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Statewide Offices of Mediation: Experiments in Public Policy

An examination of offices in Hawaii, Massachusetts, Minnesota and New Jersey

PUBLIC POLICY AND STATEWIDE OFFICES OF MEDIATION

Big, factious, often controversial disputes involving many people and driven by strong emotions often set the stage for forging public policy. Every political leader who has faced angry constituents knows that. The challenge for government officials is to see that large, complex disputes are settled in ways that result in equitable, efficient and workable public policy; that the heat generated from disputes doesn't ultimately distort the public interest.

The goal of the public policy program at the National Institute for Dispute Resolution is to help build the institutions, the infrastructure, and the methodologies for settling large-scale conflicts involving the public interest. The program includes support for public policy dispute resolution experiments within state and federal government and for the continued use and refinement of public interest mediation in disputes across the country. A central part of the Institute's program is testing and supporting development of statewide offices of mediation as institutions within government that promote mediation in public policy disputes.

As Lawrence Susskind notes in his lead article, the Institute has provided matching grants to several states willing to experiment with statewide offices. A preliminary examination of how those offices have fared is the subject of this issue of *Dispute Resolution FORUM*. An independent evaluation of the offices is underway. In the coming year, the Institute will assess the evaluation results and provide policy recommendations for states considering such offices.

Susskind's article provides an overview of the uses and development of statewide offices. To get a close-up of each state, we interviewed the directors of offices in Hawaii, Massachusetts, Minnesota, and New Jersey. We also talked with Sanford M. Jaffe, director of the Center for Negotiation and Conflict Resolution at Rutgers University, and Christine Carlson, program officer at the Kettering Foundation. Both have been advisers to the Institute and keen observers of the growth of statewide offices.

Complementing our coverage are four case studies reporting how statewide offices have contributed to the resolution of major disputes. These disputes involve such frequently controversial matters as herbicide spraying, emergency medical services, public housing, and water resources. Rounding out the issue is a page of excerpts from a new handbook for governors on dispute resolution. To be published next year by the National Governors Association, *Governors and the Resolution of Public Policy Disputes* was written by Howard S. Bellman, a former state cabinet officer and a mediator, and William R. Drake, vice president of the Institute.

Robert M. Jones
Editor
Dispute Resolution FORUM

Dispute Resolution FORUM

The National Institute for Dispute Resolution publishes Dispute Resolution, *FORUM* several times a year as a medium for discussion and debate of the principal questions in the field. Each edition focuses on a single subject and, in addition, includes a brief summary of new information about dispute resolution under the heading, "In The Process" and announcements of Institute programs and activities in a section titled "NIDR Notes." Readers wishing to submit letters, provide information for "In The Process," or be placed on the *FORUM*'s mailing list should write Dispute Resolution, *FORUM*, 1901 L St., N.W., Washington, D.C. 20036. Single copies of the *FORUM* are available without cost; bulk copies are available at a nominal price.

Robert M. Jones, Editor

Letters

As a vehicle for debate, Dispute Resolution *FORUM* welcomes letters commenting on the issues and opinions discussed in its pages. Because of space limitations, however, letters selected for publication are subject to abridgment.

EXPERIMENTS IN STATEWIDE OFFICES OF MEDIATION

LAWRENCE SUSSKIND

For years, the possibility of creating state offices to promote mediation in public policy disputes has been intriguing but generally untested. The statewide office approach has involved using mediation and allied tools of dispute resolution to settle disputes in matters as diverse as environmental quality, land development, budget allocation, and rulemaking.

In 1984, the National Institute for Dispute Resolution decided to test the concept. It has provided multiyear matching grants ranging from $10,000 to $50,000 to five experimental state offices of mediation in New Jersey, Massachusetts, Minnesota, Hawaii, and Wisconsin. While a full-fledged assessment of these offices is only beginning, regular meetings convened by the Institute of the state office directors and advisors have provided an opportunity to review their activities and to assess the work in progress.

The Institute began with several objectives. First, there was a desire to demonstrate that dispute resolution techniques could help state governments deal more effectively with public disputes that clog their courts and bog down administrative and legislative efforts. Until the Institute announced its program of state incentive grants, there had been surprisingly few attempts at the state level to use mediation, arbitration, and other alternatives as a means of resolving public disputes in the regulatory, permitting, rate setting, budgeting, municipal annexation, facility siting, and other areas. A few successful experiments (such as the Negotiated Investment Strategy projects sponsored by the Kettering Foundation and the State of Virginia's annexation mediation program) attracted a great deal of attention, but they did not lead to additional demonstrations.

Second, the Institute sought to seed an array of efforts to institutionalize dispute resolution along lines that made sense in each state. Finally, it hoped to help create a market for the services of private dispute resolution practitioners. A great many practitioners have had problems establishing a regular flow of cases and overcoming financial obstacles generated by the unequal ability of the disputing parties to pay for the services of a neutral.

Five Different Models

Each state office began with a different administrative structure, and each has focused on different projects and activities. In New Jersey, the Center for Public Dispute Resolution, developed and directed by James McGuire and currently under the direction of John Gleeson, is located in the Department of Public Advocate's Division of Citizen Complaints and Dispute Settlement. A 17-member advisory board provides guidance to the program and staff of two mediators and an attorney/mediator. The center has served as a special master appointed by the state court and has helped to settle several complex public disputes, including a ten-year legal battle over the establishment of a regional sewage treatment facility. The staff has also helped initiate a policy dialogue (involving public officials, citizen action groups, and industry leaders) on siting solid waste disposal facilities and has facilitated an agreement on policies governing ambulance services within the state, avoiding a potential loss of $20 million in federal funds. (See the case study on p12)

The Massachusetts Mediation Service is under the jurisdiction of the Executive Office for Administration and Finance and directed by David O'Connor. A 12-member board provides advice to a two-member staff. The service has mediated statewide disputes concerning hazardous waste disposal, the clean-up of a Superfund site, and long-term health care insurance regulation. The state's appellate court appointed the service as the coordinating agency for implementation of a long-delayed and often-litigated jail construction project in Boston. The service has also been invited to mediate several local disputes, including a recall battle involving a local board of selectmen, a controversy over siting a mobil home park and a public housing contract dispute (see the case study on p8). Finally, the service has devoted a substantial portion of its energies to behind-the-scenes consultations with state agencies interested in, but still wary of, its dispute resolution efforts.

The Minnesota State Planning Agency serves as the administrative home for the state's Office of Dispute Resolution. An *ad hoc* advisory board oversees the efforts of Director Roger Williams and a small support staff. The office has helped develop and implement the nation's first farmer-lender mediation program within the Department of Agriculture Extension Program. In its first year, the program has received over 5,000 requests for mediation from farmers and lenders which have resulted in over 1,500 mediated settlements. The office has played a key role in brokering the use of mediation in a state-wide herbicide spraying dispute (see the case description on p10) and has mediated a sewage treatment dispute between two small cities. It is also facilitating a process to determine the future role of regional treatment centers for the developmentally disabled and those with mental health disorders. The Minnesota office has helped to train state officials who want additional mediation skills and organized the first statewide dispute resolution week in November, 1987.

