.

3. Promotes maximization of joint gains; balance of competing interests.

4. Keeps control of the dispute situation in the hands of those directly involved and affected.

5. Through working together, parties develop a degree of trust in each other rather than discrediting each other and looking for revenge.

6. Maintains communication links between all parties and beyond to those the parties are accountable to, thereby increasing adherence to agreed-upon solutions.

7. Face-to-face dialogue instead of one-way communication characteristic of court procedures.

8. Most disputes involve multiple parties. Mediation involves all in the decision-making process. Also, additional parties can enter the process at various stages in the procedure as they become involved in subsequent aspects of the dispute.

9. Comparatively, time and cost efficient.

10. Convenient; can take place at dispute location.

11. Retention of traditional adversarial procedures, including litigation, still an option subsequent to mediation.

12. Early intervention in conflict situation may inhibit development of an imbalanced power situation building between parties.

13. Eventually, like labor negotiation, environmental mediation will become accepted and have standardized frame works and parameters for re-negotiation of re-opened disputes and continued oversight.

14. In face-to-face, parties can get to positions of underlying interest that do not come out of traditional public hearing or litigation.

15. Agreed-upon solutions remain stable over time, with parties in amicable relationship following agreement rather than frustrated and embittered.

16. Mediation focuses on content questions; litigation addresses procedural questions and can bar crucial evidence.

17. Mediation outcome reflects broader community welfare; litigation outcome reflects extreme position of one interest.

18. Mediation is less subject to political pressure than legislative and administrative processes.

19. Parties view the mediating process as fairer, more understandable, with better outcomes; this results in higher morale and a larger obligation felt on parties' part to uphold agreements reached.

20. Parties are in a better position to monitor each others' performance following agreement.

21. An agreement voluntarily arrived at is more likely to be adhered to.

22. Mediation makes productive use of conflict.

23. Mediation focuses on interests rather than issues, allowing creative alternatives to emerge.

24. Mediation promotes clarification of problem definition, issues, interests, values, risks. Promotes testing of accuracy of information and basic assumptions.

25. Early intervention prevents or inhibits problem escalation.

26. Diffuses paralyzing intense emotions, characteristic of environmental disputes, through neutral setting and facilitating.

27. Mediation procedure builds good relations with the community for future projects.

28. Complex political environment surrounds each environmental issue. With present approaches, disputes get shifted from agency to agency with no single decision-maker or regulatory process to coordinate the decision making. Incentive is then more powerful or knowledgeable to shift the dispute from agency to agency or from legislative to executive to judicial or from local to state to federal governments in order to achieve one's goals.

29. Can establish a working relationship with the courts and be a vehicle for reference by courts for cases more appropriately handled through mediation.

30. Combine fact finding with mediation to help courts and parties deal with scientific uncertainty or complex factual disputes.

31. Generation of consistent standards and policy guidelines.

32. Arbitration would reduce court loads, and courts will uphold agreements arrived at through agreed-upon arbitration.

Hindrances to Implementing Mediation:

1. Environmental groups fear co-optation in institutionalized mediation mechanisms.

2. Environmental groups fear they will compromise their principles or values in accepting a compromised agreement.

3. Environmental groups (because they are dealing with so many issues and using volunteers, feel overwhelmed in the face of powerful industry groups) file suits to gain a standing and also for time delays to improve their position.

4. There is usually an imbalance of power between disputants because of environmentalists' limited resources; sufficient influence by all parties concerned is essential for joint participation in decision making.

5. Environmental groups prefer litigation because they get good results through the courts as courts have tended to favor environmental groups. Fear of losing; insecurity is high because of limited knowledge or experience.

6. The mediation process acknowledges "conflict" which some see as implying failure.

7. There is some belief that mediation is second class justice for disputants with fewer resources; belief that parties of means and knowledge would use courts (first class justice).

8. The neutral, professional mediator may have success in achieving agreement between parties, then leave the scene and parties have difficulty implementing the agreement (due to reluctant governmental authorities, changing economic conditions, subsequent conflict, etc.).

9. Nediation does not reduce courts loads. Mediated agreements are not legally binding.

10. A new cast of players because of time lapse in the mediation process (change in political arena, a voluntary organization's personnel, etc.) may make any agreement reached by the original parties hard to implement if not backed by the legal court system.

11. Public disputes are complex, with many parties who have a legitimate interest in the issue. Some parties may be diffuse, inarticulate, hard-to-organize groups; also it is difficult to identify and include all legitimate interests in the process. Some interests evolve over time and must be considered. The number of participants may be unwieldy.

12. In mediation, the informality of the forum and no formal record keeping may preclude setting of precedents and enforcing norms.

13. Environmental mediation is not long standing and institutionalized like labor mediation and so must be "sold" to participants who do not understand the process, and groundrules must be generated anew for each situation.

14. In labor negotiations, the on-going relationship between dispute parties serve as a vested interest to maintaining the terms of the agreement; in addition, in labor negotiations, specific persons are designated as spokespersons for the parties between successive disputes and following agreements, providing continuity. In environmental mediation, changing conditions and transcient, one-time relationships may offer no incentive to honor an agreement. Environmental mediation still has an ad hoc nature.

15. There is no stable funding source for environmental mediation.

16. Except for labor and international relations, the entire field of dispute resolution is not well known or established, and documentation and evaluation of results thus far is limited. Thus, interested participants and legislators are wary of an untried, unproven mechanism.

17. Environmental mediation has been tried experimentally for 10 years and programs thus far have failed to develop larg case loads; however, it is growing slowly.

18. Parties look to mediation only when the outcome to litigation is in doubt.

Some Suggested Requirements For Successful Mediation:

1. Mediator must be impartial, professional level; could use mediators from American Arbitration Assocation.

2. Use mediators located throughout the state to allow mediation to occur at or near dispute location.

3. Mediation must be voluntary, with freedom to withdraw at any time.

4. No waiver of legal rights or responsibilties. Litigation still a subsequent option.

5. The parties establish the structure, groundrules for negotiation, and fee structure.

6. Pre-negotiation assessments involving all parties to estimate whether mediation has a chance for success in that particular case; parties then decide whether to proceed with mediation.

7. Agreement should be considered binding when signed by all parties.

8. Establish a formal relationship with the courts (for credibility with parties and public and for references from the court for cases appropriate for mediation).

9. Conduct on-going evaluation to compare effectiveness of various mediation processes.

10. Arbitration can be optional, following agreement by all parties to submit to arbitration proceedings and agreement by all to the arbitrator chosen.

11. Any legislation to establish a mediation mechanism should include representatives of the following in the drafting process: business, environmentalists, labor relations, the courts, regulatory agencies, and neutral public groups such as the LWV.

Other Suggestions:

1. Establish the mediation program on a pilot basis; it will seem less threatening.

2. Apply for a grant to lend credibility to the pilot project.

3. Utilize National Institute for Dispute Resolution for technical assistance, information, money for public hearings or educational conferences.

