

# THE WILLIAM D. RUCKELSHAUS CENTER

UNIVERSITY OF WASHINGTON

## Strengths and Weaknesses of Practicing ADR from Different Institutional Settings ACR-EPP Conference Workshop/Presentation June 28-30, 2011, Portland, Oregon

### Annotated Bibliography

Bingham, Gail. 1986. *Resolving environmental disputes: a decade of experience*. Washington, D.C.: Conservation Foundation.

This book focuses on the first decade (1974-1984) of experience with the use of mediation to resolve environmental disputes. The study used extensive interviews with mediators and other parties to a wide variety of disputes, analyses of more than 160 environmental mediation cases, and tabulations of key data (e.g., types of issues mediated, success rate, and implementation results). Among the factors affecting EDR success were case assessment and EDR preparation, the parties' incentive to negotiate an agreement, negotiation technique, and the direct participation of those with authority to implement any agreement. Although data on litigation and EDR cases are not comparable, preliminary data suggest that EDR involves less time.

Bourdeaux, Carolyn, Rosemary O'Leary, and Richard Thornburgh. 2001. Control, communication, and power: A study of the use of alternative dispute resolution of enforcement actions at the U.S. Environmental Protection Agency. *Negotiation Journal*. 17 (2): 175-191.

Two decades after pioneering the use of alternative dispute resolution (ADR) techniques, practices, and processes, the US Environmental Protection Agency (EPA) has emerged as the leader among federal agencies. As such, the EPA provides a useful setting for testing conventional wisdom and theories about alternative dispute resolution. This essay took data collected as part of an assessment of the agency's enforcement ADR program and examined how well it reflected or illuminated current theory and conventional wisdom about conflict resolution. In particular, the reasons why parties to a dispute choose ADR, and the key elements needed for the successful resolution of environmental conflicts were examined, including the dynamics between the parties at the table and mediator characteristics.

Carcasson, Martin. 2011. Facilitating democracy: centers and institutes of public deliberation and collaborative problem solving. *New Directions for Evaluation*. 2010 (152): 51-57.

The continued development and maturation of campus based centers and institutes tied to deliberative democracy, such as those that are a part of the National Issues Forum network and the University Network for Collaborative Governance (UNCG), represents a phenomenon that holds great promise to provide our communities with the necessary capacity to spark and sustain productive collaborative problem solving. Such centers can serve as critical "hubs" of democracy that provide the necessary impartial resources and process expertise to connect experts, institutional decision makers, and the public in ways that democracy currently sorely lacks, but clearly requires to function well.

Duryea, M. L. and Potts, J. (1993), Story and legend: Powerful tools for conflict resolution. *Conflict Resolution Quarterly*, 10: 387-395

Aboriginal stories and legends have a great deal to contribute to conflict resolution training, process design, and intervention. These stories have been passed down from one generation to the next as part of the oral tradition of First Nation peoples in Canada. They communicate conflict-related values held by aboriginal people that include valuing collective harmony and nature as a teacher. Intercultural training is enriched by Native stories, which convey values, challenge assumptions, and engage participants in ways that speak not only to the intellect but also to the intuition. An understanding of the structure and power of narratives is important to effective conflict intervention in any cultural context.

Haberfeld, Steven and Jon Townsend. 1993. Power and dispute resolution in Indian country. *Conflict Resolution Quarterly*, 10: 405-422.

For several hundred years, Indian tribes in the United States were at the mercy of powerful adversaries in the public and private sectors. As long as these adversaries found that they could act unilaterally, without regard for the tribes' interests, there was no sincere negotiation. During the past thirty years, there has been a noticeable shift in the balance of power between tribes and outsiders. This has set the stage for more cooperative relationships and more collaborative forms of dispute resolution. By overcoming their legitimate cynicism about the negotiation process, by honing their own negotiation skills, and by continuing to pursue complementary strategies (litigation, lobbying, building alliances, influencing public opinion, and so on), tribal leaders should be able to better persuade their opposition to come to the table and to negotiate in good faith once they are there.

Huber, Marg. 1993. Mediation around the medicine wheel. *Conflict Resolution Quarterly*, 10: 355-365.

The author describes both the model design process she facilitated with a group of Canadian Aboriginal community leaders in Vancouver and the resulting mediation model for use by urban Aboriginal individuals. She includes procedural suggestions for the mediation process and potential adaptations to increase its cultural relevance for the Aboriginal parties to the process. She discusses the diversity of opinion among those of Aboriginal and dominant cultures regarding the intercultural use of a mediation model based on Aboriginal spirituality.

