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Alternative dispute resolution and public policy conflict: Preemptive dispute resolution negotiated rulemaking

Allen G. Norman

ALTERNATIVE DISPUTE RESOLUTION AND PUBLIC POLICY CONFLICT:

PREEMPTIVE DISPUTE RESOLUTION NEGOTIATED RULEMAKING

A Project

Presented to the

Faculty of

California State University,

San Bernardino

In Partial Fulfillment

of the Requirements for the Degree

Master of Public Administration

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CHAPTER 1

INTRODUCTION

Alternative Dispute Resolution (ADR) has become the rage among people and groups interested in litigation reform. The cost of litigation has become too high in every avenue of society, from the federal government to disputes among neighbors.

Kimberlee K. Kovach notes,

> In a majority of cases, the parties begin with a recognition that a problem, disagreement or dispute exists. If an immediate answer or resolution is not attained, the conflict escalates. In fact, the path of conflict has been likened to a snowball rolling downhill. The size as well as the intensity increases. If stopped early, the growth is halted. That has been the goal of much of the current ADR movement. [1]

ADR techniques have been implemented in the federal government as well as in corporate America. A recent corporate survey in The Dispute Resolution Times found that the main reasons corporations chose ADR over litigation are to reduce costs and save time. [2]

This project will briefly define and discuss Alternative Dispute Resolution (ADR) as a precursor to Preemptive Dispute Resolution. It will then examine Preemptive Dispute Resolution and, more specifically, Negotiated

Rulemaking as means of resolving differences before litigation becomes necessary. Finally, it will discuss how Negotiated Rulemaking could be improved and expanded to the benefit of local and municipal governments.

CHAPTER 2

ALTERNATIVE DISPUTE RESOLUTION

Alternative Dispute Resolution (ADR) is a group of processes through which disputes, conflicts and cases are resolved outside of formal judicial and administrative adjudication. These processes include negotiation, mediation, arbitration, case evaluation techniques and private judging.

The need for alternative dispute resolution was born out of a litigation reform movement. Corporations, private parties, and governments all needed a better method of resolving disputes in a timely and cost effective manner; hence ADR was offered as a viable solution to a societal need. ADR can provide many advantages over litigation: speed, lower costs, confidentiality, simplicity, flexibility and preservation of business relationships.

ADR techniques provide a faster resolution of a dispute when compared to litigation. A civil case may take up to seven years to reach a final verdict and longer if appealed, giving truth to the cliche, "Justice delayed is justice denied." In contrast, arbitration may take anywhere from one month to eight months from hearing to award. This time savings converts into a significant cost savings; less time that is taken, the lower are the billable hours charged by attorneys, the less is the administrative overhead, and the

greater is the present value of the amount recovered by successful parties.

Another feature of ADR is that proceedings may be held on a confidential basis. The parties involved may avoid the adverse publicity of an embarrassing dispute as information relating to an ADR process is not open to the public record.

ADR is less formal than litigation. Discovery may be limited or excluded altogether. Rigid rules of evidence do not apply. Finally, ADR is more flexible procedurally than are the rules of civil procedure. The judicial system is structured to impose traditional remedies whereas the ADR process does not have to abide by precedent and has more freedom to award unconventional settlements.

ADR also assists in the preservation of business relationships. Litigation is structured to be adversarial. Richard H. Weise, senior vice-president and general counsel of Motorola, Inc. in a recent interview in The Corporate Legal Times stated that,

> The real costs of disputes is the disruption of valuable relationships. And since most of our litigation is with customers, suppliers, employees and the government, what more important relationships are there? There is tremendous cost during long, protracted litigations because of the unpleasantness created and the bile stirred up between you and those with whom you have a relationship. [3]

On the whole, ADR offers methods of dispute resolution that run the gamut in their levels of confrontation. Obviously, formal litigation would be

the most confrontational process. The level of adversarial confrontation decreases as you move from arbitration to mediation to negotiation.

MEDIATION

The most widely used and flexible form of non-binding ADR is mediation. Mediation allows both parties to maintain their positions while the mediation process guides the parties down a path that hopefully leads to settlement.

More succinctly, mediation is the process where a third-party neutral acts as facilitator in resolving a dispute between two or more parties. It is non-adversarial in nature as the parties communicate directly. The role of the mediator is to facilitate communication between the parties, assist them in focusing on real issues of the dispute, and generate options for achieving a settlement. The goal of mediation is that the parties themselves arrive at a mutually acceptable resolution of the dispute.