4. Work with moderate environmental groups first as extremists are most suspicious and fear co-optation.

5. A university setting can take advantage of the expertise available there and the resource contact available through those experts.

6. Do not include a binding arbitration component. It is too threatening. This is a step to be incorporated, if needed, several years down the road when all interests have internalized mediation as an accepted, appropriate step in achieving goals.

7. If the underlying intent is really to establish a mechanism whereby industry can more easily impose its will upon the public, then re-examine your conscience and shelve the mediation center concept.

Specific Examples of Successfully Mediated Disputes:

1. Forest Hills: public housing project (Mario Cuomo was mediator).
2. Seattle, Washington: Dam on Snoqualmie River to prevent floods threatened development of open land space.
3. New York City: Con. Ed. power plant license, a 17-year dispute.
4. Missouri: Railroad right of way conversions.
5. Maryland: Patuxent River water quality.
6. Fishing rights.
7. Housing and shopping center developments.
8. Historic preservation.
9. Port development.
10. Conversion of oil power plant to coal.
11. Park access.
12. Highway extension.
13. Land reclamation.
14. Farmland preservation.
15. Estuary development.
16. Land annexation.
17. Uranium mining regulations.
18. Mobile home siting.
19. Solid waste siting.
20. Water supply disputes.
21. Natural resource development.
22. Coal mining policy development.
23. With OSHA, negotiation of national benzene standard.
24. Conversion of public lands to private water development purposes.
25. Soil conservation.
26. Use and management of environmentally sensitive lands.

have focused attention on the issues. Moreover, their very existence has helped make some interests more comfortable with the process.

Several agencies now have begun using the process and are developing a body of direct experience in negotiated rule making. Although a full understanding of whether the process is entirely successful will have to wait a few more months, the experience thus far holds important lessons.

The Administrative Conference of the United States (ACUS), the federal agency responsible for making recommendations to agencies and Congress on administrative procedure, commissioned a comprehensive study of regulatory negotiation in 1981.[3] At its June 1982 session, the Conference formally recommended that "agencies should consider using regulatory negotiation" and recommended procedures for doing so.[4]

The Bar Association of the District of Columbia later held a series of seminars on the subject, and the Section of Administrative Law of the American Bar Association devoted its annual conference to it. Discussion of the prospect of negotiating regulations has been included in other forums and among a variety of interests. The notion of developing regulations through face-to-face negotiations also has generated a great deal of debate in regulatory circles.

Until recently, these discussions were based on theory and drew on negotiation experiences in analogous areas. Several agencies now have begun using the process, however. Hence, a body of direct experience in negotiated rule making is being developed. Although a full understanding of whether the process is entirely successful will have to wait a few more months, the experience thus far holds important lessons.

Second National Conference on Environmental Dispute Resolution

The Conservation Foundation will sponsor its Second National Conference on Environmental Dispute Resolution on October 1-2, 1984, in Washington, D.C.

If you deal with environmental issues today, controversy is a familiar experience. At this conference, you will have the opportunity to learn more about the experience to date with alternative approaches to resolving environmental disputes. Under what conditions are dialogue and negotiation effective? How can business, environmental groups, and public agencies learn to negotiate resolutions to environmental issues more effectively? What lies ahead for these new approaches?

For further information about the conference, please contact Gail Bingham, senior associate, or Yvonne Lewis, conference manager, at The Conservation Foundation, 1717 Massachusetts Avenue, N.W., Washington, DC 20036. 202/797-4300.

Environmental Protection Agency

The Environmental Protection Agency (EPA) was the first to announce that it planned to use the negotiated rule-making process. Joseph A. Cannon, who was then associate administrator for policy and resource management and is currently assistant administrator for air and radiation, was an early supporter of the idea and served on the committee of the Administrative Conference that developed its recommendations. In the fall of 1982, he announced that the agency was planning to move ahead "aggressively" with a program of developing regulations through negotiation and that the staff was completing details on the program before briefing the Office of Management and Budget.[5]

Cannon described the program more fully in a speech at The Conservation Foundation's National Conference on Environmental Dispute Resolution, in which he reviewed the problems with the traditional rule-making process and announced that the agency intended to conduct a "demonstration project" involving the negotiation of two rules.[6] A major goal of the project would be to gain a better understanding of the process, such as the resources and time needed, the role of the convener, and the usefulness of the results to the agency. In keeping with its experimental nature, EPA contracted with the Harvard Negotiation Project to design and conduct a documentation system that would capture the lessons learned from the experience.

EPA contracted with John McGlennon, an experienced environmental mediator and former administrator of EPA Region 1, as the independent convener for the first rule. Cannon announced that an EPA official, independent of the program office responsible for the regulation under development, would serve as the convener for the second rule. He also announced that EPA would provide funds to defray some of the costs of participation for the parties.

Selecting the topics to be negotiated would be a collective process involving the EPA program offices, major interest groups, and the public at large. Each of these interests would be asked to nominate prospective rules. After the agency itself reviewed the suggestions to determine whether they were likely candidates for successful negotiation, EPA would review the list with the interests and, following those discussions, select the final contenders. In February 1983, EPA published an "Information Notice" in the *Federal Register* formally announcing the program, describing the criteria it would use in selecting "candidate" rules, and inviting suggestions for regulations to be developed under the program.[7] Suggestions were submitted by several different interests, including both industry and environmental groups, in response to the notice and in informal discussions with the agency.

EPA was in the process of reviewing the

submittals and discussing potential topics with interested parties when the massive resignation of senior officials began. Although the project was not entirely shelved during this period of turmoil, the prospects of actually selecting a rule for negotiation were slowed significantly. The regulatory negotiation program has since picked up again as faith in the agency itself has been renewed.

Following discussions with various groups that would be affected by a regulation in the area, EPA settled preliminarily on low-level radioactive wastes as the topic for the first regulatory negotiation. Several interests objected to the topic, however, on grounds that the subject did not meet several of the requisite criteria. They were worried, for example, that the issues that would be raised during the discussions would require the parties to confront fundamental, strongly held values; that extensive factual research would be needed, which some of the parties lacked the resources to conduct; that too many agencies would necessarily be involved and hence there would be no clear line of authority within the government; and that the issues were not sufficiently ripe and specific, which might result in too many extraneous issues being raised.

After, additional meetings, the agency abandoned low-level radioactive wastes as a topic and began looking for another. The current subject under consideration is the regulation of a chemical group under the Toxic Substances Control Act.

Thus, more than a year after announcing its intention to experiment with the process of regulatory negotiation, EPA is still getting started.

