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POLICY CONSENSUS INITIATIVE

STATES MEDIATING CHANGE
USING CONSENSUS TOOLS IN NEW WAYS



This report is meant for governors, attorneys general, legislators, and other state officials. The Policy Consensus Initiative is newly formed to encourage states to use the tools of conflict resolution to resolve policy disputes and negotiate change in order to benefit all citizens.

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*The Policy Consensus
Initiative gratefully
acknowledges the support
of The William and Flora
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State Offices of Dispute Resolution

Following is a list of 30 state dispute resolution programs that have been identified to date.

ALABAMA

Alabama Center for Dispute
Resolution
415 Dexter Avenue, P.O. Box 671
Montgomery, AL 36101
(334) 269-0409
Email: adr@alabar.org

ALASKA

Resource Solutions
University of Alaska
Environment and Natural
Resources Institute
707 A Street
Anchorage, AK 99501
(907) 257-2716
Email: mjkingbk@aol.com

ARKANSAS

Arkansas ADR Commission
Justice Building
625 Marshall Street
Little Rock, AR 72201-1020
(501) 682-9400, Ext. 1332
Email: ArkansasAOC@com-
puserve.com

CALIFORNIA

California Center for Public
Dispute Resolution
Joint Program of California State
University
Sacramento and McGeorge
School of Law
980 Ninth Street, Suite 300
Sacramento, CA 95814
(916) 445-2079
Email: sacjean@saclink.csus.edu

COLORADO

Office of Dispute Resolution
Colorado Judicial Department
1301 Pennsylvania Street,
Suite 110
Denver, CO 80203-2416
(303) 837-3667
Email: csavage@usa.net

FLORIDA

Florida Conflict Resolution
Consortium
Florida State University
The Shaw Building, Suite 132
2031 East Paul Dirac Drive
Tallahassee, FL 32310
(850) 644-6320
Email: flacrc@mailers.fsu.edu

Florida Dispute Resolution
Center
Supreme Court Building
500 South Duvall Street
Tallahassee, FL 32399-1905
(904) 921-2910
Email:
press@wpgate.courts.state.fl.us

GEORGIA

Georgia Office of Dispute
Resolution
Supreme Court of Georgia
800 The Hurt Building
50 Hurt Plaza
Atlanta, GA 30303
(404) 527-8789
Email: bartona@mindspring.com

HAWAII

Center for ADR
P.O. Box 2560
Honolulu, HI 96804
(808) 522-6464
Email: ekent@hawaii.edu

INDIANA

Indiana Conflict Resolution
Institute
Indiana University
School of Public &
Environmental Affairs
Room 330
Bloomington, IN 47405-2100
(812) 855-1465
Email: lbingham@indiana.edu

IOWA

Iowa Peace Institute
917 10th Avenue
P. O. Box 480
Grinnell, IA 50112
(515) 236-4880
Email: iapeacei@ac.grin.edu

KANSAS

Dispute Resolution
Office of Judicial Administration
Kansas Judicial Center
301 West 10th Street
Topeka, KS 66612
(785) 291-3221
Email:
oldham@lawdns.wuacc.edu

MAINE

Court ADR Service
RR#1, Box 310
West Bath, ME 04530
(207) 442-0227
Email: dekenty@aol.com

MASSACHUSETTS

Office of Dispute Resolution
Commonwealth of Massachusetts
Saltonstall Building, 14th FL
100 Cambridge Street,
Room 1005
Boston, MA 02202
(617) 727-2224, ext. 315
Email: fkay@state.ma.us

MICHIGAN

State Court Administrative Office
Box 30048
Lansing, MI 48909
(517) 373-4839
Email: vaneppsd@state.mi.us

MINNESOTA

MN Office of Dispute Resolution
340 Centennial Office Building
St. Paul, MN 55155
(612) 296-2633

MONTANA

Montana Consensus Council
Office of the Governor
State Capitol Building
Helena, MT 59620
(406) 444-2075
Email: cg2061%zip02@mt.gov

NEBRASKA

Office of Dispute Resolution
Supreme Court of Nebraska
Admin. Office of the
Courts/Probation
P.O. Box 98910
Lincoln, NE 68509-8910
(402) 471-3148

NEW HAMPSHIRE

New England Center Program on
Consensus and Conflict
Resolution
University of New Hampshire
11 Brookway, Room 207
Durham, NH 03824
(603) 862-2051
Email: jsv@bopper.unh.edu

NEW JERSEY

Office of Dispute Settlement
CN 850, 25 Market Street
Trenton, NJ 08625
(609) 292-1773

NORTH CAROLINA

Institute of Government
University of North Carolina
Campus Box 3330
Chapel Hill, NC 27599-3330
(919) 962-5190
Email:
Stephens.iog@mhs.unc.edu