The Hawaii Program on Alternative Dispute Resolution is located in the Office of the Administrative Director of the Courts, directly under Chief Justice Herman Lum, and is directed by Peter Adler. The Hawaii program has helped to implement a court-ordered arbitration plan in the civil courts and launched a major effort to divert complex civil litigation concerned with public policy into court-sponsored mediation. The program also played a key role in facilitating a legislative effort to redraft Hawaii's politically sensitive water code (see the case description on p 6).

continued on page 13

Lawrence Susskind is director of the MIT-Harvard Public Disputes Program. This article is an updated and expanded version of a column that appeared in the October, 1986 issue of *Negotiation Journal*.

NEW NEGOTIATING TOOLS FOR GOVERNORS

How can governors use the tools of dispute resolution? Howard S. Bellman and William R. Drake address that question in ***Governors and the Resolution of Public Policy Disputes*** *which the National Governors Association will publish next year. Bellman, a former cabinet officer in Wisconsin state government, is a veteran mediator. Drake is vice president of the National Institute for Dispute Resolution. Following are excerpts from the publication.*

Policy conflicts are the business of political life. They involve the essence of political judgement and the best aspects of being involved in politics. Governors always have used negotiations to resolve conflicts and balance competing interests, both to achieve their initiatives as well as to respond to initiatives undertaken by others. But now the increasing pressure to be actively, even personally, involved in many policy disputes calls for a broader repertoire of innovative problem-solving and dispute resolution alternatives.

Mediation and Conflict

Mediation and consensus-building tools are proven procedures to help governors manage and resolve conflicts. Of course, they are not intended to replace traditional legislative, regulatory, administrative or judicial mechanisms. Instead, governors should view them as useful adjuncts to these institutionalized decision-making mechanisms that should not be applied indiscriminately.

Making Decisions

Mediation and other dispute resolution approaches can be used to enhance the decision-making process and help state executives broaden and strengthen their leadership roles. Using mediation as a problem-solving tool does not mean relinquishing the authority or power granted to a leader by state constitutions and statutes. Recent trends suggest that mediation can be used in addition to traditional decision-making processes, and that the use of this alternative is often politically advantageous.

Mediated Negotiation

Mediation, as discussed in this issue on statewide offices, is a voluntary, structured process of negotiation in which key stakeholders—those parties affected by a problem or decision—seek to resolve their differences consensually in ways that are mutually beneficial. Key to this "mediated negotiation" approach is a collective effort to set aside certain behaviors common to traditional bargaining and negotiation and address the underlying interests of the parties.

Settling the Snoqualmie Dispute

The Snoqualmie River flood control dispute in 1973 probably was the first time mediated negotiations were used by a governor to resolve a dispute other than labor conflict. Negotiations were proposed by Daniel J. Evans, then governor of Washington, when several environmental groups opposed the building of a flood-control dam on the river. At Evans' request, two mediators helped the parties negotiate a solution. By December 1974, an agreement was signed which included formal recommendations for the project and the creation of a coordinating council which guides the project and monitored its progress for its first 10 years.

Resolving Hundreds of Conflicts

Since 1973, mediators have helped states resolve hundreds of conflicts involving almost every policy and decision-making area—aligning highways, siting waste facilitators, establishing environmental standards, allocating social service funds, and drafting rules and regulations. During the 1980s, the use of mediation has increased dramatically. The four states discussed in this issue have created offices to provide mediators. Other states have passed legislation to "trigger" the use of mediation and negotiation during policy development and implementation.

Examples of the use of mediation multiply. Ten states have used mediation in farmer-lender disputes. Virginia authorizes mediation to resolve annexation disputes among local jurisdictions. Pennsylvania sanctions mediation in local land use conflicts. States as different as Connecticut and Mississippi use negotiated investment strategies to allocate federal social service block grant funds. Massachusetts, Rhode Island, Texas, Virginia and Wisconsin have statutes that permit mediation for settling disputes over siting hazardous waste dumps.

The Governor as Mediator

Sometimes a governor may personally serve as a mediator. Although specialists may call that role a "mediator with power," such power does not mean that the mediator cannot be neutral in helping participants reach an agreement. Indeed, the governor's power and stature may be a healthy catalyst for convening key parties and enabling opposed groups to negotiate. Governors can use mediation to enhance their leadership roles in three ways: as consensus builders, problem solvers, and institution builders. Depending upon the circumstances, governors may fill any of these roles personally or use their authority and influence to help others act in such capacities.

The Governor as Consensus Builder

Governors often act as consensus builders, an appropriate strategy for resolving complex issues. This role can be greatly enhanced, in selected situations, by using a mediated or facilitated approach to negotiations. Consensus building through mediation involves more than compromise. It recognizes areas of agreement which are mutually acceptable to all interested parties. A neutral mediator or facilitator can help structure a multiparty negotiation in ways that increase the chances all parties will agree on some, if not all, of the key issues.

For example, former Colorado Governor Richard Lamm once convened a 31-

party negotiation over water policies and asked a team of professional facilitators to assist him. The parties ranged from the Denver Mayor's office and suburban governments and water districts to the League of Women Voters and neighborhood groups. Eventually the Denver metropolitan water roundtable successfully negotiated a needed set of policies and guidelines.

The Governor as Problem Solver

Governors use the problem-solving approach to address a specific situation and to settle urgent problems rather than to resolve issues related to the gradual development of broad policy. As with consensus building, the governor may personally intervene to help structure negotiations or may arrange for assistance by a third party.

For example, Govenror William A. O'Neill of Connecticut assumed the role of problem solver to reallocate social services block grant funds by convening a Negotiated Investment Strategy, a form of mediated negotiation. The federal government had forced states to accept sharply reduced social service funds in a lump sum and to distribute the money among competing programs. The Charles F. Kettering Foundation provided two mediators to guide the negotiations. O'Neill assigned a personal representative and committed himself to accept a consensus agreement. This personal commitment was an essential element in creating an environment for competing parties to enter and successfully conclude the negotiations.

The Governor as Institution Builder

Governors can support and promote a state framework that sanctions and provides incentives for the use of mediation in public policy and enforcement disputes. The statewide offices of mediation discussed in this issue are the best current examples.

STATEWIDE OFFICES— THE DIRECTORS SPEAK

Statewide offices of mediation have taken on several different forms. To learn how four states have developed their offices, the FORUM interviewed their directors: ***Peter Adler****, director of Hawaii's Program on Alternative Dispute Resolution;* ***John W. Gleeson****, director of New Jersey's Center for Public Dispute Resolution;* ***David O'Connor****, director of the Massachusetts Mediation Service; and* ***Roger Williams****, director of Minnesota's Office of Dispute Resolution.*

Q. What is the mission of your office? What services do you provide? To whom?

Adler: We have two missions, one broad, one narrow. The broad one is to be a catalyst for dispute resolution development and experimentation throughout the state, notably in the judiciary but in other branches of government and outside the government as well. In other words, to develop and broaden the field of dispute resolution in Hawaii. This office is a proving ground, a place that could get good evaluative tests of dispute resolution up and running.

The narrower mission is to pay particular attention to the continued testing of dispute resolution alternatives for public controversies of varicus sorts, both those in litigation and those outside of the courts that involve policy matters.

Our office provides several different services. Our largest initiative has been designing and getting a statewide court-annexed arbitration program going in all circuits. In the public disputes area, last year we started a program working with judges and litigants to identify appropriate cases and match mediators to those cases. We provide ongoing mediation services for public disputes, ongoing arbitration services for tort cases, and other services in research and planning.