Federal Aviation Administration

The Federal Aviation Administration (FAA) announced in May 1983 that it intended to form an advisory committee to develop proposed regulations concerning flight and duty time and rest requirements for aircraft crews.[8] These regulations had been particularly nettlesome to the FAA and had remained virtually unchanged for 30 years, notwithstanding the dramatic change in aircraft and the air transportation industry during that period. Several previous attempts at revision had failed for various reasons, and the subject had generated more requests for interpretation than had any other FAA regulation. The agency had issued more than 1,000 pages of interpretations of the existing rules over the years.

One Department of Transportation official quipped that regulatory negotiation looked particularly attractive, because various interests critical of the FAA had asserted that all would be well if only the government would let the private sector address the problem. Regulatory negotiation afforded these parties the opportunity to demonstrate whether that really was the case.[9]

Nicholas Fidandis, director of mediation services of the Federal Mediation and Conciliation Service, served as the convener. The *Federal Register* notice stated that he and the FAA had reviewed the subject matter in the abstract and with a number of interested parties and had concluded that it met the criteria for regulatory negotiation. The notice described potential parties to the negotiations and the issues that would likely be raised. Also, it explicitly said that the

> objective of the committee is to prepare a report containing a notice of proposed rulemaking...and preamble...The FAA would issue the proposed rule as prepared by the committee unless the agency finds that it is inconsistent with the statutory authority of the agency or other statutory requirements or it is not appropriately justified. In that event, the agency would explain its reasons for its decision.

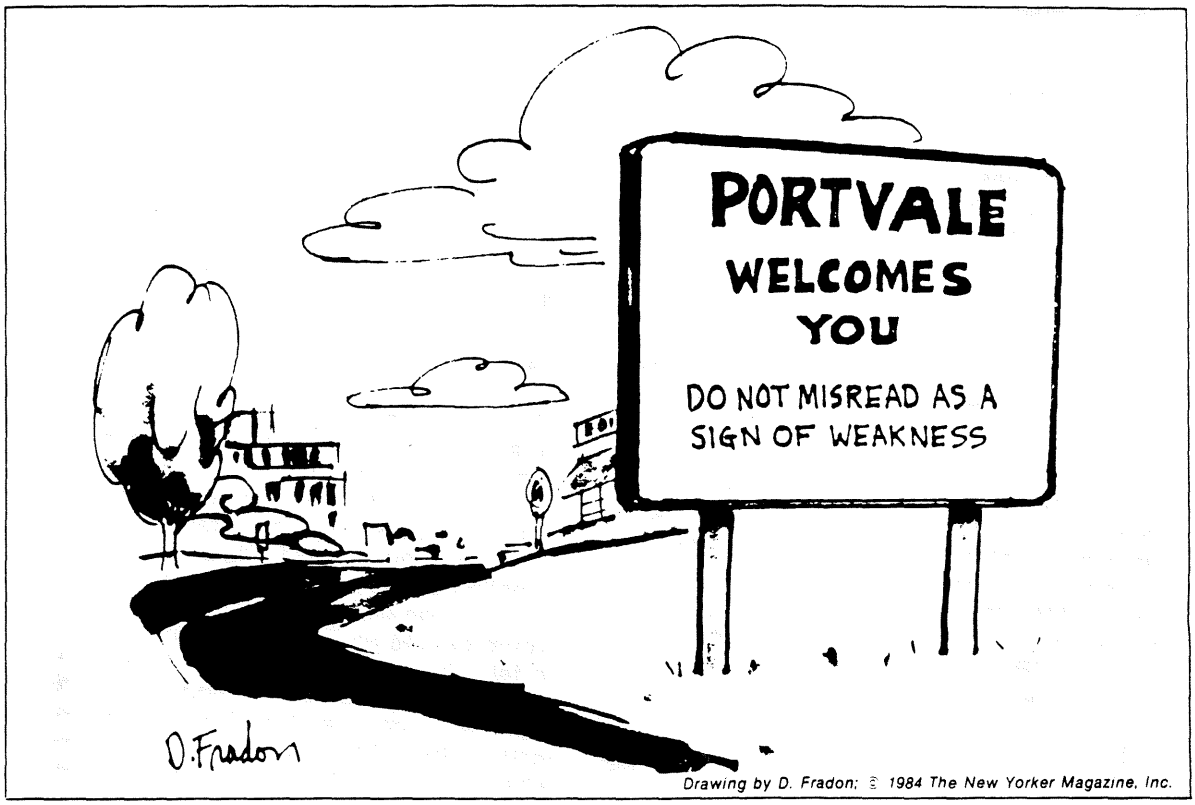
Finally, the notice it invited additional groups to request representation on the committee if they would be substantially affected by the regulation and were not otherwise represented. Several parties were added to the committee as a result.

The committee began meeting on June 29, 1983, with representatives of 19 interests. Some interests opposed the process because they believed the issue was the subject for collective bargaining and should not be codified in a regulation, but they decided to participate on the committee. Given the earlier attempts at renovating the existing standard, some also may have felt that there was no realistic threat of a deadline by which the agency itself would issue a rule. These problems notwithstanding, the discussions were undertaken in earnest during 19 days of meetings extended over three months. The meetings were open to the public and resulted in a give and take on the issues that is rarely seen in other regulatory forums. A great deal of work also was done in caucuses.

The committee came close to a consensus on a proposed rule for specialized air carriers, although there were some dissents. The regulations for scheduled carriers proved more intractable. Seven proposals were made, but no agreement was reached by the time the committee adjourned. The group also made substantial progress on policies for the commuter airlines—a sector of the industry that particularly needed guidance because of its recent growth.

After the committee adjourned in late September, the FAA itself undertook to develop draft regulations that built on the negotiations. It plans to circulate its draft to the committee for review before a meeting that has been scheduled for the middle of February. Following the February meeting, the agency will issue a formal notice of proposed rule making. The agency has said that it found the discussions extremely helpful in furthering its understanding of the problems

Regulatory negotia needs the clear su port of the agency some intimate con tion with it during development of th regulatory proposa



Drawing by D. Fradon; © 1984 The New Yorker Magazine, Inc.

involved. One official was quoted as saying that the progress the group made on a number of items was "really miraculous...it shows the process works."[10] It is too early to know whether the discussions will enable FAA to complete the rule making with a product satisfactory to all the parties, but so far the reviews of the process have been good.

Occupational Safety and Health Administration

In 1978, the Occupational Safety and Health Administration (OSHA) of the U.S. Department of Labor issued a standard governing occupational exposures to benzene. It was challenged by industry, and the case wound up in the Supreme Court as the first of two in which the role of costs in OSHA health regulations was considered. The Court invalidated the standard and sent it back for further work. OSHA committed itself to publishing a proposed rule by the end of 1983 and a final rule by summer 1984.[11] (The deadline for the proposed rule was missed, despite a diligent effort by the agency.)

Simultaneously with announcing its commitment to this schedule, OSHA retained Gerald Cormick and this author through the Mediation Institute in Seattle to conduct a feasibility analysis to determine whether it would be appropriate to develop the rule through regulatory negotiation. To that end, meetings were held with the interests that had played a major role in the earlier, particularly bitter rule-making proceeding. The discussions centered on what the process would be like and whether the issues were such that they could be addressed more satisfactorily through regulatory negotiation than through the traditional route.