NORTH CAROLINA

North Carolina Dispute
Resolution Commission
P.O. Box 2448
Justice Building
Raleigh, North Carolina 27602
(919) 715-1701
Email: leslie.ratliff@aoc.state.nc.us

NORTH DAKOTA

North Dakota Consensus
Council, Inc.
1003 Interstate Avenue, Suite 7
Bismarck, ND 58501-0500
(701) 224-0588
Email: spears@agree.org

OHIO

Ohio Commission on Dispute
Resolution and Conflict
Management
77 South High Street, 24th Floor
Columbus, OH 43266-0124
(614) 752-9595
Email: CDR_mone@ohio.gov

Ohio Office of Dispute
Resolution
Supreme Court of Ohio
30 East Broad Street
Columbus, OH 43266-0419
(614) 752-4700
Email: pruette@sconet.ohio.gov

OKLAHOMA

Oklahoma Administrative Office
of the Courts
1915 North Stiles, Suite 305
Oklahoma City, OK 73105
(405) 521-2450
Email: tates@OSCN.net

OREGON

Oregon Dispute Resolution
Commission
1174 Chemeketa Street, NE
Salem, OR 97310
(503) 378-2877
Email: odr@igc.apc.org

TENNESSEE

The Commission on Alternative
Dispute Resolution
Administrative Office of the
Courts
511 Union Street, Suite 600
Nashville, TN 37243-0607
(615) 741-2687, ext. 135
Email:
IB271RI@smtpaoc.tsc.state.tn.us

TEXAS

Center for Public Policy Dispute
Resolution, Univ. Of Texas Law
School
727 East 26th Street
Austin, TX 78705
(512) 471-3507
Email:
jsummer@mail.law.utexas.edu

VIRGINIA

Dispute Resolution Services
Supreme Court of Virginia
100 North Ninth Street
Richmond, VA 23219
(804) 786-6455
Email:
GRavindra@courts.state.va.us

The States' Need for Conflict Resolution

This report describes how states can benefit by using the processes of conflict resolution to deal with many of today's differences over policies.

More than ever, the states are laboratories of democracy as they struggle to manage the complexity and divisiveness surrounding today's tough policy issues. Several factors intersect to make this so. One is that state governments have an increased load as more responsibilities devolve to them from the federal government. Another is that term limits for legislators and other office holders and downsizing of executive branch staffs affect the experience level and capacity of state leaders to manage policy disputes. A third factor is familiar: The complex issues that states must deal with often impact not just statewide matters but the crucial interests of local government and the private and not-for-profit sectors.

How can governors and state legislators respond to these factors? Lessons that began to be learned in the 1980s point to a convincing answer for today. First in dealing with environmental issues, then in other areas of policy development and disputes over implementation, several states experimented with conflict resolution. They learned that lasting, successful resolution of difficult policy issues requires that all affected stakeholders play a part in the decision-making if disputes are to be resolved. They found that the processes of conflict resolution—mediation, facilitation, collaborative problem-solving, and consensus-building—can help fashion better policies and better tools for implementing policies.

Here are a few examples.

- In Texas, a negotiated rulemaking involving nursing home interests and patient advocates establishes regulations for allocating valuable Medicaid beds.
- In Colorado, state health officials, gay men, and coalitions representing the poor and people of color help mediate a plan for dispensing federal dollars for HIV prevention.
- Eight states—Illinois, Michigan, Wisconsin, Minnesota, Indiana, Ohio, Pennsylvania, and New York—and the federal government mediate a 90-year dispute over the rights to Lake Michigan's waters.
- In Florida, facilitators guide a governor's work group of key stakeholders to devise recommendations for providing much-needed affordable housing.
- In Oregon, a process that musters local public support and teamwork among various levels of government is essential to carrying out a plan to restore coastal salmon populations and fisheries.

Principles of Consensus Building

- Arriving at a common information base about the source(s) of a problem
- Separating the people from the problem
- Focusing on interests instead of positions
- Brainstorming win-win options
- Reaching a solution that serves everyone's interests

A Conflict Resolution Glossary

Here are some basic terms in the practice of conflict resolution.

ADR- Appropriate dispute resolution

Negotiation- Disputing parties engage in discussions to explore their interests and needs in an effort to reach agreement.

Facilitation- An impartial third party provides guidance to design and manage the communication process. Specifically, a facilitator helps a group work toward effective participation and communication to resolve a problem or address a set of related issues.

Mediation- An impartial third party assists disputing parties in reaching a mutually acceptable agreement. The mediator guides the parties in developing their own resolution of the issues and does not impose a decision on them.

Collaborative Problem Solving- Parties work together to define problems and generate options and objective criteria to reach decisions by consensus (see below). A third party may provide facilitation for the group.

