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RESOLUTION SERIES



# GETTING TO THE TABLE

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***The Corps Commitment to Alternative Dispute Resolution (ADR):***

*This working paper is one in a series of working papers describing applications of Alternative Dispute Resolution (ADR). The working paper is part of a Corps program to encourage its managers to develop and utilize new ways of resolving disputes. ADR techniques may be used to prevent disputes, resolve them at earlier stages, or settle them prior to formal litigation. ADR is a new field, and additional techniques are being developed all the time. These working papers are a means of providing Corps managers with examples of how other managers have employed ADR techniques. The information in this working paper is designed to stimulate innovation by Corps managers in the use of ADR techniques.*

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# **GETTING TO THE TABLE**

A Guide for Senior Managers

Alternative Dispute Resolutions

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## I. ON THE WAY TO THE FORUM

Ancient Romans created fenced areas near their marketplaces as a place for lively political discussions and public judicial activities. These areas became known as forums. People today continue to take their disputes to special arenas for solutions. The number and variety of forums in today's society for the host of judicial, legislative, and administrative decisions is continually increasing.

Rather than riding our chariot to the forum, we now use a broad range of sophisticated tools to select, develop, and use a forum. In conflicts, the choice of forum is often the most significant strategic decision. Each party is seeking to ensure that the forum is suitable for the pursuit of their interests. Forums, however, are easily slanted toward the interests of their creator. In public disputes, public agencies, like the U.S. Army Corps of Engineers, are often primarily responsible for legitimating forums. In private disputes, each party usually has the right to veto forums outside of the judicial arena.

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Let's examine a brief case study. In Texas, highway officials sought to expand the number of lanes of an Interstate highway that forms the southern border of downtown Fort Worth. After the requisite public hearings, a citizens' group filed suit because it opposed the option selected -- expanding an elevated freeway. Ten years of litigation led to a ruling that the highway department had not met citizen participation obligations because one of the first public hearings was advertised as focusing on an intersecting Interstate highway.

In 10 years the traffic problem had dramatically worsened, downtown businesses felt choked by the congestion, and relationships between the principal players were badly fractured. The Court had finally made a definitive ruling, but was the problem solved? Clearly not.

After six months of forum-creating work by a mediator, representative parties jointly convened a 14-member working group representing all interests and took almost three years to consensually select an alternative routing<sup>1</sup>. In this instance, the facilitated **joint decision-making process**<sup>2</sup> was superior to both the forums created by individual citizen action which, escalated the conflict and to the court which ruled on procedural issues tangential to the question of how to respond to increased traffic.

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<sup>1</sup> See "Multi-Year Mediation Breaks Fort Worth Interstate Deadlock, Participants Say", *ADR Report*, vol. 2, Oct. 27, 1988, pp. 381-383.

<sup>2</sup> While we are writing about what is commonly called Alternative Dispute Resolution or ADR, we use the phrase "joint decision-making processes" to distinguish between adjudicative processes where a third party decides and those which we are writing about -- negotiated processes.

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Joint decision making, which includes negotiated, mediated, and facilitated processes, comes without the rules and established practice that guide many other forums. This flexibility creates both opportunity and obstacle. The opportunity arises from the ability to create a joint decision-making forum that directly responds to the nature of the issue, the needs of the parties, and the external constraints. The obstacle emerges as you explore the other parties' desires and test the willingness of people to work together. They may want a much different forum than you, they may not trust you to create a fair forum, they may be trying to create their own forum, or they may be reluctant to try something new.

The process of overcoming the obstacles and building an acceptable forum has been dubbed "getting to the table"<sup>3</sup>. The best-seller on negotiation, Getting to Yes<sup>4</sup>, starts with the parties at the table. In multi-party, high-stakes disputes, the most difficult part of the process may be gaining agreement on what is the **design** "of the table," **who** should be "at the table," and **which issues** should be "on the table". Indeed, parties in complex disputes often must deal with competing forums and forum shopping. Yet, getting to the table, often called "negotiating about negotiating", is possible. It is the phase during which the parties design a forum. Indeed, most executives and managers do it all the time, intuitively moving through the steps.

The purpose of this guide is to offer a four-step process for designing a forum to help you get to the table. Mini-case studies which represent composites of actual conflicts involving the Corps are presented throughout. A variety of approaches are suggested for overcoming the obstacles you are likely to encounter.

While this guide focuses on both public disputes and contractual disputes that occur in construction projects, the emphasis is on public disputes. If you face a contract dispute, we also encourage you to read the Corps publication, Using ADR in the U.S. Army Corps of Engineers: A Framework for Managerial Decision Making<sup>5</sup>.

