

INSIDE

CASE STUDY: ADOT Saves Millions with Partnering

Arizona discovers a better way of doing transportation business. PAGE 6

Assessing the UMA's Applicability

Now that it's passed, how can states decide whether to adopt? PAGE 3

Florida Governor Signs EO

Executive Order requires agencies to increase their use of DR. PAGE 4

Changes in Oregon

Mike Niemeyer named Director of Oregon Commission. PAGE 5

State DR Programs Meeting

Annual Meeting Set for Wed. August 21 in San Diego, CA

The annual PCI State Programs meeting is scheduled for Wednesday, August 21, in San Diego. The meeting will be held one day prior to the start of regular sessions at the Association for Conflict Resolution conference. Both the PCI and ACR meetings will be at the Town and Country Resort and Convention Center in San Diego.

Because of travel restrictions in many states, we anticipate that this year's attendance may be much smaller than previous conferences. PCI is planning for a more informal meeting, with a format that allows ample time for sharing information and problem solving among attendees. An enthusiastic group of state programs who do

plan to attend are currently helping us set the agenda and topics to be covered. Registration materials will be available on the PCI website by the end of June, and also will be mailed to state DR programs.

Are you interested in attending regional meetings for DR Programs?

In response to continuing budget shortfalls and travel restrictions for a number of state programs, PCI is planning to convene smaller regional meetings over the coming year. Please contact PCI with your ideas about hosting, topics and locations for these meetings. Information will be available as the meeting plans are finalized.

Virginia Passes Two Dispute Resolution Bills

Virginia Governor Mark Warner in April signed a bill authorizing state agencies to use dispute resolution tools to resolve conflicts with the public, and another bill expanding mediation confidentiality protections in the state.

Administrative DR Act

The Virginia Administrative Dispute Resolution Act, HB 450, authorizes public bodies to use dispute resolution proceedings and requires state agencies to adopt policies regarding use of DR proceedings for the agency's programs and operations. Each state agency must designate a DR

coordinator and identify and implement changes necessary to promote the use of DR. Agencies' DR policies must establish qualifications for all neutrals an agency uses, and must include a training policy for employees involved in the agency's DR activities.

The Act also establishes an Interagency Dispute Resolution Advisory Council to the Secretary of Administration. The Council's purpose is to publish educational materials and conduct training on DR, and to track and report on the use of DR proceedings.

Mark Rubin, a Richmond attorney and mediator who drafted the key pieces of the legislation, said the idea

for the bill came from a PCI-sponsored panel at the Council of State Governments Summit on Dispute Resolution in Kentucky. The panel featured state DR program directors from Florida, Maryland, and Ohio.

"I listened to these states' experiences, and realized that where there are specific acts authorizing the use of mediation, it gets used more," Rubin said.

Rubin, who was then Chair of the Joint Bar Association Committee on ADR, returned from the conference and assembled a committee of dispute resolution experts, a number of agency

Continued on Page 2

Virginia Passes Two DR Bills...

Continued from page 1

representatives, attorneys, and others. After nearly a year of monthly meetings and consultations on its language, the committee drafted the bill, which the General Assembly passed easily. Committee members are continuing to work with state leaders in planning for implementation of the Act.

House Bill 818 on Confidentiality

This bill modifies general and court-referred mediation statutes to expand confidentiality and liability provisions. It re-designates the current evaluation session as an "orientation session" and clarifies existing provisions. In addition, the bill makes only certified mediators immune from civil liability while engaged in mediation unless the mediator acts in bad faith, with malicious intent, or exhibits willful disregard for the rights of another.

Geetha Ravindra, Director of Virginia's Department of DR Serv-

ices, said the impetus for drafting the modifications began with a review of the nearly 10-year-old enabling legislation for court-referred ADR. As part of the review, Ravindra convened a committee of mediators, judges, court personnel, and representatives from the State Bar to identify aspects of the legislation that were unclear, ambiguous, or required elaboration.

"We met every month or so and went through the 1993 legislation to assess what the shortcomings of the statutes were, and identify ways to strengthen and clarify the language," Ravindra explained.

