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Transportation Planning Capacity Building Program

Public Involvement Techniques

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3.B.d - Negotiation and Mediation

What are negotiation and mediation?

Negotiation and non-binding mediation are alternative dispute resolution (ADR) processes designed to resolve a conflict between parties unable to reach agree procedures aim to resolve conflict before it moves toward the courts. Agency staff can use some ADR procedures; others require outside experts, often called third-party neutrals. In some ADR procedures such as binding arbitration, third parties make decisions. Binding procedures, however, are not appropriate to transportation planning and project development. This report deals only with *non-binding* techniques.

The major ADR procedures suited to transportation decision-making are negotiation, facilitation, and non-binding mediation.

- **Negotiation is the process of bargaining between two (or more) interested parties.** It can be conducted directly by the concerned parties or can take place during a third-party mediation process. In negotiation, the concerned parties meet to resolve a dispute. In Nevada and California, after a suit was filed against the Lake Tahoe-area Metropolitan Planning Organization (MPO), environmentalists, developers, and other parties negotiated in workshops and small meetings to develop mutually acceptable environmental standards and long-range plans. The city of Salamanca, New York negotiated with representatives of the Seneca Indian Nation to reach consensus on steps to provide economic development opportunities for the tribe. (See [Small Group Negotiation Techniques](#).)
- **Facilitation refers to skilled leadership focused on meeting process and organization.** Agency staff or third parties can facilitate. Because it is broad and applicable to public involvement situations other than dispute resolution, facilitation is presented in this volume as a separate technique. (See [Facilitation](#).)
- **Mediation uses a trained, impartial third party to help reach consensus on substantive issues at disagreement** among conflicting parties in public involvement. A mediator can be from within or outside an agency but must be neutral and not involved in the project as such by all parties. While mediation can be binding or non-binding, only non-binding mediation is considered here. Non-binding mediation generally has the following characteristics:

characteristics:

- A neutral third party, impartial and unaligned with any side of the conflict, is appointed to find consensus; the third party has no decision-making authority;
- All interested parties are included, by agreement;
- The parties are asked to participate voluntarily;
- Opportunities are offered for local people, as well as officials or leaders, to be heard;
- Community people receive responses to their suggestions or concerns;
- The parties work toward reaching consensus; the third party makes suggestions for possible compromise positions and otherwise helps the parties negotiate;
- If agreement is reached, it is usually considered a commitment on both sides;
- Written agreements, memoranda, meeting minutes, or reports are usually included; and
- Sessions are typically confidential and often protected by State statute.

Mediation and facilitation have some similarities but are not the same. Facilitation is similar to mediation in that participants work toward mutual understanding with the leader. However, facilitation works toward building consensus within a meeting, right from the beginning of the process, while mediation is usually employed when an impasse is reached.

Why are they useful?

Sometimes consensus-building efforts lead to an impasse. This is especially true for controversial or complex projects. In such cases, both agencies and participants need a neutral means to determine which way to go.

Mediation and negotiation take a problem-solving approach rather than an adversarial one. The process helps participants:

- Resolve differences without court suits;
- Facilitate agreement and address primary concerns of involved local residents and/or interested groups;
- Work together to ease implementation of a plan or project;
- Obtain agreement without an agency imposing an unpopular or polarizing decision;
- Deal directly with a project proponent or agency as an equal participant.

Mediation helps reach consensus on controversial transportation plans and projects. It is often used in construction disagreements with contractors. Outside the field of transportation, examples of how mediation has been used range from child custody conflicts over siting hazardous waste or energy facilities. In transportation, the Pennsylvania Department of Transportation (DOT) has used mediation for several years. As one example, for Philadelphia's new interstate Route I-476, an outside consultant worked to develop agreements between community people and the agency regarding environmental mitigation issues that had stalled the project.

Mediation and negotiation provide a structured, semi-formal, and orderly way for people to find agreement. They require no one to commit to an outcome that may be unpredictable. The consensus reached through them is non-binding on participants.

Alternatives to mediation and negotiation are more costly and time-consuming. A dispute resolution process can avoid time wasted in unproductive or acrimonious negotiations.

meetings, litigation, major redrafts of plans when they are nearly complete, or staff spent rebuilding agency credibility.

Do they have special uses?

Negotiation is especially useful in informal situations—to resolve differences between parties, avoid engaging a broader group with local disputes, or address several aspects of a dispute simultaneously. Negotiation can be brought into a process at any time but is most effective before polarization. In Hampton, Virginia, a negotiation process to find a route for a new connector road was established. Participants were trained in the steps of the process. When the staff was further trained in facilitation and collaborative methods, consensus building became a regular element in Hampton's planning efforts.