Overall, mediation creates an environment where a settlement can be achieved that is mutually satisfactory to both parties without having to undergo the cost or aggravation of more confrontational methods.

ARBITRATION

Arbitration involves one or more neutral parties (an individual or panel) who listens to both sides of a dispute and then renders an award. Arbitration can be binding or non-binding. In binding arbitration, the decision of the arbitrator(s) is final. However, the parties to the arbitration can file a petition with the court to confirm, correct or vacate an award in accordance with law. In non-binding arbitration, if the decision of the arbitrator is unsatisfactory to the parties, they may elect to go to court.

Arbitration is more formal procedurally than mediation and therefore more confrontational. The costs of the proceeding are higher when compared to mediation as is the level of aggravation.

NEGOTIATION

Negotiation is at the heart of all settlements. It can occur during any phase of the litigation - arbitration - mediation spectrum. The other ADR processes are different in that they generally require the intervention of one or more third parties. On the other hand, negotiation involves only the parties to the dispute and, if represented, their lawyers. Legal negotiations may take place informally between lawyers for both parties as they discuss different aspects of the case. Formal negotiations may take place when there is a real desire to

settle the matter. However, often direct negotiations do not result in a satisfactory settlement. When this occurs, it is time to bring in the third party neutral for assistance.

PREEMPTIVE DISPUTE RESOLUTION

While Alternative Dispute Resolution provides an alternative to litigation in solving disputes, Preemptive Dispute Resolution (PDR) seeks to iron out disagreements prior to any dispute arising. It seeks, that is, to preempt litigation, arbitration and mediation. Methods such as negotiations, mediated negotiations and negotiated rulemaking fall into the preemptive category. Each method is an attempt at consensus building.

Any form of negotiation, buyer-seller or labor-management for example, is a consensus building process. If the parties fail to reach an agreement then no joint conclusion is achieved. When these negotiations fail to reach a consensus, the parties turn to other processes. Labor may have a strike, a buyer may turn to another seller or the parties may submit their differences to an adjudicatory body. Through the use of these preemptive processes, litigation becomes less necessary.

Discussing conflict between the oil and fishing industries, Gerald W. Cormick and Alana Knaster note:

> Mediated negotiations and similar processes have

> increasingly been used during the past decade to resolve a variety of disputes over such public policy issues as the use and allocation of natural resources. Mediation has thus evolved from being an interesting experiment to being a widely accepted public policy option. [4]

The greatest current expansion in the use of mediated negotiations is in the development of consensus regulations, where parties in conflict are brought together to hammer out regulations that all parties find acceptable. This process has come to be known as negotiated rulemaking.

CHAPTER 3

NEGOTIATED RULEMAKING

The concept of negotiating regulations was originated and developed by Philip Harter. In his 1982 article, "Negotiating Regulations: A Cure for the Malaise, " Harter outlined his concept of negotiated rulemaking in the regulatory process. He argued that the federal government was spending a great deal of time and money in litigation over disputed regulations. Harter proposed including all interested parties in the rulemaking procedure to stave off later disputes--to preempt them. He concluded that by including potentially affected people in the process, most disagreements and concerns could be put out in the open and resolved prior to the rules going into effect rather than after the rules were already in place. [5] As a result of his work, the federal government and state agencies began to adopt this concept.

The obvious advantage of this method is its potential to head off potential litigation by having affected parties meet and negotiate before the rules go into effect. Negotiated Rulemaking gives each side a forum for discussing concerns in a non-adversarial manner. To the extent that it offers an opportunity to avoid expensive litigation, it must be viewed as offering a "win-win" opportunity for all affected parties, including government.

THE NEGOTIATED RULEMAKING ACT OF 1990

The Negotiated Rulemaking Act of 1990 was passed as an amendment to the Administrative Procedure Act. The 101st Congress cited six reasons as to why this Act was necessary.

(1) Government regulation has increased substantially since the enactment of the Administrative Procedure Act.

(2) Agencies currently use rulemaking procedures that may discourage the affected parties from meeting and communicating with each other, and may cause parties with different interests to assume conflicting and antagonistic positions and to engage in expensive and time-consuming litigation over agency rules.

(3) Adversarial rulemaking deprives the affected parties and the public of the benefits of face-to-face negotiations and cooperation in developing and reaching agreement on a rule. It also deprives them of the benefits of shared information, knowledge, expertise and technical abilities possessed by the affected parties.

