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NEGOTIATED RULEMAKING

A BETTER ALTERNATIVE

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Under traditional notice-and-comment rulemaking, a government agency publishes a proposed rule, seeks and reviews written comments, and publishes a final rule.¹ Commentators have criticized this process because it encourages parties to take extreme positions and fails to prioritize disputed issues. It also discourages any interaction among opponents and ultimately may not be accepted by stakeholders, thus increasing the possibility of challenges and even litigation.² Dissatisfaction with traditional rulemaking led to the development of a concept called negotiated rulemaking, in which representatives of the interests substantially affected by a proposed rule negotiate to reach consensus *before* the rule goes through the traditional notice-and-comment process.³ Congress endorsed this when it passed the Negotiated Rulemaking Act of 1990.⁴

¹The Administrative Procedure Act, 5 U.S.C. § 551 (2010), sets forth the rulemaking procedures for federal agencies. Most states have similar rulemaking procedures.

²Philip Harter, *Negotiating Regulations: A Cure for the Malaise*, 71 *GEORGETOWN LAW JOURNAL* 1, 6–7 (1982); Henry H. Perritt Jr., *Negotiated Rulemaking Before Federal Agencies: Evaluation of Recommendations by the Administrative Conference of the United States*, 74 *id.* 1625, 1630–32 (1986).

³Philip Harter, *Assessing the Assessors: The Actual Performance of Negotiated Rule-Making*, 9 *NEW YORK UNIVERSITY ENVIRONMENTAL LAW JOURNAL* 32, 33 (2000); Perritt, *supra* note 2, at 1627. For other articles on negotiated rulemaking, see Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 *DUKE LAW JOURNAL* 1255, 1261–62 (1997); William Funk, *Bargaining Toward the New Millennium: Regulatory Negotiation and the Subversion of the Public Interest*, 46 *id.* 1351 (1997); Cary Coglianese, *Assessing the Advocacy of Negotiated Rule-Making: A Response to Philip Harter*, 9 *NEW YORK UNIVERSITY ENVIRONMENTAL LAW JOURNAL* 386, 390–91 (2001); Jody Freeman & Laura I. Langbein, *Regulatory Negotiation and the Legitimacy Benefit*, 9 *id.* 60, 70 (2000); Curtis W. Copeland, Congressional Research Service, RL32452, *Negotiated Rulemaking* (Aug. 28, 2006), <http://bit.ly/fVypjp>; Danielle Holley-Walker, *The Importance of Negotiated Rule-Making to the No Child Left Behind Act*, 85 *NEBRASKA LAW REVIEW* 1015, 1035–36 (2007); Jeffrey S. Lubbers, *Achieving Policymaking Consensus: The (Unfortunate) Waning of Negotiated Rulemaking*, 49 *SOUTH TEXAS LAW REVIEW* 987, 991 (2008).

⁴Negotiated Rulemaking Act of 1990, 5 U.S.C. § 561 (2010).

Our purpose here is to encourage public interest lawyers to use the tools of negotiated rulemaking in their regulatory and statutory reform efforts. First, we give an overview of negotiated rulemaking. Second, we discuss the conditions that increase the likelihood of success. And, third, we describe how the principles of negotiated rulemaking have been used to improve the regulation of restraint and seclusion in Maryland, obtain consensus on contentious elements of a Massachusetts guardianship law, and pass the Americans with Disabilities Act Amendments of 2008.

Overview: Conditions that Increase Success

The Negotiated Rulemaking Act authorizes the head of a federal agency to establish a “negotiated rule-making” committee to negotiate and develop a proposed rule if the procedure is in the public interest.⁵ The goal of the committee is to reach consensus concerning the proposed rule.⁶ “Consensus” is defined as “the unanimous concurrence among the interests represented on a negotiated rule-making committee.”⁷ Each member agrees to support the proposed rule to the extent that it reflects the consensus reached by the committee.⁸ The agency, ultimately responsible for issuing and enforcing the rule, then publishes the proposed rule in accordance with the traditional notice-and-comment procedures required by the Administrative Procedure Act.⁹

