

## RESOLVING CONFLICT

Newsletter of the Interagency Alternative Dispute Resolution Working Group  
of the U.S. Government

Issue 4 - March, 2016

*In this issue of **Resolving Conflict**, there is an article about the peaceful mindset that some mediators are trying to instill in their participants; a piece on the IADRWG Collaborative and Facilitative Processes Committee; a description of the Federal Mediation and Conciliation Service programs; and an article on a workshop that three IADRWG members will be giving at the upcoming ABA ADR conference in New York City. We hope you enjoy this newsletter.*

### **Is What We Do a Mindset or a Skillset?**

By LoValerie Mullins, Mediator-ADR, National Mediation Board

I was recently reminded of one of my first ever training activities in the labor field. I was in graduate school, and had the pleasure of volunteering with a team, mediating sessions with a local union. It was not an altogether good memory, but full of teachable moments. More than anything else, it was the first time I was forced to consider what it really meant for me to be a mediator. I had chosen, to my immediate demise, to start my training segment with a brief self-reflection activity that had participants with their eyes closed and thinking about a peaceful bargaining process, and what that would look like. I had trainees quietly visualizing what it would feel like to be a positive agent for change. In just a couple of minutes, a room full of labor negotiators were picturing how

they would approach a mental negotiating table for their opening session. For that few moments, the room was still, and it was the first time in a great while that our parties were at the table in peace together. When we were finished, the room was at rest. In a matter of moments, the energy had changed, and there was calm, much to the anger and dismay of my training partners! Yes, to their dismay. In my honest efforts to alter our parties' mindset, I had inadvertently ruined our mission. I just couldn't figure out why, until a recent conversation over margaritas opened my eyes.

As I understand it, my co-trainers, in large part, were agitated that I would teach something outside the bounds of the "traditional" interest-based mediation process; but even more, they were irritated that I would try to finesse away parties' rights to their deeply held angst. I was seen as attempting to soothe the beast of rightful discontent, and disconnect parties from their righteous indignation. I learned much later that the big question in my co-trainers' minds was how I could know so little about the needs of our labor parties to try to entice them into frivolous mindfulness, when what they really needed was the battle axe of their agony. Needless to say, my first time out was textbook bad, and my poor first impression lingers to this day.

In my particular case, the parties' discontent was a major boon to their process. It was the fuel for the normal chaos of collective

bargaining, and a natural backdrop to a history of bad blood. It was the mindset in which the parties were used to operating, for better or worse, and that mindset was as much tradition as anything else. The problem was, we were trying to train parties to do things differently, to engage them in integrative bargaining, to learn the issues, interests, and options of a better way of doing business, as it were. In those efforts, my downfall became obvious. I was there to change a mindset, while my co-trainers were only there to change a process. As ADR specialists, it is likely second nature to believe the two are inextricably intertwined, until we're reminded, sometimes abruptly, that perhaps they really are not.

So my question is this, as dispute resolution practitioners, as subject matter specialists, what are we really serving through our work? Are we serving a process or an ethos? Is what we offer a skillset or a mindset? From what do our parties' find instruction and relief?

Is it possible that what we're really offering our parties is an opportunity of the mind - the opportunity to deconstruct and reconstruct a better way of approaching the experience of conflict, of how to interact with conflict, how to resolve conflict or how to cope if all else fails? Isn't it possible that what we do is more than issues, interests and options? Is it a leap to suggest that if we can't change the mindfulness of our parties, change the way parties' minds perceive their process, then the rest of our effort is strictly academic? Is what we do a mindset or just a skillset?

Fast forward the years as I was developing a negotiation training program last fall, and lo and behold, the textbook our agency chose dedicated a chapter to the "Presence of Mind." The chapter highlights the process I

used with parties so long ago. It turns out that the Harvard author is a big proponent of moving our parties toward self-awareness as a necessity to the collective bargaining process.

Who knew....? I read the page a few times over, and allowed a little smile to cross my face. . . . Just a little one.