Consensus- All people who have a stake in an issue or conflict work together toward common understanding and agreement that satisfies all their interests. Consensus is not compromise. Compromise involves a resolution of differences in which each side makes concessions or agrees to settle for something in the middle.

Sharing a Common Element

These examples, which we examine in case studies, share a common element. Some states are settling actual and anticipated public policy differences within their borders and with other states by building consensus. In democracy's laboratories, they are fostering the use of conflict resolution tools to solve problems, forge agreements, and negotiate change.

Conflict resolution processes can defuse potentially rancorous and prolonged conflict. They can help lower voices raised in disagreement. They foster resolution of complex issues to the satisfaction of all parties having a stake in them. Through consensus building, constructive change occurs. As we note throughout the report, governors and other state leaders are voicing their support for consensus building and other tools of conflict resolution. And some states are using the tools of conflict management and consensus building broadly. Examples:

- The Massachusetts Office of Mediation has handled 33 wetlands mediation cases during the past four years.
- The Florida Conflict Resolution Consortium mediated more than 60 environment enforcement cases in 1996.
- The Oregon Public Policy Dispute Resolution Program funded 70 cases involving disputes tied to the state's natural resource and land use agencies.

But even though hundreds of public policy matters have been resolved using the tools of conflict resolution, these instances are relatively rare when matched against the supply of disputes affecting the public good in state after state. And although conflict resolution processes have experienced growing use in the legal system, they are only beginning to be employed in the policymaking arms of government, in the executive and legislative branches.

Q & A: Using Mediated Approaches

Question. Why are state officials interested in using mediated approaches to resolving public policy disputes?

Answer. Policy conflicts are the business of political life. Governors, legislators, and others are used to negotiating and mediating the resolution of conflicts. But over the past 25 years policy conflicts have become more complex and the public more frustrated and angry over the growing list of seemingly intractable problems. While officials are working very hard to listen and be responsive to citizens, they recognize that they need more than typical public involvement techniques. They are struggling to find effective ways to give citizens a more active role in making choices and setting priorities.

Q. That's why they are turning to mediated approaches?

A. Yes. The past 25 years have seen a steady growth in the use of methods for building consensus among competing interests that enable officials to put new policies in place. These methods successfully complement traditional processes when used appropriately by public officials. They are not intended to replace traditional legislative, regulatory, administrative, and judicial mechanisms.

Q. When do elected officials find these tools most useful?

A. It is often critically important for governors, legislators, attorneys general, and other public officials to personally serve as mediators or negotiators. But with ever-increasing pressure from interests to be more directly involved in resolving issues, officials run out of time and resources to mediate all the issues that are out there. Building consensus on complex, contentious issues is time-consuming, espe-

cially when there are many interests involved. And when issues are contentious, the parties may need help to work out agreements among themselves. State leaders can turn to state dispute resolution offices to help structure multiparty negotiations in ways that increase the chances that parties will be able to find agreement.

Q. Are there some kinds of issues that particularly lend themselves to the use of mediated approaches?

A. The case studies reported here are good examples of the breadth of issues that have been successfully addressed. Many controversial issues lend themselves to solution by involving all the stakeholders in a collaborative problem solving process. As in the Lake Michigan case study, mediated approaches may be especially useful for intergovernmental and regional issues. Issues often spill over traditional government boundaries and require the involvement of many units of government for their resolution.

Q. When shouldn't these approaches be used?

A. There are issues that are not appropriate for collaborative problem solving. Some examples are when the political climate is not favorable, when decisions have to be made quickly, when key parties are unwilling to participate or unable to be represented effectively, and, in some cases, when legal precedent needs to be established.

Q. How can these new approaches help state government function more effectively?

A. Businesses, governments, and citizens, frustrated by years of litigation and stalemate, have begun to turn to these processes, sometimes out of desperation. These approaches are usually less costly than litigation. But more importantly, they are being used to demonstrate that the diverse interests are competent to inform themselves about the issues, work out their differences, and jointly design solutions that their elected representatives can ratify. These kinds of collaborative stakeholder processes are springing up across the country and their use can help restore confidence in government. Political leaders can play a role in sponsoring or initiating the use of these approaches.

Q. How can state officials take advantage of these new approaches?

A. The Policy Consensus Initiative (PCI) and a network of existing state programs stand ready to assist officials in establishing conflict resolution and consensus building efforts as a part of state government.

State Officials Speak Out

Governors and other state leaders around the nation are turning to the tools of consensus building and mediation to resolve conflicts that affect the public interest and to develop and implement productive state policies. For example, in 1997, the Western Governors' Association passed a resolution that states:

Consensus building represents a set of concepts and processes—collaborative problem solving, mediation, facilitation—that can be used by states to craft better policies and better tools for implementing them. Such methods are already being employed in the legal system, but they are not yet widely accepted by state government. However, those states which have adopted consensus building processes as an essential tool of policy making have met with considerable success in improving government performance.