Proponents of negotiated rulemaking contend that the final rule is likely to be issued more quickly, is easier to implement, has more legitimacy, and is less likely to be challenged in court when negotiated rulemaking is used.¹⁰ Critics believe that negotiated rulemaking has not fulfilled its initial promise of saving time and reducing court challenges.¹¹ Other critics contend that it “subvert[s] the basic, underlying concepts of American Administrative law—an agency’s pursuit of the public interest through law and reasoned decision-making.”¹² Nevertheless, as the cases below show, the principles underlying negotiated rulemaking have proven to be remarkably successful in achieving regulatory and statutory reform.

Attorneys can adapt negotiated rulemaking to other contexts but should try to follow the principles that underlie negotiated rulemaking in particular and effective negotiations in general.¹³

Strong Leadership Commitment. A strong, respected decision maker—such as a legislative committee chair, a judge or an agency director—is necessary to encourage the affected interests to negotiate and try to reach consensus. This decision maker needs to commit, to the extent permitted by law, to use the consensus as the basis for the proposed rule or law.

Negotiation—the Best, Last Option. The purpose of negotiation is to explore whether the interested parties can satisfy their respective interests through a ne-

⁵*Id.* § 563(a). Negotiated rulemaking must comply with the Federal Advisory Committee Act, *id.* app. § 2 (2010). For the procedures for establishing and facilitating the committee, see *id.* §§ 563–67.

⁶*Id.* § 566(a).

⁷*Id.* § 562(2).

⁸Harter, *Assessing the Assessors*, *supra* note 3, at 33.

⁹5 U.S.C. § 553.

¹⁰Freeman & Langbein, *supra* note 3, at 68–71.

¹¹Coglianese, *Assessing Consensus*, *supra* note 3, at 1261; Coglianese, *Assessing the Advocacy*, *supra* note 3, at 386.

¹²Funk, *supra* note 3, at 1356.

¹³On the principles of negotiated rulemaking see Harter, *Negotiating Regulations*, *supra* note 2, at 15–20; Perritt, *supra* note 2, at 1642–47. On the principles of effective negotiations see, e.g., such classics on negotiating as ROBERT FISHER & WILLIAM L. URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (Bruce Patton ed., 2d ed. 1991) (1981); WILLIAM URY, *GETTING PAST NO: NEGOTIATING IN DIFFICULT SITUATIONS* (1991); G. RICHARD SHELL, *BARGAINING FOR ADVANTAGE, NEGOTIATING STRATEGIES FOR REASONABLE PEOPLE* (2d ed. 2006) (1999).

gotiated agreement better than through other means.¹⁴ However, “[n]egotiations are likely to work best if a decision is inevitable, or even better, imminent.”¹⁵ The parties have to realize that someone else—the legislature, the administrative agency or even a court—will make the decision if their negotiations fail.¹⁶

A Small, Balanced, Representative Negotiating Group. The number of participants on the negotiating committee should be small enough so that members can talk directly to one another, find shared values, recognize one another’s concerns, and, in the end, compromise.¹⁷ The countervailing power of the parties must be evenly balanced so that, at the outset of negotiations, the outcome is genuinely in doubt, forcing the parties to reconcile their competing interests.¹⁸ A drafting group should take the agreements reached by the core members of the group and turn them into concrete language. The members can then review the language with their various constituencies.

Decision Making by Consensus. Most important, the members must recognize that their goal is to reach consensus and that no party will unilaterally make changes in any agreement without the consensus of the entire group. Thus each member has veto power over the decision.¹⁹ To reach consensus, parties need to focus on their respective interests, not on their initial positions.²⁰ Negotiations can deteriorate quickly if the parties dig in to defend their original positions rather than identifying their respective interests and priorities

and seeking options to allow mutual gain.²¹ Facilitators and the parties themselves can help all involved in the negotiations stay focused and engage in joint problem solving by defusing emotions and getting each side to acknowledge each other’s feelings and concerns.²² The parties need to be able to reframe their positions and build a bridge toward a satisfactory solution.²³ They may have to remind themselves that they cannot win by themselves, but only by working together.²⁴

