THE MEDIATION EXPERIENCE IN THE UNITED STATES

A Paper on the Structure and Operation of Conciliation Services with Emphasis on Recent Trends and Problems in Dispute Resolution in the United States.

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By its nature, the American mediation process cannot be given precise dates of historic beginning since it lies at the heart of conflict in the work place and conflict resolution. In the United States reference is often made to language in federal legislation of 1913 creating the United States Department of Labor as one historical benchmark of the formal recognition of American mediation: ". . . The Secretary of Labor shall have power to act as a mediator and to appoint commissioners of conciliation." Such recognition of the function was based on the satisfactory earlier experience with the process under both private and institutional auspices.

Organization

The 1913 legislation did signal the source from which most American mediation and conciliation services would spring. While private third party mechanics have and continue to play a small role in United States dispute resolution, the overwhelming majority of such services are provided by public institutions. The 1913 legislation was the basis for the establishment of the United States Conciliation Service as a part of the Department of Labor. Subsequently, in 1947, when the National Labor Relations Act was amended, it provided for the creation of an independent agency, The Federal Mediation and Conciliation Service. The current United States policy concerning mediation provides that ". . .the settlement of issues between employees and employers through collective bargaining may be advanced by making available full and adequate governmental facilities for conciliation, mediation, and voluntary arbitration to aid and encourage employees and representatives of their employees to reach and maintain agreements. . . ." (Section 201 [b], Title II, Labor-Management Relations Act, 1947)

Other Federal labor mediation functions in the United States include those of the National Mediation Board, (established in 1934 to succeed the United States Board of Mediation of 1926) with jurisdiction over disputes in the railroad and airline industries and the Atomic Energy Labor-Management Relations Panel created in 1949, as well as other Federal activities which use mediation techniques to resolve disputes. The most recent of these is the Federal Labor Relations Act of 1978 with jurisdiction over Federal sector labor relations.

At the state level, policies and practices regarding mediation vary. Twenty-three state, urban, and territorial agencies have labor mediation functions with full or part-time mediation staff serving the private and/or public sectors. While five function in disputes in both inter- and intra-state commerce, their jurisdictions and activity vary widely. Eight other states empower state officials to appoint or serve as mediators. Eighteen of the states recognize the right of public employees in those states to organize and to bargain collectively with employees at the state, county, and municipal levels and provide mechanisms, including mediation, for the settlement of labor disputes which preclude the right to strike. In most instances, mediation services are provided by independent state government agencies.

At the municipal level, there are a few mediation agencies associated directly with the city government. The most notable of these is the Office of Collective Bargaining of the City of New York which deals exclusively with public sector disputes. Other smaller city agencies and one at the county level, which are active in the private sector, do not utilize a mediation staff. Rather, professional staff provides this service when it is needed or outside professionals are engaged. The American Arbitration Association, a private organization oriented to the full range of arbitration services, will also provide mediation services through ad hoc mediators. Finally, there are occasional mediation services provided by individuals. In some instances the individuals hold an office or position which, on occasion, provide circumstances under which they are called upon to act in an intermediary role. Thus government officials and professionals act as neutrals. With increasing frequency, arbitrators serve as mediators either at their own or the parties' motion. Finally, the parties may request a private individual who has a reputation as a mediator to serve in that capacity, providing fees and expenses. The overwhelming majority of mediation in the United States, however, is performed by mediation staff of governmental agencies. And, again, these agencies at the Federal and lower jurisdiction levels, are separate and not part of the various labor administrations.

Federal mediators are located in eighty-two locations in the United States, administered by four regional offices under the direction of the FMCS National Office in Washington, D. C. As a result, the mediators have a high level of discretion in dealing with case assignments and handle any type of mediation case they are assigned.

Thus, mediators do not generally specialize in sectors (Federal, public, or private), in industries or type of mediation work (e.g., dispute versus preventive mediation). Some mediators may have greater experience or interest in one area or another, but assignments are generally made on the basis of other criteria as well, e.g., location, time availability, other dispute characteristics, etc.

While there are academic efforts to distinguish between conciliation and mediation activity in the United States, there is no practical distinction and the terms are used interchangeably. In current usage, the term mediation is more common.

One author defined conciliation as ". . .a mild form of intervention limited to primarily to scheduling conferences, trying to keep disputants talking, facilitating other procedural niceties, carrying messages back and forth between the parties and generally . . . keep(ing) things calm and forward looking in a tense situation."