But, before we go step-by-step through the process, it will be helpful to have in mind the various kinds of forums you might use.

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<sup>3</sup> Laue, James H., et al, "Getting to the Table: Three Paths", *Mediation Quarterly*, 20, Summer 1988.

<sup>4</sup> Fisher, Roger and William Ury, Getting to Yes: How to Negotiate Agreements Without Giving In, New York: Penguin, 1981.

<sup>5</sup> Susskind, Lawrence, Susan L. Podziba, and Eileen Babbitt, Using ADR in the U.S. Army Corps of Engineers: A Framework for Managerial Decision-Making, IWR Case Study 89-ADR-R-1, Fort Belvoir: Institute for Water Resources, USCOE, 1989.



## II. JOINT DECISION-MAKING FORUMS: HOW THEY DIFFER

Imagine a City Hall meeting room with 30 people, seated in a semi-circle, being led by a professional facilitator who covers the walls with poster paper. The press is rapidly making notes while an environmentalist offers alternatives to channelizing a stream. Corps officials are both observing and participating as members of the group.

Across town in a small hotel conference room, a Corps senior executive is meeting with his counterpart from a large construction concern over the company's claims for further payment due to allegedly inadequate soil tests. The neutral advisor for this mini-trial is about to introduce key staff who will be making presentations to support their organization's perspective. The press has not been informed of the meeting and all have agreed that information presented here cannot be used in court.

Public or private; large or small; facilitated, refereed, or not -- these are but a few of the many characteristics that shape the nature of a forum. The significant contrasts between the above meetings is obvious, but what about the nuances? Which 30 people? Did the Corps select them, or were they self-invited? Is the facilitator from the Corps or not? How will you decide?

Will the executive who has managed the construction project for the Corps represent the Corps? Or should it be his superior? Or someone completely disassociated from the project? Making wise judgments about joint decision-making processes requires a set of criteria that differs from the typically adversarial legal gamesmanship or applying professional technical judgment.

A partial list of the characteristics of a forum is shown in Table I. These are the variables you must keep in mind as you move through the steps of designing a forum. Ultimately, the Corps must be able to live with each of the decisions made about a forum -- and, of course, with the outcome reached.

**TABLE I: CHARACTERISTICS OF A FORUM**

- What issues are on the table?
- Who are the parties?
- How are they represented?
- The setting -- public or private?
- What are the decision-making rules?
- What are groundrules?
- Is there a third party?

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### Characteristics of Joint-Decision-Making Forums

What are the issues on the table? Occasionally the issues are well-defined and straightforward, but in most cases the situation is murky and full of uncharted waters. Should the implementation ability of a potential permittee be on the table with the permit? Should local land use issues be addressed with the potential channelization of a stream?

If the issues are narrowly defined and primarily serve the Corps' interests, there may not be enough "solution space" for the parties to find an acceptable outcome. If the issues are too broad, too many stakeholders may need to be at the table and the resulting negotiation can become unworkable. Finding the middle way usually means addressing the other parties' most important issues directly related to the primary issue ( for example the permit, the financial claim, the viability of a construction project, etc.) and ensuring that the appropriate stakeholders are at the table for the issues discussed.

Having the appropriate issues on the table increases the likelihood that a solution can be reached which satisfies all the parties.

Who are the parties? When the dispute is between two organizations, as in the typical construction dispute, identifying the parties is straightforward. But what about a hazardous waste site? To identify the parties, you need to conduct a stakeholder assessment, that is, an assessment of all those who have a stake in the issue<sup>6</sup>. Stakeholders include:

- those with formal responsibility for the decision,
- those affected or potentially affected by the outcome, and
- those with the power to block or obstruct an agreement.

For example, consider the clean-up of a typical hazardous waste site and the parties. Those with formal responsibility might include the Corps, Department of Defense, Environmental Protection Agency, the State Department of Natural Resources, and a Federal District Court. Parties affected include the public directly affected by the site, taxpayers might have to incur a portion of the clean-up costs, a probable potpourri of potentially responsible parties -- the alleged polluters -- and a range of additional federal, state, and local agencies. Finally, those able to block or obstruct a potential outcome might include national environmental or chemical industry groups watchdogging the process, various senior executives not directly involved in the process, or elected officials who can influence some of the parties.