Successful Application in Public Interest Contexts

Negotiated rulemaking is usually used to develop a consensus on proposed rules, but it has also been a useful tool in the legislative context. Below are examples of how the principles of negotiated rulemaking have been used to achieve regulatory as well as statutory reform:

Negotiating Maryland Restraint and Seclusion Regulations. House Bill 569 was enacted by the Maryland legislature in April 2002 to address the restraint and seclusion of students in schools.²⁵ There was strong objection to the bill from many quarters, and the Maryland Disability Law Center negotiated at great length with both traditional and nontraditional partners to draft a politically acceptable bill. Here, however, we focus on the negotiated rulemaking that followed H.B. 569’s enactment.

The new statute is unusual because it requires the Maryland State Department of Education to appoint a task force—essen-

¹⁴Ury, *GETTING PAST NO*, *supra* note 13, at 21.

¹⁵Harter, *Negotiating Regulations*, *supra* note 2, at 47.

¹⁶*Id.*

¹⁷*Id.* at 17.

¹⁸*Id.* at 16.

¹⁹Harter, *Assessing the Assessors*, *supra* note 3, at 34.

²⁰Harter, *Negotiating Regulations*, *supra* note 2, at 36–37 (summarizing the principles first developed by the Harvard Negotiation Project and published by its directors, Fischer and Ury, in 1981 in *GETTING TO YES*, *supra* note 13).

²¹*Id.* at 36–37.

²²URY, *GETTING PAST NO*, *supra* note 13, at 11–12.

²³*Id.* at 12.

²⁴*Id.* at 13.

²⁵Md. CODE ANN., EDUC. § 7-1101-1104 (LexisNexis 2010).

tially a negotiated rulemaking committee—to develop regulations to implement the statute. The intent of the statute was to take control of the regulatory process away from the Department of Education and ensure that a broad group of stakeholders was involved in the actual drafting of the regulations.²⁶ The task force included the Maryland Disability Law Center and represented a wide range of people who had a deep interest and significant stake in the outcome.

The task force met at least monthly from July 2002 through December 2002. At each meeting the Department of Education presented an updated draft set of regulations and then the task force members engaged in a comprehensive, sometimes heated, discussion, slowly moving forward in developing a consensus set of regulations.²⁷ Because the task force was diverse, every viewpoint was represented and discussed. Much time was devoted to debating, for example, the definition of “time out” before that term was rejected in favor of “exclusion.” Lengthy discussion occurred on students’ safety during transportation. Although the regulations went too far for some and not far enough for others, ultimately, by December 2002, the deadline set by the statute, the task force members voted unanimously to support the regulations.

The Department of Education then submitted the regulations to the necessary agencies and legislative committees for permission to publish. When the regulations were published and public comment was solicited, very few people appeared at the public hearings. Virtually every public comment received mirrored issues that had been thoroughly discussed by the

task force. The regulations were adopted unchanged by the department and became effective in June 2003, a fairly quick turnaround time for new, nonemergency regulations in Maryland.²⁸

The regulations have been revised several times since their initial promulgation. The Maryland Disability Law Center worked with the Department of Education to tighten several loopholes when other special education regulations were being revised. Having been unable, through the regulatory process, to enact a prohibition against the use of face-down (prone) restraint, the center again utilized the legislative process in 2008, securing a sponsor for a bill that would have banned prone restraint and limited the use of seclusion. The bill died in committee, effectively killed by the association of nonpublic schools. Thereafter the center regrouped and approached the nonpublic schools association to determine how the advocates and nonpublic schools could attempt to move forward on this extremely divisive issue. After a series of negotiations brokered by the department, all involved agreed to compromise language.²⁹ Ultimately the department promulgated revised regulations that became effective in October 2009. The regulations now include time limits on seclusion and restraint, a prohibition of prone restraint and any other restraint position that impairs breathing, and other provisions that protect students.