(4) Negotiated rulemaking, in which the parties who will be significantly affected by a rule participate in the development of the rule, can provide significant advantages over adversarial rulemaking.

(5) Negotiated rulemaking can increase the acceptability and improve the substance of rules, making it less likely that the affected parties will resist enforcement or challenge such rules in court. It may also shorten the amount of time needed to issue final rules.

(6) Agencies have the authority to establish negotiated rulemaking committees under the laws establishing such agencies and their activities and under the Federal Advisory Committee Act (5 U.S.C. App.) Several agencies have

> successfully used negotiated rulemaking. The process has not been widely used by other agencies, however, in part because such agencies are unfamiliar with the process or uncertain as to the authority for such rulemaking. [6]

As the "Findings" indicate, Congress realized that the rulemaking process had become unacceptable. In many cases, the process created an adversarial environment that encouraged litigation. Additionally, it was recognized that often in the rulemaking process experts were not always consulted. Finally, it was noted that if all affected parties feel that they have a stake in the making of a rule, they will be less likely to find it unacceptable and feel the need to litigate.

The Negotiated Rulemaking Act outlined specifically the procedures agencies using negotiated rulemaking must use.

First, the agency head must determine if negotiated rulemaking is in the public interest. The Act sets forth that the agency head shall consider:

* Whether there is a need for a rule;
* If there is a limited number of identifiable interests that will be significantly affected by the rule;
* If there is a reasonable likelihood that a committee can be convened with a balanced representation of persons who can adequately represent the interests and are willing to negotiate in good faith to reach a consensus on the proposed rule;

* If there is a reasonable likelihood that a committee will reach a consensus on the proposed rule within a fixed period of time;

* That the negotiated rulemaking procedure will not unreasonably delay the notice of proposed rulemaking and the issuance of the final rule;

* That the agency has adequate resources and is willing to commit such resources, including technical assistance to the committee;

* The agency, to the maximum extent possible consistent with the legal obligations of the agency, will use the consensus of the committee with respect to the proposed rules as the basis for the rule proposed by the agency for notice and comment. [7]

Knaster and Harter discuss the Environmental Protection Agency's (EPA) decision to utilize negotiated rulemaking in their regulatory procedure,

> The debates over passage of the legislation had been contentious, and it was felt that developing the regulations would be equally controversial. William Rosenberg, EPA's Assistant Administrator for Air Programs, decided to consider using regulatory negotiation to develop the rules. Even though negotiation would be time consuming and would preclude staff from beginning drafting immediately, Rosenberg determined that the process would provide EPA with expertise, experience, and practical insight of these parties in sorting through the complex issues. And, at least as important, it would develop a consensus on the rules. [8]

Final consensus is paramount when developing regulations. Displeased parties can block actions with court proceedings and tie up the proceedings

for years. Negotiated Rulemaking seeks to make all parties happy and stave off unwanted and costly litigation.

Fortunately, by implementing this process, the rules were developed close to schedule and met the ambitious goals of the Clean Air Act Amendment of 1990. It is very likely that without negotiated regulations, these goals would have never been met, or at least delayed.

The next section of the Negotiated Rulemaking Act of 1990 discusses the role of a convener. A convener is a person who impartially assists an agency in determining whether establishment of a rulemaking committee is feasible and appropriate in a specific rulemaking case. It is the job of the convener to identify persons who will be affected by the proposed rule and conduct discussions with them to determine if the formation of a committee is viable. It is the duty of a convener to report his/her findings to the agency. The agency can then request that the convener furnish the agency with the names of people who would be willing and qualified to represent the interests that will be affected by the proposed rule. The convener's report can be made available to the public upon request.

In the case of the Clean Air Act Amendment of 1990, the EPA chose Knaster and Harter, pioneers in the field of ADR and negotiated rulemaking, to act as conveners. The EPA decided to assign one convener to the

oxygenated fuels rule and the other to the reformulated gasoline rule.

Some parties were interested in both rules, so Knaster and Harter tried to coordinate their efforts as much as possible. They began the process by conducting extensive interviews with the EPA's Office of Mobile Sources. This office had potential sources for the conveners to contact. The conveners discussed the regulatory process with each potential participant and were mainly concerned that the negotiations take place in the limited time the EPA was allotting; three months. The conveners also did not want the negotiations to reopen issues that had been debated and resolved during the legislative process. It would be the responsibility of the neutral facilitators and the participants themselves to keep the talks productive. The conveners main task was to keep a manageable number of direct participants since they knew they could never hope to get representatives of all affected interests around the same table.