The resolution supports “the development and enhancement of structured consensus building programs as an essential part of state government.”

Individual governors and other state leaders similarly favor the use of consensus-building tools. They are quoted throughout this report.



States are helping introduce new ways to resolve problems and disputes. Just as business has discovered dispute resolution methods can cut legal costs and help preserve business relationships, we in state government are introducing these methods to help produce more effective, less costly resolution of conflicts involving government and citizens.

*Governor George V. Voinovich
of Ohio*

Case Studies

Following are five examples illustrating how state leaders are using conflict resolution and consensus-seeking processes to resolve difficult policy dilemmas.

Negotiating the Allocation of Medicaid Beds

The Problem

An expose in the Austin American-Statesmen about widespread nursing home abuses prompted the Texas legislature to act. There were reports of egregious negligence. Nursing homes were being investigated across the state. Many suffered disciplinary action.

Legislators wanted to crack down on nursing homes by taking away unused beds that had been allocated for Medicaid patients. It was estimated that of about 115,000 Medicaid beds in Texas, only about 50,000 to 60,000 were occupied.

In 1997, the legislature passed a bill that extensively changed the state's regulatory framework for nursing homes. A section of the bill called for decertifying and reallocating valuable Medicaid beds. The section was brief, with little elaboration. Basically it said that unused Medicaid beds in nursing homes were to be decertified and decertified beds reallocated to other nursing homes.

The measure had significant financial consequences. Nursing homes in Texas held on to as many Medicaid beds as they could get because they could borrow money off projected revenue streams from the beds, even if the beds were unoccupied.

The state agency that primarily regulates nursing homes is the Texas Department of Human Services (DHS). Its challenge was to develop regulations to implement what was the legislature's brief and somewhat vaguely worded action on Medicaid beds.

The department decided that creating these regulations was an apt subject for the first regulatory negotiation (reg-neg) to be convened under a new Texas Negotiated Rulemaking Act. Reg-neg, or negotiated rulemaking, is defined as a form of public policy mediation where parties having a stake in proposed government regulations reach agreement on key provisions through the assistance of mediators and facilitators.

The Process

The reg-neg process began when Paul Leche, deputy general counsel for DHS, convened the reg-neg and identified key people willing to take part in negotiations. The players included representatives of the American Association of Retired Persons (AARP), Texas Advocates for Nursing Home Residents, Advocates for Nursing Home Reform, the Texas Health Care Association, the Texas Association of Homes and Services for the Aging, the Texas Department of Aging, and the Texas Health and Human Services Commission.

Opposing poles in the reg-neg were the politically influential AARP and the nursing home industry, which was defensive about decertification because of the specter of diminished revenues and borrowing power. DHS worked with the Center for Public Policy Dispute Resolution at the University of Texas School of Law in Austin to get the process underway and select the facilitators.

The reg-neg committee held its first session on October 31, 1997 against a backdrop of skepticism on the part of several stakeholders and DHS personnel that consensus could be reached. Patients'



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Mediation works because it is built on the good sense of the people. People either rise to or descend to the expectations you have of them. I like to expect good sense.

Governor Marc Racicot of Montana

advocates and nursing home representatives were leagues apart on the pivotal matter of mechanisms governing decertification of Medicaid beds and their reallocation.

The first and perhaps the most important procedural step in the reg-neg was the development of the committee's agenda: What should be the order of issues considered? Decertification of beds was certain to be the most contentious issue because it meant inevitably taking beds from at least some nursing homes. The industry was sure to strongly resist such action, and patient advocates were sure to press hardest on this point. Reallocation, on the other hand, was likely to go smoother because it would be keyed to determining how nursing homes could obtain more beds, or even how they could get decertified beds back.

The facilitators chose to put reallocation of beds first on the agenda. They hoped that if the parties could agree on a reallocation method, then the concerns of the industry on decertification might be allayed. A reallocation system was developed fairly rapidly and the committee moved on to decertification. Assured that lost beds could be recovered, decertification became less contentious.

Over eight sessions that lasted into February, the dozen or so committee members around the reg-neg table found common ground on rules covering Medicaid beds. En route to agreement was a good deal of negotiation, information sharing, and facilitated dialogue—familiar ingredients in the successful resolution of conflicting positions.

All sessions were open to the public. The news media were expected, but never attended. Staffers of various legislators were present as, for several sessions, was a member of the legislature who developed an interest in the dynamics of regulatory negotiation. Representatives of organizations that lend money to nursing homes attended most sessions and communicated their concerns through parties at the reg-neg table.