Negotiated rulemaking proved itself effective for Maryland to regulate restraint and seclusion. Without negotiated rulemaking, stakeholders likely would still be attempting to pass legislation or pre-

²⁶*Id.* § 7-1102(b), specified that the task force must include representatives of the state department of education; representatives of local school systems, including teachers, administrators, school psychologists, and social workers; representatives of advocacy communities; representatives from nonpublic special education facilities; and individuals with knowledge of and expertise in positive behavioral intervention. Many of the provisions which the Maryland Disability Law Center had originally written into the bill were included in a list of items for the task force to address through legislation.

²⁷*Id.* § 7-1102(c). The task force was directed to consider, among other factors, the circumstances under which physical restraint, mechanical restraint, and seclusion would be prohibited, the size and characteristics of a time-out room or other area, definitions of positive behavior supports, interventions and strategies, documentation and training requirements, notice requirements to parents, and other such requirements.

²⁸Md. CODE REGS. 13A.08.04.01–.06 (2011).

²⁹Through a strange twist, the drafters of the final version of the regulations omitted a comma, thereby changing the meaning of the phrase negotiated by the parties and resulting in final regulations that prohibit the use of prone restraint, a prohibition favored by advocates.

vail upon the Department of Education to enact regulations in this controversial area. Any regulations that might have been enacted without negotiated rulemaking would not have been grounded in the multiple viewpoints and extensive discussions that produced the 2003 regulations upon which the state, prodded by advocates and others, continues to build in an ongoing effort to protect its children.

Negotiating a Massachusetts Guardianship Bill. In 2008 a broad-based coalition of Massachusetts legal aid attorneys, private lawyers, bar associations, and judges finally prevailed in their fifteen-year effort to persuade the Massachusetts Legislature to reform the state's antiquated guardianship and trusts and estates law.³⁰ The state's probate and family court, with the assistance of a working group, was able to implement the new statute reasonably smoothly within six months of its enactment.

As the law was being implemented, some groups objected to some statutory provisions that had attracted little or no attention over the decade and a half that the bill awaited enactment. The most contentious of the issues was raised by providers, guardians, and their attorneys. These parties complained about a provision prohibiting guardians from authorizing admissions to nursing facilities unless a court found that the admission was in the incapacitated person's "best interest."³¹ The critics threatened to seek to delete the provision from the new law. Concerned that more than a decade of hard work could be seriously compromised, a group of legal aid attorneys representing elders and people with disabilities met with the chief judge of the probate and family court to urge her not to back down on the long-sought reforms.

In response the chief judge formed a negotiating group of approximately twenty people representing the affected interests. There were more lawyers for health care providers and guardians in the

group than legal aid lawyers, but no one group dominated the negotiations probably because both sides were represented by individuals with extensive guardianship expertise.

There was no express agreement that the process would end with consensus. However, a strong desire for consensus was implicit as all participants shared an interest in avoiding a prolonged legislative battle. Moreover, everyone knew that court procedures could not be changed without the chief judge's agreement and that statutory change was unlikely without her support. One could reasonably infer that most participants wanted to reach an agreement that would satisfy their constituents, be acceptable to the chief judge, and, to the extent statutory amendments were necessary, had a reasonable chance of enactment.

The chief judge chaired the meetings. Although discussions were lively and sometimes contentious, the judge was tolerant of focused, vigorous advocacy. Difficult issues were discussed openly and frankly. The sides appeared to learn from each other—each coming to better understand the concerns of the other, even if they did not totally agree that the concerns warranted changes in the process or the law. Although the chief judge seemed sympathetic to some of the concerns about the requirement for a court order for nursing facility admissions, she was not in favor of repealing the requirement. She moved the debate from absolutist positions by narrowing the discussion to the difficulties that hospitals and nursing facilities claimed to have in complying with the new mandate.

What became clear was that the hospitals and nursing facilities experienced particular difficulty in obtaining timely court approval when patients with guardians needed short-term nursing home admissions for postsurgery rehabilitation. The facilities argued that they were forced to hospitalize patients needlessly (and at some expense) while waiting for the court to act. Since brief nursing fa-

³⁰Act Relative to the Uniform Probate Code, 2008 Mass. Acts ch. 521; MASS. GEN. LAWS ch. 190B (2010).