Gleeson: Our basic mission is to develop and promote effective methods of resolving major public interest disputes through mediation and other third-party neutral services. Our goal is to resolve the disputes faster, at less cost, and with greater satisfaction to the disputing parties than more adversarial methods. Center services are broad, involving a variety of neutral third party techniques but principally mediation by staff and nonstaff consulting mediators. This year we facilitated a major case that used collaborative problem solving over issues surrounding the state's emergency medical services system. To date, state agencies, municipal officials, private parties, and their lawyers have been involved in, and the beneficiaries of, the mediations. State courts send us a significant number of our cases.

A major center service is training in dispute resolution techniques. Over the years we have trained public managers, law clerks, probation officers, community mediation volunteers and public interest lawyers, among other groups.

O'Connor: The mission of the Mediation Service is to resolve major public policy disputes of statewide significance. We provide a range of services which we group in four categories.

The first is direct mediation of major disputes involving a public agency in some capacity, if not as a direct party, then as a concerned indirect party. These situations also include private parties such as advocacy groups, corporations and business interests. Our expertise here is to assist in negotiations that cross the boundary between public and private interests. We identify and appoint mediators acceptable to the parties and arrange for their funding. Occasionally I serve as a co-mediator.

A second area is to help public officials develop better administrative procedures for processing disputes. This is less glamorous but can have a substantial impact over time. It can be accom-

"We have known for some time that mediation works in the field of labor relations and I am convinced that it can be used in other areas of public policy."
Governor Michael S. Dukakis,
Massachusetts

plished with more opportunities for settlement and fact-finding.

A third area is education and training in dispute resolution for public officials. We meet with and explain dispute resolution to state and other officials and periodically sponsor training programs for them and their staffs.

A final area is service to the court system. We help the judiciary understand and implement dispute resolution programs. We help insure the quality of services and work on the development of case selection and referral procedures.

Williams: The mission of the office is to help public agencies become more adept at settling disputes and helping them actually settle public disputes. We do that in several ways. We provide training courses in negotiation and mediation to state employees and managers. We work with agencies to determine the dispute resolution procedure best suited to a particular dispute. We provide mediation services or suggest non-profit or for-profit service providers which would be appropriate, given the nature of the dispute. And the office maintains and disseminates up-to-date information about the use of dispute resolution techniques in settling public-sector disputes. Our principal clientele are state agencies, although we will assist any public agency that requests our help.

MEDIATING HAWAII'S WATER CODE

The Dispute

For nearly half a century, lawmakers in Hawaii have wrestled with complex policy issues related to the management of the state's surface and ground water resources. In 1978, the Hawaii state constitutional convention passed, and the electorate approved, a specific provision mandating the Hawaii legislature to protect, control, and manage Hawaii's water. Various versions of a State "water code" were introduced and heatedly argued. For nearly a decade, these discussions pitted developers against environmentalists, large landowners against small ones, and the counties against the state. Inevitably, each legislative water code battle ended in stalemate.

In the summer of 1986, the Judiciary's Program on Alternative Dispute Resolution, Hawaii's office of mediation, was approached by JoAnn Yukimura, a legislator from the county of Kauai. Yukimura, on behalf of lawmakers from several counties, requested that the program organize an informal and voluntary policy dialogue centering on some of the issues invovled in the water code impasse. The Program on Alternative Dispute Resolution agreed to assist and assembled a team of mediators.

The Process

To initiate discussions, the mediators first set in motion a process that identified major "sectors" that stood to be affected by any new water law. These included, among others, federal, state, and county agencies involved in water administration; large and small farmers; county legislators and planning departments; environmental and conservation groups; private developers and large landowners; and native Hawaiian groups.

Next, the mediators drafted a brief concept paper called "Towards A Water Code Roundtable". Focusing largely on procedural matters, the paper suggested the creation of a neutral, ad hoc forum that would promote information exchange, issue clarification, and, if feasible, joint problem solving and negotiation. The mediators recommended that a "safe haven" of discussion be created for people who normally took opposing positions with each other before the legislative on water issues. The document, stamped "draft", was circulated to the individuals who had been identified as prospective participants along with an invitation to a first meeting.

The Water Code Roundtable's initial meeting, held in the Supreme Court building in July, 1986, produced an agreement to proceed with substantive, mediated discussions. All decision-making within the roundtable would be by consensus and the process would continue only so long as all individuals were willing to meet. Additional prospective roundtable participants were identified and ground rules for participation adopted. Of particular importance was a provision that allowed roundtable members to speak in their personal capacities rather than as official representatives of their constituencies. The effect was to permit everyone at the table to enter into "no-risk" discussions.

Moving from procedure to substance, the roundtable next concentrated on identifying and improving the definition of various water code issues. The roundtable's first breakthrough came when all parties acknowledged that, regardless of who owned Hawaii's water, water in general should be regulated. Discussions continued on questions dealing with the types of water code and water permits the state should have and on how authority for regulating Hawaii's water should be divided between the state and counties. Between July and December of 1986 the Water Code Roundtable held more than 25 large and

Q. What has been the most important accomplishment of the office?

Adler: The most visible accomplishment has been the start-up of the court annexed arbitration program and the public disputes project. People can see cases being arbitrated and mediated.

The quieter accomplishment has been to help create a climate of receptivity for dispute resolution experimentation. By this I mean basic missionary work with judges, court administrators, legislators, and executive branch officials that arouses their curiosity about dispute resolution and interests them in trying it.

small group working sessions. As the start of the 1987 legislature drew closer, the group's efforts intensified.

The Result

In January the roundtable was able to draw up an arrangement-in-principle covering many of the major water code issues that had been sticking points in prior legislative sessions. The agreement was forwarded to key committee chairs and to other public and private groups. Among its features, the agreement called for an independent state water authority, a statewide water permitting system, the development of individual county water plans, and the creation of an administrative dispute resolution system for dealing with various water matters.

Between January and April, 1987, the roundtable's water code proposals were discussed and debated in various public hearings. Further compromises and modifications occurred. Then, in the final hours of the legislative session, a water code embracing many of the roundtable's key consensus proposals passed both the Senate and House of Representatives. On May 30, 1987, after more than 10 years of debate, Governor John Waihee signed Hawaii's new water code into law.

Gleeson: That we are functioning, active, moving ahead. In terms of casework, the single most important accomplishment was the settlement of a ten year litigation over the Camden County regional sewage and waste treatment system. The dispute involved 37 municipalities including Camden, New Jersey's single most economically depressed city. The settlement included reducing the costs of the system by about $50 million; lowering system costs to individual homes in the county from $1000 to about $350. The settlement was instrumental in a decision by the Campbell Soup Company, Camden's single largest employer, to remain in the city. That was very uncertain before the settlement. Campbell now is in the process of constructing a $40 million international headquarters and investing another $37 million in modernizing the Campbell plant in Camden. So the settlement really played a direct role in stabilizing the employment and tax base situation in Camden.

O'Connor: Developing a solid track record of using mediation in a wide variety of important public policy disputes. Our recent annual report describes the role of the office in 26 major public policy issues or problems during the last year covering everything from health care and environmental issues to construction and transportation issues and insurance and rate-setting problems.

"The New Jersey Public Advocate's Center for Public Dispute Resolution is an exciting experiment in the use of alternative methods of resolving society's conflicts."
Governor Thomas Kean, New Jersey

We have been able to show to public officials the wide applicability and flexibility of mediation and other dispute resolution procedures.