At the monthly meetings, Ravindra also provided information on the Uniform Mediation Act for the committee to consider. "We spent a lot of time considering the (UMA) drafts, trying to decide if we were in favor of it or not," she said. But because the UMA changed often during the life of the committee, the decision about whether

to adopt became "terribly frustrating," she said. In the end, the committee decided not to consider the UMA until it was final, and focused instead on how to improve Virginia's existing statutes. At this point, the issue of whether to adopt the UMA in Virginia has been postponed.

The committee sent a draft of its recommendations to nearly 1,000 certified mediators, who had six months to review and comment. Then, the committee met one last time—in the fall of 2001—to review the comments and make final amendments before sending it to the General Assembly.

Ravindra said that while much is left to be done in terms of promoting dispute resolution in the state, this legislation likely will make the use of mediation in Virginia much clearer. "These changes should make the program stronger, and promote growth in the use of dispute resolution processes across the state," she said.

Environmental Summit on the West II Focuses on Application of Enlibra Principles

The growing use of Enlibra principles by communities, watersheds, and regional organizations is helping to ensure sustainability of environmental, economic, and social resources, said Oregon Governor and PCI Board Chair John Kitzhaber in opening remarks at the Environmental Summit on the West II in April. Enlibra makes it possible for people to meet their needs without compromising future generations, he said.

Kitzhaber and Utah Governor Mike Leavitt, who serve as the lead governors for Enlibra, hosted policy roundtables at the Summit, which was sponsored by the Western Governors' Association (WGA) and the White House Council on Environmental Quality (CEQ). PCI

Co-Executive Directors Chris Carlson and Dick Gross facilitated sessions on species conservation and reducing wildland fires. National Policy Consensus Center (NPCC) Director and former PCI board member Greg Wolf, and NPCC Fellows Howard Bellman and Lang Marsh, also participated in the Summit.

Enlibra—a Latin term referring to a movement toward balance—represents a new, shared doctrine for environmental management. Based on the principles of collaborative decision making and the connecting of communities with organizational and institutional decisions, Enlibra focuses on outcomes, rather than just programs, and the need to move beyond regulation

through the use of collaborative tools to improve environmental decision making.

A central focus of the Summit was the application of those principles, and featured remarks by CEQ Chairman Jim Connaughton; Secretary of Interior Gale Norton; and Environmental Protection Agency Administrator Christie Whitman.

The nearly 500 Summit participants attended sessions and working groups aimed at developing recommendations for policy makers on a diverse set of environmental issues. A draft of those recommendations is available at WGA's website, www.westgov.org.

PCI Board member and WGA Executive Director Jim Souby was a key organizer of the event.

Assessing Applicability of the UMA in Your State

The Uniform Mediation Act was adopted in August 2001 by the full National Conference of Commissioners on Uniform State Laws. In February, the ABA's House of Delegates followed suit and voted to endorse the Act, and in April, the Association for Conflict Resolution conditionally approved it.

According to UMA observer Ron Kelly, the desirability of this Act has been hotly debated in a number of states, particularly those that currently have what they consider to be stronger protections. To clarify the intent of the Act, the ABA Section of Dispute Resolution released a statement that "The Act is crafted as a minimum level of protection in those states that have none and is not meant to replace stronger confidentiality protections already on the books."

Today, Uniform Law Commissioners across the country are working to replace their state's existing laws with the UMA, in an effort to get law makers to adopt it as the main statute governing mediation in their state. According to the National Conference of State of Commissioners on Uniform State Laws website, the following states introduced the UMA and subsequent legislation:

STATE	BILL #	SPONSOR	STATUS
Neb.	LB 1190	Landis	Interim study
N.Y.	SB 6842	Volker	Senate rules
Okla.	SB 1557	Coffee	died
N.C.	HB 4499	Campsen	House judiciary
Vermont	HB 595	Osman	died

Now that the Uniform Mediation Act has passed, how can your state decide whether to adopt it, or to assess its impacts?

This may be an opportunity to determine whether the UMA, or other

“The Act is crafted as a minimum level of protection in those states that have none and is not meant to replace stronger confidentiality protections already on the books.”

changes in legislation, could help overcome some of the legal barriers to use of ADR in your state.

