

FASTER, SMARTER, CHEAPER?
ASSESSING THE BARRIERS TO DELIVERING ON THE PROMISE
OF ADMINISTRATIVE DISPUTE RESOLUTION IN FLORIDA

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ROBERT M. JONES

Robert Jones is the director of the Florida Conflict Resolution Consortium (<http://consensus.fsu.edu>), at Florida State University where he works with representatives from state and local government and other stakeholders to design and implement collaborative approaches to consensus building and dispute resolution on policy issues. He may be reached at rmjones@mailier.fsu.edu.

While the use of mediation is growing dramatically throughout the country, in a variety of different contexts, the mediation of administrative disputes is just beginning to receive attention from legislatures and practitioners.

Indeed, after two decades of experience several states are reviewing their Administrative Procedure Acts (APAs) -- adopted by most states in the early 1970s as “informal citizen-friendly forums” to resolve disputes between government agencies and citizens – with an eye toward reform. Florida’s experience is telling.

Florida’s APA Review

In 1995, a state study commission concluded that the act’s initial promise of providing citizens with easy, quick and cheap access to relief was not being realized. Rather, the process had become costly and even more formal and adversarial than litigation in the courts. In 1997 alone there were 3,373 Florida agency administrative hearings.

Following the success of mediation in the Florida courts, the Florida legislature amended the APA in 1996 to encourage more mediation in disputes over state agency actions. These amendments and the uniform rules implementing them did not mandate the use of mediation in administrative disputes. However, in all matters subject to review by the Department of Administrative Hearings, the amendments and rules call for state agencies to include notices about whether mediation is available.

In 1998, in response to bipartisan concern about the limited implementation of APA mediation provisions, the legislature created and funded the State Agency Administrative Dispute Resolution Project (Project) administered by the Florida Conflict Resolution Consortium (Consortium), a statewide, public-funded neutral service center based at Florida State University.

The Consortium was asked to study the impact of the new legislation encouraging mediation of administrative disputes. The Project's objectives included documenting the experience to date, identifying barriers, and demonstrating through case examples and training how mediation and facilitation may be integrated into the management and budgeting of state agency administrative litigation. In July 2000 the Project issued its policy report to the governor, and in spring 2001 an independent study team issued a research report on the project.

GAINS ESTABLISHED

The Project's final report and recommendations to the governor addressed the barriers to greater use of mediation for administrative disputes and demonstrated how the concerted application of its proposals could successfully resolve administrative matters more quickly and at lower costs.

In more than 18 months of program activity, from July 1998 through December 1999, the Project worked to demonstrate the value of administrative dispute resolution and to encourage state agencies to implement the mediation provisions in the Florida APA. During this time, the Project oversaw or provided mediations in 36 administrative cases, 31 of which were settled successfully.

The Project offered a series of training workshops on administrative dispute resolution, free of charge, to more than 300 agency staff from 10 executive agencies. Among the mediated cases that settled, parties reported that potential savings in comparison to litigation costs exceeded \$3 million. The Project report identified legal, organizational, budgetary, leadership and educational barriers to greater use of administrative mediation, and offered policy recommendations to reduce or eliminate these impediments.

BARRIERS IDENTIFIED

An independent, interdisciplinary study team of four professors and several graduate students from Florida State University evaluated the Project and compiled information on administrative mediation in other states. The team also identified barriers that work against, and incentives that promote, more widespread utilization of administrative dispute resolution practices in state administrative procedures.

The study included an overview of administrative mediation activities in Florida state agencies and a survey of managerial attitudes toward the use and value of dispute resolution in administrative procedures, including barriers to the use of mediation. Finally, it included an in-depth survey of Project mediation participants to ascertain their assessment of administrative dispute resolution process and outcomes.

Professors Frances Berry and Bruce Stiftel, in a paper delivered at a recent dispute resolution research conference, reported on the obstacles to mediation identified through an interview sample of agency managers and attorneys from 10 state agencies that account for more than 80 percent of Florida's administrative cases. Many of those interviewed had not necessarily had direct experience with administrative mediation.