Williams: Acceptance of the office as a legitimate endeavor by the local dispute resolution community. In shaping the office, we worked closely with the dispute resolution community to determine the need for a state office and the role it might play. This open process allowed the office to be accepted as an important addition to the community. Being a small office, we must utilize non-profit and for-profit resources in serving our clientele. Today, we are able to draw on the dispute resolution community's resources in responding to the dispute resolution and training service needs of our clients.

Q. What has been its most difficult challenge?

Adler: The most difficult challenge involves the opportunistic nature of this work. It is very difficult to do a strategic plan for the use of dispute resolution methods. That's the most frustrating aspect for me. I've been trying to figure out how we assess in the widest possible way the potential uses of dispute resolution in Hawaii in various settings and establish some priorities in the effort. We have not succeeded in putting together a coherent plan that cuts across different sectors, across the different institutions and branches of government, and across the substantive areas of the field, such as family mediation, civil and criminal matters, and environmental and community mediation.

Gleeson: Creating an awareness among potential users of dispute resolution services, ours and others, of the usefulness of the services in meeting their immediate needs. Everybody

"The Minnesota State Office is helping state officials to understand that a broad range of disputes—over farm credit, state policy or personnel issues—can be resolved most effectively through a collaborative rather than adversarial process."
Governor Rudolph S. Perpich, Minnesota

agrees that mediating disputes without going to court is a wonderful idea. The difficulty is making decision makers in government and elsewhere aware that dispute resolution methods exist and that there are places where these services can be obtained. That's a difficult job. For example, city managers are constantly faced with what seem to be intractable problems such as siting a homeless shelter or halfway house. Mediation can be an effective way to resolve these problems. The tough part is to get their attention that mediation is a tool to help them to resolve community problems.

The center has tried to raise awareness of dispute resolution around the state through training and conferences such as one we co-sponsored in 1986 with the League of Women Voters and a major symposium in December, 1987 on critical issues in dispute resolution. A broad, targeted and educational effort is necessary and is not a one-shot effort with us.

O'Connor: Consciousness raising. How to get the word out to let public officials know this option is available to them, and help them understand when and how they can use it. We began the office in 1985 from ground zero. Nothing of the kind predated it. It took considerable effort to develop momentum and increase awareness of the office's existence. Even now, we constantly remind and alert public officials that there is assistance in alternative dispute resolution available to them in state government.

Williams: To convince state agency officials that there is something other than

ENDING BOSTON'S PUBLIC HOUSING STALEMATE

The Dispute

Gentrification and a rising standard of living have resulted in what Mayor Ray Flynn has called "a crisis of affordability" in Boston's rental housing market. The Boston Housing Authority (BHA) has almost 15,000 people on its waiting list for public housing. In this context, the authority's Franklin Field Public Housing Project, with 19 low-rise buildings, has provided affordable housing for low income families every year since 1959. In the mid-1970s the authority recognized the project's dilapidated condition and decided to rehabilitate the buildings rather than construct new ones. When it contracted with Shah/Wexler Construction Company in 1982 to rehabilitate the buildings at Franklin Field, the contract called for almost $26 million of renovations to the 346 units. The last ones were to be ready to inhabit by June, 1984.

Reliance Insurance Company posted a bond for the Shah/Wexler joint venture at the start of the project. Along the way, construction work was delayed due to many complications and hundreds of change orders. Three years after the contracted date of completion, Wexler Construction had gone bankrupt leaving Shah Construction alone to finish the work; all $26 million had been paid out; the last buildings had not been touched; and work had come to a standstill. The insurance company claimed to have paid out $35.5 million and demanded reimbursement of $9.5 million. The BHA and Shah threatened each other with litigation over responsibility for the delays, the amount owed, and the cost for rehabilitating the last building. BHA argued that many of the cost increases were not its responsibility.

The Process

The parties made numerous attempts at bilateral negotiation, but all failed. The case was scheduled to enter the administrative appeals process of the Executive Office of Communities and Development (EOCD), the state agency that provided the BHA with funds for the project. This move would have been the first round in a long, costly series of hearings and court cases leaving the fate of the project and those who live in it in limbo for many years.

At the urging of its general counsel, the agency recommended that the parties use a mediation process and they agreed. EOCD asked another state agency, the Massachsuetts Mediation Service (MMS), the statewide office of mediation, to arrange and oversee the process. Mediators David O'Connor and Stanley Shuman were assigned to the case. O'Connor, MMS executive director, was available at no cost to the parties through funding from the National Institute for Dispute Resolution and the state. Shuman, an experienced arbitrator and construction company executive, would be paid by the parties. Negotiations involved three major issues: reaching agreement on a delay claim, completion of the final 24 units to be rehabilitated, and future liability issues. The parties held many caucuses and occasional joint sessions to determine the facts in dispute and the basis on which each side might make a settlement. Distrust was high between negotiation teams and internal differences among members of the teams threatened to end the process.

The Result

After months of difficult negotiations, the parties agreed to settle the delay

going to court. It is politically safe for public managers and officials in any state to turn disputes over to the attorney general for resolution. Generally, the court can be blamed for an undesirable decision. When an official agrees to a negotiated settlement, however, there is a perception that they are open to criticism on the terms of the settlement. Someone can say, "you gave away the store, you gave in too soon, could have done better in court, look how much more someone else got in a similar case, etc." The continuing challenge is to convince public officials that they have much more control over process and outcome in a negotiated settlement process and, that they do not waive their right to a court settlement if these attempts fail.

claim on the basis of 414 days of delay, with the housing authority and EOCD each paying Reliance $1.7 million. Shah agreed to complete the last building within eight months for a total of $1.83 million. Shah insisted that this amount was less than the actual cost for renovation, but recognized the agreement enabled Reliance and the construction company to avoid years of legal suits and provided a prompt payment on the delay claim. EOCD released Reliance from liability for routine warranty work in exchange for Reliance's agreement to continue to carry liability for undiscovered defects throughout the entire project.

A lengthy settlement agreement and other documents were signed on August 3, 1987. Work soon began on the last building. With the completion of the last apartments, families would finally enjoy the satisfaction of clean, modern, handsome rehabilitated housing at Franklin Field. The 322 other families already living there would see the end of the construction work at the site and the agencies could turn their attention to other critically needed public housing projects.

Q. How do you view the office's prospects to survive and to flourish?

Adler: Prospects for survival are very good. I am confident the programs that have been created—court annexed arbitration, public disputes mediation, family court mediation and so on—will survive and grow.

The office itself will survive, but it will continue to be a small office with a catalytic role. We have demonstrated the utility of having a single state office not only thinking about dispute resolution but designing and carrying out experimental uses in various settings and functioning as an incubator. As we develop programs and put them in place, they will find homes other than in this office. For example, at the moment in the court-ordered arbitration area, I have three people working. Over time I think those numbers will diminish since the organizational home for the program won't remain in this office but in the appropriate court. My goal is to try and build these programs, find the right homes for them, and spin them out and integrate them within the appropriate institutions.

Flourishing for me means continued enthusiasm and receptivity across the state for adaptations of dispute resolution in various settings. Flourishing in the public disputes program for me would mean having an active and accepted mediation service that is used by negotiators from the government, business and community sectors.