In making such an assessment, states will want to look at:

State DR Structures and Capacity:

What are the state structures for delivering DR services? In the state court system? In administrative agencies? ALJs? Attorneys General offices? The private sector?

Coordination: What kinds of mechanisms exist to ensure coordination among state DR programs?

Legal Authority: What is the legal authority for use of dispute resolution? What kinds of statutes regarding ADR are on the books? Are they being used?

If so, to what effect? If not, why not?

- What DR processes are authorized? How are they defined? How are they linked to traditional mechanisms?

- What is the interplay with the Administrative Procedures Act and non-APA procedural requirements?

- Are there general provisions concerning confidentiality? How do existing confidentiality or privilege provisions comport with the UMA? How do these provi-

sions relate to openness in government requirements?

- Are there provisions for oversight? For feedback and evaluation?

Resources: What kinds of resources are available to support the use of DR?

Barriers: What are the current barriers to the use of dispute resolution in the state? Are there mechanisms that can be developed in law or policy that will help overcome those barriers?

At the American Bar Association's ADR section meeting in April, panelists from DR programs in Oregon, Florida, Texas, and California described how they have assessed the legislative framework in their states. Each of these states say they are unlikely to adopt the UMA because they have well developed legislative frameworks for ADR and have had confidentiality provisions in place for some time.

Nevertheless, other states can benefit from their assessment method. It includes a tool designed by Mike Niemeyer, newly named Director of the Oregon Dispute Resolution Commission, which examines a continuum of approaches that states can employ to determine what kind of policy framework would work best. On one end of the continuum is "little or no institutionalization of ADR", and on the other is "statutes and rules that prescribe when and how ADR is used."

According to Niemeyer's tool, the scenarios to consider include:

- The various approaches to ADR are left to the discretion of all involved, or to market forces.
- ADR professional organizations provide guidance or regulation of members and education to government.

Continued on Page 4

Assessing the UMA in States...

Continued from page 1

- Government adopts permissive statutes, rules or policies.
- Government adopts prescriptive statutes, rules or policies.

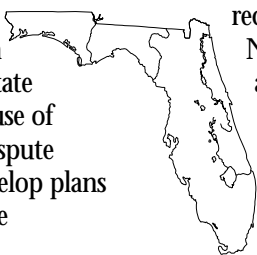
Using this kind of assessment process, leaders in your state could work together to decide how to approach the UMA and whether there are other provisions that ought to be incorporated in the legislation to strengthen the state's ADR programs. Then they can work together to build support among providers and programs, and with policymakers, in support of the legislation.

Institutionalizing ADR Practices				
	Little or no institutionalization of DR		Statutes & rules prescribe when and how DR is used	
	DR methods left to discretion of all involved or to market forces	ADR professional organizations provide guidance	Gov't (state & local) adopts permissive statutes, rules or policies	Gov't adopts prescriptive statutes, rules or policies
ADR use by state government				
Mediation confidentiality				
Mediator/mediation best practices, ethics				
ADR use in complex public policy disputes, admin. hearings, courts and schools				

source: Mike Niemeyer

Governor Bush Signs DR Executive Order

Florida Governor Jeb Bush signed an executive order in March requiring 15 executive state agencies to assess their current use of dispute resolution, appoint a dispute resolution coordinator, and develop plans to increase agency use of dispute resolution.



recently adopted by governors in New Mexico, Utah, Oregon, and Massachusetts.

The Florida Conflict Resolution Consortium will work with Gov. Bush's office to develop an implementation plan. The Consortium, according to

Director Bob Jones, will provide technical assistance and training to executive agencies and the governor's office in the coming year as they undertake agency DR assessments, develop their DR plans and annual reports, and evaluate and document their experiences with the use of dispute resolution.

The pursuit of an executive order began several years ago, after the Florida legislature supported a study to evaluate the effectiveness of Administrative Procedures Act provisions encouraging agencies to use mediation for contested actions and negotiated rulemaking. Few agencies took advantage of the Act.

Even after the Act was reformed and new implementing rules were drafted by a State Bar committee, few agencies were

requesting mediation in contested cases or for negotiated rulemaking. The aim of the study, conducted by the Consortium, was to determine the extent to which agencies were using mediation, identify barriers to the use of mediation by agencies, and provide policy recommendations.