The researchers identified the following obstacles as having the greatest impact:

- timelines set by statutes other than the APA for processing and resolving disputed administrative cases,
- agency budgets that do not build in staff or consultant costs to allow mediation to be used regularly,
- lack of in-house expertise in the APA mediation process, and

- lack of agreement among managers and attorneys that mediation offers a faster, more efficient or higher-quality method of resolving administrative disputes.

Despite these obstacles, more than 80 percent of respondents said they would support increased use of mediation in their agencies if more resources and other problems were dealt with. Furthermore, they felt the most successful way to increase agency use of mediation was through overt support from agency leadership, an executive mandate or a statutory requirement. The interviews suggest that training may be needed to educate staff on the value and basics of mediation, to teach them when its use is most productive, and to provide them with more advanced skills in conducting mediations.

Evaluation of the 35 Project mediation cases generally supported the positive assessments of mediation found in the literature. Of the 35 Project cases, 31 settled, and respondents were pleased with the settlements. More than 80 percent reported being either very or moderately satisfied with the mediation. About three-quarters of the participants believed the mediated outcome would not have been likely had the case gone to administrative hearing. These participants often focused on the ability of the mediator to find specially tailored, creative solutions that would not have been possible in settlements or in less-flexible administrative hearings. A high proportion (more than 80 percent) also thought the mediations were quicker and cheaper than hearings would have been. They estimated savings to their organizations ranging from \$2000 to \$700,000.

Most participants felt the mediations resulted in the goals they hoped to achieve; half the participants said they achieved almost all of their goals while another 40 percent said they achieved many of their goals. The practices used by the mediators received generally high ratings. In particular, mediators got high marks for group process knowledge, the ability to avoid bias, and verbal skills.

Other barriers identified included overcoming regulatory rigidity and dealing with the case's precedent potential, open-government laws, and political interference. The absence of authority to settle on the part of negotiators at the mediation, and the fact that many of the parties had never negotiated with each other before were also seen as barriers to settlements.

Policy Recommendations

The Project's policy report provided a description of agency dispute resolution practice, the cases mediated and the training and education programs offered. It also offered policy recommendations using a "barriers framework" developed by the Policy Consensus Initiative to analyze the experience and provide advice on how to increase the use of administrative dispute resolution.

The Consortium retained two experienced court and administrative mediators to help direct the Project. It relied on a panel of experienced mediators familiar with administrative law practice as well as a diverse advisory group of administrative lawyers and managers to develop recommendations for addressing legal, budgetary, educational, and leadership barriers to greater use of administrative dispute resolution.

To address the legal barriers, the Project examined confidentiality protection and recommended amending chapter 120 of the Florida statutes so that it extends to administrative dispute resolution the confidentiality and evidentiary exclusion protections now provided for judicial mediation. The report suggested adopting legislative language clarifying that agency representatives at administrative mediation conferences must come to mediation with maximum available settlement authority or at least authority to recommend a proposed settlement to a governing body for its ratification.

In addition, the report urged the governor's office, or a designee, to review and seek to improve the record of agency compliance with chapter 120.573, which requires that agencies notify parties to administrative disputes whether mediation is available.

To address and minimize budget barriers, the Project suggested adapting state funding formulas for administrative litigation to include direct consideration of alternative dispute resolution. This change should include crediting administrative dispute resolution efforts that save agencies time and expense. There were also suggestions for streamlining agency procurement of mediators and facilitators for administrative disputes.

Finally, the report suggested that leadership and educational barriers could be lowered via an executive order directing executive agencies to evaluate all pending administrative cases and potential rule development for possible use of the administrative

dispute resolution. Such executive orders have been issued in the past two years by Governors in Massachusetts, New Mexico and Oregon. It recommended that administrative dispute resolution functions be included as part of their agency's functional plan and corresponding budget requests. The executive order could also encourage administrative dispute resolution training for agency leaders, attorneys and managers to ensure that the state fully benefits from administrative dispute resolution.

DELIVERING ON THE PROMISE

Focusing on the obstacles to greater use of administrative mediation by state agencies as encouraged by the APA, the Project examined the practice and perceptions surrounding administrative mediation. On the promise of faster, smarter and cheaper, the project appears to have been successful.