LoValerie Mullins can be reached at [mullins@nmb.gov](mailto:mullins@nmb.gov)

### **The Collaborative and Facilitative Processes Committee: The Cutting Edge of Government ADR**

By Jennifer M. Gartlan\*

Committee Chair and Deputy Director of the Federal Maritime Commission's Office of Consumer Affairs & Dispute Resolution Services \*\*

The Interagency ADR Working Group (IADRWG) established the Collaborative and Facilitative Processes Committee (CFPC) in 2013 to meet the growing needs of agencies that are exploring and implementing new collaborative dispute prevention and resolution processes. Members of the CFPC range from *ombuds* programs that address workplace, regulatory or Freedom of Information Act matters, to transportation agencies that address complex multi-party commercial and regulatory challenges, to environmental agencies that conduct and oversee large-scale multi-party industry facilitations. Many of these organizations are experimenting with cutting edge processes and techniques such as coaching, upward feedback, and facilitation to accomplish a multitude of agency goals and objectives.

One particular challenge noted by CFPC members is the need to identify and clarify prospective disclosure and nondisclosure requirements when engaging in conflict

prevention and dispute resolution activities in furtherance of agency objectives. For example, while a large scale industry facilitation to discuss regulatory best practices may or may not implicate the confidentiality requirements of the Administrative Dispute Resolution Act, 5 U.S.C. § 571 et. seq. during the facilitative process, a neutral may also need to assist parties with resolving a collateral dispute arising between two or more participants that may impact the facilitation. In such a case, the neutral may need to explore what, if any, confidentiality protections exist with respect to the over-arching facilitation as well as the resultant mediation. In another example, an *ombuds* provides conflict coaching services to an individual who may or may not enter into a separate mediation with a disputing party. At the same time, the party receiving coaching may also be participating in an upward feedback session regarding managerial practices that may also be discussed in the coaching and/or prospective mediation session. In such a case, a neutral may need to organize the various agency objectives and activities to better understand nondisclosure vs. disclosure requirements.

The CFPC has undertaken an ongoing project to assist neutrals with organizing collaborative processes from the perspective of disclosure and nondisclosure requirements. It is building upon work undertaken by the Environmental Protection Agency's (EPA's) Conflict Prevention and Resolution Center entitled, "Better Decisions through Consultation and Collaboration," by Deborah Dalton and Philip Harter (2008)

[http://www.epa.gov/sites/production/files/2015-09/documents/better\\_decisions.pdf](http://www.epa.gov/sites/production/files/2015-09/documents/better_decisions.pdf)

That report, which is based upon previous studies conducted in the 1990's by John

Ehrmann and Tim Mealey of the Keystone Policy Center, Suzanne Orenstein of Resolve Inc., a practitioner committee of the International Association for Public Participation (IAP2), and the Society of Professionals in Dispute Resolution, provides guidance to EPA managers and staff who design and implement collaborative processes to meet the agency's public engagement policy requirements.

The report touches upon the prospective use of neutrals to assist the agency in meeting agency objectives which are broken into the following categories: outreach, inquiry, information exchange, recommendations, agreements, and stakeholder action. The report's appendix also provides the ethical standards for mediators as set forth by SPIDR (see Appendix IV: Ethical Standards of Professional Responsibility). In particular, it discusses the professional requirement of confidentiality:

***Confidentiality.** Maintaining confidentiality is critical to the dispute resolution process. Confidentiality encourages candor, a full exploration of the issues, and a neutral's acceptability. There may be some types of cases, however, in which confidentiality is not protected. In such cases, the neutral must advise the parties, when appropriate in the dispute resolution process, that the confidentiality of the proceedings cannot necessarily be maintained. Except in such instances, the neutral must resist all attempts to cause him or her to reveal any information outside the process. A commitment by the neutral to hold information in confidence within the process also must be honored.*