³¹MASS. GEN. LAWS ch. 190B § 5-309(g).

cility admissions usually do not lead to the collateral damage that the legal aid lawyers most feared—for example, a long term forfeit of liberty, the irreversible loss of a house or apartment, discontinuation of community services—compromise was possible. The members ultimately agreed that if the nursing facility placement was anticipated to be for fewer than sixty days, if the treatment team and the guardian were in agreement, and if the incapacitated person and the person's attorney, if any, did not object, the guardian could avoid seeking court approval by filing an affidavit stating that the admission was to be for no more than sixty days. If the person being admitted did not have counsel, the court, upon receiving the affidavit, would be required to appoint a lawyer. Although the compromise was not all that either side wanted, both were content. The compromise has been added to a bill with technical amendments and the members clearly expect that it will have the support of (or at least not be opposed by) everyone who participated.³²

The negotiation took only two months. If the complaining groups had pursued a legislative strategy to repeal the nursing facility provision, resolving the issues would likely have taken months, if not years. The outcomes seemed fair. For the legal aid lawyers, there were, arguably, small compromises on some procedural rights in nursing facility admission, but

that loss was balanced by the proposed mandatory appointment of counsel—something not currently required. The final test of the process will be whether all the participants support the compromise bill and whether that support is enough to get it enacted.

Negotiating the Americans with Disabilities Amendments Act of 2008. The Americans with Disabilities Act (ADA), which prohibits discrimination on the basis of disability, was originally passed by a bipartisan Congress with great fanfare in 1990.³³ Pres. George H.W. Bush described it as the “world’s first comprehensive declaration of equality for people with disabilities.”³⁴ But, within less than a decade, the initial promise of the ADA was seriously eroded in a series of U.S. Supreme Court decisions.³⁵

Following these decisions, disability advocates came to a consensus that there should be an ADA restoration act correcting the Supreme Court by amending the definition of disability.³⁶ On July 26, 2007, the seventeenth anniversary of the ADA, companion ADA restoration bills were introduced in both the House and the Senate with bipartisan support.³⁷ By January 2008 there were 247 cosponsors of the House bill.³⁸ The business community strenuously objected to the bill as being too broad.³⁹ The George W. Bush administration also opposed it.⁴⁰

³²See the bill, titled An Act Making Corrective Changes in Certain General and Special Laws, <http://bit.ly/eDcBth>. The proposed amendment to the nursing home admission process appears in Section 27 of the bill.

³³Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 (effective Jan. 1, 2009). See Claudia Center & Brian East, *The ADA Amendments Act of 2008 and Employment: Practical Strategies*, 43 CLEARINGHOUSE REVIEW 121 (July–Aug. 2009), for a discussion of the practical effects of the ADA Amendments Act and practice tips.

³⁴White House, A Special C-SPAN Series on TV, Online, and on Radio, George H.W. Bush at the Signing of the Americans with Disabilities Act on the South Lawn, 1990 (July 26, 1990), <http://bit.ly/hi85CS>.

³⁵In a series of cases known as the *Sutton* Trilogy, the U.S. Supreme Court held that mitigating measures had to be considered in determining whether an individual was substantially limited in major life activities (see *Sutton v. United Airlines Incorporated*, 527 U.S. 471 (1999); *Murphy v. United Parcel Service Incorporated*, 527 U.S. 516 (1999); and *Albertson's, Incorporated v. Kirkenburg*, 527 U.S. 555 (1999)). The Supreme Court further restricted the definition of disability when it held in *Toyota Motor Manufacturing, Kentucky, Incorporated v. Williams*, 534 U.S. 184, 197, 201–2, that “major life activities” were “activities that are of central importance to daily lives” and “substantially limits” meant “prevents or severely restricts.”

³⁶For an extensive discussion of the efforts to restore the ADA and fix the definition of disability, see the excellent article by Chai R. Feldblum et al., *The ADA Amendments Act of 2008*, 13 TEXAS JOURNAL ON CIVIL LIBERTIES AND CIVIL RIGHTS 187 (2008).

