

Alternative Dispute Resolution in the USA¹

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ABSTRACT

This paper provides an overview of the different methods of Alternative Dispute Resolution (ADR) that exist in the United States of America and their application to Industrial Relations via the Federal Mediation and Conciliation Service. It is hoped that this overview will help build the readers' interest concerning the institutional, legal and public policy framework that is most appropriate for the successful delivery of governmental mediation services in their respective nations.

ADR METHODS EMPLOYED IN THE USA

In the United States of America, third-party assistance comes in a variety of forms ranging from most facilitative/least adjudicative to least facilitative/most adjudicative. Since the field of Alternative Dispute Resolution (ADR) is still evolving, the processes described below sometimes come with different names, or processes with the same name having different descriptions in different contexts. Therefore, it is not important to match the correct name with the correct ADR process, but it is important to have an intuitive grasp of the range of ADR services from most facilitative/least adjudicative to least facilitative/most adjudicative. With that in mind, the following is a sample of ADR services performed by third-party neutrals:

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¹ This is a paper from the Federal Mediation and Conciliation Service (FMCS) International & Dispute Resolution Services Division.

- (1) **Facilitation:** In facilitation, the third-party neutral simply provides logistical support, helps parties "break the ice" to get down to substantive discussions, stay on track, and record the discussions. Facilitation is generally performed in groups greater than six people, so the techniques of a facilitator apply mainly to large-group dynamics.
- (2) **Mediation²:** In contrast to a facilitator, a mediator takes her intervention one step further and actively works with the parties to jointly solve problems and reach a concrete agreement. This active intervention is harder to sustain as the number of people at the table rises. With higher numbers of people, a mediator may have to employ the techniques of a facilitator, or break the group up into smaller committees in order to work at the level of detail required.
- (3) **Early Neutral Evaluation:** An Early Neutral Evaluator is a facilitator who is also an expert in the subject matter at hand. The Evaluator gives his opinion as to which party is more likely to legally prevail on the issues in dispute, and uses this information as a pressure point to encourage parties to reach an agreement using mediation techniques.
- (4) **Non-binding Arbitration:** In a non-binding arbitration, the arbitrator listens to the legal arguments of both sides, examines evidence, and then renders an opinion that the parties are not obligated to follow, but which they can use in negotiations.
- (5) **Binding Arbitration:** In binding arbitration, the parties present their case to a subject matter expert who renders an opinion that the parties contractually agree to abide by. An arbitrator's opinion is enforceable in a court of law, except in the rare circumstance in which an arbitrator has somehow violated the law, abused her discretion, or acted arbitrarily or capriciously.

² Although in some countries mediation and conciliation have different meanings, this paper will treat them as synonymous.

- (6) Mediation/Arbitration ("Med-Arb"): The parties present their case to a mediator, who works with them to reach an agreement using mediation techniques. If no agreement is reached, then the mediator renders a non-binding or binding opinion. The advantage of med-arb is that the parties must be as forthright as possible, and not hold any arguments or evidence "in their pocket" because at the same time that they are working with the mediator to reach an agreement, they are also trying to influence the outcome of an arbitration.

As was mentioned before, since ADR is (at least formally) a relatively new field, the terminology is still developing and, as a result, the terms described above are often used interchangeably. For example, facilitation, conciliation and early neutral evaluation are sometimes used to describe, in some cases, what we have referred to as "mediation" and in other cases referred to as "early neutral evaluation." Likewise, fact-finding and mini-trial are used to describe what we have referred to as non-binding arbitration. The effect of this confusion of terminology is that, when one hears the name of a process, in reality it can mean several different things, and when one designs a process it may subsequently be referred to in several different ways.