"The first and preeminent recommendation called for the development of an executive order as an initial, key step by leadership," Jones explained. "Then the Consortium began working with the governor's office to start developing and promoting an order."

Jones says the impact of the order in Florida is likely to be significant. "It is going to provide the green light for agencies to really use these tools in ways that go beyond the simple statutory or enabling piece that the 1996 legislation provided." The order, he said, "helps to frame and more clearly underscore that dispute resolution and consensus building is good public policy."

The order also should benefit practitioners in the state, Jones said. "If

Continued on Page 5

Mike Niemeyer Named Director of ODRC

The Oregon Dispute Resolution Commission (ODRC) has appointed Mike Niemeyer as Executive Director. Niemeyer replaces Susan Brody, who served as ODRC Director for three years.

Brody has begun a consulting practice focusing on land use and transportation planning, project management, and collaborative problem solving. She also is under contract to Portland State University to coordinate a training program for Chinese land use professionals on sustainable land use and development practices.

Brody said Niemeyer worked closely with ODRC's public policy DR program over the past six years as ADR Coordinator for the Oregon Department of Justice. "Mike has in-depth knowledge of dispute resolution in Oregon," Brody said. "He is especially committed to

continuing Oregon's leadership in developing effective program evaluation tools."

Niemeyer has 13 years of experience in dispute resolution, and extensive background in public policy and community mediation as well as victim-offender and state government experience — most recently at the Department of Justice. As a member of the Governor's Dispute Resolution Steering Committee, Niemeyer has worked closely with the Department of Administrative Services, the Governor's office, other state agencies and ODRC to expand dispute resolution services throughout Oregon.

Prior to coming to Oregon, Niemeyer was founder and manager of the Institute for Conflict Management in California, a large community dispute resolution program.

"The Oregon Commission really has a broad scope," Niemeyer said, "and I'm looking forward to working with both the community and public policy dispute resolution programs."

He said the Oregon program, like other states around the country, is facing a huge deficit and the challenge of keeping DR afloat. "We will be continuing to look at ways to respond to the greater need for accountability, and demonstrating the measurable accomplishments of dispute resolution initiatives in the state."

Because much of what the Commission does is intangible, Niemeyer says he is soliciting tangible items from consensus processes around the state for a new Dispute Resolution Museum. The collection so far includes a salmon skeleton, illustrating the commission's involvement in a salmon passage task force, and a piece of curb from the successful multi-stakeholder access management process. "This will help us to really tell the story of collaborative dispute resolution when we go out to the schools and the legislature," Niemeyer mused.

FL Consortium Weighs In

The following letter was printed in the April 2002 issue of Governing Magazine in response to an in-depth article the previous month that featured the Montana Consensus Council.

Alan Ehrenhalt's "Meetings of the Minds" [Assessments, February] highlights an important trend toward growing leadership support at the state level for consensus building, one that goes far beyond Montana. During the past decade, as Florida became the nation's fourth most populous state, its leaders have (without fanfare) increasingly turned to consensus building and dispute resolution techniques.

For the past 14 years, Florida's Conflict Resolution Consortium — a neutral center created by the legislature and based at Florida State University — has been assisting state and local governments and private interests with problem solving on public issues, including facilitating consensus with

18 statewide policy commissions set up by the governor and legislature.

The consortium has organized successful consensus processes in key areas, including Everglades restoration, updating the controversial state transportation plan, and a four-year ongoing effort to reach consensus on new uniform state building codes. Thanks to these and other successes, Governor Jeb Bush — following the lead of several other governors — issued an executive order requiring all state agencies to establish dispute resolution and consensus building in their planning and regulatory efforts.

Florida is only one of a growing number of states with consensus-building programs. These state level efforts represent smart investment in the "ounce of prevention," while facilitating better ways for dispute resolution to achieve a more cost-effective "pound of cure."

*Robert M. Jones, Director
Florida Conflict Resolution Consortium*

Governor Bush Signs EO...

Continued from page 4

the EO starts to produce even modest gains, it will create a synergy with practitioners. They will be able to go to the agencies and become more involved in public service work."