The Result

Key to this reg-neg success was hammering out acceptable formulas on bed decertification and reallocation. The new formula for decertifying Medicaid beds involved setting a base occupancy rate of 85 percent.

Nursing homes that wanted more Medicaid beds had to have at least a 95 percent occupancy rate for their current Medicaid beds, according to the reallocation formula devised by the committee. Homes that met this threshold could seek a 10 percent increase over their current number of occupied Medicaid beds.

Another key aspect of the agreement, urged by AARP, was that nursing homes petitioning for reallocation of Medicaid beds had to requalify for receiving them under stricter quality of care standards.

It is difficult to estimate specific savings stemming from the reg-neg's outcome. However, most parties agreed that development of the rule through the traditional process would not have yielded a final rule as rapidly, and that litigation would have been possible with a rule unsatisfactory to either side.

Also important was the legislative scrutiny that was focused on the rule. DHS could have lost legislative support if the rule had been viewed as soft on the industry. The legislative agendas of the other parties might have been hindered if they were seen as bad actors in a traditional rulemaking. By allowing the parties to work together and reach consensus, all interests seemed better off.



The old approach gave neither side what it wanted. If you involve the people who must live with your policy, there's a decent chance you'll get buy-in and ownership of the process. Based on the progress we've made through a collaborative process, I wouldn't hesitate to use a similar approach to some other area of conflict.

Governor Tom Carper of Delaware

Allotting Resources for HIV Prevention

The Problem

When the Centers for Disease Control (CDC) announced it would distribute money to the states for HIV prevention programs, it included a pivotal condition: To a considerable degree, the amount of money a state received would depend on how well the state engaged all concerned parties in agreeing on the state's HIV prevention plan.

For the Colorado Department of Public Health and Environment, CDC's condition raised two questions. The first was straightforward: how to comply with CDC's demands, thus securing for the state as much funding as possible for HIV prevention?

The second question was more complicated, raising issues of centralization versus decentralization in allocating resources for HIV prevention. Who should be guiding HIV prevention? The state health department? Community-based organizations? Or those who are infected or affected by it?

State health department personnel were inclined to believe that they were the best ones to ensure that HIV prevention programs were effective. A range of opinion existed in the department about how much control it should retain. Local health departments, which get much of their funding from the state, also tended to believe that public agencies should hold prevention funds fairly close, again in the name of effectiveness.

But organizations of gay men, advocacy groups for the poor and people of color, and support organizations wanted the state health department "to let go, to stop controlling how HIV prevention would be done," in the words of one observer.

The Process

In January, 1994, the state department of health received the CDC directive and assembled a coordinating committee of interested parties. Its purpose was to design a community planning process and to convene a group to develop a statewide plan for preventing the spread of HIV.

To mediate the community planning process, the coordinating committee hired the National Civic League, an organization fostering community-based problem solving, and CDR Associates, a Colorado-based conflict resolution organization.

The statewide planning group was called Coloradans Working Together: Preventing HIV/AIDS. The acronym became CWT. Its first meeting was held on July 10, 1994, and the process design phase had done its job. A total of 110 participants showed up, including

- persons with HIV, some who also had AIDS
- gay men
- representatives of the African-American, Latino, and Native-American communities
- HIV prevention specialists from community-based organizations, local health departments, and the state health department
- doctors, nurses, and other health care specialists
- public health educators, case managers, and social workers
- members of various religious organizations



It is important for citizens and government to know how to resolve disputes without litigation or resorting to violence. Ohio is most fortunate to have a commission which helps us learn how to utilize dispute resolution techniques. As a public official, I believe these programs are vital to making Ohio a safer and better place in which to live.

Senator Merle Grace Kearns of Ohio



During my eight years as governor of Wyoming, working with state policy issues and with other Governors, I became a true believer in the necessity of governors, their staffs, and other public officials operating as consensus builders. Given the complexity of the issues, the speed of change, and the diversity of the many constituencies, new tools and skills are required to forge lasting agreements on public policy. What PCI is about, therefore, is essential to enhancing government effectiveness and efficiency.

*Former Governor Mike Sullivan of Wyoming
Chair, Board of Directors
Policy Consensus Initiative*

Mediator Michael Hughes chronicled the progress of the meetings. The July meeting focused on process. An August meeting concentrated on data. Three presentations provided a sense of the degree of HIV infection in Colorado, an evaluation of HIV prevention organizations, and a review of strategies in use to stop HIV transmission.