How are the parties represented? If these are the stakeholders, is there a table large enough to seat them all? Of course not. The difficult question is how to best represent these stakeholders to ensure that the collection of representatives covers the diversity of

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<sup>6</sup> See Appendix A, "A Guide to Situation Assessment" for additional questions to guide a stakeholder assessment.

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interests, functional differences (for example regulators, alleged polluters, affected publics, etc.), and knowledge sources necessary for a wise decision to be reached and for all parties to feel that their interests helped shape the outcome.

Several different levels of authority need to be considered as well. One needs to contemplate only how to best represent a local government (consider elected officials, the city manager, or a department head) to realize how rarely one person can bind an entire city. Levels of authority include:

- those with full ability to bind their organization,
- those with a limited ability to bind (e.g., those who can make binding decisions on procedural issues, but must consult on major substantive decisions),
- those who are trusted liaisons with the decision-makers, and
- those who represent the interests and concerns of an affected unorganized party.

At many tables, representatives with many different levels of authority will be involved. For example, the private corporation may be represented by a senior vice president who can bind the corporation. The local government may be represented by the city manager who needs an affirmative vote of city council to consummate an agreement. The local environmental group may need to call a meeting of its members before it allows a representative to bind the organization to a specific course of action. The differing levels of authority present often determine how decision-making rules are established, and how quickly progress can be made.

It also is important to consider how representatives are chosen. They can be:

- selected by you, the Corps representative,
- selected by a small representative group of primary stakeholders,
- selected or elected by each organized party,
- developed jointly by the parties through use of a single negotiating text, or
- some combination of the above.

If all of the parties are comfortable with the process of choosing representatives **and** how their interests are represented **and** how the group is balanced, they will most likely support the process.

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Representatives may be slimmed by:

- grouping like stakeholders together with a single representative,
- differentiating primary stakeholders (i.e., those at the table) from secondary stakeholders (i.e., those who need only be kept informed),
- having a small primary working group that links to committees that have broader representation. In general, groups smaller than 15 persons are desirable in multi-party disputes, and even smaller groups are desirable in two-party disputes.

The setting -- public or private? In many situations, local, state, or federal sunshine laws may apply, and the question of whether the setting is public or private will not be a matter of choice. When the law does not apply, discussions can become heated on this point.

In general, when meetings are closed to the public and to reporters, meeting participants may be more open, more willing to explore new ideas, and less pressured to speak the way they do to their constituents. When positions are firm and the battle has been heated, private meetings often are thought to be necessary to break through the impasse. Private meetings, however, can engender distrust in the public's eye, with negotiation sessions viewed as the modern-day equivalent of a smoke-filled back room. Private sessions may also drive a wedge between party representatives and their constituents.

While public meetings can create more posturing and be less efficient, they can also serve to build a broader consensus. Observers and the media can help reach a much broader public, and conducting meetings in public can demonstrate the integrity of the process. But public meetings can be more difficult to manage, especially if large crowds or many reporters are present.

Knowing the law, developing a sense of whether the parties at the table will need privacy, and understanding how the public and constituent groups are likely to respond should frame your discussion with other parties.

What are the decision-making rules? Once a finely-crafted group of representatives has been developed, do you allow alternates? This is one of many questions that emerge around decision making.

Decision-making rules cover most of the "what if" questions and some of the "what is" questions that emerge during a group's life. What is consensus? What if we do not reach consensus? Do we need consensus within the group only or also within each of the parties? Is the decision binding or advisory? What is the role of the third party?

Answers to these questions and others are usually included in a document that is discussed as the first item of business of a new group. The document may be labeled as protocols, groundrules, policies and procedures, or memorandum of understanding. This document

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usually includes a statement of purpose or mission statement, a discussion of necessary logistical issues (such as who keeps the minutes), and behavioral groundrules. For purposes of this document, we will continue to refer to the decision-making rules as **protocols**. Sample protocols are enclosed in Appendix C.

What are groundrules? Groundrules are the set of guidelines that define constructive interaction for the group's work. They also may sanction destructive interaction. They focus on behaviors, not attitudes. They are commonly a part of the protocols and may be posted on the wall at the beginning of each meeting. If the group is being assisted by a mediator or facilitator, that person may propose draft groundrules that the group then amends, or adds to, and then adopts.

Is there a third party? Mediators, facilitators, referees, and moderators are some of the roles played by a third party. The term "third party" comes from social science literature and refers to a group or person who helps manage the **process** in a conflict situation, but is impartial about and does not have a specific stake in the **substance** of the outcome. The use of a third party is often a difficult issue for some parties to work through because of the lack of shared concept of the third-party role.