According to the Act, after the convener's assessment, if the agency decides to go forward with the formation of a committee, the agency must publish in the Federal Register and/or other appropriate trade publications a notice which must include:

* an announcement that the agency intends to establish a negotiated rulemaking committee to negotiate and develop a proposed rule;

* a description of the subject and scope of the rule to be developed and the issues to be considered;

* a list of the interests which are likely to be significantly affected by the rule;

* a list of the persons proposed to represent such interests and the person or persons proposed to represent the agency;

* a proposed agenda and schedule for completing the work of the committee, including a target date for publication by the agency of a proposed rule for notice and comment;

* a description of administrative support for the committee to be provided by the agency, including technical assistance;

* a solicitation for comments on the proposal to establish the committee and the proposed membership of the negotiated rulemaking committee; and

* an explanation of how a person may apply or nominate another person for membership on the committee. [9]

After publication of notice, the agency makes a final determination as to whether to form the committee. It bases its decision on the applications made for membership to the committee and comments submitted. If the agency determines it will form a committee, it must then comply with the Federal Advisory Committee Act. If the agency should decide not to form a committee, it must then publish a notice of this decision and the reasons for the decision in the Federal Register and/or trade publications.

Should an agency go forward with forming a committee, it is bound by the Negotiated Rulemaking Act to limit the number of members on the committee to twenty-five. However, if the agency head determines that a greater number of members is necessary to achieve balance, then more than

twenty-five members may be appointed. In addition, there must be at least one person on the committee representing the agency.

In the case of The Clean Fuels Regulatory negotiation, the conveners recommended that approximately twenty-five members sit on the committee. However, the parties involved insisted that the number of seats on the committee be expanded so that all the key sub-interests within each major organization were represented.

Harter and Knaster state in their article,

> The diversity among members in several key interest groups became an important consideration in the final design of the clean fuels negotiation process. For example, the petroleum refiners had two trade associations, one representing a broad spectrum of the industry including numerous small refiners and the other representing major refiners. Differences in market share, geography, and organization structure between the large and small refiners necessitated that both associations be seated at the table. Representation was complicated further by the diversity among the major refiners, ranging from significant differences in the composition of the crude oil they used to a wide variety of investment strategies that affected companies' position on the content of the regulation. Moreover, several of the major companies were further along in their product reformulations in response to changing stringent regulations. [10]

Due to the complexity of this negotiation process, it was necessary to expand the committee to thirty-one members in order to include all interests that needed to be represented. The conveners proposed that the EPA establish an "Umbrella" committee that would be responsible for establishing

consensus on the whole package. In addition, there would be work groups formed around the specific interests that would make recommendations to the umbrella committee for final consideration. (Figure 1)

The Act addresses the question of expenses for committee members and states that members will be reimbursed for travel, etc. only if there is a financial need that would otherwise preclude them from membership on the committee. The Act is also quick to point out that any funds received as a result of membership on a negotiated rulemaking committee does not constitute employment in the Federal Government. The remainder of the Act addresses compilation of the data and judicial review. In reference to compilation of data, the Act makes three points:

* The Administrative Conference of the United States shall compile and maintain data related to negotiated rulemaking and shall act as a clearinghouse to assist agencies and parties participating in negotiated rulemaking proceedings.

* Each agency engaged in negotiated rulemaking shall provide to the Administrative Conference of the United States a copy of any reports submitted to the agency by negotiated rulemaking committees under section 586 and such additional information as necessary to enable the Administrative Conference of the United States to comply with this subsection.

* The Administrative Conference of the United States shall review and analyze the reports and information received under this subsection and shall transmit a biennial report to the Committee on Governmental Affairs of the Senate and the appropriate committees of the House of Representatives.

FIGURE 1

CONSTITUENT GROUPS/AGENCY MANAGERS
REPRESENTED ON UMBRELLA COMMITTEE
EPA/
FEDERAL
AGENCIES
PRIVATE SECTOR
PUBLIC INT. GRPS.
STATE/
LOCAL
GOV'TS
Modeling
Testing
Anti-Dumping
Oxygenate
Credits
Enforcement
Supply
Distribution
Capacity

Finally, the Act requires that any agency action relating to establishing, assisting or terminating a negotiated rulemaking committee is not subject to judicial review; however, nothing in the Act shall bar judicial review of a final rule if judicial review is provided by law.