A first meeting in September brought hard questions about the process, data, the mediators, and the true intentions of the state health department and the CDC. The meeting focused useful discussion on ground rules for the process so that by a second meeting in September the CWT group was ready for substance in a serious way. In that meeting and in subsequent meetings in October, November, and December, the group worked to articulate 14 core needs that a statewide HIV prevention should address. In Hughes' words, "through painstaking negotiation ...the group not only wrote and revised the core element of the plan—word by word—but came to understand, listen to, and respect one another. On December 3, Coloradans Working Together came to consensus in the State of Colorado's 1995 HIV prevention plan."

There are several reasons why a group of this diverse makeup could find common ground on matters such as needle exchange, comprehensive health education, condom availability, and abstinence education.

One reason is that the group forged a shared vision and purpose. Another is that the process was open. No one was excluded. A third reason was that CWT designed a flexible process in which facilitators interrupted only to summarize, bring a discussion to a close, and check for consensus.

The group's ground rules fostered an atmosphere of respect and honesty. Finally, Hughes writes, there was "time to heal wounds. It is difficult to do justice to the depth of grief and fear that permeated CWT's work. CWT members struggled to ensure that their work would do justice to those whose lives have been irreversibly changed by the virus."

The Result

The process resulted in a three-year plan for statewide HIV prevention. The three-year plan was successfully completed. In years two and three, the plan became increasingly decentralized and successfully brought to Colorado more than \$3 million annually in CDC funds for statewide prevention programs, according to Robert Bongiovanni who runs the HIV Prevention project for the state health department.

A new plan, now in effect, guides \$3.7 million a year in CDC funds for HIV prevention in Colorado. The CWT group that charts and approves the plan now has representatives of 28 coalitions and, more than ever, "matches the face of Colorado's HIV epidemic," in Bongiovanni's words.

Mediating the Use of Lake Michigan's Waters

The Dispute

For most of this century, other Great Lakes states and the federal government have been in a recurrent dispute with Illinois over the use of Lake Michigan's waters. The lake is Chicago's primary source of water, and many of the region's sanitary sewer systems use its waters.

Various studies over the years show that taking too much water from Lake Michigan in the Chicago area could lower water levels on all the Great Lakes, affecting navigation, locks, ports, and hydroelectric power development at Niagara Falls.



Between 1906 and 1979, the Great Lakes states were a part of at least four Supreme Court suits against Illinois on the matter. In the 1920s, for example, the states brought an action challenging the right of Illinois and Chicago to take any water out of Lake Michigan. At about the same time, the federal government filed suit to stop Chicago from obtaining more water from Lake Michigan than allowed under limits established by the U.S. Corps of Engineers.

Interstate suits go directly to the Supreme Court. The high court eventually limited the amount of water that Chicago could take from Lake Michigan after 1938 to 1,500 cubic feet per second (CFS) in addition to domestic pumpage.

The case was reopened in 1959 on questions of municipal use and in 1967 the limit was raised to 3,200 CFS for all purposes—municipal use, navigation of Illinois waterways, and water quality matters. In the 1970s, Wisconsin reopened the case, seeking a new way to account for Illinois' diversions of the lake's waters. A decree amendment in 1980 set in motion new accounting procedures that gave the Corps of Engineers some responsibilities for measuring diversions.

By the 1990s, the new accounting procedures showed that Illinois was exceeding the set limitation of 3,200 CFS. In 1995, Michigan spearheaded new legal action. It wrote the clerk of Supreme Court that it would soon reopen the case. Michigan's attorney general asserted that Illinois, Chicago, and Metropolitan Water Reclamation District of Chicago had been diverting more than 3,200 CFS. The stage was set again for years of litigation and the expenditure of millions of taxpayer's dollars.

The Process

At this point, a U.S. Justice Department lawyer, Andrew F. Walch, contacted the states about the possibility of mediating the latest incarnation of the dispute. Officials in charge of alternative dispute resolution at the Justice Department and from the Solicitor General's office convened meetings of attorneys representing the Great Lakes states. Besides Illinois, Michigan, and Wisconsin, Indiana, Minnesota, Ohio, New York, and Pennsylvania had an interest in the negotiations. Some of the initial meetings were described as acrimonious.

Eventually the eight states agreed to try mediation and they and the U.S. government agreed to share the cost of the mediator.

The mediator later summed up what happened: Initially, several parties expressed skepticism that a non-binding, voluntary mediation would produce a durable solution that had previously defied resolution. Nonetheless, they all agreed to try. In less than a year, they produced a framework to permanently settle the dispute.

Representatives from Canada and the Province of Ontario observed the negotiations and took part in discussions.

The Result

In the mediator's words, the solution the eight states devised "affirms Illinois' right to use Lake Michigan water, but within bounds acceptable to the other Great Lakes states."

The agreement, in the form of a memorandum of understanding signed by the eight states, was announced on Oct. 9, 1996. "By choosing to mediate instead of litigate, these states did the right thing," said then-Associate Attorney General John R. Schmidt, who oversaw the Justice Department's ADR program. "This agreement will save millions of taxpayer dollars. Another trip to the Supreme Court wouldn't have done anybody any good."