To assist neutrals balance the interplay between confidentiality and potential disclosure statutes, the CFPC has utilized the agency objectives outlined in the CPRC report to draft a tool that will be universally applicable to neutrals that engage in collaborative and facilitative practices across

the government. The tool is a chart that allows neutrals to determine where they are on the confidentiality/ disclosure spectrum. The tool will draw upon the agency objectives outlined in the CPRC report and will then further explore various types of sample processes that may be used to meet those objectives (e.g. open houses, joint fact-finding, focus groups, listening sessions, advisory committees, etc.) from the perspective of workplace, regulatory, and environmental agencies. Further, the CFPC will explore the neutral's role with assisting the agency to conduct such processes and the ADR tools that may be available to the neutral in a given matter (e.g. coaching, mediation, facilitation, etc.). It will also list prospective disclosure/nondisclosure statutes that may be implicated based upon agency objective and the neutral's role.

At this time, the CFPC will present the completed draft tool to the IADRWG. Upon approval by the IADRWG, the CFPC will seek comment from ADR practitioners regarding the usefulness of the tool as well as input for additional follow up work on the project (e.g. the need if any for statutory guidance, the creation of best practices, etc.).

For additional information regarding this article/project or to obtain information on becoming a member of the CFPC, please contact Jennifer M. Gartlan at [jgartlan@fmc.gov](mailto:jgartlan@fmc.gov).

\*The opinions and views expressed in this article are those of the author and not binding on the Federal Maritime Commission.

\*\*This article was written with input from Deborah Dalton, Senior Conflict Management Specialist, Conflict Prevention and Resolution Center, Environmental Protection Agency

## **The ADR Programs of the Federal Mediation and Conciliation Service**

By Eileen Barkas Hoffman, JD,  
Commissioner

FMCS was created by Congress in 1947 as an independent agency under the Taft-Hartley Act. The goals were to reduce or avoid labor-management strife by assisting in the mediation of contract negotiations and work stoppages or lock-outs in private industry; and to promote sound and stable labor-management relations. It is a small agency, with about 240 employees and 60 field offices. FMCS has provided ADR assistance to the Federal government for more than 50 years and is involved in more than 1,000 ADR disputes and interventions per year in a variety of administrative program areas.

### **Labor Management Work**

FMCS provides mediation for labor-management contract talks in private, public, and Federal sectors as well as training of labor and management representatives in interest-based problem solving, relationship by objective, grievance handling and other related skills. FMCS mediators facilitate labor-management forums and assist with labor-management committees in the public and private sectors. They provide grievance mediation to the parties—unions and management—in the public, Federal and private sectors.

### **ADR Work**

In addition to the labor-management part of FMCS's work, the Administrative Dispute Resolution (ADR) Act of 1996 calls upon FMCS to help other Federal agencies with a wide variety of professional services such as mediating disputes, designing and building capacity for conflict management systems, and developing tools for cooperation and collaboration. FMCS has a small, six-

mediator office within its Washington, DC, headquarters, comprised of ADR and International Services. These mediators work with the approximately 160 field mediators in field offices around the country to coordinate the ADR and international services, which are provided to other agencies on a reimbursable basis. They report to the Manager of National Programs and Initiatives, Director of ADR and International Services.

### **Negotiated Rulemaking**

FMCS facilitated the first **negotiated rulemaking** in the United States in 1983. This involved the Federal Aviation Administration's use of the negotiated rulemaking process to develop a new flight and duty time regulation for pilots. FMCS has also worked with the Administrative Conference of the United States (ACUS) on this topic and continues to facilitate regulatory negotiations for a variety of Federal agencies and Indian tribes, as well as convening and facilitating complex public policy forums.

### **Virtual Technology for ADR**

Through the use of virtual technologies to enable effective e-communication during times of tight budgets, FMCS has been able to offer mediation, training, and facilitation to parties with very successful results. These mediations, trainings, briefings, facilitations, and consultations have included the use of a wide variety of virtual platforms that support face-to-face remote engagement..