Mediation is ". . . a slightly more affirmative function." The mediator is thought to use positive tactics, even to making suggestions or even formal recommendations in spite of the fact that his actions have no formal power or authority.

In final analysis, the American mediator does not make these distinctions and views all these and other tactics as available to him as a mediator.

Adequacy of Mediation Services

Adequacy of service is difficult to discuss because it involves levels of service in light of needs and/or demand. The terms "need" and "demand" would require some preliminary definition as well.

The level of mediation service in the public sector varies considerably from the high level provided by the New York State Public Employment Relations Board in which they are active in about 40% of cases in which contract expirations occur, through the varying levels of activity in such states as Wisconsin, Michigan, New Jersey, Massachusetts, etc. where refined dispute resolution mechanisms exist, to those states which have no such services at all. (In between all of these are some states which may or may not have legislative provisions for public sector negotiations, but use the services of the FMCS. In 1980, FMCS handled 1,010 public sector cases as compared to 47 cases in 1970.) It should be noted that in most, if not all states, even the more sophisticated jurisdictions, case entry occurs only at impasse and at the request of the parties.

In the case of FMCS, Section 8. (d) (1) of the Labor Management Relations Act (1947) requires that FMCS be notified of the parties' intention to terminate or modify an expiring contract. That same notice is required to be sent at the same time to any

state or territorial agency established to mediate and conciliate those type disputes in these respective areas. After determination of appropriate jurisdiction, an assigned mediator contacts the parties and offers mediation assistance. Well in advance of the contract expiration, the parties may elect to have mediation or they can decline for any number of reasons. In 1980, FMCS mediators were involved in over 24,000 cases of which 21,500 were contract negotiation cases, an increase of about 5% of activity over the previous year. In effect, most of the cases in FMCS' jurisdiction which require mediation are handled by the Service. Others, which cannot be handled because of size, lack of jurisdiction by FMCS, etc., are able to turn to other agencies for mediation assistance.

In summary, mediation services appear adequate where jurisdiction is provided by law. Certainly, increased mediation facilities would allow for additional or earlier intervention. In the state situations where no law provides for mediation services, it can be argued that rights and/or needs of collective bargaining are especially unserved. To that end, recent arguments have been made for a national law extending bargaining rights to public employees of all state jurisdictions but these have been unsuccessful.

Technical Support

Some few of the agencies, including FMCS, have technical staff to aid mediators with research and technical information services. This assistance is limited to special needs of the mediators and not directed to the parties. In effect, the parties are viewed as having their own sources of information, including specialized state and Federal sources which provide statistical data, comparative contract language, etc. Mediators are not ordinarily sources of this information. The technical information provided to the mediator is usually limited to background information the mediator needs to understand a particular dispute or special information which the mediator views as a contributing to a settlement. The mediator relies on information acquired in his career in the field and current information provided by the parties.

Mediators: Recruitment, Training, and Status

Given the relatively small size of the FMCS, the largest employer of mediators, and the slow turnover of staff, recruitment of new mediators is not a problem. FMCS field staff frequently suggest that outstanding people apply. Practitioners often seek mediators based on their experience with the Service. The service's criteria for successful application includes seven years of collective bargaining experience. Usually this means experience at the bargaining table representing one side or the other with the attendant usual responsibilities of contract administration. In some instances, credit for some but not all of this requirement is given for appropriate academic experience, experience with appropriate governmental agencies (e.g., National Labor Relations Board), other neutral experience, etc. This requirement is intended to provide the Service with mediators thoroughly grounded in the processes, dynamics, issues, and interplays of bargaining upon which training as a mediator can be built. FMCS has successfully experimented with hiring mediator candidates with less than the required amount of background. That success has been based on the high standards set for the experimental programs and that the experience criteria had been reduced only slightly.

Most state agencies follow similar recruiting practices as that of FMCS. In some instances, state agencies have departed from the "experience" criteria and sought mediator candidates from among recent professional school graduates. They have been successful, according to informal reports, in developing capable mediators from these sources.

In almost all instances, professional mediation staff is employed in that capacity. It is not United States' practice to seek candidates for mediation from existing Federal or state civil service roles, even from employees of departments of labor and related agencies, who, upon promotion would leave the mediation function to go on to other civil service responsibilities. Certainly, the most successful of the United States' mediation experience has been that of agencies which hire people into a mediation career field from whatever sources. While people leave mediation career positions for other opportunities, the turnover rate is comparatively very low.