Although in the abstract the issues met the criteria for regulatory negotiation quite well, one overriding problem caused the consultants to recommend against using a negotiated rule-making process: no one wanted to interfere with the short timetable OSHA had allowed itself. Hence, using the regulatory negotiation process was inappropriate unless the chances of success were greater than they appeared to be at that time. In addition, there was considerable disquiet about whether it would be appropriate to use negotiation to develop a health standard and a healthy skepticism over whether it would work.

On the other hand, it appeared to the conveners that the parties did indeed have a great deal to discuss. They proposed a joint meeting to determine whether additional meetings would be fruitful, what the ground rules for such meetings would be, and what items could be placed on an agenda for discussion. The meeting took place with four industry associations (and member companies) and four unions represented. OSHA made a presentation but did not attend as a participant. Its staff was fully committed to meeting its deadline and feared that this process would detract from that effort. The staff agreed to give strong consideration to any recommendations that might result from the discussions, however.

At this first joint meeting, the unions presented an outline of the policies that they thought were needed in the benzene standard, and the ideas were discussed fully and openly. At the next meeting, the industry groups made a similar presentation. Both

Policies to regulate polychlorinated biphenyls (PCBs) under the Toxic Substances Control Act have resulted in major lawsuits over the past several years. In one such case, *EDF* v. *EPA*, the U.S. Court of Appeals for the District of Columbia Circuit Court invalidated the exclusion of PCBs in concentrations of less than 50 parts per million (ppm) from the "PCB Ban Rule" issued by the Environmental Protection Agency (EPA). Among those directly affected were chemical companies whose processes inadvertently generate PCBs as impurities in concentrations below 50 ppm.

Since that 1980 ruling, attempts to develop policies affecting such processes have remained controversial. On April 13, 1983, however, the Chemical Manufacturers Association (CMA), the Environmental Defense Fund (EDF), and the Natural Resources Defense Council (NRDC) presented a document to EPA that represented their consensus on a "Final EPA Rule on Inadvertent Generation of PCBs." This document represented the culmination of negotiations that began in mid-1982.

In the consensus proposal, the parties recommended that the manufacture of chemicals be allowed in processes that inadvertently generate PCBs, if certain conditions are met. Among these are the conditions that concentrations of inadvertently generated PCBs in products are not to exceed an annual average of 25 ppm and a maximum of 50 ppm at any given time and that concentrations of such PCBs are to be less than 10 ppm at the point where they are vented to the ambient air. Additional conditions regulate concentrations discharged from manufacturing sites to water, discounting factors for monochlorinated and dichlorinated biphenyls, and various certification, reporting, and record-maintenance requirements.

In a June 3, 1983, letter to the parties, EPA stated that it would use the consensus proposal as a framework for regulation, with some modifications.

On December 8, 1983, EPA published a proposed rule in the *Federal Register* that is largely the same as the consensus reached between CMA, EDF, and NRDC. In issuing the proposed rule, excluding inadvertently generated PCBs from the PCB Ban Rule under limited conditions, EPA found that such PCBs present no unreasonable risk of injury to human health and the environment.

For specific information on the consensus reached by CMA, EDF, and NRDC and on the proposed rule, see 48 *Federal Register* 237, 55076-98 (December 8, 1983).

meetings reflected considerable thought and preparation, and the level of the discussion was high.

The group actually addressed the issues at the third meeting, covering perhaps half the issues involved in the standard. The parties resolved their differences on many of the issues and narrowed their disagreement on others. The participants also agreed to exchange materials on some points in an effort to clarify various positions and to define ways of addressing the remaining issues. At the time this article was written, the group was making a significant effort, and indeed was making progress, to reach consensus on the whole standard. The consensus standard would be an interrelated whole, with each part of it depending on the others, as opposed to a collection of free-standing agreements on different components of the standard.

The group is also grappling with the question of precisely what effect a consensus position would have and how binding it would be and on whom. Hence, it is too early to tell whether the effort will succeed in developing a final recommendation to OSHA. Whether or not that happens, the parties have made substantial progress in addressing what had been a bitter issue. Both sides have commented to this author that they have found the process helpful and worthwhile.

Some preliminary lessons

While it is too early to derive any definitive conclusions from these experiences, some preliminary lessons about negotiating regulations can be drawn.

Meeting the criteria. Both the FAA and OSHA rules met the criteria for regulatory negotiation fairly well. In both, the number of parties that had to be represented was relatively small, although some participants complained that the FAA group may have been a little too large, especially if all the people who were actually present during the discussions were counted.

The issues were ripe for decision. For example, it would have been highly unlikely that an OSHA health standard could have been negotiated before the role of costs was clarified, at least somewhat, by the Supreme Court. Otherwise, a fundamental tenet to all the parties would have been a matter of negotiation. But, since that has been confronted in litigation, developing the standard itself has not forced the parties to compromise their beliefs, although some parties may come close.

In both the FAA and OSHA negotiations, the outcomes of many aspects of the standards were genuinely in doubt. In both, the issues also were relatively crisp and in need of resolution. And, finally, in both cases, the relevant agency had announced its intention to develop the regulation on a relatively short deadline so there was pressure for action.

Role of the agency. Regulatory negotiation needs the clear support of the agency

and some intimate connection with it during the development of the regulatory proposal. In contrast to the three examples above, several interest groups have proposed to an unwilling agency that the process be used. But, without interest in an idea, an agency will not undertake it. Such reluctance can come from lack of familiarity with the process, from a belief that the rule in question would not lend itself to this approach (in which case the agency, of course, would be unwise to proceed), or from a belief that the process would diminish the power of the agency. In the last instance, however, the agency may be confusing its authority to issue a regulation, which remains unchanged, and the often inaccurate perception that it actually has the power to do so unilaterally and unchallenged (as the FAA discovered earlier when it attempted to rewrite its regulations).

Although the ACUS recommended that a government agency be represented at negotiation sessions by senior officials who would participate directly in the discussions, there may be other successful relationships. OSHA is not participating directly in the benzene discussions. However, because its staff is preparing its own proposed regulation for presentation to the senior management of the agency, it will be in a position to evaluate anything that is presented by the negotiating group. The manner in which the benzene-negotiation group will present its product to OSHA, should a proposal actually be developed, is currently being worked out.

An agency's direct participation in a negotiation group may have problems of its own. When an agency official floats an idea or makes a statement, some participants have said that the group as a whole pays too much deference to it—as if that alone is a demand or an indication of the only thing the agency would accept. At the opposite end, some complaints have arisen that an agency has not said enough, so that the parties have had little guidance about the agency's own thinking. That can, of course, simply reflect that the agency has not developed an initial position or has internal conflicts. In either event, a delicate balance needs to be struck between domination and reticence. An agency and the other parties need to view the agency as a full participant with equal responsibility for negotiating in good faith.