Mediation, by contrast, has a special and distinctive use: it is generally employed when a process has reached an impasse or major breakdown. Mediation has been employed on transportation projects and long-range planning studies where profound disagreements occurred. In the Boston, Massachusetts, Central Artery/Tunnel Project, the process was used to resolve an impasse over a critical river crossing design, leading to adoption of an alternate plan. In Fort Worth, Texas, a mediator was hired after local groups and residents filed suit over the results of an environmental impact study for expansion of I-30. The process resulted in multiple options, which were broadly supported within the community and carried forward in the study.

Who participates? And how?

It is essential to include all potential stakeholders in establishing a dispute resolution process. Stakeholders may include neighborhood residents, local business people, and regional interest groups, public officials, and agencies. Failure to include all pertinent stakeholders undermines consensus. A person or group whose position has been ignored can challenge the legitimacy of the process. Parties need to be identifiable and willing to participate. All participants must feel some pressure to agree and must have concluded that they can do better by steam rolling each other or going outside the transportation process by, for example, appealing to the political process.

Parties in a dispute resolution process can appoint or elect representatives to avoid large, unwieldy meetings. This requires that groups be sufficiently well-organized to identify leaders who can speak for the group credibly. In Silver Spring, Maryland, representatives of project opponents and proponents, the county, and a developer met regularly to resolve a dispute involving a proposed downtown shopping and office development. The size of the small, representative group helped to resolve the issues quickly.

The representative process requires a high degree of cooperation and trust in selecting individuals to serve. A strong neighborhood group in Minneapolis, Minnesota, was the focus of leadership meetings with police and other agencies to address drug problems in disadvantaged neighborhoods. Churches represented many residents and served as a focus for consensus building in the Binghamton, New York, downtown revitalization program and in the Fredericksburg, Virginia, homeless shelter program.

Mediation usually consists of a series of meetings. Negotiation can consist of more meetings among parties. All participants are accorded equal status in the process and are encouraged to present their views on each issue. For maximum success and effective participation, the process must strive for:

- Regular and timely opportunities for participation;
- An on-going commitment from each participant to attend meetings;
- Full and honest expression of issues and concerns;
- Complete willingness to listen to other participants; and

- Agreement on the process and basic guidelines for managing it.

An agency sponsors and/or participates in a mediation or negotiation process.

Agency staff members develop and use negotiation and consensus-building skills as part of their public involvement practice. Agency staff people also are potential third-party mediators, although they should not serve in situations where their neutrality on the issue in question is in question. Effective professional negotiators focus on meeting the parties' underlying interests. By doing so, they open up many areas for creative resolution. Amateur negotiators commonly understand negotiation as the hard-nosed exchange of positions in which one starts low, the other high, and each tries to give as little as possible in the process to reach an agreeable middle ground. Professional negotiators avoid this win-lose approach and look for win-win solutions. The Pennsylvania DOT has on-call mediation consultants who are available as necessary. Its project engineers are aware that they can request assistance or needed basis from agency headquarters when projects begin to encounter obstacles. Expert consultants can be assigned to resolve conflicts, if approved by agency officials.

How do agencies use the output?

The goal of all dispute resolution is to reach a publicly-supported decision by addressing and resolving pertinent concerns. Thus, the result should be consensus or a plan of action, including the possibility of not going ahead with a plan.

Producing long-term results requires on-going leadership. While many uses of dispute resolution center around a particular plan, sometimes mediation and negotiation are needed over a longer period of time to keep a process moving forward. For 23 years, the mayor's advisory board in Indianapolis, Indiana, has used negotiation and mediation to resolve competing community objectives regarding allocation of resources to foster economic growth and civic expansion.

Mediation can resolve impasses over controversial projects. In Chapel Hill, North Carolina, a third-party mediator (who was also a local architect versed in design) worked with neighbors, city officials, and business people to develop a consensus plan for a new McDonald's restaurant opposed by the community.

Mediation or negotiation can be used in addressing priorities for capital improvement. In New Jersey, mediation of a State Department of Transportation road widening project in Montgomery Township successfully resulted in a plan using staggered phases of implementation spread over several years.

Mediation has helped in developing policies for new regulations by bringing sides together and avoiding obstacles and potential disputes. The U.S. Environmental Protection Agency often uses a mediator to develop consensus over regulations among public and private interests, for example in the areas of water and air quality.