If the situation is highly contentious, involves many complex issues, has a large number of parties, or has high stakes, a third party may be of considerable assistance to the parties. Commonly, the parties to a dispute will negotiate with the third party over the third party's role. The third party can draft protocols, offer groundrules, help the parties clarify representation, run meetings, help the parties communicate clearly between meetings, and help the parties develop a final agreement.

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These are the most significant characteristics that define a forum. Each one should be explicitly discussed among the parties in the process of jointly designing the forum. You will need to answer the above questions for every joint decision-making process. Let's move to the four-step method to examine how consensus on these issues might be developed.

### III. GETTING TO THE TABLE: A FOUR-STEP METHOD

The Four-Step Method is a straightforward approach an executive can use to initiate a joint decision-making process with the other stakeholders. It is heavily dependent on analysis and your ability to select a strategic course of action.

The Four Step Method is:

- Assessing the Situation

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- Developing Agency Strategy
- Designing and Building the Forum
- Getting Parties to the Table

These steps -- or stages -- often occur sequentially. However, they are not always either successive or discrete stages; they can occur out of sequence or simultaneously. And assessment, the first step, continues throughout the entire process.

In **Assessing the Situation**, the goal is to develop a strategic perspective on the situation drawing on the basic facts, each major party's perspective, an assessment of power issues, and an understanding of the operating environment. In **Developing the Agency Strategy**, the Corps executive reviews the assessment in light of agency policy and needs, and makes specific choices about how to proceed in attempting to resolve the problem.

**Designing and Building the Forum** is the step where you and other parties make key decisions about the characteristics of the table -- who sits at the table, what issues are on the table, how decisions get made, and others. Finally, **Getting Parties to the Table**, while frequently taken for granted, includes important decisions regarding timing, the order of invitation, relationships with other agency activities, and the like. Each step creates choices and decisions for you and the other parties about the worth of joint processes in comparison to the alternatives.

Joint decision-making processes -- negotiation, mediation, collaborative problem solving, mini-trials, and others -- are not a panacea for all situations. By following the stages, you not only will be preparing to initiate joint decision-making processes, you will be better able to determine the appropriateness of these processes for your situation. Litigation, administrative and legislative processes, public relations campaigns, and other forums may be better matched to the situation you face. The Four-Step Method helps you make the right choice.

### STEP 1. ASSESSING THE SITUATION

Developing a working understanding of the situation, as you **and** others see it, is an essential step for determining how to proceed. A preliminary assessment covers the topics shown in Table II.

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## TABLE II: QUESTIONS FOR THE PRELIMINARY ASSESSMENT

Who are the parties?

What are the stakes for you?

Do some represent essential agency objectives?

What is the power of the agency relative to that of other parties?

How will the power balance affect this situation?

What are the current relationships among the parties?

What are your goals for future relationships?

What is the level of interdependence and compatibility among the parties?

What is the context and background? How does that influence your choices?

A successful assessment allows you to develop a workable strategy to determine how the situation can be resolved, to clarify your interests and goals for a satisfactory outcome, and to thoughtfully design a forum that responds to your needs and those of the other parties. Conducting the assessment of an actual or potential conflict helps you think beyond the natural first response -- how to fix it quickly -- and move to longer-range issues of agency objectives, relationships, power, and procedure.

### A. Data to be Gathered in the Assessment

In this stage, you are primarily interested in information essential to the development of a strategy for the agency. A Guide to Situation Assessment, included in Appendix A, contains a model comprehensive assessment guide.

Your ability to gather the information shown in Table II may depend on what stage the decision-making process has reached. If you are in the midst of a full-blown conflict, this information may be readily available through newspapers, internal documents, correspondence, and other written material. You will be better able to understand and predict the responses of other parties from the existing pattern of interaction.

It may be wise to start discussions with potential parties much earlier in the assessment step if other sources of information are not available. Agency preventive action in response to likely or imminent conflicts can occur as agencies better understand some of the destructive consequences of ongoing conflict.

Key Characteristics of the Situation. Understanding the broad outlines of the situation will provide you with a context for synthesizing specific information. The key characteristics

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include the parties and their basic interests, the issues, and the potential forums for decision making.

Parties or stakeholders, as we discussed earlier, are persons or groups who:

- have decision-making authority,
- may be affected by the decision, or
- can block or delay a decision.

In assessing the parties, it is important to understand how they cluster (for example, anti-development, pro-environment, pro-development, etc.), their organizational size and structure (for example, hierarchical, democratically elected leadership, etc.), their general interests, and their central issues.