Although there are certainly good arguments that an agency itself should not participate in the discussions, so that it can maintain a dispassionate distance to judge later whether the outcome is "in the public interest," on balance it seems that the agency should be there. The agency will continue to represent the public interest at the table, and no recommendation will be made over its dissent. And experience is fairly consistent that when an agency does not participate, or have some other intimate connection to the process, it will have difficulty assessing the recommendations. If that happens, an agency very likely will not adopt the proposals, or, if it does, it will do so only after considerable work and frequent second guessing.

EPA, in its attempt to pick a subject for its initial topic, has been trying carefully to undertake something of significance while avoiding an issue so controversial that consensus would be unlikely. One environmentalist familiar with the effort described this as the "Goldilocks Problem": some proposals are too big; some are too small; and they are looking for one that is "just right."[12] Thus, searching for the perfect rule has proved difficult. Indeed, the process itself has caused some consternation, in that EPA has sometimes appeared to have a "process looking for a rule" instead of a process used as a tool for solving a problem. Both the FAA and OSHA, in contrast, have seen regulatory negotiation as a way of remedying particularly difficult regulatory problems.

Moreover, the fact that EPA has been labeling its project as a "demonstration" also has raised problems: The purpose of an experiment is to gain knowledge about the process itself, yet the parties in the EPA negotiations would be developing a regulation that would likely be quite significant to them. They would, therefore, want to take the process very seriously and not have its primary purpose be the acquisition of knowledge as to how a substantive decision was reached.

Finally, the respective roles of the convener and EPA have sometimes been confused, because the agency itself has been attempting to select a topic (which necessarily entails many of the functions that usually would be performed by the convener) and only then actually proceeding to use the process for developing a rule.

Currently, however, EPA appears to be addressing many of these problems.

Nature of the process. The definition of "consensus" can be important when an interest is deciding whether to participate. If it fears that its position will be overrun by the other participants, it may reasonably believe that it would be better off with the traditional process. Thus, there must be an explanation in preliminary discussions that "consensus" means that, unless all interests concur in an outcome, it will not be regarded as the product of the group as a whole. This does not mean the consensus of each individual. Nor does it mean that all interests must endorse all aspects of the package. Rather, it is an indication that each interest is willing to support, or at bare minimum not oppose, the whole.

A negotiating group needs to try to reach consensus on a recommended rule and supporting documentation, but that may be elusive. The group may only be able to agree on a "region" of acceptable alternatives and then toss the issue to the agency to draft a rule within the boundaries of the acceptable alternatives. As one participant remarked, one of the significant aspects of the process is the "dog didn't bark syndrome";[13] sometimes what is not said about certain proposals indi-

he regulatory negotiaons held thus far apear to bear out the oncept's promise of nabling parties to adress the major issues irectly and practical. Time will tell hether regulatory egotiation is also uccessful in transrring the high quality f discussion into betr rules.

cates what may be acceptable.

The groups at FAA and OSHA have shown they are able to grapple with highly complex, difficult issues and to discuss the merits of the respective issues, as opposed to horsetrading or negotiating based on a sheer exertion of power. Although tension has unqestionably been high when the meetings began—in part due to the charged nature of the issues and in part to the novelty of the process—the participants have eventually settled down to a productive dialogue.

The meetings at both FAA and OSHA have been open to the public, but private caucus rooms have been available for use at any time. These rooms have, on occasion, been essential. On the whole, the principals participate directly in the negotiations, with their lawyers serving more as counsel than as advocate.

Direct participation has raised some problems. At times, parties have found it difficult to take the responsibility of actually deciding what would be an appropriate regulatory position. Under the traditional process, the relevant government agency, not the represented interests, can be blamed for anything the interest party dislikes.

The regulatory negotiations held thus far appear to bear out the concept's promise of enabling parties to address the major issues directly and practically. Time will tell whether regulatory negotiation is also successful in transferring the high quality of discussions into better rules.

Notes

1. If the negotiating group did not have some assurance that its efforts would be taken seriously, it would not likely incur the time, expense, and anguish necessary to develop a consensus. The expection that an agency would actually use the results as a proposed rule is legitimate inasmuch as the agency itself participates through senior officials, in the development of the recommendation. Thus, whatever needs the agency might have would be reflected in the recommendation itself.
2. See Gail Bingham, "Does Negotiation Hold a Promise for Regulatory Reform?" *Resolve*, Fall 1981, for a description of the bills; Congressman Donald J. Pease and Senator Carl Levin have reintroduced their bills in the current Congress.
3. The report to the Conference was published as Philip J. Harter, "Negotiating Regulations: A Cure for Malaise," *Georgetown Law Journal*, vol. 71, no. 1 (1982).
4. Recommendation 82-4; 1 *C.F.R.* sec. 305.82-4.
5. "Policy Chief Slates Regulatory Negotiation Pilots for Fall, Briefs OMB," *Inside E.P.A.*, October 15, 1983.
6. Remarks of Joseph A. Cannon, January 25, 1983.
7. 48 *Federal Register*, 7,494 (February 22, 1983).
8. 48 *Federal Register*, 21,340 (May 12, 1983).
9. Remarks of Assistant General Counsel Neil Eisner to D.C. Bar Seminar, February 24, 1983. He later commented that the direct discussions among the parties showed them just how hard it was to reconcile the conflicting and strongly held views of those who would be affected by a regulation. "Participants See Value in Reg. Neg.'s First Flight," *Legal Times*, October 10, 1983, p. 2.
10. "Rule Making by Consensus Passes Its First Test," *Business Week*, November 14, 1983, p. 194k.
11. "OSHA Requests Information for Accelerated Rulemaking on Workplace Benzene Standard," *U.S. Department of Labor News*, July 8, 1983.
12. Remarks of David Doniger, senior attorney, Natural Resources Defense Council, before the Section of Administrative Law, American Bar Association, program on "Consensus as an Alternative to Adversarial Proceedings," September 30, 1983.
13. Cornish F. Hitchcock who represented the Aviation Consumer Action Project, as quoted in "Participants See Value...."

Upda

In mid-1982, the U.S. Forest Service announced its timber management and road construction plans for 40 square miles of the San Juan National Forest in southwestern Colorado. The area, which is located between the Weminuche Wilderness Area and the Piedra Wilderness Study Area, had been part of RARE II (Roadless Area Review and Evaluation), a program set up to study which lands should be included in the federal wilderness system. However, passage of the Colorado Wilderness Act in December 1980 released it from further consideration for wilderness status.

Public opposition to the management plan began to emerge in early 1983. Wildlife conservationists expressed their concern that the area is an important part of the elk and bighorn sheep migration path between the Weminuche Wilderness and lowland areas. Local business leaders and residents also were concerned about the effects of timber sales on tourism and the impacts of heavy logging equipment on the road passing through their town of Vallecito. Several public meetings were held between February and June 1983, and most of the public comments were in opposition to the proposed plan.