Gleeson: The prospects for survival are excellent. The function of dispute settlement within the Department of the Public Advocate existed prior to the creation of the Center for Public Dispute Resolution and has been recognized by the legislature by statute and through the appropriations process for 11 years. Since the center's creation the dispute settlement function has become a line item in the state budget. This bodes well for its future survival. Al Slocum, the current public advocate, as well as Governor Kean, give very strong support for the center. To flourish, the center needs the continued recognition and support of these same public officials—

"The Hawaii State Judiciary's efforts in the field of ADR honors a long-standing island tradition of settling differences of opinion informally. Mediation and arbitration are modern-day counterparts of ho'oponopono, the ancient Hawaiian way of "setting things right."
Chief Justice Herman Lum,
Supreme Court of Hawaii

by the legislature, by the Governor, by the Public Advocate—as well as through the input from its advisory board. In addition, we'll work to generate a much wider general knowledge of the potential of dispute resolution among the public and among government officials.

O'Connor: The prospects for survival are excellent. We've been getting tremendous support from Governor Dukakis and the legislature as we grow into a mature agency. Our track record is probably the best indication of our prospects for survival because performance is what public officials are looking for.

The question of flourishing is more difficult to answer. Like any public entity, we are subject to constraints and pressure reflecting what the citizens of our state are most concerned about. Massachusetts has had 5-6 years of unprecedented economic success. So there hasn't been an urgency about cost cutting and reduction in services across the government. In an era of frugality we would have a tougher time in expanding or even sustaining our levels of activity because the services we provide are not highly visible to voters and do not directly provide jobs or other essential services.

An innovative and conscientious ad-

ministration like the one we now work under sees great benefit in mediation services. Our challenge is to broaden and deepen that constituency. Performance is the way to do it.

Williams: I'm not concerned about the long-term future of the office. As long as we meet the needs of our clientele, we will continue to exist. The small size of the office will, however, be a limiting factor in our ability to meet future needs. As agencies become familiar with out-of-court settlement procedures, I predict they will develop procedures for automatically attempting settlement through negotiations at various levels in the organizational structure. As these procedures are incorporated into the day-to-day operations of agencies, there could be a declining role for the office over time.

RESOLVING MINNESOTA'S FORESTRY DISPUTE

The Dispute

In the fall of 1985, environmentalists challenged the Minnesota Division of Forestry's use of aerial herbicides that clear away old forest growth and make room for new stands of conifer trees such as pines and firs. They prepared a petition that claimed the aerial spraying could harm human health, wildlife, forest ecosystems, and the quality of ground water. The Sierra Club, People Against Chemical Contamination, and about 50 individuals filed the petition with the Minnesota Environmental Quality Board. The petition called for the Department of Natural Resources to prepare an environmental assessment worksheet on the aerial application of herbicides.

The department responded with its worksheet in December, 1985, but the petitioners found several flaws in the department's documents. According to the petitioners, the documents failed to provide accurate and complete documentation of the need for the aerial program; to furnish the information necessary for a cost-benefit analysis of the program; and to analyze the risks associated with herbicide use in forest management. The petitioners claimed the documents misstated the effectiveness of the department's administrative processes in safeguarding against adverse environmental effects.

Nonetheless, the department's staff said that its review process produced no new information requiring preparation of a more detailed environmental impact statement. But the staff did believe that legitimate questions existed that could best be resolved through a dispute resolution process.

The Process

In May, 1986 staff members began discussing the use of mediation with the director of the Minnesota Office of Dispute Resolution, the statewide office of mediation. He explained the process of mediation and identified several mediators with environmental mediation experience. After many discussions between department staff and the environmentalists, both sides agreed in February 1987 to use mediation as a means of settling their disputes.

As part of the agreement, the Sierra Club and others set aside the possibility of suing the department to stop the aerial application of herbicides on state forest lands while the mediation proceeded. The department, in turn, deferred its formal decision on the necessity of preparing an environmental impact statement. Next, the parties retained the services of Leah Patton of the Seattle-based Mediation Institute. Finally, representatives of the forest products, chemical manufacturing, and agriculture industries jointly indicated an interest in becoming a party to the mediation and the two original parties decided to allow industry participation.

Each of the parties—the Department of Natural Resources, the environmental coalition, and the industry group—formed a work group consisting of members representing their respective interests and constituents. Each work group designated contact persons to represent the group during the course of the mediation and to coordinate communications during and between mediation sessions. Strict ground rules addressing attendance, confidentiality, media relations and cost-sharing were adopted to guide the mediation process. The rules also defined the issue and focused discussion on particular aspects of chemical usage. The Office of Dispute Resolution was responsible for logistical arrangements.

From Feb. 5 through June 5, 1987, the parties held eight full-day sessions, concluding negotiations at a June 4-5 retreat at which they developed and signed an agreement.

The Result

The wide-ranging agreement includes provisions that call on the department to protect public health, wildlife, and water and fisheries and to redirect its aerial herbicide spraying through changes in management activities. The agreement makes the director of the Minnesota Office of Dispute Resolution the chair of a Forest Herbicide Committee that is to evaluate compliance with the agreement through 1993. All the parties agreed to make their best efforts to reach by 1993 important targets such as reducing by 50 percent the number of acres treated with aerial herbicides.

In addition, the environmentalists agreed to redefine their petition to conform with the agreement regarding the herbicide application program for growing new conifers during the 1986-93 period. In turn, the department issued a record of decision that the 1986-1993 program does not have the potential for significant environmental effects, provided the agreed-upon targets are met and other provisions of the agreement are accomplished.

STATEWIDE OFFICES—THE EXPERTS' VIEWS

The development of statewide offices of mediation has benefitted from constructive advice and continuing encouragement from many quarters. Among the leading observers and proponents of statewide offices are ***Sanford M. Jaffe****, director of the Center for Negotiation and Conflict Resolution, and* ***Christine Carlson****, a Kettering Foundation program officer. Their views were expressed in a recent interview with the FORUM.*

Q. What has been the significance of the role of the courts in the statewide offices of mediation?

Carlson: It has varied from state to state. Obviously one of the factors is where the office is located within the structure of state government. Hawaii's office is located in the judiciary and the program has been shaped by that. The other three offices are not located in the courts, but they inevitably developed relationships with the courts. In New Jersey, the courts turned to the office as a source of training and as a special master in some complex cases. In Massachusetts, the courts turned to the office as a consultant in how to set up a program in the courts. Inevitably, because the offices are becoming centers of information and experience with dispute resolution, they are going to be positioned to assist the courts as courts become more interested in using dispute resolution.

Jaffe: If you look at what has happened in dispute resolution over the 5-6 years, a great deal of dispute resolution activity has been in the courts. It is not surprising that the state offices would begin to develop connections with the court system as part of their general evolution. As courts have become more anxious to use the range of dispute resolution processes, they need resources to deal with the complex cases they want dispute resolution processes such as mediation to play a role in. The state offices can play a very important role in being that kind of resource.

By working with the state court systems, the state offices garner an additional degree of legitimacy and credibility. This is particularly important in the beginning stages of any social experiment and change. This legitimacy helps the offices in dealing with other constituencies within the state, the executive and legislative branches and the broader community.

The next stage will be to look at dispute resolution not just in the courts, but as an overall system for resolving conflict and solving problems within each state. The relationship between the state offices and the courts in that context becomes an integral part of a system-wide approach to resolving disputes.

Q. What are the chances of other states replicating the models developed by the statewide offices of mediation offices supported by the Institute?