Kolb, Deborah M. 2001. *When talk works: profiles of mediators*. San Francisco: Jossey-Bass.

The book consists of twelve personal and compelling stories of successful mediators for all areas of our society. Kolb reveals who they are and what techniques they use to achieve results.

Matthew McKinney. 2009. Moving Toward a Civic Mission: The Relevance of Universities in Natural Resources and Environmental Policy. *Higher Education Exchange*: 23-33.

During the past five years, the Kettering Foundation and the Public Policy Research Institute at the University of Montana have explored a common interest in the political challenges posed by natural resource and environmental issues. We have considered a variety of ways in which citizens and civic associations are recognized as key actors in the political process. The purpose of this essay is to step back from individual projects and lessons learned about citizen participation and public problem solving, and reflect on what the Institute's experiences suggest in terms of the role of universities in promoting and supporting natural resource and environmental policy.

Mayer, Bernard S. 2000. *The dynamics of conflict resolution: a practitioner's guide*. San Francisco: Jossey-Bass Publishers.

This book goes beyond the "how-to" skills and illuminates the creative internal thinking processes that drive the practice of successful conflict resolution. Beginning with a comprehensive analysis of the nature of conflict and filled with useful case examples from a broad range of conflict situations-international, family, public policy, organizational, environmental, labor management and community-this book is a rare blend of practical experience and theoretical knowledge. Recommended for both beginning and experienced professionals and anyone else seeking a deeper appreciation of the nature and origins of conflict.

O'Leary, Rosemary, and Susan Summers Raines. 2002. Lessons learned from two decades of alternative dispute resolution programs and processes at the U.S. environmental protection agency. *Sage Public Administration Abstracts*. 29 (3): 309-456.

Mediation, facilitation, and other alternative dispute resolution (ADR) techniques are being used in federal agencies, state and local governments, private-sector organizations, and among private citizens in an effort to prevent and resolve disputes in a timely, cost-effective, and less adversarial manner. The U.S. Environmental Protection Agency (EPA), one of the pioneers in the application of ADR processes and techniques to public

policy disputes, recently announced that it plans to increase the use of ADR techniques and practices across all agency programs. This article reports the results of a four-part evaluation of the use of ADR in enforcement actions at the EPA during the last two decades. The four groups interviewed were EPA's alternative dispute resolution specialists, potentially responsible parties (defendants) to EPA enforcement lawsuits, mediators and facilitators to EPA cases, and agency enforcement attorneys who had participated in agency enforcement ADR processes. Concluding that there are generally high levels of satisfaction with the EPA's enforcement ADR program, this article examines the sources of obstacles and assistance to ADR efforts at the EPA, suggests ways in which the EPA might improve its ADR programs, and draws lessons from the EPA's experiences that may be helpful to other public programs or organizations.

Paulson, Deborah and Katherine Chamberlin. 1998. Guidelines and issues to consider in planning a collaborative process. Department of Geography and Recreation, University of Wyoming. Final Report submitted to the Institute for Environment and Natural Resources.

Collaborative efforts in natural resource management and environmental dispute resolution continue to evolve, and there is need for periodic review and assessment of collaboration and the lessons that have been learned. This research project was designed to provide some general guidelines and principles of collaboration that reflect the experience gained over recent years. A survey was developed to assess the reaction of practitioners with extensive experience in collaborative processes to various principles and guidelines that have been proposed in this field. The survey of practitioners revealed that the frameworks used to organize concepts in this complex field vary significantly among practitioners.

Policy Consensus Initiative. 2005. Finding better ways to solve public problems: the emerging role of universities as neutral forums for collaborative policymaking. <http://www.policyconsensus.org/publications/reports/docs/UniversityReport.pdf> (accessed April 29, 2011).

A report on the emerging role of universities as forums for collaborative approaches to public policymaking. The 20-page booklet is based on a PCI survey of 42 dispute resolution and consensus building programs housed in universities in 35 states

Senecah, Susan. 2000. Current issues facing the practice of environmental mediation. *Conflict Resolution Quarterly*, 17: 391-407.