Who leads these techniques?

In mediation, an outside party or someone from within an agency serves as a party, provided she or he is neutral and is perceived as such by all parties. The individual should have the following qualifications:

- Training in dispute resolution;
- Experience from many possible fields—including public involvement, law, business management, planning, and training;
- No stake in the outcome;
- A relationship of trust with all parties to a dispute;
- Strict impartiality and fairness; and

- Ability to make suggestions and to find areas of agreement.

A mediator frequently creates a draft working document that is modified through discussions with all parties to reflect developing points of consensus.

A skilled mediator should be able to work on a single issue on a short-term basis. The possible option to remain involved as a monitor of future activity or implementation. Eugene, Oregon, the mayor hired an experienced mediator to assist in developing new positive relationships between city agency staff and minority community residents. The two-day process filled with frank and open discussion, strong relationships were formed between previously unconnected staff and community people.

Negotiation is led by agency staff or management. The chief qualification is a deep understanding of interest-based negotiations—whether from training or experience.

Trained consensus-builders and mediators are available throughout the United States. Agency staff can also be trained to develop their facilitation, negotiation, and consensus-building skills. The North Front Range Transportation and Air Quality Council of Metropolitan Organizations (MPO) for Fort Collins, Colorado, area—hired a consultant to train the staff in mediation and consensus-building.

How are these processes organized?

The first activity of any mediation or negotiation is conflict assessment. The mediator or agency staff needs to address such questions as: is the conflict resolvable? What are possible resolution approaches?

Further preparation is crucial. In beginning a process it is essential to:

- Identify essential participants;
- Afford all participants an equal standing;
- Structure sessions to encourage participation;
- Find a neutral location for meetings, probably not in an agency's headquarters;
- Achieve consensus among participants on the agenda;
- Find convenient times for meetings; and
- Provide sufficient time between sessions to do follow-up work and analysis;

A successful negotiation might be completed in a very short time—as little as a few days for a very specific issue with a small number of stakeholders, where generally positive relationships are already in place.

For a complex mediation, many months may be required, and large complex transportation issues involving many stakeholders may take a year or two or more. Spending every two to four weeks for two to four hours is a common scenario. Time between sessions is often needed for staff to modify plans or conduct additional analysis to respond to participant concerns.

In mediation, the work varies but usually includes the following steps:

- Open the discussion and outline the process;
- Agree on the scope of effort and roles of participants;
- Reach consensus on the agenda among participants;
- Review the ground rules (one person speaks at a time, etc.);

- Ask all sides to present their viewpoints, perceptions of the issues, and reasons for dispute;
- Help people express their concerns;
- State all the issues;
- Review any points of agreement that can be determined;
- Develop several alternative scenarios to bridge the gap between the disputing sides;
- Work with all sides to develop a solution to the dispute; and
- Document elements of project alternatives, funding priorities, or other decisions agreed upon by the various interest groups.

In negotiation, the process is more flexible but usually involves the following steps:

- Identify underlying interests, as contrasted to positions;
- Develop alternative scenarios to meet underlying interests;
- Combine or further refine scenarios to meet as many interests as possible; and
- Select a scenario via consensus.

Sometimes participants do not feel comfortable meeting in the same room with their opponents. In such cases, the third party meets individually with participants outside the group to work out an agreement step-by-step. The mediator carries proposals between conference rooms until the issues are resolved. In a significant historic example, President Jimmy Carter carried draft documents between Prime Minister Begin and President Sadat—located in cottages at Camp David—to obtain a formal Middle East peace agreement. In this method, strict confidentiality must be pledged by all participants at the outset and maintained throughout the process. In some situations, use of a third party follows stringent confidentiality principles, although the resulting agreement becomes a public document available to anyone who is interested.

What helps people change their positions?

Guiding participants toward finding shared and compatible interests is an effective method. Usually participants take strong positions assumed to be "the only answer" to addressing their needs or wants. Often, however, alternatives exist that still respond to a party's interests but are easier for other parties to accept or consider.

Identifying interests begins with asking questions. Asking participants why they hold a certain way clarifies basic needs and desires that have not yet been articulated. Breaking general interests into specific elements helps focus the areas of disagreement. Suggesting alternative choices also works. Figuring out why people have made certain choices is a first step toward finding different ways of fulfilling their interests that may be more compatible with the other party's needs.