Carlson: Overall, I think the chances are very good that states in one way or another will take up this idea of providing some state leadership and assistance for resolving disputes involving government. Part of that is because the interesting conflict resolution is so high. The approaches will be tailored to the particular state.

Two of the most important considerations are where the offices are located in the state government structure and the skills of the people initiating the activity. Some offices are better positioned in terms of being able to interact with the various agencies of state government and the various branches. Part of that is related to the role the agency plays, that is, whether it is seen as an initiator and innovator; whether it is a line agency or agency reporting directly to the governor.

Jaffe: I believe that state offices are worth replicating and will be replicated in other states in the coming years. They appear to me to offer a good product that is replicable. The challenge will be informing the public of the product and lending technical assistance to help replicate the offices in new states.

You need a good model that is replicable. I believe that the state offices are a good product. We'll be in a better position to test my intuitive judgment on this point when the assessment that institute is conducting is completed. The evaluation will not provide absolute measures of success or failure, but it should help identify common elements in the state offices that can be replicated, even while recognizing that each state will be different. The four NIDR offices are in some ways quite different. I do think there are common elements. One is that each state office has as its fundamental operational goal the provision of dispute resolution services to the state and the public. Another is the educational role each office has undertaken to get people to understand the role of these processes. Both of these are important elements and replicable while preserving state-by-state diversity.

You need to inform the public of the product and provide technical assistance to help replicate these offices. The step from having knowledge and a need to actually structuring a project that addresses the needs is a difficult one. Assistance from persons familiar with these operations can help.

Q. What role has private funding played in creating and maintaining these offices? Is it a necessary element of these models in the future?

Carlson: Private funding has provided opportunities for both acquainting and involving a broader spectrum of non-government as well as government agencies in experimenting with these approaches to solving problems. I am particularly impressed with the development of the Public Mediation Fund created by the Boston Community Foundation in conjunction with the Massachusetts Mediation Service as a model other states and foundations should look to. The field of dispute resolution as applied to public policy issues is very new and there is much to be learned. Private funds are needed to allow for innovation.

When a field is new, it is very important and useful to have support from both government and non-government sectors. Such funding and support indicates that it isn't just government that is interested in these new approaches, but that there is broader interest in using these processes for resolving public policy problems. It helps make the idea of dispute resolution both legitimate and credible.

Is public funding necessary for these models? It is important to think about the kind of funding to get an office started and the funding that is needed to sustain it over time. Some issues these state offices will be addressing will be primarily related to the way government functions and are appropriately supported by public funds. My sense is that in the foreseeable future, the expansion of the field will involve trying to establish some mediating function between government and the public and between government and the private sector. Shared funding and support of new approaches makes them more legitimate. Private funds should continue to support innovation and permit people who would not otherwise be able to use these approaches to participate. Private funds are needed to support innovation. Private support is most likely to be available for extending dispute resolution into new issue areas or making possible participation by those who cannot otherwise.

Jaffe: Private funding played a key role in helping start the state offices. Without private funds it is unlikely that any of these offices would have gotten started. Private funds were important to help make the case with public officials that these were experiments that should be tried.

In the future private funders will continue to play a key role in getting offices started. It may not, and probably

MEDIATING NEW JERSEY'S EMERGENCY SERVICES

The Problem

In 1986, the federal government, upset about New Jersey's divided system of emergency medical services, said it would no longer reimburse the state for emergency transport bills it pays through Medicare and Medicaid programs. At stake was about $20 million a year. The federal government objected to the tradition-bound fragmentation of effort between volunteer ambulance crews and professional paramedics in handling emergency medical services.

When volunteer ambulance crews respond to distress calls, they are restricted to providing basic life support such as administering CPR and oxygen, bandaging wounds, and splinting fractures. In turn, hospital-based paramedics are limited to providing advanced life support such as administrating intravenous lines, drug therapy and specialized techniques. The volunteer crews are allowed to transport patients to hospital. Paramedics ride with patients in the volunteers' ambulances.

In the past conflict and competition among volunteer ambulance services, hospital-based paramedics, state and local agencies, health care institutions and consumer organizations have prevented New Jersey from implementing a comprehensive, coordinated, statewide emergency medical services system. But the federal threat to end its $20 million in reimbursement prompted change.

In September, 1986, Gov. Thomas H. Kean created the Governor's Council on Emergency Medical Services to recommend overall policy and a state plan that would meet the state's needs and federal guidelines. In November, the council asked the New Jersey Center for public Dispute Resolution (CPDR), a part of the state's Department of the Public Advocate, to provide dispute resolution services in helping it develop these recommendations. After an initial assessment, the center, which is the state's office of mediation, agreed.

The Process

The center staff and the council's leadership first evaluated the various dispute settlement processes that could be useful in forging recommendations. With the council kept informed, the center retained mediation consultants, Interaction Associates, Inc., of Cambridge, Massachusetts, to assist in developing the most useful process. The consultants and the center's staff devised a collaborative problem-solving process as a form of mediated negotiation whereby all policy recommendations would be adopted by consensus of the council.

Subcommittees were created to develop recommendations on a range of important matters such as training, staff response time, data, reporting and quality assurance, communications, and the structure and design of the state's emergency medical services system. Initially, Interaction Associates led monthly negotiations, a job now filled by center staff which all along has guided subcommittee meetings.

should not require the same amount of resources as in the first four offices. But it may require a small amount to provide the glue to get things started. Experimental and innovative projects state offices may want to undertake may still need some private support. Those efforts remain difficult to fund completely from public sources. Finally, and perhaps most important, private funding helps to preserve the neutrality and credibility of these offices. Complete dependence on state funds may present problems. The experience to date shows that the state is often a key party in the kinds of public policy disputes these offices have handled. I think it's important for these offices to rely on a balanced mix of public and private support.

Experiments in Statewide Offices of Mediation
continued from page 3

Wisconsin's approach differed from the other states with Institute-funded pilot projects. There, rather than create a separate office or hire new staff, Howard Bellman, the state's Secretary of Labor, Industry and Human Relations, chaired an informal screening panel composed of two other members of the governor's cabinet to determine whether dispute resolution techniques might usefully be applied in certain controversies. In 1985, through Bellman's intervention, two major statewide disputes between the Department of Natural Resources and Indian tribes over fish and game regulations were mediated. When the governor's office changed hands in 1987, though, and Bellman was replaced, the Wisconsin dispute resolution effort dissipated. The Wisconsin approach indicates the difficulties of implementing a state-wide dispute resolution through the personal efforts of one individual, no matter how highly placed that person might be.

Achievements and Lessons Learned

In choosing among the applications submitted by interested states, the Institute sought guarantees of official support (especially matching funds), indications of a readiness to move quickly, and a multi-issue focus. From what four of the states have accomplished thus far, it appears that the Institute chose wisely. It is no small accomplishment to win political support for such experimental efforts, gain approval for matching allocations, select senior staff, develop constructive relationships with the courts and various administrative agencies, and achieve actual case results in two or three years. Moreover, it appears that the state offices in Massachusetts, New Jersey, Minnesota and Hawaii have succeeded in winning long-term state funding commitments.