In order to understand the underlying ADR process at issue, the most important thing is to ask exactly what the third-party neutral is doing: (1) is she providing a controlled forum for discussion? (facilitation here); (2) is she trying to get the parties to reach an agreement but is focused solely on process and not on who is legally right? (mediation/conciliation here); (3) is she trying to get the parties to reach an agreement but, in addition to process, also uses legal knowledge to convince the parties that they do not have a better alternative to a negotiated agreement? (early neutral evaluation here); (4) is she hearing parties' legal arguments as well as evidence in support of their positions, but not rendering a legally binding decision? (non-binding arbitration here); (5) is she hearing parties' legal arguments as well as evidence in support of their positions, and also rendering a legally binding decision? (binding arbitration here). In sum, the two big questions are "to what degree does the neutral take the parties' legal positions into account?" and "to what degree does the neutral intervene in the parties' discussions and the outcome of those discussions?"

In terms of which services a Mediation Institution should provide to its customers in a particular case, the mediator should have the ability to make an assessment at the outset of negotiations: Do the parties need a forum for an informal discussion for brainstorming or to formulate a general action plan? (facilitation); Do they need a neutral to help them structure their discussions and maintain their relationship so that they may reach an agreement? (mediation); Do they have a relatively good relationship, and are able to discuss their interests and accordingly negotiate new legal contractual rights to satisfy these interests? (also mediation); Are they convinced of the correctness of their legal positions and need a contrary legal opinion in order to possibly change their position? (early neutral evaluation); Do they have very little room for discussion at the level of interests? (early neutral evaluation); Have the parties' positions hardened to the point where they need someone else to decide the matter for them, but still want to preserve some room to fashion their own accord afterward? (non-binding arbitration); Have the parties' positions hardened to the point where they need someone else to decide the matter for them, and they just want to be rid of the matter? (binding arbitration).

If a Mediation Institution wants to offer all of these ADR services, it of course has to have the human capital available to provide them. Sometimes one finds a person who has the relationship-building and legal skills and knowledge to perform all ADR services well. More often, one will have to maintain separate staff for facilitation and mediation on the one hand, and non-binding and binding arbitration on the other. The parties who offer the whole package of skills required may be the best early neutral evaluators, which involves mediation skills as well as knowledge of the law. If it were not possible to maintain such a variety of skill sets on the staff of the Mediation Institution, it would be wise to maintain a roster of neutrals that are available to provide services on an as-needed basis. In some cases the Mediation Institution would pay the fee of the neutrals on the roster. In other cases, one party could pay the fee, while in other cases there could be cost sharing between the two.³

³ Excerpted from *Strengthening Governmental Conciliation Institutions: A Practitioners' Handbook*, David Thaler and Ariella Bernstein, APEC, 2003. (The Handbook is available from the Federal Mediation & Conciliation Service.)

SUCCESSFUL ADR METHODS IN THE PUBLIC AND PRIVATE SECTORS

A. Dispute Resolution in Collective Labor Cases

i. Private Sector (Economic and Non-Economic Issues)

Under the Taft-Hartley Act of 1947, in the case of a renewal of a current collective bargaining agreement the parties are obligated to give each other 60 days notice of intention to bargain as well as 30 days notice to FMCS and any state mediation agency that may exist. In the health care industry, the parties are obligated to give each other 90 days notice of intention to bargain as well as 60 days notice to FMCS and any state mediation agency that may exist. The penalty for failing to provide such notice falls on the union, which suffers at least a temporary loss of protection as a recognized labor organization under the Taft-Hartley Act.

Once proper notice is provided to FMCS and any state mediation agency that may exist, the parties are under no obligation to accept FMCS' assistance. Participation in FMCS mediation is completely voluntary. In 2004, FMCS mediators presided over 4,478 collective cases. In 3,768 of them, the parties resolved their issues successfully and reached agreement. The 2004 "settlement rate", therefore, was 79.4% of collective cases. Interestingly, in 74.6% of the cases in which FMCS received notice of pending collective bargaining negotiations, the parties *rejected* FMCS' assistance. In the year 2001, the last year for which such figures are available, in approximately 50% of the cases in which the parties did not accept FMCS assistance the parties were able to reach agreement on their own within a two-year period of the case remaining "open" with FMCS.