State government needs to take the lead in the use of creative problem solving and dispute resolution. These tools, used appropriately, have proven to be more effective and efficient ways to address many of the difficult issues that citizens and government face.

Attorney General Christine O. Gregoire of Washington

The Memorandum of Understanding created a process and set key benchmarks for the states to achieve over a three-year period during which no litigation is to be initiated. Among other things, Illinois agreed to comply with earlier court decrees limiting the amount of water it can take from Lake Michigan and to restore excess water that it took. The system for measuring diversion is to provide almost instantaneous estimates. Illinois is to take steps to prevent leakage.

If Illinois makes clear progress in meeting its obligations and an independent panel accepts the lakefront measuring system, the parties are to ask the Supreme Court to incorporate their agreement in a final decree.

Funding Affordable Housing

The Problem

Like many states, Florida needs large amounts of affordable housing for low and moderate-income residents. In 1991, state officials decided to energize lagging efforts to meet those needs. They convened the Governor's Ad Hoc Work Group on Affordable Housing. The goals for the group were to reach consensus on recommendations for creating a state housing policy and establish a Florida Housing Partnership.

For years, various elements making up the work group had been "fighting each other," in the words of one observer. "Here was an opportunity where they could come together and really come up with a coordinated strategy for affordable housing and, more important, a funding mechanism for that strategy."



The work group was made up of state and local government officials, representatives of the business and nonprofit sectors, lawyers, and academics. Public officials included state legislators and representatives of the Department of Community Affairs, the Housing Finance Agency, and regional planning councils. Business interests were represented by individual home builders and officials of the Florida Home Builders Association and the banking industry. Nonprofit interests included representatives of community development corporations and the Florida Low Income Housing Coalition.

The Process

The work group held three day-long facilitated meetings about 30 days apart. Staff and sub-groups, or committees, met in between. The committees explored such subjects as regulatory reform, assessment of existing housing programs, and funding and legislation recommendations. The Florida Conflict Resolution Consortium helped to develop the agendas and facilitated the discussions.

The first meeting dealt with such matters as (1) clarifying the group's mission; (2) defining the rules and responsibilities of group members; (3) identifying matters to be examined by committees and the scope of their efforts; and (4) reviewing "who was responsible to produce what to be delivered to whom."

The second meeting focused on the reports of the sub-groups. For example, a regulatory reform committee reviewed regulations at all levels of government and identified ways to reduce the costs and increase the availability of affordable housing. A second example: A committee that assessed existing housing programs focused on identifying state programs that made best use of public monies in such areas as leveraging funds, number of persons served by the programs, and timely and cost-effective delivery of housing.



Legislating has never been easy, and it's getting much more difficult as issues become more complex. These complex emerging issues require new skills to operate effectively in the legislative environment. Legislators need the Policy Consensus Initiative to help teach us the skills of consensus building so we can deal with these issues more effectively.

Senator Roger D. Moe
Minnesota Senate Majority
Leader

Each committee developed its recommendations in accord with the guidelines established by the full work group. For example, one guideline required that state money should be heavily leveraged, spent on housing, not program administration, and used whenever possible as loans, not grants.

At the second meeting, the full work group ranked committee recommendations, listed areas where there was disagreement, and pursued ways to resolve differences.

The final meeting dealt with refining the recommendations of the committees, examining the reasons for making them, and building consensus on them within the full work group for its final report.

The Result

The immediate result of the work group was a series of recommendations that became the framework for legislation. Among the accomplishments of the Affordable Housing Act was the institution of a real estate transfer document stamp that became a dedicated funding source for affordable housing.

With funding developed through the act, Florida now provides \$120 million a year in state funds for affordable housing. More important, that amount is leveraged on a four-to-one basis so that the state has about a half-billion dollars a year available for affordable housing, according to Mark Hendrickson, a national housing consultant who as a state official served on the work group in the early 1990s.

The Florida Housing Partnership that emerged from the work group was instrumental in encouraging passage of the housing act. The partnership incorporated the changed relationships that developed as profit and nonprofit interests and state and local government officials worked together and found consensus on affordable housing. “These people continue to work together—the relationships the work group created have sustained themselves over the years for the purposes of affordable housing,” according to Tom Taylor of the Florida Conflict Resolution Consortium.



I use consensus process to resolve public policy problems simply because it works. The complex nature of issues today requires an integrated collaborative approach to ensure sound lasting solutions.