The volume of case work has been surprisingly high. For example, during the past year in Massachusetts, 26 public disputes involving a wide range of subject matter were handled by the state office. The positive impacts of the settled cases have also been considerable. For example, in New Jersey the settlement of a complex case involving a regional sewage and waste treatment system with 37 municipalities directly led to a saving of $50 million in construction costs and indirectly to a decision by Campbell Soup Company to remain in New Jersey's most economically depressed city, Camden, and invest more than $75 million to build new headquarters and upgrade its Camden plant.

The success of several of the state offices has been in part due to the realization that mediation and other forms of dispute resolution are best institutionalized through an almost invisible, behind-the-scenes, set of interactions among policymakers, state officials and various disputants. When public officials are able to announce a constructive solution to a difficult controversy, they are more inclined to try mediation a second time. The state office directors have all opted for this behind-the-scenes approach, and have spent a great deal of

The Results

In April, 1987, the council gave Gov. Kean an interim report, reached through consensus, that recommended that all emergency medical services personnel must meet certain basic training standards. Those personnel include dispatchers, police, firemen, ambulance drivers, and rescue workes. The council agreed that all volunteers in the system should be trained to qualify as emergency medical technicians. Only some do now.

Other council recommendations call for uniform standards for equipment on ambulances, minimum response times by ambulance squads, and a coordinated system to review all levels of emergency medical service.

The council now is in the midst of the second phase of negotiations with more changes expected that could help provide greater coordination and efficiency to the emergency medical system. The center is helping the council in developing a process to obtain increased public comment on all proposed changes. Meanwhile, the federal government and the state are discussing the threatened withdrawal of reimbursements in light of changed regulations recently issued by the U. S. Department of Health and Human Services.

For the Bergen *Record*, one of New Jersey's leading newspapers, mediation in this public policy case played a vital role. It said, "Over the past year, the Governor's Council on Emergency Services has been meeting to find a solution that would satisfy Washington and still provide an active role for volunteer ambulance corps. These discussions could have bogged down in petty rivalries and competition. Instead, cooperation has prevailed." Affected parties "wisely called in a third party—the Center for Dispute Resolution in the Office of the Public Advocate—to act as intermediary. The mediator, Thomas Fee, helped bridge the gap in communication and guide the council toward a consensus. This is how government works when it works well."

time consulting with state officials who want advice on how best to handle difficult disputes. This approach has helped to build good working relationships which, in turn, have enhanced the reputation of the mediation offices within state government. While the public in each of the states may as yet have almost no inkling of what has been accomplished thus far, the prospects for institutionalization have been boosted by this strategy.

The interest in the offices shown by the state judiciaries has surprised some and helped legitimize the work of the offices. The state offices were initially aimed at dealing with disputes under the auspices of the executive branch, particularly administrative agencies. The state courts, though, have shown enormous initiative in identifying and adopting alternative dispute resolution techniques and strategies. New Jersey, Hawaii, and Massachusetts have keyed portions of their state office functions to cases and activities suggested by the judiciary.

Most recently, the state offices have begun to build public awareness and acceptance of dispute resolution through training sessions and conferences. In Minnesota, Governor Rudy Perprich recently announced a statewide "dispute resolution week" that was suggested and coordinated by the state office. While these activities require much work by office staff, they can be important in raising consciousness and may pay off in referrals and requests for assistance. Each of the state offices has made a commitment to continue its training activities and other forms of public education.

As other states contemplate creating their own state offices, the challenges encountered by the first five states should be given careful consideration.

Resistance from Agencies

A vexing but not surprising problem has been resistance to the idea of state offices of mediation from inside the executive branch, particularly from administrative agencies concerned about their authority. A number of key officials in each state have been antagonistic to the idea of "turning over" highly visible policy, siting, or other kinds of disputes to "outsiders." Some believe it is their responsibility to resolve disputes using traditional means and view the entry of a mediator as an admission of failure on their part.

Of course, some state officials mistakenly assume that mediation is the same as binding arbitration, and that the disputants, including the chief executive, will be forced to "give up control" if dispute resolution procedures are employed. Only with great care and persistence have the heads of the state offices (and their advisory boards) been able to convince the doomsayers that the use of informal dispute resolution mechanisms involves neither admission of failure nor a loss of statutory authority.

Mediation Services

Another function of these offices involves the identification of acceptable neutrals to serve as mediators or facilitators. The notion of prescreening in-state professionals for the purpose of creating a roster of dispute resolvers has proven very difficult. While none of the state offices has wanted to take responsibility for any kind of de facto certification, each office has put together informal lists of experienced public dispute mediators. The office directors agree that they must be ready with appropriate suggestions when the court asks for special master nominees or regulatory agencies seek a nominee. In Hawaii, the state office held special training sessions for carefully selected public dispute mediators and developed an expedited case entry system which is now being tested.

An important premise so far guiding each of the state offices is that the offices themselves will not normally serve as mediators in most of the cases referred to them. Instead, they have tried to match disputants with appropriate dispute resolvers private practice. Ultimately, the parties themselves must feel completely comfortable with the neutral they select; the state offices, while prepared to make suggestions, have tried to avoid any implied certification or the appearance that they are forcing particular practitioners on anyone.

Funding and Payment for Services

Funding persists as a central concern for these offices, even as several state governments have moved to pick up their annual operating costs. Each state office has created a pool of funds that can be used to cover the costs associated with specific mediation efforts. One breakthrough came when the Massachusetts Mediation Service received a grant from a Boston-area foundation to put funds aside to create such a resource pool. The fund's primary focus is support in public policy disputes of importance to lower-income residents in the city of Boston, but it can be expanded by contributions from other sources to serve other groups or issues. This may lead other funders to create targeted resource pools.

Several of the state offices have just reached the point of charging at least a nominal amount for some of the services they provide. This is tricky. The offices do not want to impose costs of those least able to pay, and sliding fee schedules are hard to construct. Moreover, agencies of government are not in the habit of charging for their services and state and federal labor mediation offices have historically not charged for mediation services. On the other hand, as in-state groups and other agencies seek additional training and advice from the state offices, they have indicated a willingness to pay at least a modest amount for such services.

Finally, the rate at which professional mediators should be paid has been an issue each office has grappled with. The offices in general have sought to use the highest quality mediators with experience in public disputes. While one state has tried to set a standard fee range from $350 to $500 a day, another state handles this on a case-by-case basis. Establishing a going rate can be a difficult task in the public disputes area work. Some believe setting a standard fee might eliminate from the mediator pool some of the most experienced professionals whose per diem rates can be much higher.

The Future

One forecast in 1985 was that the state office "fad" would die out as soon as the initial round of Institute grants was spent. Others suggested that the offices quickly would take hold in the initial states and many other states soon would follow suit. The experience to date suggests both of these predictions were wrong. Instead, the offices have moved at a deliberate pace in experimenting

with various roles, building momentum through successful case work, and institutionalizing their functions. They have done so with quiet but savvy political and institution-building strategies.

It is possible over the next few years that as many as ten more states will adopt dispute resolution programs—whether by statute or informally. California, for instance, is once again considering legislation that would create an office to advise local governments on how to proceed with mediation when disputes arise. This bill passed both houses during the last legislative session, but the governor vetoed it. The bill has been reintroduced, and its backers have made a special effort to explain the merits of the idea to the governor. The governor of Ohio has expressed interest in creating a state office of mediation. Key agency heads in Maine, Vermont, Florida, Oregon, Washington and Virginia have indicated continuing interest in the state offices concept.