At FMCS, collective cases are mediated using elements of both Traditional and Interest Based Bargaining. Traditional Bargaining is usually characterized by each side's staking out extreme positions in the hope that such demands will enable it to settle above its "bottom line." The problem with such bargaining is that parties are often left disappointed if they are not powerful enough to impose their will on the other side. For this reason, traditional bargaining has been referred to as *power based*. Even in its most benign form, power based dispute resolution results in the overbearing of the will of the weaker party, if that party does not have a better alternative to a negotiated agreement. Sometimes,

if one or both of the parties perceive that they have a better alternative to a negotiated agreement, the result is a lockout or a strike. Almost always, in a power based negotiation the parties' relationship suffers. Given the amount of time that most people spend at work, the relationship is a significant one in most people's lives, and damage to it has very serious consequences.

Before an organization can get out of that pattern, it is almost always necessary to train the labor-management partners in Interest Based Problem Solving (IBPS) Techniques. In a nutshell, the IBPS process involves the parties learning how to communicate by expressing their needs, concerns and feelings – in the form of "we" statements as opposed to "you" statements – and engaging in a joint problem solving to satisfy those needs, concerns and feelings, which in the IBPS process are called interests. In order for this process to take place and be successful, it is necessary to engage in joint training with labor and management partners in skills such as communication, active listening, brainstorming and consensus decision-making.

Contrast the IBPS process and Traditional Bargaining. In the IBPS process, the parties openly exchange information concerning the *interests* that they need to satisfy (i.e., "We need to keep production costs low enough to compete in the market") and then engage in joint problem solving to develop several means of satisfying those interests. In contrast, in traditional negotiations parties demand inflexible, absolute *positions* (i.e., "We must keep production costs low by cutting wages 30%") and then use power-based or rights-based arguments to satisfy those demands (i.e., "We will cut 30% of the workforce if you do not agree to take a pay cut, and the law permits us to do that after the collective bargaining agreement expires at midnight Tuesday"; or "If you keep pressing your demand we will go out on strike, and the labor law statute protects our right to do so").

While Traditional Bargaining may seem to reflect the reality of workplace negotiations and are still in wide use in many workplaces, they often hurt organizations because the parties overlook options that can satisfy both parties' interests and help the organization move forward and improve. Unless organizations become better at communicating to articulate common goals, and exchanging information on the interests that workers and managers must satisfy in order to accomplish those goals, tremendous inefficiency and loss of productivity will result. This type of communication is

simple to explain in theory but hard to achieve in practice. Many organizations struggle with power-based threats and demands to satisfy positions. Often, workers and managers do not stop and think about working together to satisfy everybody's interests to the benefit of the organization. For these reasons, training in what is, for many, a counterintuitive way to communicate is essential component to achieving a more productive and efficient workforce.

ii. How Have Winning Organizations Incorporated Interest Based Negotiations and Principles Into Their Work Processes?

In the United States, Miller Dwan Medical Center in Duluth, Minnesota stands as an example of an organization that has made significant improvements upon years of contentious labor relations through the use of Interest Based Problem Solving (IBPS). The FMCS mediator, Commissioner Darlene Voltin, conducted IBPS training for union and management bargaining committees for four different collective bargaining agreements with four different unions. In each case the parties, with much hard work and great effort toward attitudinal change, overcame years of acrimonious relations and set the course for the future using IBPS. Commenting on their fourth and final contract, the mediator writes:

Finally, it was time for the real test of Interest Based Bargaining. Was it possible to use such a process when the chief spokespersons for MDMC and the United Food & Commercial Workers (UFCW) local union had such a contentious history with each other that involved deep-seated personality conflict? Since the FMCS mediators who did the [IBPS] training were well aware of the history of the relationship between MDMC and UFCW, the training was geared towards listening, understanding and team building. At the outset, ground rules were created based on [IBPS], and they prepared a plan for how the parties would move to traditional bargaining if the [IBPS] approach did not succeed. In addition, the Federal Mediator who facilitated the bargaining obtained an agreement from the parties to follow the process and not take short cuts. Not only did the parties arrive

at an agreement based on consensus, but they also dramatically improved their relationship. As they began to resolve issues through the [IBPS] process, their trust increased and their relationship with each other greatly improved . . . [The IBPS process allowed] two parties who were blindsided by previous history and personality conflict among party members to re-focus their interests back towards their respective goals and the needs of their members, a process that resulted in a successful, voluntary agreement.⁴