Luke Danielson, an attorney for residents in the Vallecito area, and Paul Sweetland, forest supervisor at the San Juan National Forest, agreed that mediation would be helpful. Sweetland contacted the Mediation Institute in Seattle. Twenty-six representatives attended the first meeting, held September 7-8, 1983. At that meeting, a general consensus was reached about how the area should be managed.

During September, it became clear that several issues remained to be resolved. So, in early October representatives of the various interests rode through the area together. In subsequent meetings, the parties agreed to more detailed recommendations, and Sweetland issued his decision notice on October 11, 1983, in which he adopted virtually all of the recommendations made by the parties. Four of eight controversial sales will not take place during the 10-year period of the plan, and road construction will be significantly reduced. An advisory group has been formed to work with the Forest Service to conduct environmental assessments on remaining timber sales and road construction.

For more information, contact Leah Patton or Orville Tice, The Mediation Institute, Two Nickerson Street, Suite 301, Seattle, WA 98109. 206/285-4641.

A BRIEFING ON ALTERNATIVE DISPUTE RESOLUTION IN MINNESOTA

Updated September, 1984

Peggy Byrne
Alternative Dispute
Resolution Program
State Planning Agency
612/297-4014

In response to the high costs of litigation in terms of both money and time, there has been a resurgence in the use of alternative dispute resolution processes using mediation to resolve disputes.

For purposes of definition, mediation is a non-adversarial process which encourages two or more persons involved in a dispute to voluntarily agree to sit down with a trained neutral mediator who attempts to assist the parties in reaching a mutually agreed upon resolution to the dispute. The proceedings and related data are confidential and, depending on the dispute and/or program, may or may not be binding. Should the process break down or should there be a subsequent violation of the agreement, the parties would be free to pursue resolution in the traditional dispute resolving process.

Beyond the use of mediation as a tool for resolving disputes, the use of neutrals is also being used in processes involving collaborative problem solving, decision making and policy development.

The use of mediation originated from the labor mediation field and was first used to settle minor civil and criminal disputes in neighborhoods. Community Dispute Resolution (ADR) programming began cropping up throughout the country in the early 1970's. They were funded by LEAA, foundations and local units of government. The only program that was operating in Minnesota at that time was the Citizen Dispute Settlement Program, funded and administered by the Minneapolis City Attorney's office. It continues to be a successfully operating program today.

The direction now for some states is to institutionalize the process. In 1980, New York's Chief Judge Lawrence Cooke initiated and got funded, a Community Dispute Settlement Center Program ($1 million/yr.) The program, administered by the state's unified court system, granted up to 50% of the operating costs of approximately 20 dispute settlement programs in its first year. In 1981, Minnesota became the second state in the country to appropriate state money. $100,000 was appropriated to fund two pilot dispute resolution programs; the Dispute Resoltuion in Ramsey County and the St. Louis Park Juvenile Mediation Project. In addition to administering that money, the Judicial Planning Committee was required to report back to the legislature by Oct.1,1983 "the types of programs which provide convenient access to effective inexpensive and expeditious alternative dispute settlement" . The study has been delayed and will not be done until sometime in 1985.

The initial funding of the two pilot community dispute settlement programs spurred considerable private interest in ADR over the next several months. The St. Louis Park Juvenile Mediation Project was later folded into a larger effort; Mediation Center headed by John Wolf. Mr. Wolf sought and received foundation and Bar Association money and has assisted several Hennepin County communities in establishing dispute settlement centers. They have since branched off into other related areas. i.e. The Mediation Center together with the Ramsey County Dispute Resolution Program last year developed and conducted a training program for county welfare units who expressed interest in using mediation to resolve family divorce and child custody disputes.

Other communities sought funding and set up dispute resolution programs on their own. The State 4-H received a $43,000 foundation grant to develope mediation programs for juveniles in rural communit Divorce and family mediation business began to crop up.

Christian Conciliation Servies, headed by former Judge William Bo rager, was formed to make available mediation for those persons seeking help with family related disputes. As evidenced by the name of the program, it is a religiously-based offerring of mediation.

The Citizen Council on Crime and Justice, headed by Dick Ericson, received foundation monies to establish Victim-Offender Reconciliatic Programs (VORP) in the metropolitan area. These programs would make available neutral mediators to asist the victim and the offender in reaching a voluntary mediated agreement on restitution and reparatior contracts. They have contracted with the VORP program in Elkhard, Inc to conduct training for their programs.

Professional Arbitration Services, a Duluth-based company run by Conrad Fredin, former head of the Minnesota Bar Associaiton, is the only company in Minnesota which, in addition to other services, pro- vides a private rent-a-judge arbitration service. Throughout the countyr, a small number of private lawyers have begun to venture into the business of offering an array of "private judical processes" such as rent-a-judge, mini-trails and other related alternative dispute resolution pro cesses for a fee.

In the Fall of 1983, a Minnesota Chapter of SPIDR (Society of Prof- essionals Involed in Dispute Resolution) was activated. While hist- orically comprised of labor mediators/arbitrators, they have broadene their discussion beyond labor negitiation/arbitration to include persons interested in the application of mediation/arbitration t other areas of dispute. Monthly breakfast and luncheon meetings are now ongoing. Most recently, SPIDR has been providing a forum for discussions about establishing a statewide association of volunteer community mediators.

Both Hamline and Billy Mitchell Schools of Law have expressed intere in receiving information and training in the areas of ADR, with the intention of eventually building it into their curriculum . The Univ of Minnesota's Law School already has a class on ADR.

This year, Govenor Perpich, in recognizing the leadership of the Minnesota Bar Association for its efforts to draw attention to and t advance the use of alternative dispute resolution proclaimed June, Alternative Dispute Resolution Month. In conjunction with a Bar Assc sponsored seminar, the Bar's Committee on Methods for Non-judicial Resolution of Disputes surveyed the state and identified 41 programs and businesses which provide a variety of mediation and/or arbitrat services;many of which are private divorce mediation businesses.

In the meantime, alternative dispute resolution processes were begi ing to be advocated for use within state government as well. In 198 a pilot mediation program was established within the Dept. of Human Rights to help alleviate the backlog of discrimination cases. In 19 the Mediation Center received funding for a pilot study from the

National Institute for Dispute Resolution in order to evaluate the success of mediating backlog cases referred to them by the Dept. of Human Rights. Recent blue ribbon committees investigating the chronic backlog problem recommended increased use of mediation. Those recommendations have since been implemented and mediation is now offered routinely as part of the Dept's intake process. Efforts are also underway to increase the usage of mediation at the local Human Rights Commissions as well.

