

NIDR's State Office of Mediation Experiment

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The National Institute of Dispute Resolution (NIDR) is currently providing multi-year matching grants to five experimental state offices of mediation. At a recent meeting in Washington, D.C., the directors of these offices and key state government officials exchanged ideas and reviewed recent activities and future plans. The session was extremely encouraging—thus far, it looks as if the state office idea is working.

When NIDR agreed to give grants (ranging from \$10,000 to \$50,000 a year) to New Jersey, Massachusetts, Wisconsin, Hawaii, and Minnesota, it had several objectives. First, there was a desire to demonstrate that dispute resolution techniques could help state governments deal more effectively with disputes that currently clog the courts and bog down administrative and legislative efforts. Until NIDR 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 regulatory, permitting, rate setting, budgeting, municipal annexation, facility siting, and other government policy disputes. While the few successful experiments (such as the Negotiated Investment Strategy experi-

ments sponsored by the Kettering Foundation and the State of Virginia's annexation mediation program) attracted a great deal of attention, they did not lead to additional demonstrations.

Second, NIDR hoped to 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 disputing parties to pay for the services of a neutral. A third NIDR objective was to seed an array of efforts to institutionalize dispute resolution along whatever lines make sense in each state. Unless ad hoc efforts eventually lead to institutionalization, the dispute resolution movement will die.

Five Different Models

Each state office has a different administrative structure, and each has focused on different projects and activities. In New Jersey, the Center for Public Dispute Resolution (headed by James McGuire) is located in the Department of the Public Advocate's Division of Citizen Complaints and Dispute Settlement. A 13-member Advisory Board guides the efforts of two attorney/

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mediators and a director of training. The Center has served as a special master (appointed by the state court) in three complex public disputes. Staff has also worked with the state Supreme Court to establish a network of dispute resolution centers throughout New Jersey, and initiated a policy dialogue (involving public officials, citizen action groups, and industry leaders) on the siting of solid waste disposal facilities. The Center publishes a periodic newsletter, and has compiled a directory of "third party professionals" in the state.

The Massachusetts Mediation Service (directed by David O'Connor) is under the jurisdiction of the Executive Office for Administration and Finance. A 12-member Board provides advice to a two-member staff. The MMS has already 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 recently appointed MMS as the coordinating agency for implementation of a long-delayed and often-litigated prison construction project in Boston. The Mediation Service has devoted a substantial portion of its energies to behind-the-scenes consultations with state agencies interested in but still wary of dispute resolution techniques. In addition, MMS played a key role in securing legislative approval of a new state law that guarantees confidentiality privileges to mediators.

The Minnesota State Planning Agency serves as the administrative home for that state's Office of Dispute Resolution. An Ad Hoc Advisory Board oversees the efforts of Director Roger Williams and a small staff. The Office has helped develop and implement a farmer-lender mediation program within the Department of Agriculture Extension Program. The Office has also sponsored a statewide conference on mediation and

helped to train state officials who want additional mediation skills. Current activities include the compilation of a roster of mediation professionals.

The Hawaii Program on Alternative Dispute Resolution (directed by Peter Adler) is located in the Office of the Administrative Director of the Courts, directly under Chief Justice Herman Lum. The Hawaii Program has helped to implement a court-ordered arbitration plan in the civil courts and encouraged mediation in public resource allocation disputes. The Program has also sponsored the introduction of "ADR" legislation and developed a statewide ADR directory.

Wisconsin's approach differs from the other states with NIDR-funded pilot projects. There, rather than creating a separate office or hiring staff, Howard Bellman, the state's Secretary of Labor, Industry, and Human Relations, chairs an informal screening panel (including some of the Governor's key policy advisers) that determines 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 regulation were mediated. In addition, Bellman has participated in a statewide study of Alternative Dispute Resolution and worked to implement a court-sponsored arbitration project.

Lessons Learned

In choosing among the applications submitted by interested states, NIDR sought guarantees of official support (especially matching funds), indications of a readiness to move quickly, and a multi-issue focus. From what the five states have accomplished thus far, it appears that NIDR chose wisely. It is no small accomplishment to win political support for such experimental ef-

forts, gain approval for matching allocations, select senior staff, and achieve actual case results in only a year or two. On the other hand, it is too soon to tell whether the states will agree to accept full financial responsibility for long-term support once the NIDR grants run out.