Mediator training varies considerably. In those agencies such as FMCS where new mediators come with extensive bargaining experience, the majority of initial training is conducted in regional on-the-job training after minimal formal orientation. Initial field training is intended to provide fundamental experience in mediation techniques, acquaintance with various styles and familiarization with sectors beyond the new mediator's experience. The new FMCS mediator spends a full year in training status with progressive assignments to familiarize him or her with Service procedures, techniques used by experienced mediators and the types of cases handled in the region. Case assignments are made with experienced mediators before the new mediator is allowed to function alone on progressively more demanding assignments. Counseling by regional authorities is conducted during this period. Most states are on similar system with some supplementing the training with formal classroom activity.

At FMCS, mediators are hired directly by the Service and not through the normal competitive processes of the U. S. Civil Service system. While mediators receive all the compensation and benefits of their competitive system counterparts, they do not have Civil Service status. At most state agencies, mediators have state Civil Service status.

By the nature of mediation itself, mediators are in decentralized, highly discretionary positions. The supervision given their work is that of professional status employees. In many instances, where mediators are posted at locations away from administrative offices, their independent status is even more apparent.

Types of Conciliation

As explained earlier, the practical distinction between "conciliation" and "mediation" does not exist. Mediators, from whatever source, consider they have the discretionary use of the full range of neutral techniques available to them. Thus, while they might see the use of conciliation techniques as optional, many would consider their effectiveness limited if they were to be limited to such techniques as a condition of their involvement. It is not unlikely that if their role would be limited to conciliation efforts, in the strict sense, they would consider their involvement as severely hampered.

Voluntary vs. Compulsory Mediation

Because collective bargaining itself is considered a voluntary process, the involvement of a mediator has to be voluntary on the part of the parties. As a result, there is no legal means of compelling the parties in the private sector to use the services of a mediator. In more significant cases, various indirect means are used to persuade the parties but none are compelling.

In the public sector, various states have tied the legal recognition of public sector employees' right to organize and to bargain collectively to dispute resolution mechanisms required in place of the right to strike. In these instances, the mechanisms involve the progressive use of mediation, fact-finding, and arbitration. In the sense that mediation is part of a legislated process, it is a required step but limited, in part, by the interest of the parties in using it. In many instances, public sector disputes use mediation exclusively, but this is the choice of the parties in that the dispute is settled at that level.

Because of the voluntary nature of bargaining in the private sector and the voluntary atmosphere of public sector negotiations, voluntary mediation is considered most desirable. It preserves the voluntary nature of agreements, maintains the locus of agreement with the parties, and contributes to the ability of the mediator to change adversary positions to collaborative. Compulsory mediation would be viewed as having a negative caste, and agreements would have limitations because of the context in which they are worked out. Certainly mediators working under a compulsory context would have difficulty in gaining similar levels of acceptability and confidence as is experienced in voluntary mediation. Because mediation is viewed as an instrument of the parties in a voluntary bargaining process, the use of compulsory mediation would be inconsistant, and therefore less effective in U. S. situations.

Who Mediates?

Mediation is usually undertaken by individual mediators in the U. S. The use of various boards or commissions is rare. There are some instances, such as the Missle Sites Labor Commission (now defunct), the Atomic Energy Labor-Management Relations Panel, appointed at the federal level, the Joint Labor-Management Committee for Municipal Police and Fire, appointed by the Commonwealth of Massachusetts and the Retail Food Industry Joint Labor-Management Committee, operating under the auspices of the parties, which mediate labor disputes in a specific area. The format of that mediation varies according to the organization and the situation. In most instances, members of the board of the commission will serve as a mediation panel, with one serving as chairman and the others working as co-equal mediators. The number, functions, and approaches of the mediators vary according to the dynamics of the dispute.

Dual mediation, involving the joint efforts of a Federal and state mediator occurs in those situations in which both FMCS and a state mediation agency have jurisdiction and the agencies decide to combine forces. This is relatively infrequent. In such instances the mediators either share the chairmanship or agree on one or the other as chairman. The mediators then work as a team, deciding on strategies and assuming complementary mediation tasks.

Finally, there is an accepted practice of paneling a mediation case, usually using two mediators from the same agency. In some instances, this approach is used for new mediator training. In other cases, it results from the practice of escalating the mediation effort by bringing another mediator from the regional or National Office level. In the latter example, the original mediator assigned to the case is joined by a new mediator who frequently assumes the lead role. This again is thought of as a team effort with roles and techniques dictated by need rather than structure.