**Interests** are those underlying concerns or principles that must be satisfied for the development of an equitable and durable agreement. **Interests are why** a party is involved, and **issues are what** they are concerned about. Interests and issues are the tangible items that need to be addressed for resolution to be reached. They need to be distinguished from positions. **Positions are specific answers, demands, or proposals** that a party believes will satisfy its interests in this issue.

Knowing the potential **forums** where parties might seek to resolve the dispute can help a manager compare joint decision making to other approaches. While we focus on joint decision-making forums here, courts, private hearings, administrative procedures, and public hearings are also forums. Each party may engage in **forum-shopping**, trying to find the setting it believes will be most advantageous in protecting its interests. Occasionally, there may be several forums used simultaneously. For example, negotiations and court processes are often pursued at the same time.

Knowing these key characteristics will allow you to build a comprehensive picture of the situation. Each of the next questions provides information used in building a strategy for agency action to respond to that situation.

Stakes in the Situation. Stakes are what each party believes it has at risk in the situation. Criteria for judging stakes are:

- the importance of the issue to each party.
- the relationship of the issue to the strongly held values or essential interests of each party.
- the strategic nature of the issue for the agency -- the importance of its resolution to the future ability of the agency to meet its mission.



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- the degree to which the resolution of the issue may set a precedent which will constrain agency action on similar issues in the future.

Knowing the stakes of each party is an important predictor for party behavior. When the stakes are high, a party will be highly assertive or aggressive in working toward a resolution that protects its interests. If the stakes are high for your agency, you should seek a strategy that protects your bottom line interests -- even in the worst case. If the stakes are not that significant, parties are likely to be more flexible in their response, and the agency is no exception.

Relative Power of the Agency. Power can be defined as the ability to control and influence others or a situation in a way that furthers your interests or thwarts those of others. Three characteristics are important when considering power.

First, power is relational. Having a power resource, such as status, legitimacy, money, time, knowledge, or organization, is significant only if that resource is recognized by other parties. You may have the authority or power to convene a meeting, but what if nobody comes?

Second, the existence of power sources and uses is independent of the motivation for that use. Groups occasionally choose to exercise their power simply to demonstrate to others their strength, or to attract attention, or to play out an internal political battle.

Third, certain power resources are more effective in some forums than others. A community organization with many active members may be highly effective in a lobbying or electoral process, but might need more technical staff resources to participate effectively in an administrative process. Environmental organizations with staff attorneys often function better in litigation processes.

For this analysis, we distinguish between power based on a **legal right** and the **informal power resources** a person or institution may have by virtue of position, personality, or network. Parties to a dispute can have a **legal right** to participate in any dispute resolution process, or they may be able legally to enforce certain procedural requirements.

If parties have a legal right to participate, the forum design must reflect their rights. And indeed, you may not have a choice of forum, especially if Congress or the courts are involved. But do not overcompensate because someone has legal rights. Remember that other parties may be just as dissatisfied with the formal process, and may seek to move you toward **their** alternate forum of choice or may pursue simultaneous forums.

Those with **informal power** often can be extremely influential, even without the legal right. The chair of a key congressional committee may have considerable influence, if he or she chooses to use it, over which water projects are destined for his or her state. Neighborhood, environmental, and NIMBY (not in my back yard) groups have been able to

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delay indefinitely or at least dramatically influence major decisions through a combination of symbolic, moral, and people resources.

There are many sources of informal power. A partial catalog is given in Table III. The source of informal power needs to be assessed on a forum-by-forum basis to understand the preferred forums of a particular stakeholder and its power relative to your own.

**TABLE III: SOURCES OF POTENTIAL POWER**

**Physical Resources**

money  
property  
control over institutions with property or money

**Information Resources**

factual information  
expertise to obtain and interpret information  
access to the media or ability to disseminate information

**Symbolic Resources**

reputation and prestige  
appeal to fundamental values (e.g., fairness)  
legitimacy of an established authority role  
dependable allies or coalitions

**People Resources**

skilled and committed leadership  
member numbers, skills, and commitment  
effective organizational systems

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Bidol, Patricia, *et al*, eds., Alternative Environmental Conflict Management Approaches: A Citizens' Manual, Ann Arbor, MI: School of Natural Resources, 1986, pp. 96.

In many cases, organized groups can use legal processes to obstruct decisions they see as detrimental to their interests. If you seek to avoid court, the operative question becomes: Which forum can be used to develop an agreement that will be accepted by the parties who have the legal right to raise the issue in court? In situations where there are power