President George Bush stated on the signing of the Negotiated Rulemaking Act of 1990:

> This Act will encourage Federal agencies to use negotiation in the regulatory process, to the extent that it may be appropriate, as a means of avoiding costly and time-consuming litigation. [12]

Although the process of negotiated rulemaking can seem time-consuming, on the whole when compared to protracted litigation the time and money invested is a fraction. The Congress and the President both viewed this Act as a necessary component and guide on the road to litigation reform.

CHAPTER 4

ADMINISTRATIVE APPLICATION

The immediate administrative impact after the passage of the Act was important to some agencies and business as usual to others. For example, the EPA and the Department of Labor's Occupational Safety and Health Administration had been utilizing negotiated rulemaking since the early '80's. These departments were quite familiar with the procedure and its benefits. Marshall J. Breger, Solicitor of Labor, in his introduction to the Department of Labor's Negotiated Rulemaking Handbook notes,

> Those seeking to learn about DOL negotiated rulemaking activities for the first time may take the bulk of this Handbook as a sign that the process is so complex that it is not worth pursuing. Such a conclusion would seriously misconstrue the reg-neg process and the purpose of this Handbook. [13]

The main hesitation of many agencies came out of their unfamiliarity with the process. As is true with all forms of ADR, unfamiliarity breeds suspicion. The task of each agency was to train its personnel in the negotiated rulemaking process. Most agencies, as the Department of Labor, developed highly detailed handbooks to address specific concerns and step-by-step procedures for the given agency.

The Act allotted for a great deal of discretion to each agency head. First, the agency head decides whether or not to form a committee. Even if a committee is formed and rules are proposed, the agency is not required to adopt the consensus reached by the committee. Therefore, the fear of too many people running the process is unfounded. Some autonomy is still in place.

Obviously, the agency has an agenda it is trying to meet. As with the Clean Air Act Amendments of 1990, certain deadlines were in place that had to be met by the EPA. As stated previously, the EPA's Assistant Administrator for Air programs considered the costs and the time frame in deciding whether to utilize the negotiated rulemaking procedure in relations to this Act. Agency administrators though uncomfortable with a new procedure are willing to try it if it helps them meet their goals in a more stream-lined and cost effective manner.

CHAPTER 5

APPLICATION

In a more analytical look at negotiated rulemaking, one might ask what is the true definition? In the House Report on Public Law 101-648, Negotiated Rulemaking is defined as when,

> "representatives of all affected parties, including the agency, come together in an effort to draft a proposed rule that takes into account the needs of the various interests, as well as the requirements of the underlying statute. "[14]

To discover a more simplistic definition, one must break the word into its component parts. "Rulemaking" is much easier to define. It simply is the process of making or setting down a set of rules. "Negotiated" or "Negotiation" are a bit more complex to define.

Alana S. Knaster in her paper entitled, "How to Negotiate, A Guide for Participating in Multi-Party Public Policy Negotiations", defines negotiation as,

> "The art of reaching compromise. It requires give and take on the issues under discussions."[15]

Knaster believes people would have an easier time in the negotiating process if they would view it as an everyday process. Negotiation is in fact a part of our everyday lives. We negotiate food choices, entertainment choices

and the like with family members and friends on a regular basis. The same skills we use to negotiate with those closest to us are the skills needed at the formal negotiation procedure. Knaster contends that if participants would view negotiations as an everyday skill then this would help decrease the apprehension about participating in the process.

In the final analysis, negotiated rulemaking is a process by which participants utilize compromise and consensus building to formulate rules. The rules can be of the regulatory nature, as with the EPA's rulemaking, or they could be rules of understanding between two municipal entities.

In August of 1991, the community of Westchester, California, and Loyola Marymount University entered a negotiated rulemaking process in order to reach an agreement on the Leavey Campus Development and to address community and University concerns and needs. Both parties felt this consensus building process was a productive way to hash out differences and concerns over this new project.

As previously discussed, ADR in general and negotiated rulemaking more specifically, is a way to preserve relationships. Both the community of Westchester and Loyola Marymount had a much larger stake in preserving their relationship than in proving a point through litigation. [16]

Westchester wanted Loyola to address the construction impact, the phasing of the project, traffic and parking issues, and the aesthetics of the project and its community compatibility. Loyola was interested in addressing these issues

as the community of Westchester had a hurdle of permits for Loyola to get through. Without the help of Westchester, the permit process could have been an impossible task.