However, Florida's experience shows that despite the importance of legislation encouraging administrative mediation, legislation alone is not sufficient to prompt greater use. More than 80 percent of the agency respondents identified legal, budgetary and leadership barriers. They also said they would support increased use of mediation in their agencies if they had more resources, greater flexibility for meeting the filing and processing deadlines, and leadership support -- especially through explicit support from agency leadership, an executive mandate or a statutory requirement.

Another lesson from the Project is that those promoting administrative mediation must acknowledge the sometimes considerable and creative settlement efforts agencies themselves have undertaken. The interviews suggest that agency managers and attorneys may feel they are not given enough credit for the settlement efforts they have incorporated into their practice and procedures. This view was reflected by the fact that agency respondents identified the most significant barrier as "satisfaction with current settlement practices." In the Project training, efforts were made to credit agencies for their efforts and help them assess the administrative procedures they have already established with an eye to enhancing opportunities for earlier intervention and more productive settlement efforts.

The results of both the independent study and the Project suggest there are indeed real barriers that constrain the greater use of administrative dispute resolution. The

Project’s policy recommendations highlight the need for continuing leadership support and education to achieve better results when using administrative dispute resolution. Finally, both reports suggest that states can deliver on the promise of administrative mediation only if there is leadership commitment and an investment of resources to build capacity and provide assistance to state agencies and citizens.

The results of this Project suggest that states that make the investment to increase the use of administrative dispute resolution will be able to produce measurable dividends in the form of time and costs savings. They will also experience improved citizen and agency satisfaction with redress and resolution through use of the enhanced administrative appeals process.

[Graphic for Florida article]

MOST SIGNIFICANT BARRIERS TO USE OF ADMINISTRATIVE MEDIATION

- Belief that current settlement practices are satisfactory
- Time constraints (i.e., statutory deadlines)
- Concern that negotiating representatives lack sufficient authority as “agents” and that “principals” will not agree to the settlement
- Budget constraints (no funds to pay for mediation)

LEAST SIGNIFICANT BARRIERS TO USE OF ADMINISTRATIVE MEDIATION

- “Prior negative experience with mediation in [our] agency”
- “Negative attitude of senior management towards mediation”
- “Existence of a ‘reward’ system in the agency that favors successful litigation rather than mediation
- “Perception by staff that attorneys should not be involved in mediation”
- “Belief that collaborative processes are illegitimate methods of making public decisions”

References

- AMERICAN BAR ASSOCIATION, FEDERAL ADMINISTRATIVE DISPUTE RESOLUTION DESKBOOK (2001). This 765-page book is the most complete single document offering information on the efforts to promote administrative dispute resolution for federal agency disputes.
- Policy Consensus Initiative, *Report on Barriers to the Use of ADR in States and Approaches for Overcoming Them*. (http://www.policyconsensus.org/PCI_Publications/barriers_use_of_adr_in_states.html)
- Policy Consensus Initiative, “Executive Orders- How Governors Can Promote Collaborative Processes and Dispute Resolution for More Effective Governance,” *Solutions*: Vol. 1, September, 2000.
- Florida APA Mediation Provisions: FLA. STAT. ch.120.573: “Each announcement of an agency action that affects substantial interests shall advise whether mediation of the administrative dispute for the type of agency action announced is available and advise participants that choosing mediation does not affect the right to an administrative hearing”; FLA. STAT. ch. 120.54(2)(c): “...The [rule development] workshop may be facilitated or mediated by a neutral third person, or the agency may employ other types of dispute resolution alternatives for the workshop that are appropriate for rule development”; FLA. STAT. ch. 120.54(d)(1): “An agency may use negotiated rulemaking in developing and adopting rules”; FLA. ADMIN. CODE ANN. r. 28-106.400 (mediation); FLA. ADMIN. CODE ANN. r. 28-103.002 (rule development workshops); FLA. ADMIN. CODE ANN. r. 28-103.003 (negotiated rulemaking). These provisions are part of the Uniform Rules of Procedure adopted by the Florida Administration Commission in 1997, as amended March 18,1998.
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- Frances Berry and Bruce Stiftel, Mediation in State Agency Administrative Procedures: An Assessment of its Use in Florida State Agencies, paper presented at Syracuse University’s Conference on Evaluating Environmental and Public Policy Dispute Resolution Programs and Policies, Washington, D.C., (Mar. 8-9, 2001).
- The interdisciplinary team included law professors Jim Rossi and Jean Sternlight, planning professor Bruce Stiftel, and public administration professor Fran Berry.
- Rosemary O’Leary and Tracy Yandle, *Environmental Management at the Millennium: The Use of Environmental Dispute Resolution by State Governments*, 10 J. PUB. ADMIN. RES. & THEORY 137-155 (2000).
- Neil Sipe and Bruce Stiftel, *Mediating Environmental Enforcement Disputes: How Well Does it Work?* 15 ENVIRONMENTAL IMPACT ASSESSMENT REVIEW 139-156 (1995).