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

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

Of course, most 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 five state offices (and their advisory boards) been able to convince the doomsayers that the use of formal dispute resolution mechanisms involves neither an admission of failure nor a loss of statutory authority.

A second difficulty 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 has sometimes proven to be very difficult. Prescreening turns out to be a form of *de facto* certification, and none of the state offices wants to take on that role.

On the other hand, the state office

directors agree that they must be ready with appropriate suggestions when the courts ask for special master nominees or regulatory agencies want a list of possible mediators. One important premise in all five states is that the offices will not serve as mediators in all or even most of the cases referred to them. Instead, the emphasis is on matching disputants with appropriate dispute resolvers, thereby, ensuring a steady flow of cases for private practitioners. The matching process, however, has not been easy. Ultimately, the parties themselves must select neutrals; the state offices, while prepared to make suggestions, are working to avoid implicit certification.

The funding problem persists. The NIDR grants and state matching funds have been used in four of the states to cover the cost of staffing and running an office. Each state hopes to create a "kitty" or a "revolving fund" that can be used to cover the costs associated with specific mediation efforts. Ideally, at the end of each mediation effort, the parties would pay what they could into a revolving fund to cover the cost of future mediation efforts. This way, an unequal ability to pay would not be seen as influencing the mediation effort in which the parties were involved.

Unfortunately, the state offices have not been in a position to "charge" their clients full cost for the services provided. That's not the way to get someone to try something new, particularly when they have worries and doubts about it. In addition, it is difficult for the state offices to explain to local clients why they should pay a fee for a government service.

Finally, the issue of the rate at which mediators should be paid has been the cause for some concern. Several of the states have tried to set a standard fee (ranging from \$350 to \$500 a day). This has eliminated from the mediator

pools some of the most experienced professionals, whose rates are often much higher.

While the problems of selecting and matching neutrals, long-term financing of the services provided by the state offices, and resistance from inside state government have slowed the process of institutionalization, several other factors have helped create positive outcomes.

One such factor is the interest shown by the state judiciaries. The state offices were initially aimed at dealing with disputes under the auspices of the executive branch—particularly the administrative agencies. The state courts, though, have shown enormous initiative in identifying and adopting alternative dispute resolution techniques and strategies. New Jersey and Hawaii, in particular, have keyed most of their state office efforts to cases referred by the judiciary.

A second factor in the success of several of the state offices has been the realization that mediation and other forms of dispute resolution are best institutionalized through an almost invisible, behind-the-scenes, set of interactions with policymakers and elected officials. When public officials are able to announce a winning solution or project, thereby getting the credit for the success of such efforts, they are more inclined to try mediation a second time.

The state office directors have all opted for the behind-the-scenes approach, and have spent a great deal of 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 five states may have almost no inkling of what has been accomplished thus far, the prospects

for institutionalization have been boosted by this strategy.

The state offices have tried to build public awareness and acceptance of dispute resolution through training sessions and conferences. While these activities have sapped the energy of office staff, they have paid off in referrals and requests for assistance. All five state offices have made a commitment to continue their training activities and other forms of public education (like newsletters or community seminars).

The Future

It is still too soon to predict the final results of the first five experiments with state offices of mediation. One forecast discussed at the NIDR meeting is that “the fad will die out” in two to three years when the states refuse to pick up the costs involved in sustaining the offices that have been created. A second prediction is that the first few offices will continue with modest state funding, but that will be it.

A third possibility is that as many as ten more states will adopt dispute resolution programs over the next few years—whether by statute or informally—with or without further NIDR grants. California, for instance, is currently considering legislation that would create an office to advise local governments on how to proceed with mediation when disputes arise. The California office, headquartered in the lieutenant governor’s office, would be funded with a \$100,000 loan from the state treasury.

The final, most optimistic forecast is that many states will enact dispute resolution procedures that “add a mediation step” to a host of policymaking and resource allocation processes, and that the state courts will create a growing demand for skilled dispute resolution practitioners.

NIDR, the Kettering Foundation, the

Program on Negotiation at Harvard Law School, and the new Center for Negotiation and Conflict Resolution at Rutgers University have all agreed to provide ongoing assistance to not only the first five state offices but to other states that want to initiate similar efforts. In addi-

tion to California, officials in New Hampshire, Virginia, Ohio, Florida, and Maine have indicated interest in the state office concept. Within the next year or two, there will be enough experience to begin a formal evaluation of NIDR's State Office experiment.