Jones said one of the Consortium's first steps is to promote the executive order so that DR processes are more central to state agencies' core functions. "One of the next leadership challenges will be who steps forward from among secretaries and general counsels to champion this approach as an opportunity to innovate and improve productivity. They will help model this for the other agencies."

Partnering Program Saves ADOT Millions

Arizona's Department of Transportation, like others around the country, spent much of the last several decades buried in litigation. At the start of the 1990s, ADOT had 60 unresolved claims totaling nearly \$40 million.

In addition, major construction projects were consistently running behind schedule, with no incentives for change. Administering construction contracts—about \$1 billion worth—was proving more and more difficult both for ADOT and the Corps of Engineers.

In frustration, the Corps of Engineers and ADOT asked a state university for help in developing a model for administering construction contracts more effectively. They were put in touch with Charles Cowan, a colonel in the Corps of Engineers known as a champion of the partnering model, and invited him to speak at a two-day conference.

At that conference, 750 participants from Arizona's transportation, engineering, and construction sectors learned about the strategy and benefits of partnering, said Ginger Murdough, who now heads ADOT's partnering section. "They decided then that this is the way we're going to do business in Arizona."

Partnering, as defined by ADOT and the American Association of State Highway Transportation Organizations (AASHTO) is a process of collaborative



CASE STUDY

teamwork to achieve measurable results through agreements and productive working relationships. It is seen by many as a form of risk management in which participants jointly develop a vision of a project, then use that vision to identify and manage the risks and general direction of a construction project.

At the conference in Arizona, participants' initial hope was that partnering would enable ADOT projects, most of which were ending at least 8 percent behind schedule, to finish on time. "We hadn't done a lot of measurement or benchmarking at that stage," Murdough said. "We had the knowledge that we weren't finishing on time, but that was it. So that issue alone was reason enough to try it."

As partnering got underway, ADOT began tracking those projects and how many days were being saved. "The results were amazing," Murdough said. Projects started finishing not just on time, but ahead of schedule, and the number of claims began to dwindle. In addition, ADOT no longer needed a "claims group." Instead, the focus shifted to building partnerships, and a "Partnering

Team" emerged.

Today, says Murdough, after more than 1,100 partnered projects, ADOT has stayed out of litigation on construction claims, and projects are finishing 8 to 10 percent ahead of schedule. Overall, partnering initiatives have saved ADOT up to \$35 million.

The success is due in large part to resolving the issues throughout the project, Murdough said.

"A collaborative environment allows people to be creative," she said. "In Arizona, ADOT and the contractors worked out incentives that boost productivity and quality. Contractors have the opportunity to earn incentive payments based on their performance. They can earn the incentive and the public benefits because the project is delivered more quickly and with the same quality."

ADOT's "issue resolution" process provides a method of working through issues jointly as they arise, while also documenting the issues so parties have records, in the event a case goes to arbitration. "People do file claims," Murdough explained, "but they go through the issue resolution process, so most issues get resolved without arbitration."

Issue resolution at ADOT involves a ladder approach with four "levels of empowerment." At the first level are project stakeholders (including key stakeholder groups, field-level partners, ADOT foremen, inspectors, etc.), who work to resolve issues among themselves. If they are not successful, the issue goes to resident engineers and contract managers. If unresolved at that level, it escalates to the district engineer or the contractor's regional manager. From there it moves to the final level—the state engineer's office and the contractor's CEO or president.

Cases still unresolved go to arbitration, then litigation. Since 1996, three cases have had formal arbitration. None have been litigated.

Murdough said resident engineers have up to \$50,000 to spend on resolving issues. District engineers are empowered to resolve issues up to

ADOT PARTNERING CONSTRUCTION CONTRACTS SINCE JULY 1991	
Completed contracts	1,140
Contract days saved	15,405
Average time saved	8.2 percent
Construction engineering savings	\$27.6 million
Construction value engineering savings	\$7.9 million
Over-project bid amount (including contingencies, incentives/bonuses, revisions, omissions and additional work paid by others)	9.8 percent
Arbitrated construction claims reported since 1996	3
Total Construction Dollars	3.2 billion

Continued on Page 7

DR DIGEST

NC INSTITUTE FOCUSES ON ENVIRONMENTAL JUSTICE

The Ford Foundation has awarded \$200,000 to the North Carolina State University Natural Resources Leadership Institute's initiative, "Leadership for Environmental Justice." The objectives of the initiative are 1) to build capacity in low-resource communities so people can effectively make decisions and resolve environmental policy issues; 2) to provide training in low-resource communities in collaborative problem-solving and principled negotiation; and (3) to establish new social and professional networks among and between people in low-resource communities and government agencies, industries, and environmental and educational organizations.