Governor John A. Kitzhaber,
M.D., of Oregon

Restoring Oregon’s Coho Salmon—and Healthy Streams

The Problem

The run of coho salmon was once bountiful along Oregon’s coast. At the turn of the century, coastal coho salmon north of Cape Blanco numbered about 1.25 million adults. From that time through the 1930s, the figure was 900,000. Then annual production declined to about 450,000 in the 1940s and 1950s. In recent years, the annual figure for wild coho in the state’s coastal basins has dropped to between 50,000 and 80,000. The cause of the decline was, as a state report put it, “human activities.” In 1996, the National Marine Fisheries Service (NMFS) proposed listing two groups of coho salmon in Oregon as threatened under the Endangered Species Act.

Such action would place sanctions on commercial or sports fishermen who caught the salmon. But agricultural and timber interests were the ones most threatened by proposed federal listing. Their upstream actions may affect coho habitat and spawning routes.



Oregon's response was to attempt to develop and fund a salmon recovery plan that satisfied the fisheries agency before it made a final decision to add the salmon to the endangered species list.

The Process

To get things moving, Governor John Kitzhaber summoned his natural resource agency heads to begin a planning process and assemble key stakeholders to deal with the coastal salmon issue. The stakeholders included sportsmen, commercial fishermen, timber and agricultural interests, public and private agencies, and, not least, conservationists.

Governor Kitzhaber assumed a role that was not traditional for most governors. He acted as convener and mediator. On and off over a six-month period, he met both individually and collectively with stakeholders, sometimes relaying messages back and forth, sometimes facilitating group sessions.

The process led to agreement on a plan—designated the Oregon Coastal Salmon Restoration Initiative. But another environmental factor entered into the equation that eventually melded the salmon plan with a clean water initiative.

At about the same time that the federal government proposed action on salmon, issues surrounding the federal Clean Water Act were coalescing. A total of 870 stream segments in Oregon did not meet water quality standards. In addition, several environmental groups sought a ballot measure that would phase in fencing to exclude livestock in watershed areas.

Once again, the governor convened parties ranging from agricultural and timber interests to environmental organizations to deal with the water issues. The result was the Healthy Streams Partnership Agreement.

During the next year and a half, government agencies worked with stakeholders to develop measures that would restore the coho salmon and improve water quality statewide. In 1997, the legislature provided \$30 million to help pay for the measures. Among other things, the money went to watershed councils, soil and water conservation districts, landowners, and others to enhance watersheds.

In the end, the Healthy Streams Partnership and the coho restoration plan were merged into the Oregon Plan for Salmon and Watersheds.

The Result

The National Marine Fisheries Service took notice of the Oregon Plan's measures and funding and decided not to add coho on the Oregon coast to the endangered species list. It did list as endangered the salmon in a coastal area that Oregon shares with California, mainly, according to Oregon officials, because California did not develop a recovery plan for its part of the shared area.

As to long-term results, it is too early to say if the coho salmon will come back in abundant numbers.



Utilizing Alternative Dispute Resolution within Maryland's judiciary and state agencies will enable cases to be solved earlier with less cost and, more important, without the animosity that litigation so often produces. (Maryland's Commission on the Future of the Courts found that) agreements reached through ADR tend to hold up better in terms of compliance than do judgments imposed by courts on disgruntled litigants.

*Governor Parris N.
Glendening of Maryland*

Creating the Policy Consensus Initiative

Only about half the states have publicly financed offices or centers of dispute resolution. These offices are located in courts, administrative agencies, universities, and private, nonprofit agencies. Some are flourishing. Others are small and fragile. Budgetary pressures and the tendency to downsize government have impeded the development of current offices and the creation of new ones and forestalled other efforts to build the dispute resolution capacity of states.

To assist the states, the Policy Consensus Initiative (PCI) was formed in 1997 to work with state governments to develop and strengthen consensus building and conflict resolution programs and policies in the executive, legislative, and judicial branches.

The William and Flora Hewlett Foundation is providing generous two-year funding for the Institute.

PCI works with state leaders—governors and their staffs; executive branch agencies; state legislators and legislative staff; attorneys general and their staffs; and state centers for conflict resolution. Its services include acting as initiator, convener, catalyst, and broker linking state centers of conflict resolution with public officials and agencies. We provide education, training and consultation to state leaders to prevent, manage and resolve public policy conflicts.

PCI helps current state centers of conflict resolution by (1) fostering policies and programs to ensure the highest quality of conflict resolution and collaborative problem solving practices, (2) providing a network for technical assistance, communication and support, and (3) disseminating information and fostering practice models for programs and policies.

PCI is also an information resource on (1) the latest developments in ADR legislation and policies; (2) tools, models, and guidelines for policies and procedures; (3) current national trends in use of consensus building for public policy issues; and (4) existing state conflict resolution centers and what services they offer.

For more information and assistance, contact PCI or visit its website (www.agree.org).