Miller Dwan Medical Center is but one of thousands of organizations that have worked with the U.S. Federal Mediation and Conciliation Service to incorporate Interest Based Problem Solving into their labor relations work. Other notable success stories include the Kaiser-Permanente Labor Management Partnership, the Levi-Stráuss and Company-UNITE Labor-Management Partnership, and Iron Mountain Records⁵.

iii. Dispute Resolution in Collective Public Sector Cases

In 2004, FMCS mediators were assigned 460 Federal Sector (USA Government) collective cases. In the U.S. federal sector, there is no right to strike and wages and benefits are not negotiable. Issues that cannot be resolved are sent to the Federal Service Impasses Panel (FSIP) for a legal ruling. In 2003, the parties settled 77% of the agreements without going to the FSIP.

Given the non-economic nature of federal sector negotiations, issues tend to concern quality of life matters such as flexible work arrangements (flexi-place and flexi-time), smoking policies, training and employee development, access to building entrances,

⁴ Excerpted from the APEC Best Practices Toolkit from the 2001 project, "Responding to Change in the Workplace: Innovations in Labor-Management-Government Cooperation," funded by the APEC Human Resources Development Working Group. David Thaler, David Glines, and Jennifer Ortiz, at www.qnzlz.com (moved to www.fmcs.gov/qnzlz/index.htm) under the "Best Practices Tool Kit" tab, at pp. 52-54.

⁵ Excerpted from *The Role of Industrial Relations in the Structural Change of Organisations*, David Thaler, European Industrial Relations Observatory, 2002. (The Article can be found on the World Wide Web at <http://www.eiro.eurofound.eu.int/2002/12/feature/us0212101f.html>.)

policies concerning the playing of radios in cubicles, etc. FMCS mediators also comment that the fact that parties cannot engage in strikes or lockouts makes federal sector negotiations continue for much longer amounts of time than private sector negotiations.

B. Dispute Resolution in Individual Labor and Employment Cases

i. Grievance Mediation

In many collective bargaining agreements, the parties agree that mediation should be a mandatory step in cases when one party (usually the union) files a *grievance*, which is a complaint lodged against the other party to accuse it of violating the collective bargaining agreement. The *grievance procedure* is usually spelled out in detail in the text of the collective bargaining agreement. The grievance procedure usually specifies that grievances should first be resolved in the organizational unit where the alleged violation took place. The next *step* of the grievance process is usually a meeting among the union's chief steward in the organization and his management counterpart. Third, in rare cases the parties might involve the head of the union confederation within a defined geographic area. If that fails, the agreement usually provides for a lengthy and expensive arbitration procedure. At that point the grievance has usually taken up a lot of the organization's resources and soured the parties' relationship. In 2003, FMCS mediators conducted 1544 grievance mediations, and an agreement was obtained in 82% of them.

A better way for organizations to resolve their grievances is to have the parties agree in the text of their collective bargaining agreement to have mediation as the third or the fourth step of the grievance procedure, before the parties can become entrenched in an arbitration battle. This would be more likely to preserve the organization's resources and the parties' relationship, and also provide the mediator with an opportunity to suggest to the parties programs aimed at labor dispute prevention. With labor conflict prevention programs, the number of grievances filed is often drastically reduced in the long term.

ii. Equal Employment Opportunity⁶ (EEO) and Non Taft-Hartley Mediations

FMCS contracts with numerous federal agencies to mediate disputes arising under the nation's numerous and complex anti-discrimination laws. Anecdotally, many FMCS mediators comment that complainants utilize the EEO forum simply because it often is the only means of redress that they perceive is available to them, when in reality the content of their claims concerns issues that are outside the scope of the nation's EEO laws.