In asking the question "why use negotiated rulemaking?", the Westchester-Loyola procedure offers a good example. If these two parties had not entered into this process, Loyola would have gone ahead with its building program. However, it would have been akin to shooting arrows in the dark. If Loyola did not know Westchester's concerns before hand, the project could have been stalled for years. For example, the community of Westchester files a lawsuit over traffic and parking issues, blocking construction. Not only does the community of Westchester have to pay for this litigation, Loyola's project is put on hold and they would also have to finance a costly litigation procedure. In addition, the adversarial nature of this conflict would have caused bad feelings between the two parties and both sides might vow to not be cooperative. Hypothetically, this situation can go from bad to worse to an all out war.

In any given situation, it is prudent to know where your opposition stands, whether it is in politics, sports or business. In the past, government entities have acted like "a bull in a china shop" and crammed regulations, projects, etc. down the throat of the public. Many times the public is enraged simply because they were not involved in the process.

Gerald W. Cormick notes,

> In developing a forum for the settlement of economic/ environmental conflicts, unanimity or, conversely, granting a "veto" to each participant has important benefits. The "veto" levels the playing field. For a defined period of time on the issues that the participants have agreed to address, they participate as equals. [17]

This veto power tends to create an atmosphere where each participant has a concern and self-interest in crafting a solution that meets the needs of the other participating interests. This teamwork approach creates an environment where agreements can be reached, money can be saved and amicable relations preserved.

In the mid-80's a conflict arose between the oil industry and the indigenous commercial fishermen who fished off the central coast of California. The fishermen believed the oil industry was interfering with their fishing activities and conversely, the oil industry felt the fishermen were interfering with their oil exploration work.

Specifically, the oil industry was contracting with operators of seismic testing vessels to map undersea structures and were paying charter fees that exceeded $35,000 a day. The acoustic exploration process requires that boats follow grid patterns in order to provide a predetermined sequence of data for analysis. Consequently, the captain of a seismic vessel would often find himself on a course that intersected the course of a fishing boat. The

fisherman, who was trailing hundreds of yards of gear had either to pull in his gear and face a substantial loss of fishing time or hope that the seismic vessel would alter its course. If the vessel did not alter its course, the fisherman would lose his gear as well as fishing time.

The seismic captain faced a similar dilemma. He could change his course and face the possibility of nullifying the day's exploration and losing his charter fee or hope the fisherman would move. If the fisherman did not move and his gear was damaged, the seismic captain would face protracted litigation over the gear damage. Additionally, the fisherman believed that this seismic testing interfered with the fish by dispersing schools and damaging eggs and larvae.

Both parties brought their conflicts before the California Coastal Commission and the State Lands Commission, but to no avail. Finally, one of the industries asked The Mediation Institute to chair a public meeting over the conflict and from that meeting negotiated mediation between the two industries was made possible.

Although the negotiation process took months, it did alleviate the tension between the two groups and put them on the road to consensus-building. In this case, the negotiation process saved millions of dollars that would have been spent on potential lawsuits and loss of business.

In most cases it is impossible to predict how much money could be spent to litigiously resolve conflicts that are dealt with in the negotiated rulemaking

process. However, one has to only look at the time frame for resolving these conflicts to see the potential cost/benefit ratio. A negotiated rulemaking procedure takes three months to one year to resolve a problem whereas litigation can take upwards of ten years to reach a final decision. It does not take a mathematician to compute the astronomical amount of money that can be saved utilizing this process.

Some of the pitfalls of negotiated rulemaking center around the bureaucracy in which governmental procedure is mired. Agency heads are given a great deal of discretion as to whether to implement the process or even accept the rules once they are agreed upon. Hypothetically, the entire negotiated rulemaking procedure could be completed and then the agency head could decide to go in a different direction. That is not very likely, as time constraints and agendas must be met, but it is legally possible.

The amount of time the convener must take to locate participants for the committee seems disproportional. So much emphasis is placed on finding the perfect people and groups to represent every interest that the process can be stretched too far and among too many groups. There needs to be a balance between having enough groups represented and not having every microscopic interest included. Without enough groups represented, the preemptive purpose of negotiated rulemaking would be defeated. If one or more groups are disenchanted and propose to litigate, the agency would still be caught in a litigation war it was trying to avoid.