In essence, none of the United States examples of team mediation is anything but an extension of the individual mediation technique. The use of formal board mediation techniques is so rare as to be atypical. If the boards and commissions' models have any advantages, they would have to include simultaneous use of different techniques with the parties, increased rapport between one side and one of the mediators, and internal consultation within the mediation team.

Mediation in Relation to Other Dispute Resolution Processes

In private sector disputes, mediation is rarely followed by any other dispute resolution technique. Even the noted recent growth of interest arbitration which may or may not follow mediation is relatively insignificant. The one private sector effort to use sequential dispute resolution, i. e., the provisions of the experimental negotiating agreement of the basic steel contract, has been remarkable in its lack of imitation. This agreement, jointly arrived at as a means of avoiding costly work stoppages, provides an interest arbitration panel to address unresolved negotiation issues at a point in advance of the contract expiration. Thus far, agreement has been reached before the panel has had to make its award. This procedure does not provide for mediation at the negotiations stage. Another

technique, used by some few arbitrators, is entitled Med-Arb (Mediation-Arbitrtion). Used on an ad hoc basis in the private sector, a private neutral attempts to mediate outstanding issues and, at an agreed-upon time, takes the remaining issues for consideration as an arbitrator. This approach is heralded as successful but the success is frequently attributed to the peculiar skills and acceptablity of the arbitrator. For that reason, it is relatively rare in the U. S. experience.

In the public sector and in the Federal sector, the various laws provide sequential techniques of mediation, fact-finding, and arbitration as alternative impasse mechanisms to replace work stoppages. Studies of these procedures and specifically of the effectiveness of the mediation step within the procedures are virtually unanimous in concluding that the possibility of post-mediation intervention has a "chilling effect" on mediation. In effect, the parties frequently view the mediation step as procedural. It is not uncommon for the parties to withhold full participation in mediation in anticipation of having the matter taken to a "higher" forum, i.e., the arbitration step. Fact-finding, as an intermediary function between the two steps, is viewed at best as mediation with non-binding recommendations. While fact-finding, in various situations, may contribute something by way of mediation or pre-arbitration, it too has a negative effect on mediation, per se. While the relative values of these alternative dispute resolution mechanisms is much debated in the U. S., it is clear that most observers recognize their debilitating effect on mediation within the process.

Mediation of Major Disputes

Mediation of major disputes or disputes in essential services is fundamentally the same as other mediation situations in that it remains voluntary and is subject to the same model of mediation. The so-called "emergency procedures" of the Labor-Management Relations Act, 1947, has been implemented in cases which have been found to threaten the national health or safety (Sec.206-210). In effect, the procedures provide for a "cooling-off" period with continuation of both work and bargaining. These procedures, which anticipate a continuation of mediation during negotiations, enhance mediation only to the extent of circumstantial pressures on the parties. Should the procedures not have been implemented, mediation would have been available anyway. For a number of reasons, such procedures have been implemented less frequently in recent years.

As described earlier, the technique of escalating mediation is used as an ordinary means of handling critical disputes.

Fact-finding or commissions of inquiry are not frequently used or seriously considered effective in the U. S. The majority of fact-finding occurs in the public sector, and, as described above, it has not proven to be as successful as intended.

This may be attributed in part to the fact that it, like mediation, cannot be fully effective within a multi-step dispute resolution procedure. Too, fact-finding is faulted in that it neither finds facts nor does it have finality. Public but non-binding recommendations of fact-finders do have some effect on the parties and formal recommendations may have an effect on subsequent arbitration. But a summary appraisal of the U. S. experience with fact-finding would find it less than fully successful.

As to Commissions of Inquiry, the U. S. has had an interesting recent experience which fits the pattern of this report. The 1974 amendment to the National Labor Relations Act extended coverage of the Act to employees of certain health care institutions. The amendment allows for a board of inquiry in cases of threatened or actual strikes which would substantially interrupt health care delivery to a locale. The findings of such boards would be essentially fact-finding, with non-binding recommendations. The procedure was designed to follow negotiations with voluntary mediation and anticipated continuing negotiation and mediation subsequent to the board's report. The appointment of such boards has radically declined in recent years in recognition of the parties' desire to rely on their own uninterrupted bargaining with mediation.