Other non Taft-Hartley mediations conducted by the FMCS in the past include contracts with the Solicitor's Office of the USA Department of Labor to mediate labor law enforcement cases in areas such as wage and hour law, occupational safety and health, employee retirement income statutes, and compliance with labor provisions of federal project contracts.

C. Relationship Development and Training (Formerly called Preventive Mediation)

When the USA Congress created the FMCS following World War II, its intent was to establish a cadre of mediators to resolve disputes that had already occurred, or that appeared to be imminent. This is sometimes referred to as the "firefighter" model of dealing with conflict. Shortly following the creation of the agency, beginning in the mid 1950s, FMCS mediators found themselves with many requests for training programs to teach labor and management partners the skills needed to prevent conflict before it erupted. At the collective bargaining table, mediators saw the need for giving the parties the communication and problem-solving tools to not only effectively resolve issues at the bargaining table, but also to manage their relationship throughout the term of the collective contract. This provoked an expansion in duties of FMCS mediators, from just the "firefighter" function, to a more comprehensive approach to managing labor conflict.

⁶ The Equal Employment Opportunity Commission (EEOC) was created under the Civil Rights Act of 1964 to provide a means of redress for workers suffering discrimination under defined categories such as race, gender, religion and ethnicity. Each year, workers file tens of thousands of complaints pursuant to the EEOC's legal framework. Many of these complaints are settled prior to the hearing stage.

In the 1970s the FMCS appointed its first Director of *Preventive Mediation* (PM) Services. Within a few years, as the Interest Based Bargaining model grew in use, FMCS developed its core group of PM programs, several of which are discussed below. While there were programs developed for many situations, the general idea behind all of them was to use interest-based principles to teach parties to express themselves and resolve problems in non-confrontational ways – whether in bargaining, a labor-management committee, or in a post-strike setting.

With an increasing number of PM programs requested of the agency, in the mid-1990s the agency greatly increased its emphasis on training to manage labor conflict. At that time FMCS required all mediators to make considerable efforts to learn both the techniques and the technology to become quality trainers in the subject areas required for good communication and problem-solving in the labor relations context.

In the early 2000s, the agency changed the nomenclature of its programs from Preventive Mediation to *Relationship Development and Training* (RDT). The agency made this change in recognition of the ongoing nature of conflict management, and the conclusion one cannot really *prevent* conflict because there will always be diverging interests and opinions – and that some conflict is in fact healthy. This more accurate description of both the nature and objectives of FMCS' programs took into account that, through their instructional programs, FMCS mediators were training parties in the skills and techniques to develop their relationships to the point where conflict management is maximized.

What do preventive programs look like? They range from simple Interest Based Problem Solving (IBPS) training prior to contract negotiations, to the creation of permanent mechanisms to resolve conflict on an ongoing basis (such as a committee consisting of labor and management representatives), to intense programs designed for organizations with a tumultuous history of labor-management relations, perhaps after a long and bitter strike.

An important "golden rule" of FMCS' programs is that preventive programs – and permanent labor-management committees in particular – are in no way a substitute for collective bargaining and do not supplant the parties' vigorous representation of their constituents' interests. Rather they are a mechanism to deal with ongoing workplace challenges that have been intensified by

a changing and increasingly competitive marketplace as well as the gradual lengthening of the terms of collective bargaining agreements, the latter making it necessary to deal with more issues mid-term. The labor-management committee and the accompanying training in Interest Based Problem Solving, communication, active listening, brainstorming and consensus decision-making, provide a crucial added edge for companies in this brave, new global world.