APPLICATION TO LOCAL GOVERNMENT

The implementation of negotiated rulemaking among local and municipal governments is an idea whose time has come. Since negotiation is the art of the possible, what better way to serve the needs of a city or county.

The "idea" of the negotiated rulemaking process can be extracted without having to get bogged down in all the procedural rules. The concept of a committee representing the interests of the population (the city, county or state population) over an issue to build consensus is a useful one.

Conflicts exist at every level of government; between cities, between cities and the county, between cities and the state, and between cities and the federal government. Additionally, conflicts arise between all levels of government and the private sector. (i.e. vendors)

In the Coachella Valley recently, the Valley cities were competing in a bid for a Metrolink station. The contract was being awarded by the State. In this instance, more progress could have been made if the cities had worked together to decide where the best place in the Valley to build the station was instead of only looking out for each individual interest.

Each city individually was concerned about the effect on their sales tax revenues and their transient occupancy tax (TOT). However, the entire Coachella Valley would benefit economically from such a station. To date,

no litigation is pending, however feelings are hurt and tempers are high and all could have been avoided utilizing the negotiated rulemaking process.

There are several barriers to implementing the negotiated rulemaking process in the Coachella Valley. First, every city competes very hard for tax dollars generated from the tourism industry. For example, Palm Springs is not interested in promoting a Metrolink station in Palm Desert as it is seen as potentially taking tax dollars away from Palm Springs. Naturally, the City of Palm Springs wants the station built in Palm Springs.

Another barrier to consensus among the Valley Cities is class conflict. The economic picture of Coachella Valley residents is quite diverse. In Indian Wells, the average per capita income is over $30,000 a year. In contrast, Coachella, which has a high migrant farm worker population, has an average per capita income of under $5,000 a year. There is also a sharp contrast when comparing Cathedral City to Rancho Mirage or Palm Springs. This income gap between cities creates cities that have quite different agendas. Consequently, achieving consensus over any issue, including the Metrolink station, is difficult.

Ironically, Valley cities have shown consensus over the attempt to exclude a locally unpopular land use. No Valley city wants a landfill in its backyard.

The Coachella Valley is involved in a dispute over the location of a landfill site in Eagle Mountain. The Riverside County Board of Supervisors held public forums over the issues but no committee was formed that truly

represented the concerns of the residents. The Supervisors were not only concerned with generating revenue for their county, but padding their political war chests with contributions from Mine Reclamation, Corp., the company proposing to build the landfill.[18] Already litigation has begun over the issue, even though Mine Reclamation, Corp. has not begun the project. A simplified version of a negotiated rulemaking committee with members from the public at large as well as Mine Reclamation, Corp. would have been beneficial to the process. As the project is still in the governmental approval stage, the jury is still out on the outcome of this conflict.

In a broader application, the City of Palm Springs recently formed a Human Rights Commission to address discrimination conflicts occurring in the City of Palm Springs. The committee appointees show broad community representation. This Commission is trying to resolve discrimination problems before they are taken to the Equal Employment Opportunity Commission (EEOC) or dragged through civil court. The Commission is also charged with setting up guidelines for anti-discrimination policies to be utilized throughout the city.

An area in municipal government that could benefit from the utilization of the negotiated rulemaking process is in the awarding of contracts. The negotiated rulemaking process offers a forum for developing the rules and procedures a city or county needs in determining the awarding of contracts. This process would also include vendors as well as city or county employees

on the negotiating committee. Both sides would have the opportunity to air conflicts and concerns and correct problems before the need for litigation arises.

On the whole, local and municipal governments implementing mediated negotiations can realize not only cost benefits but can create a happier constituency by making them feel a part of the process.

CHAPTER 6

CONCLUSION

Voltaire said,

> "I was never ruined but twice: Once when I lost a lawsuit; once when I won one."

Voltaire's skepticism regarding litigation has been shared in recent years by an increasing number of parties who have experienced first-hand the trauma of the traditional adversarial system. Most people engaged in a conflict are looking for other dispute resolution methods that are cheaper, more efficient, less confrontational and that also hold out at least the promise of resolving disputes without irreparable injury to the parties' underlying relationship.

This project set out to define and discuss Alternative Dispute Resolution as a precursor to Preemptive Dispute Resolution and then take a closer look at Negotiated Rulemaking as a means of resolving conflict before litigation became necessary.