### **International Work**

Internationally, the FMCS, at the request of the U.S. Departments of State and Labor, and other government entities, strives to build local capacity for effective industrial relations systems, including labor administration, inspection, collective

bargaining, mediation, and dispute resolution. FMCS has provided training and consulting in more than 60 countries over the past 25 years, including Bangladesh, Burma (Myanmar), Haiti, Honduras, Morocco, Swaziland, and Vietnam.

### **The FMCS Institute**

Through the FMCS Institute, the agency offers courses to the public about conflict and dispute resolution techniques and approaches. These courses are taught by FMCS trainers, mediators (who are known as Commissioners), and other experts in the field, and deal with such topics as mediation, arbitration, and facilitation. A listing of courses is available at: <http://www.fmcs.gov/institute>.

### **Roster of Arbitrators**

FMCS administers a roster of arbitrators comprising approximately 1,000 individuals who are private practitioners with specific expertise in holding hearings and understanding the dynamics of labor-management relations. Each year, pursuant to FMCS requirements and selection by the parties, the arbitrators adjudicate between 1500 and 2000 disputes, while many others settle during the hearing or pending the decision of the arbitrator.

### **Conferences**

FMCS has initiated a number of regional and national conferences over the years. In August 2016, FMCS looks forward to hosting a National Labor-Management Conference in Chicago with the theme of *Future@Work - Trends, Tools, and Techniques for Partnering in the New Economy*.

For more information about the FMCS's ADR programs and initiatives, please visit:

[www.fmcs.gov](http://www.fmcs.gov)

Eileen Hoffman can be reached at [ebhoffman@fmcs.gov](mailto:ebhoffman@fmcs.gov).

## **Untying the Knots Tools and Tips for a Great Working Group**

By Katie Manderson

Department of State, and Chair of the  
IADRWG

As conflict resolution professionals, we see how conflict can affect not only those directly involved in a situation, but also those on the periphery. Many times when the conflict spreads to entire groups of individuals, we must work with a team, teams, or even a whole office. For this reason, Victor Voloshin, Ramona Buck, and I are presenting a workshop to the ABA ADR Conference in April, entitled “Untying the Knots; Tools and Tips for a Great Working Group.”

We have noticed that sometimes groups which have conflict seek training rather than facilitation. Other times, groups may request team building when actually, two people have a conflict and need mediation. It might also happen that groups seek facilitation assistance, but training is what they really need. In response to such requests, we have found that it is possible to provide resources for multiple needs within groups using training segments, coaching strategies, group facilitation techniques, as well as measurements, such as climate assessments.

To give an example, a group may be having difficulty working on an important project. The participants are not sure what the problem is, but there are frequent arguments and the work isn't getting completed. The facilitator could do a group climate assessment as a first step or use a team analysis tool to find out where the problem areas are when the team tries to work together. Using this information, the facilitator could design a training that would

respond to the specific needs highlighted by the assessment. Then, the training could be followed by a facilitated meeting in which the group could put together future “rules for engagement.” And/or there might need to be some individual conflict coaching which could go hand in hand with the above efforts.

Working with groups in conflict is a unique experience, and we think that ADR practitioners need to think broadly when responding to such cases. We should consider all the tools that we have for working with individuals, and utilize them in a variety of ways so that the group can function better. Our presentation to the ABA ADR conference will focus on the many techniques that we have used in helping groups in our agencies, and we hope to see some of you there.

Katie Manderson can be reached at  
[MandersonMK@state.gov](mailto:MandersonMK@state.gov)

### **Disclaimer:**

The articles in this newsletter were written by and represent the views of individual members of the Interagency Alternative Dispute Resolution Working Group. The articles do not necessarily represent the views of the Interagency Alternative Dispute Resolution Working Group as a whole. The information in the articles is for general informational purposes only and is not intended to provide legal advice to any individual or entity. We urge you to consult with your own legal advisor before taking any action based on information in these articles. Contact information has been provided for the authors at the end of each article in the event that you would like to communicate with them about the information covered.

*Send any proposed articles, ideas or items for future issues to Ramona Buck, Outreach Committee, [rbuck@fmcs.gov](mailto:rbuck@fmcs.gov).*