This article focuses on the alternative dispute resolution process of mediation, especially as applied to environmental disputes. Many of the critical dilemmas facing environmental mediators hinge on the tension between party self-determination and informed decision making, and mediator neutrality. In the interest of advancing greater understanding and discussion of the practice of environmental mediation, this article presents a brief background to environmental mediation, its distinguishing characteristics, and some of the most commonly recurring dilemmas, many with ethical implications.

SPIDR (Society for Professionals in Dispute Resolution). 1997. *Best practices for government agencies: guidelines for using collaborative agreement-seeking processes*. Report and Recommendations of the SPIDR Environmental/Public Disputes Sector Critical Issues Committee.

These recommendations are directed primarily towards federal, state, provincial, and territorial government officials to help ensure successful use of collaborative processes for decision-making. They may also be useful to local government, although consideration must be given to how stakeholder-based processes may affect more inclusive citizen participation strategies.

Susskind, Lawrence, Sarah McKernan, and Jennifer Thomas-Larmer. 1999. *The consensus building handbook: a comprehensive guide to reaching agreement*. Thousand Oaks, Calif: Sage Publications.

Chapter 5 explores the use of facilitation, mediation, and dispute systems design in building consensual agreements. Focuses on the involvement of experienced practitioners in this process, examining the core activities conducted by these practitioners, the conditions under which professional practitioners are needed, and how best to select such individuals when the need exists. Focus is more on public sector than private

sector conflicts. The use of dispute resolution practitioners in intraorganizational settings is also discussed in Chapter 16, "Collaborative Problem Solving within Organizations".

Tonkin, Elissa. In-house neutrals: Can agency staff mediate EPA disputes? United States Environmental Protection Agency, Regional ADR Program, EPA New England, <http://www.epa.gov/ne/enforcement/adr/neutrals.html> (accessed May 23, 2011).

"Agency neutral" -- it has the ring of a perfect oxymoron. Right up there with "jumbo shrimp," "civil war," and "fresh-frozen." After all, if you were embroiled in a dispute with, say, the United States Environmental Protection Agency, where could you possibly find a less "neutral" neutral than on EPA's payroll? And given the abundance of skilled outside mediators, why would you waste more than half a second of your time even considering it? These are fair questions which probably enter the minds of many parties who are offered the services of oxymorons like myself to assist in resolving their EPA-related conflicts. Yet no one could be more amazed than I at the increasing frequency with which our modest fleet of in-house mediators has been invited by outside parties to function in a neutral capacity. Since the mid 90's when we first began offering these services, our Regional ADR Program has provided neutral services in over 100 matters. These instances of ADR use have consisted primarily of mediation but also include neutral convening and neutral facilitation. Based on this growing body of experience, I have become convinced that the availability of in-house neutrals is a valuable option when it is put forward in a responsible way. What follows is an attempt to organize and articulate the jumble of observations and considerations that have led me to this conclusion.

United States Office of Personnel Management. *Alternative dispute resolution: a resource guide*. Washington, D.C.: United States Office of Personnel Management, <http://www.opm.gov/er/adrguide/toc.asp> (accessed 10 May 2011).

The Guide provides an overall picture of how the most common forms of ADR are being implemented in Federal agencies. It summarizes a number of current ADR programs (including alternative discipline programs), and it includes descriptions of shared neutrals programs where agencies have collaborated to reduce the costs of ADR. It provides a listing of training and resources available from Federal and non-Federal sources. It also provides selected ADR-related web sites. The information in the Guide will be helpful to you as you explore the feasibility and appropriateness of implementing alternative dispute resolution programs in your organization or enhancing the one you may have now.

Wondolleck, Julia M., Nancy J. Manring, and James E. Crowfoot. 1996. Teetering at the top of the ladder: the experience of citizen group participants in alternative dispute resolution processes. *Sociological Perspectives*. 39 (2).

A well-structured collaborative process can remedy some of the imbalances and other stumbling blocks inherent in traditional forums, broadening the issues considered as well as the potential solutions. First citizens must make the strategic choice whether or not to participate in the dispute resolution process. Second, if they choose to participate, citizens must then determine how to do so effectively. Citizen representatives can significantly influence the outcome of a negotiation if they pay attention to the critical components comprising the dispute settlement process and ensure that these are satisfactory at the outset. They must also maintain effective communication with their constituencies. At the third rung, citizen groups confront the need for continued involvement, both to ensure implementation of any agreements reached, as well as to capitalize on the productive working relationships and opportunities for further influence provided by their participation in this process.