³⁷*Id.* at 198.

³⁸*Id.* at 228.

³⁹*Id.* at 229.

⁴⁰*Id.*

This set the stage for negotiations. Representatives Jim Sensenbrenner (R-Wis.) and Steny Hoyer (D-Md.), the primary cosponsors of the House bill, suggested to the disability and business communities that they work out a deal and bring it back to them for consideration.⁴¹ The legislators' encouragement and support jump-started negotiations.⁴² The business community was open to exploring the possibility of negotiations because the bill had a huge number of cosponsors and the Chamber of Commerce and others wanted to stop the bill before it moved too far in the legislative process.⁴³ Members of the disability community were willing to negotiate because House Democratic members told them that the bill would not move without the support of the small-business community.⁴⁴ The possibility that the Democrats might take control of the White House and Congress in the November 2008 elections might also have spurred the parties to negotiate.⁴⁵

Preliminary negotiations began in February 2008.⁴⁶ The size of the actual negotiating group was quite small. Five organizations represented the disability community.⁴⁷ Four organizations represented the business and human resources community.⁴⁸ At the initial meeting, all of the negotiators signed a written consensus agreement that, if they were able to reach a consensus, they would defend the deal before Congress and would oppose amendments unless the whole group agreed to the amendment.⁴⁹ Members of the negotiating group repeatedly returned to basic principles to figure out where they fundamentally agreed.⁵⁰ They also learned from each other.⁵¹ The business community asked the disability community to cite court decisions that the disability community believed had too narrowly interpreted the coverage of the ADA.⁵² Similarly the business community shared its concerns with the negotiators for the disability community.⁵³

⁴¹*Id.*

⁴²*Id.*

⁴³Telephone Interview by Jane Hudson with Michael Eastman, Executive Director, Labor Law Policy, U.S. Chamber of Commerce (Oct. 25, 2010). Michael Layman, the manager of labor and employment for the Society for Human Resource Management, said that his organization did not support the ADA Restoration Act, but he felt that getting involved in negotiations was worthwhile because organization members—human resource professionals—were sensitive to the needs of employees, especially those with invisible disabilities, and wanted to resolve workplace discrimination (Telephone Interview by Jane Hudson with Michael Layman (Nov. 1, 2010)).

⁴⁴Telephone Interview by Jane Hudson with Curt Decker, Executive Director of the National Disability Rights Network (Sept. 23, 2010).

⁴⁵*Id.*

⁴⁶Feldblum et al., *supra* note 36, at 229.

⁴⁷*Id.* at 230 n.166. The ADA Disability Negotiating Team consisted of representatives from the Epilepsy Foundation, the American Association of People with Disabilities, the Bazelon Center for Mental Health Law, the National Council on Independent Living, and the National Disability Rights Network. Faculty members from the Georgetown University Law Center served as the legislative lawyers for the disability team. According to Decker, *supra* note 44, these individuals had already been working on restoring the ADA for several years as members of the Disability Rights Task Force of the Consortium for Citizens with Disabilities, a hundred-member consortium of national disability organizations (for more information on the Disability Rights Task Force, see CONSORTIUM FOR CITIZENS WITH DISABILITIES (n.d.), <http://bit.ly/eN6Lc3>).

⁴⁸Feldblum et al., *supra* note 36, at 230 n.166. According to Eastman, *supra* note 43, the U.S. Chamber of Commerce gathered the members of the business negotiating team from representatives of the Chamber, the HR Policy Association, the Society of Human Resource Management, and the National Association of Manufacturers.

⁴⁹Feldblum et al., *supra* note 36, at 230; Eastman, *supra* note 43; Decker, *supra* note 44.

⁵⁰Telephone Interview by Jane Hudson with Sandy Fincuan, Vice President for Legal and Government Affairs and Legal Counsel, Epilepsy Foundation of America (Nov. 1, 2010).

⁵¹Telephone Interview by Jane Hudson with Michael Peterson, Associate General Counsel and Director, Labor and Employment Policy, HR Policy Association (Oct. 2010).