FMCS' Relationship Development & Training programs have one or a combination of the following elements: (1) an initial assessment to determine the propriety of the various programs that FMCS offers; (2) training in relationship-building skills such as Interest Based Problem Solving, communication, active listening, brainstorming and consensus decision making in order to increase the likelihood of success of a particular program; (3) in many cases, consulting services to establish a permanent institutional mechanism such as a labor-management committee, grievance mediation, or a company-wide full scale partnership; and (4) delivery of the program itself, which may involve training only, institutional consulting only [See (3) above], facilitation, or a combination of the all of these services.

An example of a program that combines all of these services is called a Relationship-by-Objectives program, whereby the parties receive training, exchange and discuss interests in a facilitated session, jointly develop objectives to improve their relationship, and set up (eventually) self-facilitated committees to help the parties reach their objectives. Commonly, an FMCS mediator will facilitate the first few meetings of a committee, after which the parties are on their own. The mediator will always train the parties in the habits, procedures and attitudes to successfully sustain a labor-management committee. FMCS mediators often build an evaluation and follow-up component into their preventive programs, and are always available should the parties somehow get off track.

There are a number of preventive programs a mediator can recommend to the labor and management partners from an organization. Below the reader will find the diagnostic questions that the mediator might consider in recommending a particular program. In the footnotes at the bottom of the page one can find the URLs to the part of the FMCS website where more information about each individual program may be found.

- Does the organization have relatively sophisticated parties who have a poor relationship and a collective agreement that is soon to expire? If yes, the mediator may recommend *Interest Based Bargaining Training*.
- Have the parties completed negotiations and is now faced with the task of working together to meet the daily challenges of the organization? If yes, the mediator may recommend the formation of a *Labor-Management Committee*.
- Has the organization recently undergone a strike and is now faced with the task of rebuilding a severely strained relationship? If yes, the mediator may recommend a Relationship by Objectives program.
- Does the organization's problem come from a failure on the part of supervisors and union stewards to understand their rights and obligations under the law, and how to communicate with one another to resolve problems on an ongoing basis? If yes, the mediator may recommend Steward and Supervisor Training for the organization.
- Does the organization have a high level of unresolved interpersonal conflict, with little opportunity for aggrieved parties to have their complaints dealt with in a timely manner? If yes, the mediator may recommend a Dispute Resolution System Design.
- Is the organization already committed to a collaborative labor-management relationship, and now needs help in incorporating the input of both labor and management into its strategic planning? If yes, the mediator may recommend a Partners in Change program.

1. Building Relationships from the Ground Up: Dynamic Adaptive Dispute Systems

There are numerous workplace complaints, ranging from claims of discrimination to personality disputes, which are not resolved in the collective bargaining arena. Discrimination complaints include claims that an employer or a manager took some kind of adverse action against an employee because of their race, color, creed,

age, gender, national origin or sexual orientation. These disputes are generally not resolved by unions in the grievance-arbitration process.

For these reasons, since 2002 FMCS has developed an approach called *Dynamic Adaptive Dispute Systems* (DyADS) to address all kinds of workplace conflict. In English the word "dyad" signifies two components working together as a team. Accordingly, a DyADS project includes representatives of management and labor, collaborating to design and maintain a system for resolution of conflicts arising in their workplace. DyADS is aimed at handling all kinds of conflict, particularly conflict that does not fall within the scope of the collective bargaining agreement. The objective is for the parties to set up their own alternative dispute resolution system, outside the traditional grievance procedure, to resolve employment disputes (between employees, between managers, or between managers and employees) that can threaten productivity and morale.

The DyADS process begins with FMCS-facilitated discussions between front-line managers and union representatives whose member employees would be directly affected by any new system. The parties themselves build the program from its inception, designing different processes to efficiently handle, and hopefully resolve workplace disputes. To succeed, any such system must be very flexible, open to change, and have many different avenues for disputants to bring their concerns.

A typical DyADS program includes the joint development of an internal "neutral function" — performed by either an individual (an "ombudsman") or a committee — to coordinate and implement the program and help disputants reach solutions to their workplace problems. FMCS facilitates internal dialogue between the parties, and helps them collaborate to design a flexible DyADS program that has multiple tracks for conflict resolution.