Conciliation/Mediation Procedures

Intervention of Federal mediators is keyed to the private sector notification process required by law. Once the notice is received and reviewed for jurisdiction, etc., the case is assigned to a Federal mediator who consults with the parties on his availability. Such notices, in effect, serve to alert the mediator of such negotiations in advance of contract expirations and potential work stoppages. The entry of a mediator into a negotiation depends on the recognition of both the parties and the mediator as to need and effective timing. To that extent, such entry is at the discretion of both the parties and the mediator. Currently, FMCS has established a pre-assignment system which alerts regions about scheduled contract expiration independent of the notice system. Such "early warning" provides increased options to an assigned mediator for early contact, preparation, appropriate scheduling, etc. This has proven most advantageous.

In the public sector, state agencies become aware of impasses through their internal research functions, requests for mediation assistance, or through a notice procedure in a few instances. Mediation before impasse is relatively rare since the states generally key mediation entry to contract expiration and/or impasse. Historically, this is understandable since recognition of the right to organize and bargain collectively is somewhat recent and early attention was on initial contracts. Since most states do not have any sophisticated machinery or administration in this area, the state of notification procedures in understandable.

Public sector mediation, while part of mandated mechanisms, is not required in all instances. In fact, public sector mediation functions with assumptions similar to voluntary mediation in the private sector. In the Federal sector, the role of mediation is set forth in the Federal Labor Relations Law which provides for involvement of FMCS mediators. The law does not provide a notice procedure but the parties often utilize the standard FMCS notice forms to notify the Service of their a notice procedure in a few instances. Mediation before impasse is relatively rare since the states generally key mediation entry to contract expiration and/or impasse. Historically, this is understandable since recognition of the right to organize and bargain collectively is somewhat recent and early attention was on initial contracts. Since most states do not have any sophisticated machinery or administration in this area, the state of notification procedures is understandable. Public sector mediation, while part of mandated mechanisms, is not required in all instances. In fact, public sector mediation functions with assumptions similar to voluntary mediation in the private sector. In the Federal sector, the role of mediation is set forth in the Federal Labor Relations Law which provides for involvement of FMCS mediators. The law does not provide a notice procedure but the parties often utilize the standard FMCS notice forms to notify the Service of their negotiations and to facilitate the entry of the mediator. It is also an informal practice for the parties in the various sectors to speak directly to a mediator or regional authorities about their interest in mediation assistance. In such cases, the request may be honored if the situation meets normal Service criteria.

Exhaustion of Private Procedures

Given the essentially voluntary nature of the bargaining process and mediation, little or no attention is given to the exhaustion of private procedures. In rare instances where the parties might request mediation assistance over a grievance dispute, usually subject to internal grievance procedures and final and binding arbitration, the question would arise in determining the existence of the single necessary condition required, antecedent to providing mediation assistance, that mediation is the last resort before a work stoppage. However, the mediation of grievances, while gaining new interest as an activity among arbitrators, does not constitute a significant part of mediation activity.

Sources of Relevant Information

Mediators rely on the parties to provide information relevant to a given dispute. In those instances where additional information may be required, mediators may request it from the parties, undertake informal research in one form or another, or obtain it from sources within their own agencies. However, data and information, while useful to the mediator when it is current and pertinent, is not the focus of mediation in the United States. As one mediator put it, "we mediate people, not issues." FMCS and some agencies do provide research and/or technical information services for use by the mediators. This resource is viewed as supplemental to the mediator's own resources which include the parties themselves. It is important to note that mediators in the U. S. do not view themselves as sources of information for the parties. However, the mediator will undertake to provide specific information in those situations where such information is not available to the parties in a timely fashion and its availability is crucial for a settlement.

Mediation Meetings

Once a mediator is involved in a case, meetings are scheduled by the mediator with consultation with both parties. The timing, duration, agenda, and location of such meetings is determined by the mediator, again after consultation of the parties. However, the mediator retains control over these arrangements since they are important strategy elements for the mediation function, just as they might be strategic to the interests of the parties if they were in control. In certain situations a mediator may delay joint meetings until there is some assurance of movement from one side or the other. Conversely, the mediator may call a meeting in an apparent impasse situation where one or both parties would be reluctant to seek a meeting for fear that a request would be viewed as a sign of weakness. Ordinarily, a mediator will be reluctant to call a joint meeting if it is clear that one of the parties will not attend. Infrequently, a mediator will publicly call a joint meeting to overcome the reluctance of one or the other party to attend. Mediators may choose to conduct separate meetings with the parties either to prepare for or supplement joint meetings or to take the place of joint meetings. The latter technique may be also used in those cases in which joint meetings would be counterproductive and the mediator chooses to shuttle between the parties with proposals and counterproposals. Finally, a mediator may meet with negotiating spokesmen together or individually in what is termed "side bar" meetings, usually after informing other principals of the nature and need of such independent sessions. In effect, the control of meetings is considered a mediation tool. While the participation of the parties is voluntary, it is a mediator's concern that meetings occur in such a way that the appropriate representatives attend.