⁵²Eastman, *supra* note 43.

⁵³Decker, *supra* note 44.

Once they reached agreements, language was drafted, which members vetted with their constituencies.⁵⁴

The negotiating group struck a deal in May 2008, just three months after negotiations had begun.⁵⁵ The negotiated bill was passed by the House in June 2008 by an overwhelming vote of 402 to 17.⁵⁶ Several senators who had been involved in the enactment of the original ADA wanted to make additional changes.⁵⁷ The negotiating group held to their original agreement not to advocate any amendments unless the group agreed as a whole, however.⁵⁸ The Senate offices ultimately sent the issues back to the negotiating group to resolve by consensus.⁵⁹ A final compromise was reached by the key Senate offices and by the business and disability communities.⁶⁰ The ADA Amendments bill—which included a broad definition of disability and responded to the concerns of the business community—was passed by the Senate and the House and signed by President Bush into law on September 25, 2008 (just eight months after the negotiations began).⁶¹

The process reflected all of the elements of successful negotiated rulemaking: strong leaders encouraging negotiations, a small group of negotiators, face-to-face negotiations that humanized the other side, and, most important, commitment to the consensus agreement. Participants described it as a “wonderful process.”⁶² Negotiating was “tremendously successful.”⁶³ Several expressed a willingness to try it again in other contexts.⁶⁴

Lessons Learned

The above examples show how the principles of negotiated rulemaking can be used in extremely contentious situations. Participants and decision makers were often surprised that the process seemed fair to all sides, reduced animus, and took less time than traditional law-making.

Below are some lessons learned from these experiences:

- A strong, respected leader can help jump-start negotiations.
- The leader does not have to be the facilitator of the negotiations, but there does need to be a skilled facilitator who can help the parties focus on their interests and concerns, rather than their initial positions.
- All affected interests need to be represented in the negotiations to minimize later challenges to the negotiated rule or law. If there are two “sides” in the negotiations, the number of representatives does not have to be equal, but the representatives of each “side” must have equal bargaining power based on their skills, experiences, and influence in their respective communities.
- There needs to be an agreement upfront that the representatives are going to try to reach consensus. In fact, a written consensus agreement might help the parties keep sight of their goal and withstand outside pressure to act

⁵⁴Fincuane, *supra* note 50.

⁵⁵Feldblum et al., *supra* note 36, at 230.

⁵⁶*Id.*

⁵⁷Decker, *supra* note 44; Feldblum et al., *supra* note 36, at 230–31.

⁵⁸Decker, *supra* note 44.

⁵⁹*Id.*

⁶⁰Feldblum et al., *supra* note 36, at 239.

⁶¹154 CONG. REC. 58342 (Sept. 11, 2008); 154 CONG. REC. H8286 (Sept. 17, 2008); Pub. L. No. 110-325 (codified at 42 U.S.C. § 12101). As of January 1, 2011, the Equal Employment Opportunity Commission had not yet issued regulations interpreting the Americans with Disabilities Act Amendments.

⁶²Fincuane, *supra* note 50.

⁶³Eastman, *supra* note 43.

⁶⁴Decker, *supra* note 44; Eastman, *supra* note 43.

unilaterally without the agreement of the group.

- A deadline, whether imposed by law, a leader, or circumstances, motivates the representatives to try to identify their interests and priorities and reach consensus.
- The representatives will need concrete language to discuss. After the initial interests and concerns are identified, the facilitator or an individual identified by the negotiating group should draft language that reflects agreements reached and bring it back to the group for discussion.
- Individuals outside the negotiating group, whether they be lawmakers, other organizations, or constitu-

ents, may want to make changes in the agreements initially negotiated. The group needs to be committed to bringing the proposed changes back to the entire group for discussion and resolution.

Public interest lawyers frequently encounter highly polarized situations when representing clients or advocating systemic change. Before submitting comments on laws or rules or engaging in other types of advocacy, we encourage them to step back for a moment and consider whether they might be able to achieve their goals more quickly and effectively by engaging in a process similar to negotiated rulemaking.



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