Ultimately, the key to a successful DyADS program lies with the parties' readiness to create a unique system that suits the needs of their workplace. Any such system must be dynamic, constantly evolving, changing as needed, and must not interfere with collective bargaining rights or the rights of individuals to seek redress in any statutory scheme.

FMCS IN THE CONTEXT OF AMERICAN CULTURE AND LEGAL SYSTEM

FMCS' mandate, structure and operations reflect an underlying principle in USA labor relations of self-determination by the parties.

When Congress created FMCS in the years following the Second World War, during a period of great labor strife in the country, it gave the agency a convening and *not* an adjudicatory or enforcement function. This narrow mandate reflects a general principle of self-determination by the parties that underpins USA Labor Relations. That principle, in turn, reflects an underlying American belief in the value of free labor markets and free markets in general. The latitude that the parties have to negotiate the terms of their employment relationship in the USA system has provided a fertile environment for the development of joint, Interest Based Problem Solving and other innovative methods of dispute resolution.

As was mentioned above, the use of mediation in the USA is almost always voluntary. The voluntary nature of mediation reflects the fact that it is relative bargaining power and negotiating ability of the respective parties that determine the outcome of negotiations. The party who has more of both winds up getting more of its interests satisfied in the negotiations. In other words, collective bargaining in the USA is not a legal determination of the parties' respective substantive obligations, rather it is a power-based dynamic designed to distribute resources and contractual benefits. Legal rights, such as those found in statutes concerning wages and hours, occupational health and safety, pension security, and discrimination in the workplace, only form outer limits or, in the case of the Taft-Hartley (Collective Bargaining) Act, "rules of engagement" within which parties have much latitude to make their own agreements and conduct their own labor relations. The only remedies in collective cases for parties who are unable to agree on the substantive terms of a collective contract are economic weapons (i.e., strikes, lock-outs, and tactics in between). In individual cases, except for protections afforded by the laws alluded to above, and other state and federal laws protecting workers (e.g., whistle blowers), workers without collective contracts are *employees at will*, which means they can be fired at any time and for any reason.

All of the above means that, as a general rule, in the USA, the parties have much more room within which to dictate the terms of their own agreement than is common in many other countries. Hence the development of joint, Interest Based Problem Solving and other innovative methods of dispute resolution. In addition, since most negotiations take place at the company level, and not on a nation-wide or even a sectoral basis, the parties have even more latitude to particularize the terms of their agreement to their own particular situations.

The parties' great latitude to reach their own agreements at the company level affects FMCS on an institutional level in several ways. For one thing, as was mentioned above, with very few exceptions the mediation process is completely voluntary. In fact, 74.6% of parties reject FMCS' assistance in their negotiations. This makes it all the more critical that mediators retain their acceptability with the parties. Personal relationships between the mediators and the parties matter more. FMCS must have in place a stringent mediator code of ethics in order to ensure the public that the process is fair. Mediators must take care to maintain a strict appearance of neutrality and avoid stances on public issues that may alienate some of their constituents. The FMCS Director is appointed by and answers only to the President of the United States. In order to avoid the perception that it is partial to any sector, FMCS is independent of the Labor Department or any other branch of USA Government. Finally, parties' great latitude to influence their own negotiating outcomes in the USA has greatly influenced the services that FMCS mediators deliver. In the last three decades, as was discussed above, in the last three decades FMCS mediators have steadily incorporated Relationship Development & Training programs into their standard workload.

LESSONS LEARNED AND USEFUL OBSERVATIONS FROM THE FMCS EXPERIENCE

In no particular order of importance, the following list of some lessons that FMCS mediators have learned throughout the organization's 58-year history might be helpful to readers as they develop their own national plans of action.

1. Think in terms of interests, not positions

In collective bargaining, a position is by definition a fixed demand that can be satisfied with one option. In contrast, many different options can satisfy an interest, often without prejudice to another side's interest. Parties should become trained in and accustomed to communicating on the basis of interest, both in negotiations and on an interpersonal everyday level. Such a shift would increase labor peace enormously.