Authority of Negotiators

The matter of the authority of the chief negotiators in a given bargaining situation is both critical and sensitive to the mediator. Since the structure of bargaining varies very widely, a mediator constantly encounters variations in this area. Most management spokesmen enter negotiations with some specific limits within which they can negotiate. Obviously, severe limits impede bargaining. Others at the bargaining table quickly sense the fact of these limits which affects their relationship with the spokesman. Too, the real decision-makers, being apart from the table, have little or no sense of the negotiations atmosphere. Finally, the fact of prompt decision-making may be lost at critical moments in the negotiations.

Fortunately, with the increased importance of labor relations at both the economic and non-economic levels, there are clear signs that the parties are increasingly being represented by spokesmen of sufficient organizational stature to make necessary decisions.

In situations where sufficient authority is lacking, it is not unlikely that a mediator or another representative for the mediation agency will be in direct contact with those with true bargaining authority at a time of crisis. Such contact may vary from private consultation through urging that the true bargaining authority appear at the table. These latter devices, while available, are rarely exercised since the mediator's task is to deal with those at the table in seeking a settlement.

Much of what has been said applies to both management and labor bargainers. Union spokesmen can and do have limited authority or specific mandates within which to negotiate. However, unions have two other difficulties in the area of "authority to settle." One limitation arises from the nature of the union's bargaining team. While management's team is more univocal on the various issues, the union's team composition consists frequently of representatives of various interest groups. Thus, a union chief spokesman's proposal may have to be limited by individual positions held by the union bargaining team members.

A more constant limit to a union's authority at the table is the general provision in U. S. labor union constitutions that tentative agreements reached in bargaining must be submitted to union membership for ratification. Prior to 1960, the rate of membership rejection was considered low. After 1960, the incidence of rejection appeared to be increasing even though specific data was lacking. In 1967, FMCS undertook a study of membership rejections, using FMCS closed cases as its base. The rejection percentage varies from a low of 8.7 in FY 1964 to a high of 14.2 in FY 1967. The most recent figures, for 1980, is 10.7 which a full 1.2 percent lower than each of the previous years. It should be noted that the base figure for this data is FMCS closed cases, which by definition are the more troublesome. The same incidence of rejections compared to the total number of agreements reached each year would provide considerably lower percentage numbers.

While some unions do give their negotiators complete bargaining authority, the ratification provision behind most union tentative agreements does concern the mediator at the table. The U. S. mediator may take several steps beyond agreement to help the settlement toward finality. The mediator may advise the union representatives on how the settlement package is to be presented and may even enlist the assistance of the management negotiators in an effort to help the settlement "stick." In some rare instances, the mediator obtains the permission of the Service to appear at the union's ratification meeting to explain the settlement package. This is considered an extraordinary procedure, however.

Techniques

Mediation techniques used in the United States have been well documented in various publications, including the ILO's "Conciliation in Industrial Disputes: A Practical Guide." This publication and others preclude the necessity of cataloging the various standard techniques used by mediators in the United States.

A discussion of a different view of the mediation process might be both relevant and valuable at this point. Some mediators advocate the use of a specific approach to mediation as a touchstone to mediation success. One such basic mediation posture which has been all but abandoned by U. S. professional mediators is that of conciliation as defined at the beginning of this paper. Most, if not all, mediators view conciliation so defined as too limiting and prefer a more active posture. Some other mediators might identify "aggressive" mediation as the proper approach. The vast majority of U. S. mediators would rather assert that they have a number of potential approaches in their arsenal of techniques from non-involved and accommodating through compromising to the aggressive and integrative styles.

These five different modes or styles describe the stances taken by mediators when facing different types of negotiations and different styles of negotiations. While mediators may find one or the other of these postures more comfortable than the others, they all may use each of them a variety of times and ways in each negogiation and even in dealing with each issue. These terms, taken from the growing literature on conflict management, must be interpreted specifically for mediation. However, we have found these terms useful in labeling what mediators do.