In recognition of the need to help fund the growing number of community dispute settlement programs, the legislature amended the Legal Aid funding formula so that qualified community ADR programs became eligible, along with other legal aid programs, for 15% of money generated from the increased fees on civil filings. The Hawthorne Project, modeled after the San Francisco Community Board program, received funding from this source as did Northland Mediation Services based in Duluth.

In 1984, another source of funding became available for community ADR programs. Presently, there is a large sum of money generated from interest on lawyers trust accounts (IOLTA). Administered by the IOLTA committee, under the egis of the state's Supreme Court, it was recently determined that ADR programs fit the criteria for the distribution of this grant money. A total of $50,000 was granted to three community ADR programs in the state. Of 22 operating IOLTA committee's in the countyr, Minnesota's was the first to fund ADR programs.

In 1983, an Alternative Dispute Resolution Program was created within the State Planning Agency. Its charge was to research and pilot efforts to make ADR processes available for use both within state government and in the state generally. Based upon their recommendations, legislation was passed in '83 which required the Legislative Commission for the Review of Administrative Rules (LCRAR) to study the feasibility of making available ADR processes to be used as alternatives to the sometimes lengthy and costly contested case hearings conducted by the Office of Administrative Hearings. Two state agencies were selected to be pilots for the study. LCRAR, in December, contracted with the Ramsey County Dispute Resolution Center to conduct training in mediation for agency personnel, and for Administrative Law Judges who would serve as neutral mediators in the contested cases referred to them from those agencies. The results of the study is due June, 1985.

Efforts to encourage the use of negotiated rule-making by state agencies has also been initiated. A memo from the Govenor to heads of State agencies encouraging the use of this regulatory negotiation process which uses a neutral, will be sent within the next two weeks. The goal is to cut down on the time agencies spend in rule hearings conducted by the Office of Administrative Hearings; a process which has become increasingly legalistic, adversarial and political. The success of this experiment hinges in part on resources being made available so that agency personnel can be properly trained about the process and its potential application. Again, it is anticipated that Administrative Law Judges will wear the hat of "mediator" in this process.

In yet another state agency (Labor and Industry), mediation is being successfully used to deal with Workers Compensation cases in settlement conferences. A marked drop in litigation of cases has resulted which is also due in part to reform legislation passed in 1982.

The 1984 legislative session passed several bills having to do with ADR. Legislation creating a uniform Community Dispute Settlement Centers Program (modeled after New York's program) was passed. The program was placed in the state court administrator's office with enough funding to begin the work of establishing guidelines for the program and standards for the training of the volunteer community mediators. It is expected that the state will eventually fund (like New York) up to 50% of the operating costs of these programs.

The Civil Mediation Act was passed which addressed the legal barrier to mediation i.e. liability, confidentiality, use of subpoena's etc. The Bar Association's Committee on Methods for Non-judicial Resoluti of Disputes was actively involved in drafting and refining this legislation. Finally, legislation was passed which will enable the District, County and Municipal courts to establish and use mandatory binding arbitration.

The Alternative Dispute Resolution program in State Planning was responsible for co-rdinating, monitoring and refining all legislatio having to do with ADR. That program is currently involved in staffi a Govenor's Alternative Dispute Resolution Issue Team whose charge it is to make recommendations to the Govenor regarding this subject matter. As part of that effort, a task force comprised of leaders in the public and private sector involved with environmental matters has been created to look at the use of alternative dispute resolutio as it applies to environmental disputes. This task force as well as the entire ADR Issue Team will be responsible for making specific comments and recommendations about the proposed Statewide Office of Conflict Management (attached). It is hoped that this proposal will provide the cornerstone for a major grant from NIDR.

As the result of further efforts initiated by the ADR program in State Planning, interest in ADR on the part of both the Humphrey Institute and the University of Minnesota has taken hold. Armed with information about Harvard University's Program on Negotiation (attached), discussions were begun with then President McGrath about the feasibility of the University's conducting similar research and developing curriculum in the area of negotiation as well. He subsequently assigned the task to Professor John Wallace, Assistant Vice President of Academic Affairs, who then formed a steering committee comprised of a cross section of University department hea

In '83, they sponsored a series of four monthly colloquium on ADR. In collaboration with the Humphrey Institute, Prof. Wallace and the steering committee recently gave the go ahead (to Dr. Tom Fiutak) t put together a proposal for a Conflict Analysis Project. They are presently involved in discussions about the design of that project. They have also been in touch with the Hewlett Foundation, which has expressed interest in funding academically based projects and progr related to ADR.

Independent of this effort, the Humphrey Institute recently committed themselves to seek funding to put on an "invitational only" working conference at Spring Hill. The conference would work to develope a public policy statement about ADR in Minnesota. It is hoped that Minn. Public Radio's new Public Policy Reporting Unit will be involved in reporting about the conference and its results.

Finally, with the passage of a proposed Statewide Office of Conflict Management, State Planning's role would be reduce to providing a general overview of the new program.

This briefing, while attempting to comprehensively cover those efforts begun and which have successfu lly advanced alternative dispute resolution does not touch on those as-yet-unexplored areas of potential application of ADR. Nor does it discuss those areas where other states have successfully implemented ADR programs not yet available here in Minnesota to list a few:

Children's Hearing Project
Insurance Arbitration Forums
Consumer affairs mediation within the A.G.'s office
Collection mediation
Business Ombudsman office to mediate disputes btw. business and governme
ADR curriculum in the primary and secondary schools

INDEX

There are seven components or projects associated with Harvard's Program on Negotiation.

1. The Public Dispute Program seeks to demonstrate through a variety of action research projects that mediated negotiation can enhance the fairness, efficiency and stability of resource allocation decisions in the public sector. The program focuses on four kinds of disputes: (1) environmental regulatory disputes; (2) intergovernmental policy and program administration conflicts; (3) neighborhood development disputes; and (4) local and state budgetary disputes.

2. The Program on Dispute Resolution objectives include: putting on workshops and conferences for teachers of negotiation and lawyers interested in dispute settlement; preparing bibliographies on dispute settlement; compiling a Dispute Resolution Directory of courses and internships available; brings experts in dispute resolution to speak at the Harvard Law School Dispute Colloquim; making a course on mediation at Harvard Law School available; making a video-tape demonstrating the work of the Children's Hearing Project within this program and publishing a series of occasional papers on dispute resolution. The Children's Hearing Project is a program which attempts to apply mediation to those disputes between parents and children about appropriate behavior, curfews and truancy from school.

3. The Harvard Negotiation Project undertakes research and training aimed at developing and disseminating improved theory and methods of negotiation and mediation. Its activities are categorized under four headings: theory-building, education and training, materials for practitioners and "learning hospital".

4. The Negotiation Roundtable is a small core group of people and guests who meet weekly at the Harvard Business School to subject negotiation theory and practice to rigorous analysis and testing. The Roundtable analyzes cases involving public and orivate sectors to the meetings. Their purpose is to advance a framework for analyzing negotiation that is prescriptively useful.