As the Institute begins its formal assessment of the first round of state offices and as the state offices examine their own successes and failures more systematically, further evidence should become available that will make it easier to assist interested states and forecast the future of state offices of mediation.

NIDR NOTES

Regulatory Negotiation at the State Level

The Institute soon will invite proposals from dispute resolution practitioners and government officials who seek to test the uses of regulatory negotiation at the state level.

Regulatory negotiation is a relatively new adaptation of dispute resolution methods to government agency rulemaking. In a regulatory negotiation, all parties affected by a rule are called to a bargaining table where a facilitator or mediator helps them to seek agreement on the terms of a rule *before* an agency issues it. The purpose is to avoid the delay, litigation, and acrimony sometimes associated with the current rulemaking process.

In recent years several federal agencies, including the Environmental Protection Agency and the Federal Aviation Administration, have used regulatory negotiations successfully in controversial rulemaking cases. To help examine and promote this developing process, the Institute has subsidized costs in several federal negotiations where some parties could not pay for shared expenses.

Now the Institute wants to expand to the state level its public policy program of testing, demonstrating and documenting a limited number of regulatory negotiation demonstration projects. So far, few states have experimented with regulatory negotiation, or negotiated rulemaking as it sometimes is called. One state that will is New Mexico.

New Mexico Storage Tanks

The Institute recently awarded $5,000 to help develop rules governing the state's 11,000 underground petroleum storage tanks. It is estimated that as many as 30 percent of New Mexico's underground storage tanks leak, a serious health threat in a state that relies heavily on groundwater for personal use.

"Besides wanting to help New Mexico deal with the storage tank problem, our purpose in awarding the funds is to test how government, industry, environmentalists and citizen groups can work at the state level in fashioning regulations controlling vital parts of their lives," according to Madeleine Crohn, the Institute's president.

The Institute's grant goes to Western Network, a Santa Fe-based mediation firm. The funds will be used to increase public participation in producing the new storage tank regulations.

Western Network will assist representatives from environmental, citizen, government and industry groups and the state's Environmental Improvement Division (EID) in negotiating the regulations that will apply to the storage tanks. The regulations that emerge from this process will be adopted by the state's Environmental Improvement Board along lines mandated by the New Mexico legislature during its most recent session.

The Institute also has funded Western Network to assist in a regulatory negotiation involving groundwater standards in Arizona.

In 1988, the Institute will issue an announcement with guidelines on support for state-level regulatory negotiation projects. For further information and copies of the announcement, please write the Institute.

Recent Institute Grants

Conflict Clinic, Inc., George Mason University, Fairfax, Virginia: a $25,000 grant to provide third-year support for intervention in conflicts of public interest and for study of the processes used through a "teaching hospital" method.

The Institute for Environmental Negotiation, Charlottesville, Virginia: a $5,000 grant to support a mediation process for resolution of a conflict over historic preservation in Atlanta.

University of Florida Dispute Resolution Center, Gainesville, Florida: a $10,110 grant to cosponsor with the Florida Supreme Court a national workshop on mediation standards for court-authorized dispute resolution programs.

Mediation Network of North Carolina, Durham, North Carolina: A $6,400 grant to support creation of a regional resource center for community mediation programs.

IN THE PROCESS: Resources for the Field

PUBLICATIONS

Breaking the Impasse: Consensual Approaches to Resolving Public Disputes, by Lawrence Susskind and Jeffrey Cruikshank of the MIT-Harvard Public Disputes Program (Basic Books, Inc., New York, 1987, pp. 276, $19.95) posits that conventional ways of handling public disputes no longer work. According to the authors, political compromise, litigation, elections, referendums and administrative processes have been unable to break the impasse in growing numbers of public disputes. The book draws on various cases over the past 15 years in which negotiated approaches were used to resolve politically charged public disputes. It presents a set of consensus-building strategies aimed at producing agreements that are less costly and more satisfying to those involved.

The New York University Press, (17 Washington Sq. South, New York, NY 10012) has recently published *The Politics of Environmental Mediation*, by Douglas Amy (1987, 255 pp.), and *Conflict Management and Problem Solving: Interpersonal to International Applications*, edited by Dennis Sandole (1987, 320 pp.) . . .

Alternative Dispute Resolution: An ADR Primer by Beth Paulson and Frank E.A. Sander (ABA Standing Committee on Dispute Resolution 1800 M St., N.W. Suite 200-S, Washington D.C. 20036, 1987, 36 pp. $2.50) is a pamphlet designed to answer some basic questions posed by lawyers and judges about ADR . . .

Neighborhood Justice in Capitalist Society: The Expansion of the Informal State by Richard Hofrichter (Greenwood Press Inc., 88 Post Road West, Box 50007, Westport CT 06881, 1987) argues from a Marxist perspective that community dispute resolution should be viewed not simply as an alternative to the courts, but more fundamentally as an unstable alternative to politics and community organization in general . . .

Labor Arbitration: The Strategy of Persuasion, by Norman A. Brand (Practising Law Institute, 810 Seventh Ave., New York, NY 10019, 1987, 499 pp. $75.00) is a guide for advocates on how to prepare and present cases in labor arbitration . . .

Commercial Dispute Resolution: A Resource Guide features an annotated catalogue of publications and media products available through the American Arbitration Association. For information, contact the AAA, 140 West 51st St., New York, NY 10020-1203 . . .

NEWSLETTERS, JOURNALS AND ARTICLES

Resolve, the Conservation Foundation's newsletter, will be back in publication in early 1988. The focus in the upcoming issue will be on the Institute's statewide offices of mediation and on institutionalizing state level support for mediating public disputes. For more information, write The Program on Environmental Dispute Resolution, The Conservation Foundation, 1250 24th St. N.W., Washington D.C. 20037 . . .

The October, 1987 issue of the *COPRED Peace Chronicle*, a bimonthly newsletter for members of the Consortium on Peace Research, Education and Development, focuses on the various dispute resolution programs now housed at George Mason University, including COPRED, the National Conference on Peacemaking and Conflict Resolution, the Conflict Clinic and the Center for the Analysis and Resolution of Conflict. For more information, contact COPRED/CARC, George Mason University, 4400 University Dr., Fairfax, VA 22030 . . .

The Fourth R is the newsletter of the National Association for Mediation in Education, which promotes the teaching of conflict resolution skills in schools. Its Fall, 1987 issue features a report of NAME's 3rd conference. NAME also makes available the *Annotated Bibliography for Teaching Conflict Resolution in Schools* with over 120 entries. For information write, NAME, % Mediation Project, 139 Whitmore, UMass, Amherst, MA 01003 . . .

Update, the newsletter of the Program on Conflict Resolution of the University of Hawaii, reports on the projects the program is undertaking. For information, write, PCR, University of Hawaii at Manoa, 2424 Maile Way, Porteus 107, Honolulu, HI 96822 . . .

The Natural Resources Journal recently published a special issue titled "Environmental Dispute Resolution" with articles on mediation of water disputes, toxic cleanup disputes and others. For information, write to the UNM School of Law, 1117 Stanford NE, Albuquerque, NM 87131 . . .

MEDIA

Resolving Disputes Without Going Into Court, is a series of six 30-minute color videos intended for classroom use featuring interviews with prominent labor arbitrators such as Ra'ph Seward, Arthur Stark, Eric Schmertz, Walter Gelhorn and George Nicolau. For more information, write Dr. Clara Friedman, 200 Central Park South, New York, N.Y. 10019.

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