Obviously, these various postures must be matched by the mediator with appropriate circumstances. Thus, for example, the "compromising" approach is most appropriate when parties of equal power seek mutually exclusive goals. The non-involved stance of the conciliator is most appropriate when the issues are unimportant or when the negotiations are proceeding well. The integrative approach is useful in collaboratively seeking solutions which go beyond the immediate goals of the parties.

This note on techniques is suggested as a possible area for further exploration.

Privacy of Mediation

The public's interest in a given dispute can be a factor for the mediator. Countering that interest is the fact that private sector negotiations are considered truly "private" in that they constitute the working out an agreement over privately held rights over capital and labor. In most instances, public interest in private sector negotiations are minimal at best until difficulties arise which become "news" for one reason or another. In other instances, one or both of the parties may decide to "go public" with their positions. Mediators attempt to avoid these developments or to control press interest in the negotiations to maintain open negotiating room and not have positions frozen because of public exposure. For that reason, mediators frequently, with the agreement of the parties, limit press contact to themselves and then comment only on the progress of the sessions and not on substantive developments.

In public sector cases, the interest of the public in negotiations is said to be more direct since the resolution of issues impacts on public services and taxes. In some few instances, local legislation exists which mandates that public sector negotiations be open to the public to preserve the right of the public to observe activities which affect them as taxpayers. In these instances, mediators are constrained to observe the law even though they might consider that such "open" negotiations hinder normal bargaining exchange. In some instances, it is arranged that certain activities, such as joint meetings, are public. Some mediators, while observing the requirement of the law, will also use separate meetings to work through various bargaining positions before bringing the parties together

for a public joint session. Most, if not all, mediators view the requirement of public open meetings a hindrance to bargaining and while meeting necessary requirements, will devise methods to provide the private climate necessary for effective bargaining and mediation.

Duration of Mediation

There is no limit given by a mediator to the duration of sessions since each bargaining situation is different. In private sector situations, the outstanding issues might vary from a few to a great number. In some instances, the mediator confronted with an excessive number of issues might suggest to the parties that they continue negotiating on their own and call upon him when the number of issues is narrowed. The importance of a case may cause a mediator to meet with parties over a period longer than normal. Because of their control of these meetings, a mediator might choose to bargain continuously over a period of time. Most mediation cases are handled in one or several meetings. Extended series of meetings are rare. One obvious reason for this is the contract expiration date. Most mediators are called in or enter a case shortly before such expiration and that date and/or time serves as a threshold for the number and frequency of meetings.

In other sectors where there is no strike possibility, the only threshold is the contract expiration itself, when one exists. The inclination for a higher number of mediation sessions is often heightened when the parties are limited to negotiations over non-economic issues. In such instances, it is not rare for the mediator to establish the number of meetings he will participate in both because of other duties and because the creation of this artificial "limit" somewhat takes the place of the expiration/strike thresholds. If there are other neutral forums to which the parties must advance in case of continuing impasse, the rules under which the parties negotiate may set limits on the number of mediation meetings.

Since mediators are most aware that the effectiveness of their intercession can be dulled by too prolonged a series of meetings, they will tend to limit the number of mediation meetings.

Impact of Work Stoppages on Mediation

As suggested above, mediation in the private sector uses the impending strike or lockout as an effective source of pressure on the negotiations. Mediators who are accustomed to negotiating against strike deadlines find the lack of them in public and Federal sector cases a severe hindrance. A great deal of literature on mediation in the United States dwells on the importance of timing in initiating mediation. Always a major factor in such discussions is the role of the strike deadline. A good number of mediators consider entry at some time just before the deadline as most effective.

Once a work stoppage occurs, mediation may continue in much the same way as before. However, the timing of a new mediation initiative is again considered a

factor by the mediator who looks for some sign of movement on the issues by one or both parties.

Drafting the Agreement

The final drafting of the agreement is considered the task of the parties. The matter of "language" of a negotiated change is frequently the subject of the negotiations themselves. In the final drafting, the mediator may assist in developing appropriate language to cover the meaning of a specific area of agreement. While some mediators might undertake the drafting of all the agreement language, most avoid this task and give it over to the parties since the terms they agree to will govern their relationship during the term of the contract.

While in the past there have been mediator certifications on non-agreement, there is no provision for it in the private sector and only exists, in one form or another, when it is required for the parties to pass on to the next neutral forum. It is not a common practice in United States' mediation.