Thirty environmental justice

advocates will participate in skill building workshops over a six-month period. The program is among the first in North Carolina to offer negotiation and collaborative problem-solving training to minority environmental health/social justice advocates.

WYOMING MOVING FORWARD WITH DR

Mike Sullivan, former Governor of Wyoming and former Chair of PCI's Board, has been named Chair of the Institute for Environment and Natural Resources (IENR) at the University of Wyoming. IENR promotes collaborative approaches to environmental and natural resource issues affecting the west. At its recent meeting, the IENR Board established a committee to explore the feasibility of a Wyoming

Consensus Council or other type of state program. PCI Co-Executive Director Dick Gross has been working with IENR as it moves forward with plans for a state DR program.

TEXAS PROGRAM TRAINS POLICY MAKERS

The University of Texas School of Law in April held its sixth Fellows Training in public policy conflict resolution and collaborative problem solving. The Center for Public Policy Dispute Resolution at UT sponsors this training biannually for high-level government policy makers, public and private interest group leaders, and experienced Texas mediators. PCI Co-Executive Director Chris Carlson was a featured presenter at the training, focusing on instituting the use of collaborative processes in state government in Texas and nationally. Jan Summer, Center Director and new PCI Board member, leads the Fellows Program.

ADOT Partnering Saves Millions . . .

Continued from Page 6

\$250,000. Ground rules, established at the beginning of each partnership, set a specific length of time the parties may spend at each level. ADOT provides printed material to every stakeholder describing the "resolution steps," and outlines the process for people entering it for the first time.

"An important piece of information," says Murdough, "is that there's no shame in NOT resolving an issue." The escalating process is set up to handle any outcome.

Critics of ADOT's partnering plan, and construction partnering in general, worry that such programs are expensive and bureaucratic. But Murdough says the data in Arizona don't support those claims.

"It actually saves money, because it provides opportunities for value engineering, early completion, and zero or low legal costs" she said. "Because ADOT splits value engineering savings with the contractor, there's an incentive for the contractor to come up with ways to save money."

After a decade of work on a successful partnering program, and in following the experiences of other states, Murdough is unwavering in her support for the process. "Partnering works," she says. "But you have to have a major commitment to this. It takes a lot of effort."

Caltrans Offers Partnering Resources

The Partnering Steering Committee of the California Department of Transportation has produced a video to use in training field personnel and crews on the approaches and benefits of partnering.

Caltrans, which has a successful construction partnering program, also offers a comprehensive "Partnering Field Guide" that walks users through every aspect of carrying out a Caltrans partnership. Find the guide at www.dot.ca.gov/hq/construc/partnering.html.

USDA CERTIFIES NY AGRICULTURAL PROGRAM

The State of New York and the Unified Court System's State Office of ADR have received \$200,000 in federal monies for fiscal year 2002 to institute the New York State Agricultural Mediation Program. The joint program, which becomes one of 29 states with a USDA-certified mediation program, will be involved with a number of different types of agricultural disputes, including farm and housing loans, wetlands issues, conservation compliance, and pesticide use. The State ADR Office will collaborate with the New York State dispute Resolution Association to manage day-to-day operations of the new program.

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NEW PCI PUBLICATION — “Governing Tools for the 21st Century” is a 12-page overview of how state leaders are using collaborative problem solving and dispute resolution. It describes the range of ways state agencies across the country are employing these tools in their day-to-day operations.

The booklet includes a description of the 10 key practices for integrating the use of collaboration and dispute resolution, and offers information about where to go for further resources.

“Governing Tools...” is an excellent introduction for new leaders, agencies, and other government employees who are considering the use of consensus building and dispute resolution methods.

Contact PCI to request copies.