Suggested Pullquotes:

“In 1995, a [Florida] state study commission concluded that the [Administrative Procedure Act’s] initial promise of providing citizens with easy, quick and cheap access to relief was not being realized. Rather, the process had become costly and even more formal and adversarial than litigation in the courts.” (p. 1)

“In 1998, in response to bipartisan concern about the limited implementation of APA mediation provisions, the legislature created and funded the [Project].” This group was charged with identifying and overcoming barriers to mediation. (p. 2)

During its 18 months of program activity, the Project assisted with mediations in 36 administrative cases and offered free training workshops on administrative dispute resolution to more than 300 agency staff. (p. 2)

“An independent, interdisciplinary study team of four professors and several graduate students from Florida State University evaluated the Project. . . .” (p. 3)

“Of the 35 Project mediation cases, 31 settled, and respondents were pleased with the settlements.” (p. 4)

The Project’s recommendations included legislation that would extend to administrative dispute resolution the confidentiality protections now provided to judicial mediation. (p. 5)

“Florida’s experience shows that despite the importance of legislation encouraging administrative mediation, legislation alone is not sufficient to prompt greater use. More than 80 percent of the agency respondents identified legal, budgetary and leadership barriers.” (p. 6)

“The results of this Project suggest that states that make the investment to increase the use of administrative dispute resolution will be able to produce measurable dividends in the form of time and costs savings.” (p. 7)

Alternative dispute resolution, a set of practices and techniques aimed at permitting the resolution of legal disputes outside the courts, can reduce transaction costs, since it is cheaper and faster than ordinary judicial proceedings", writes Robert H. Mnookin, Samuel Williston Professor of Law and Chair of the Program on Negotiation at Harvard Law School and Director of the Harvard Negotiation Research Project. "It can create resolutions that are better suited to the parties' underlying interests and needs; and it can improve ex-post compliance with the terms of the resolution." A weekly update of what's on the Global Agenda. Featured: Engineering and Construction View all. Fewer, Faster, Smarter. The new innovators and disruptors promise a revolution in how we live. We can't strangle them with rotary phone-era regulations. The latest installment in our series "Our Digital Future." Low-cost sensors offer the promise of connecting every one of more than a trillion items in commerce, including furniture, appliances, commercial buildings, and public infrastructure. The so-called Internet of Things will allow consumers to profoundly customize their lives, radically improve energy efficiency, and help seniors stay in their homes far longer, to name a few likely benefits. In that sense, feedback and alternative dispute-resolution systems mimic the highly adaptable law merchant, an abbreviated commercial governance model that grew up around medieval market towns. Dispute resolution is often a multistep process that can start with negotiation, move on to mediation, and, if necessary, end in arbitration or litigation. Mediation is typically faster and cheaper than arbitration or litigation, and mediation also gives parties the greatest degree of control over the final outcome. By contrast, Jack, who feels he is the victim of age discrimination by his former employer, has the primary goal of winning a large financial settlement. Thus, for him it may be wise to start with arbitration. Thus, it helps to focus on the ability of the three different dispute resolution methods to help you overcome barriers to settlement. In particular, when parties are having trouble communicating and have a strong desire to air their feelings, mediation is often the best choice.