5. The Nuclear Negotiation Project quite simply seeks to improv the process of international negotiation so as to reduce the risk of nuclear war. There are four studies and forums that are part of this project: Nuclear Crisis Central studies; U.S.-Soviet Negotiation studies; studies on Conflict Resolut Systems and II ASA Forum on Negotiation; a U.S.-Soviet collaborative effort.

6. The Conflict Clinic actively seeks out those disputes that are of major public concern. After research on the dispute has been conducted, the disputants are approached and asked if they would be willing to voluntarily mediate the dispute. Academic professionals with specialization in a broad array of subject matter are made available at mediation.

7. The Journal which puts our Negotiation: The Quarterly of Effective Dispute Resolution. A Program on Negotiation is also published. New Projects continue to develop as off-shoots of the Harvard Program on Negotiation. The EPA plans to conduct two regulatory negotiations involving either new rules or changes in existing regulations (negotiated rule-making). The Public Dispute Program has been asked to document EPA's efforts including the initial expectations of all the key actors and their subsequent evaluation of the demonstrations. (This information is relevent to LCRAR's study and resource materials has been amde available.) In addition, the Program on Negotiation has done an analysis of Connecticut's efforts to employ the use of Negotiated Investment Strategy to statewide decision-making.

OFFICE OF CONFLICT MANAGEMENT PROPOSAL

September, 1984

Submitted by
Peggy Byrne
Alternative Dispute Resolution Program
State Planning Agency

Also, a system involving user fees could be established. On a cases by case basis, parties involved can determine the formula for apportioning costs, but fees should be shared by all parties to avoid the imagined (and real) imbalance of power in the negotiation.

LOCATION

Since the programs charge involves the "management" of conflict and the design of non-adversarial dispute resolution "systems" which would affect the efficiency of state government as well as the cost of operating government, the Office of Conflict management would be located in the Department of Administration. Part of the Department's responsibilities would be to make a final determination as to where the Office of Conflict Management most appropriately belongs in state government.

This proposal contains a combination of programs, proposals related to alternative dispute resolution in existence and advanced throughout the country.

Alaska recently appropriated $200,000 which was matched by $50,000 from NIDR to do multi-party dispute settlement and to conduct a study on where an Office of Mediation should reside within state government. For the present, it is located in their Division of Governmental Coordination.

Massachusetts In additional to the Harvard Program on Negotiation, of which the Conflicct Clinic is part of, the state has received a $50,000 NIDR grant to establish a state-wide mediation office with the support of their governor, his cabinet, and the Attorney General. The Department of Administration and Finance will house the office for a two year experimental period and the office will draw on a pool of private mediators or staff to provide dispute resolution services. The state is appropriating $108,000 for its operations and they will be seeking to raise $120,000 from local foundations.

New Jersey has received $50,000 (NIDR) to implement a public dispute resolution center in the state's Department of Public Advocate. The Center will provide mediation and other negotiated processes across the state through a pool of private mediators and in-house staff in selected cases. The state is appropriated $73,000 for the center and reallocating $160,000 in existing staff and support.

Wisconsin has received a $10,000 (NIDR) development grant to help it inaugurate a statewide mediation office for resolving complex multiparty disputes. The state will pool funds for outside mediators and establish a single coordinating point in state government for referral and contracting, and allocate $35,000 to create the pool for the first year of operation.

New York has just recently drafted legislation seeking $250,000 to establish a State Center for (just) Environmental Mediation to be governed by a board of directors. (enclosed)

Enough information is now available which indicates that certain kinds of disputes settle more quickly, more satisfactorily with less expenditure of time and money when using a non-adversarial method of dispute resolution.

STATEMENT OF PROBLEM

There is limited information about alternative dispute resolution in state government. We lack the capacity to make determinations about how and when to use alternative dispute resolution and with what kind of disputes. In addition, our capacity to train people to serve as neutral mediators is virtually non-existent. Finally, there is a multi-million dollar expenditure for resolving disputes in traditional adversarial dispute resolving systems.

GOAL

Research and share information about alternative dispute resolution. Design and make available alternative dispute resolution processes to be used by state government and in disputes involving the state. Develop the capacity to train and/or use third party neutrals.

OBJECTIVE

Create a Statewide Office of Conflict Management. The possible functions or services of a Statewide Office are many. The following suggestions are also consistent with the efforts that have been going on with State Planning.

1. Generate standard guidelines and consistent policy in matters generally having to do with facilitation, negotiation, conciliation, mediation, arbitration and fact finding.

2. Consulting and providing technical assistance.

3. Outreach; that is being able to initiate efforts when a public dispute comes to its attention. Those efforts would involve doing the work-up and assessment to determine if a dispute and/or lawsuite is suitable for mediation, arbitration, etc., given the permission of the parties involved. (Conflict Clinic model)

4. Research. Essential to the program would be to conduct a flowchart study of the existing dispute resolving systems in state government accompanied by time/cost data. Only by having this information can time and cost savings be documented.

5. Develop information clearinghouse capacity.

6. Develop a range of innovative approaches and process for resolving disputes within the state agencies. Again, this can be done only if current state-of-the-art research is done.

7. Design processes for settlement of recurring disputes and for remediation generally.

8. Monitor and evaluate the implementation of agreed upon dispute settlements.

9. Evaluate various alternative dispute resolution techniques. Provide outcome evaluations. This includes being responsible for providing technical assistance and evaluating the existing mediation programs in the agencies, including the regulatory negotiation effort.

10. Provide training in alternative dispute resolution and other negotiation techniques. Facilitate curriculum development in the field. This would be done in conjunction with the Department of Education, the Bureau of Mediation Services, the Department of Employee Relations, and the University of Minnesota.

11. Besides information gathering, this program would be involved with information-sharing beyond the obvious training component. This could include co-sponsoring conferences, a Speakers Bureau, dialogue groups, seminars for exchanges of ideas among practitioners in the field for development of concepts, principles, and methods and finally handling the media.

12. The program would be responsible for efforts relating to the Negotiated Investment Strategy.

13. Networking; and establishing cooperative, working and funding relationships with other public/private entities. . . such as the State Court Administrator's Office, the Humphrey Institute, the University of Minnesota and other academic institutions, Office of Hearing Examiner, the business community, the National Institute for Dispute Resolution (NIDR), and local boards and units of government.

14. There would be a strong environmental mediation component to the program. They would be authorized to call upon outside mediators and arbitrators as needed. Both paid and volunteer mediators would be utilized depending upon the dispute situation. In-house staff would likewise mediate in selected cases.

15. Finally, the program would be responsible for doing all policy development related to alternative dispute resolution including monitoring and drafting legislation.

FUNDING

The program would be funded by an appropriation of $250,000 from the general fund.

The state appropriation makes us possibly eligible for additional match funding from NIDR and/or other foundations/corporations.