Implementing and utilizing the Negotiated Rulemaking process offers several advantages. First, it gives each side a forum for discussing concerns in a non-adversarial, less confrontational manner. Through this process, consensus is the goal and therefore it becomes a "win-win" proposition for all involved instead of creating winners and losers.

The second advantage to utilizing Negotiated Rulemaking is derived from the first. Negotiated Rulemaking by creating this "win-win" environment heads off potential litigation and consequently potentially astronomical legal bills. Parties are less likely to become litigious when they have a stake in the rule-making process. In addition to saving money, staving off litigation also assists in implementing the rule faster.

Finally, Negotiated Rulemaking helps preserve amicable relationships. Negotiated Rulemaking is preemptive in nature and creates a forum to resolve conflicts before they necessitate a confrontation. Discussing rationally concerns between parties creates empathy. More confrontational methods (i.e. litigation) destroy empathy and are destructive to relationships. (business or otherwise)

This project also set out to see how Negotiated Rulemaking could be improved and expanded to benefit local and municipal governments. In the Coachella Valley, ADR techniques are being implemented in several areas but the process is still in its infancy. Utilizing Negotiated Rulemaking in the process of awarding contracts was seen to be a beneficial expansion of the process. Realistically, any governmental process whether it be questions of administration, procedure, etc. would benefit from this consensus building process.

Consensus is the building block of resolving disputes in a non-adversarial manner and is at the heart of the negotiated rulemaking process. In the

advent of the wave of litigation reform, it just makes good sense to revert to methods that solve problems and not simply create winners and losers. Without the label of "winner" or "loser" all parties are more apt to work as a team.

Teamwork, whether in the federal regulatory process or at work in municipal governments creates an environment where things can actually be accomplished. Bureaucracy has created a system where it is impossible to achieve anything. Negotiation has created a process where it is possible to achieve everything.

FOOTNOTES

[1] Kimberlee K. Kovach, "ISSUES OF TIMING IN ADR USE", *Advocacy Skills in the Alternative Dispute Resolution Forum,* August 1993.

[2] *The Dispute Resolution Times*, "Survey: Corporate ADR On The Rise," Fall 1993.

[3] Richard H. Weise, "ADR ON THE RISE", *The Corporate Legal Times*, April, 1994.

[4] Gerald W. Cormick and Alana Knaster, "MEDIATION AND NEGOTIATION: OIL AND FISING INDUSTRIES NEGOTIATE." *Environment,* Vol. 28, No. 10, December 1986.

[5] Philip Harter, "NEGOTIATING REGULATIONS: A CURE FOR THE MALAISE," *Georgetown Law Journal,* 71, No.1 1982.

[6] THE NEGOTIATED RULEMAKING ACT OF 1990, Public Law 101-648.

[7] THE NEGOTIATED RULEMAKING ACT OF 1990, Public Law 101-648.

[8] Alana S. Knaster and Philip J. Harter, "THE CLEAN FUELS REGULATORY NEGOTIATION" *Intergovernmental Perspective*, Vol. 18, No. 3, Summer 1992.

[9] THE NEGOTIATED RULEMAKING ACT OF 1990, Public Law 101-648.

[10] Alana S. Knaster and Philip J. Harter, "THE CLEAN FUELS REGULATORY NEGOTIATION" *Intergovernmental Perspective*, Vol. 18, No. 3, Summer 1992.

[11] THE NEGOTIATED RULEMAKING ACT OF 1990, Public Law 101-648.

[12] George Bush, "PUBLIC PAPERS OF THE PRESIDENTS," VOL.II, 1990.

[13] Marshall J. Breger, *Negotiated Rulemaking Handbook, United States Department of Labor,* December 1992.

[14] HOUSE REPORT NO. 101-461

[15] Alana S. Knaster, "HOW TO NEGOTIATE, A GUIDE FOR PARTICIPATING IN MULTI-PARTY PUBLIC POLICY NEGOTIATIONS", *The Mediation Institute,* 1992.

16 GROUNDRULES between Loyola Marymount University and Westchester Community, August 1991.

17 Gerald W. Cormick, "CRAFTING THE LANGUAGE OF CONSENSUS", *Negotiation Journal*, Vol. 7, No. 4, October 1991.

18 Shellee Nunley, "THE MINE RECLAMATION CONTROVERSY", *The Desert Sun*, October 10, 1993.

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