

Regulatory Negotiated Rule Making (RegNeg)

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Today, Regulatory Negotiations, NegNeg for short, are in common use at the State and Federal level helping agencies apply laws they are charged with enforcing. This was not the case thirty years ago, before ADR use expanded into new dispute arenas.

Since statutory law lacks the detail necessary to provide for reasonable application and enforcement, government agencies charged with enforcing the law issue regulations or rules to fill in the holes. As they make their rules, agencies invite public comment. In the past, after issuing a notice of intent to issue new regulations, the agency would invite written comments and take testimony in formal hearings. These proceedings tended to be very adversarial as each interest group attempted to secure a regulation most favorable to them. Following the written comments and testimony, it fell to the agency to draft regulations giving appropriate weight to the information offered by interest groups.

Negotiated Rule Making offered much less formality and a consensus outcome that allowed for creative solutions grounded in the experience of those who will be involved in following the rules. Prior to the RegNeg phenomena, an investigation identifies all interest groups affected by the proposed rule, the issues that need to be resolved by the rule and the information needed for the resolution.

In 1982, the Federal Aviation Administration was the first Federal government regulator to attempt to use RegNeg to establish a new rule. Federal Mediation and Conciliation Service (FMCS) mediator Nicholas Fidandis was asked to lead the rulemaking meetings. The issue involved a safety rule on maximum hours for pilots on flight duty. The rule had not been changed in 30 years although equipment and practices had change significantly. Prior discussions and litigation had been unsuccessful in resolving the issue.

Seventeen groups were involved in meetings extending from fall 1982 to fall 1983. During the course of the meetings several expectations had to be changed. The initial meetings were open to the public and media with a public transcript created of each meeting. When that proved unworkable because it prevented flexibility and candor, executive sessions were used, limited to the seventeen groups. Also the FAA Administrator expected that the meetings would produce recommendations, which he could use at his discretion in creating the new rule. When it became clear that the participants wanted assurance of more direct input, the Administrator was persuaded to accept the meeting output as the new rule. At the outset of the meeting, it was assumed that a consensus would

be achieved among the participants. That proved unworkable because several groups could not publicly agree to a new rule for political and internal reasons.

The mediator was aided by the participants' recognition that a less acceptable rule would be imposed if they didn't work together to fashion a new rule. With input from the parties, the mediator wrote a rule that the majority of the participants endorsed. The FAA Administrator issued that rule in the spring of 1984.

The process developed by this initial and successful RegNeg became the model for subsequent rulemaking efforts. Since 1984, FMCS mediators have participated in dozens of RegNeg case at the Federal and State level.

Based on several years of RegNeg practice, the American Bar Association and others recommended that Congress enact the Negotiated Rule Making Act in 1990. The Act's purpose was "to encourage agencies to use negotiated rulemaking when it enhances the informal rulemaking process." FMCS is identified in the Act as a provider of RegNeg assistance.

The Act was reauthorized in [1996](#) and is now incorporated into the [Administrative Procedure Act](#). A number of States have implemented processes similar to the Federal arrangement. Many government regulatory agencies have used the RegNeg process to their satisfaction and that of interested parties.