Working toward consensus by identifying interests rather than establishing positions is a key skill that leads to effective cooperative decision-making and consensus-building. Using professionals and seeking information and strategies from books and other resources helps make ADR processes successful.

How are negotiation and mediation used with other public involvement techniques?

Negotiation is part of an overall public involvement process and of many individual techniques. Collaborative task forces have consensus-building as a major goal and use negotiation as an integral element of their activities. (See [Collaborative Task Forces](#)) Practitioners who have honed their dispute resolution skills use them informally in their work with participants and other planning team members to help foster coalitions and

toward consensus.

Written materials are required to provide information about issues or plans discussion in mediation and negotiation, as in other public involvement techniques are often overcome by providing adequate information or targeted materials that meet the needs of individual participants or groups. (See [Public Information Materials](#).)

What are the drawbacks?

A dispute resolution process such as mediation or long-term negotiation so involves a large number of interests, adds time to a process (particularly when failed previous effort), and requires significant management and organization. A three-year welfare issues in Shelby County, Tennessee, consisted of representatives of 65 members of the clergy, businesses and business organizations, providers of social services, and other organizations. A one-year negotiation and consensus-building effort was required for a leader to gain commitments and guiding principles from this large group of agency organizations.

Hiring a mediator or a trained negotiator is usually much more expensive than in-house personnel. The advantage is a more skillful mediation and/or negotiation improved process, along with a clearer position of neutrality. Sometimes a participant acts as a third party if she or he is regarded as impartial by others.

Mediation may require special preparation for participants. Some groups may not be sufficiently well-organized to participate; for example, neighborhoods with no leaders or participants, including less powerful interests, must have equal standing within the group. Consideration must be given to participants' range of knowledge and experience with the subject matter. Special printed material and briefing sessions are often necessary to bring participants an equal level of basic knowledge and understanding so they can participate effectively in the dispute resolution process.

Participants are not always pleased with the results of mediation. Failure of mediation is undertaken after people have dug in their heels and view compromise as an alteration in their position as "losing." Sometimes conflicts occur among people's beliefs, such as accepting certain environmental impacts. If a large power imbalance among participants exists, mediation may raise expectations among the less powerful that cannot be fulfilled.

For various reasons, consensus may unravel. Poor attendance suggests a lack of "buy-in" to the process. If participants drift away over a long dispute resolution process, consensus may be weak and difficult to sustain in action. Even strong consensus or agreements are broken, priorities are not followed, or principles are forgotten.

Agencies often fear the challenges and sparks that arise with many competing interests. Residents, local officials, interest groups, and agency staff may have long histories of conflict. Finding ways of defusing such antipathy and developing a fruitful mediation process is a challenge. A skilled third party's role is to effectively deal with hostility and make the process a success. Agency staff with strong negotiation skills also help to create a more positive working relationship.

Are mediation and negotiation flexible?

Mediation and negotiation have considerable flexibility. The processes:

- Are useful in long-range planning and project development;
- Resolve either major or minor conflicts;
- Are effective with either small or large groups;

- Take place in different-size municipalities or regions;
- Apply in a variety of settings—between groups or within groups;
- Work in homes, offices, or specially-designed facilities or conference settings
- Take place over a range of time frames—short- or long-term.

Choosing the most appropriate dispute resolution technique depends on the circumstances characteristics of the dispute, the participants, and the dispute resolution strategy.

When are they used most effectively?

Mediation is most effective when other less formal consensus-building fails impasse has been reached. Negotiation is most effective before an impasse is reach

Mediation and negotiation must be part of a participatory process that inclu regular activities as working group meetings, hands-on discussion sessions, and tim responses to comments and concerns. Attempts to reach consensus by addressing (early helps prevent an impasse. Consensus-building generates trust that agencies v cooperate to reach a mutually satisfactory solution or agreement. Through mediatic find help in reaching agreements, but they are still ultimately responsible for makin decisions.

For further information:

American Arbitration Association Headquarters	(212) 4
City Manager’s Office, Fort Worth, Texas	(817) 8
Community Mediation Centers—American Bar Association	(202) 3
Greater Indianapolis Progress Committee, Indianapolis, Indiana	(317) 2
Harvard Law School, Program on Negotiation	(617) 4
National Institute for Dispute Resolution	(202) 4
Pennsylvania Department of Transportation	(717) 7
Program for Community Problem Solving	(202) 6
Society of Professionals in Dispute Resolution	(202) 7
University of Virginia Institute for Environmental Mediation	(804) 9

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