2. Support for mediation and conciliation must come from the top (Labor and Management)

Through their words and actions, labor and management leaders must demonstrate faith and optimism in the mediation process, and also back up their words by sending bargaining committees with real negotiating authority.

3. Negotiators must communicate with their constituents often and at a high level of detail

In countless situations, FMCS mediators have had the results of the parties' hard work at negotiations endangered because the negotiators' constituents were not fully informed, or did not understand, what had been agreed to at the negotiating table. As a result, good mediators regularly encourage union negotiators to consult with their rank and file members, and management negotiators to consult with upper level management. However, mediators must counterbalance this need for consultations with important ground rules that the parties agree to in order to ensure that the negotiations have enough confidentiality so that parties may take risks, generate creative options, and make compromises without alienating their respective constituencies.

4. ADR works best when it is not done in isolation, but rather when it is accompanied by attitudinal and structural changes throughout the organization

Parties will have more success at the negotiating table if their organization has a culture in which people trust one another and have crucial communications skills such as active listening,

disengagement, and Interest Based Problem Solving. FMCS' Relationship Development & Training programs aim to teach the skills and set up consultative mechanisms within organizations to enable such trust building to take place.

5. Conceive of non-confrontational dispute resolution and labor conflict prevention as solid business practices, not just "feel good" initiatives

In many organizations, employees and managers feel "consulted to death." There is often a new "flavor of the month" that purports to enhance productivity, efficiency, morale or some other aspect of working life. For this reason, it important to incorporate conflict resolution and conflict management as part and parcel of everyday working life, essential for the survival of the business in a global economy.

6. Mediators should establish personal relationships at the enterprise level so that they may insert themselves into cases and generally serve as "catalysts."

An important reason why FMCS plays such a special and unique role in U.S. Industrial Relations is the relationships that local mediators enjoy with labor and management representatives at the enterprise level. In 70 offices in 44 states, FMCS mediators develop longstanding relationships with companies and their unions that are passed on to succeeding generations of mediators. Through such relationships, mediators gain a familiarity and credibility with the organization that helps them be the catalyst for relationship building over time.

7. Mediators must ensure that parties' egos are protected by ensuring that they feel they have been heard and they can save face.

A good mediator is, among others, part management consultant, part lawyer, and part psychotherapist. In this regard, *vis-à-vis* the other party, a good mediator knows that a party will not compromise until he or she has "vented" and feels listened to by the other side. The mediator must work hard to create an environment to ensure that this can take place. *Vis-à-vis* the

other party, his or her constituents, and sometimes the general public, it is essential that the mediator allow both parties to save face, especially the party that the mediator is trying to move off of his or her position. If this protection of the ego as well as the political interests does not take place, it can seriously jeopardize the chances of obtaining an agreement.

8. Mediators should encourage incorporation of mediation into Collective Bargaining Agreements

The best way to institutionalize the use of mediation in an organization is to have the collective bargaining agreement require it. In this way employees and managers become used to it over time and do not view it as mysterious and extraordinary. Over time, it is likely that their skills in resolving conflict through mediation will increase as well.

9. Mediators should never forget the importance of maintaining their perceived neutrality and general credibility

While they are at the negotiating table, mediators make direct interventions in the actual negotiations sparingly, because each time they do so they risk losing their credibility and "breaking their pick." The expression comes from the analogy of a mediator chopping away delicately at parties' demanded positions like one might chop at ice using an ice pick. If they do something to alienate one of the parties, or they simply intervene too much, they risk "breaking their pick." It goes without saying that mediators very quickly break their pick if their neutrality or ethics are called into question. In such cases, the integrity and acceptability of mediation itself is weakened, just as it is slowly gaining acceptance in society. For this reason FMCS mediators must abide by strict ethical requirements and are subject to discipline for violations of those requirements. In addition, aggrieved parties have recourse to complain to FMCS if they feel that one of the mediators has acted unethically.