The final report of the mediator to the parent mediation agency is ordinarily held confidential and the parties do not receive copies. The report usually indicates the final disposition of the case, a summary of the major points of agreement and some additional notes by the mediator which may aid the mediator's superior in understanding the manner and method of the settlement or to aid future mediation of these parties. In some public sector situations, the parent mediation organization may require more detailed information on the settlement terms for public information and/or research purposes.

Since, in most private sector cases, mediation is the one and only neutral forum, there is no referral of the case to further mediation or arbitration. In those few instances where this might exist, there is usually no report of the mediator forwarded. In the public and Federal sectors where there are additional neutral steps, there is often a mediator report in some form which provides objective information on the issues outstanding. Under no circumstances is there formal disclosure of the mediator's evaluation of the relative demands of the parties, etc., since this is considered confidential and privileged information to the mediator.

Preventive Mediation

The Federal Mediation and Conciliation Service is somewhat unique among the various United States agencies responsible for mediation services in that it has had a preventive mediation program since its inception with the Labor-Management Relations Act of 1947. In defining the functions of the Service, the Act speaks of the Service preventing or minimizing interruptions in commerce growing out of labor disputes (Section 203[a]). Initially directed at small and medium sized plants with a poor labor relations climate, the program concentrated on grievance handling and contract administration improvement. Originally, this was done through informal meetings with labor and management people responsible for these areas. In time, this approach was advanced through the use of audio-visual aids and instructional materials, and the program gained in effectiveness and popularity. The program expanded again as the mediation staff became aware of the merits of

the preventive approach. They began to use existing resources, expanded into the use of labor-management conferences to reach a wider audience of labor and management practitioners and, in many cases, served as informal consultants to parties attempting to improve their relationships through pre-negotiation and post-negotiation committees. At the same time, various efforts directed to improve grievance handling continued. In more recent times, mediators have expanded into the use of labor-management committees at the plant, regional, and industrial levels to address a variety of problems identified by the parties. The Service currently administers a small grant program to provide funds for qualified labor-management committees for specific projects. Finally, the Service initiated a somewhat structured program for use in relationships which consistently encounter difficulties in negotiations and contract administration. The Relations By Objectives Program involves the use of team of mediators who meet with representatives of a specific labor-management relationship over a several-day period, usually in a retreat-type location away from the workplace. The program centers on discussions of the parties' various perceptions of the functions and goals of the other side, the discovery of areas of mutual concern, and the development of specific cooperative programs to achieve common goals. Subsequent follow-up by one or more of the mediators assists the parties in keeping to their intended cooperation. In time, additional goals may be developed by the parties. While the program is relatively recent, it has met with significant success in most situations and is requested by parties who have become aware of it.

The role of preventive mediation in FMCS is signified by the fact that it constitutes a part of the responsibility of each mediator in the Service.

Role of Mediators in Connection with General Policy

The various national and state labor laws recognize collective bargaining as a key to labor-management peace. As instruments of those policies, mediators are champions of the process. This is evidenced, in fact, in the preventive mediation program described above. Insofar as a mediator attempts to improve the understanding and use of the process by the parties, or to actually mediate a dispute using the process, that mediator is an advocate of the process. However, it is not considered a task or even an appropriate role of the mediator to suggest or urge a bargaining relationship to employers or employees who have not chosen that process themselves. Thus, it would not be expected that a mediator would approach a situation in which bargaining does not exist to suggest the creation of the structure and relationship necessary for bargaining. Mediation is considered the creature of the process and the parties in a bargaining relationship and not a cause of that bargaining relationship.

In a similar sense, the mediator has no role in determining the issues before the parties or their relative positions on the issues. The mediator may, in some instances, assist in clarifying issues but it is not considered a mediator's role to introduce issues or positions on those issues. This becomes most evident at a time when economic controls, income policies, or other governmental policies come into play. The mediator deals with the issues as perceived by the parties. The mediator does not represent government policy at the table. It is not the mediator's responsibility to suggest or urge, for instance, that mandated guidelines on economic increases be observed. The mediator in the United States does not consider himself as agent of governmental policy because such a position would destroy the role of neutrality and the acceptability of the mediator. In some instances, a mediator might suggest privately to one party or the other that they might give some attention to one matter or another in the interest of preserving the viability of an element of the agreement. But the mediator fundamentally recognizes that the agreement and the terms of the agreement are the responsibilities of the parties. The mediator would therefore view any formal responsibilities to see to compliance or even legality of agreements as antithetical to the more fundamental responsibility to the bargaining process and its use.