
TWO CONCEPTS OF MEDIATION IN THE FmHA'S FARMER-LENDER MEDIATION PROGRAM

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In all walks of life, people have trouble addressing difficulties with one another. When they cannot work out a solution on their own, and when they cannot tolerate the situation, one or all parties may decide to withdraw, to fight, or to seek help from a legislature, administrative agency, or court. Increasingly in the United States, disputants are turning toward alternative methods of dispute resolution.¹

The least formal of these methods is mediation, a process in which an impartial third party helps others resolve a dispute or plan a transaction.² Unlike a judge or an arbitrator, a mediator does not decide the case, but facilitates the parties' negotiations. Americans are long familiar with the use of mediation in disputes between nations and between management and labor. But since the late 1970s, mediation has spread into almost every area of conflict. Thus, mediation now is common in divorce and child custody matters, personal injury claims, environmental and other public-policy disputes, special education problems, and fee disputes between lawyers and clients.³ And recently federal courts and executive agencies have moved to encourage greater use of mediation as well as the other alternatives.⁴

This article concerns just one mediation program conducted by one federal agency, but it has, I hope, significant implications for mediation efforts in other contexts. In 1988, the Farmers Home Administration launched a massive effort, mandated by Title V of the Agricultural Credit Act of 1987,⁵ to mediate between farmers and their creditors over delinquent loans. The effort's most striking aspect is that it embraced two radically different forms of mediation. This development has significance beyond the farmer-lender mediation program. The federal government is moving swiftly to employ alternative methods of resolving disputes, due in part to recent legislation such as the Administrative Dispute Resolution Act of 1990,⁶ which may portend a

1. The principal alternative methods are arbitration, negotiation, mediation, and "mixed" processes, such as the summary jury trial and the mini-trial. STEPHEN B. GOLDBERG ET AL., *DISPUTE RESOLUTION* (2d ed. 1992); JOHN S. MURRAY ET AL., *PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS* (1989); LEONARD L. RISKIN & JAMES E. WESTBROOK, *DISPUTE RESOLUTION AND LAWYERS* (1987 & Supp. 1993).

2. For extensive discussions of mediation, see JAY FOLBERG & ALISON TAYLOR, *MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICT WITHOUT LITIGATION* (1984); CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* (1986); JOSEPH B. STULBERG, *TAKING CHARGE/MANAGING CONFLICT* (1987).

3. NANCY H. ROGERS & CRAIG A. McEWEN, *MEDIATION: LAW, POLICY, PRACTICE* 203-224 (1989 & Supp. 1991).

4. See *infra* notes 6-7 and accompanying text.

5. Agricultural Credit Act of 1987 §§ 501-12, 7 U.S.C. §§ 5101-5106 (1988); 7 U.S.C. § 2006 (1988); 12 U.S.C. § 2202e (1988).

6. The Administrative Dispute Resolution Act of 1990, Pub. L. No. 101-552, 104 Stat. 2736 (1990) (to be codified at 5 U.S.C. § 581) requires each federal agency to develop a policy on the use of alternative dispute resolution, and, in so doing, to examine the use of such methods in

- (A) formal and informal adjudications;
- (B) rule-makings;
- (C) enforcement actions;
- (D) issuing and revoking licenses or permits;
- (E) contract administration;
- (F) litigation brought by or against the agency; and
- (G) other agency actions.

Pub. L. No. 101-552 § 3 (a)(2).

vast expansion in the use of alternative methods of dispute resolution (ADR) by federal agencies, and the Civil Justice Reform Act of 1990,⁷ which provides encouragement and authorization for federal district courts to use alternative methods of dispute resolution.

Part I of this article describes the background of the program and Part II its implementation. Part III explains the two kinds of mediation; Part IV deals with the significance of these developments for organizations and individuals outside the FmHA.

I have avoided excessive detail about the FmHA loan programs or the FmHA's implementation of the farmer-lender mediation program, and this for two reasons.⁸ First, this program was large and diverse, including thousands of mediations conducted by hundreds of mediators in at least thirty states. Seventeen of these states created mediation programs for which the FmHA provided matching funds. In more than a dozen other states, the FmHA arranged for mediation services through contracts. In some states FmHA used its own employees to conduct "voluntary meetings of creditors." The circumstances facing mediation participants varied not only state-to-state but also by region within states and by time periods. Every farm family had its unique set of personalities and circumstances—legal, economic, social, psychological, and interpersonal—and so did every mediator and every lender. Moreover, the mediations often were set in an elaborately complex system of loans and loan servicing options. Accordingly, it seemed impossible to describe or analyze this program in any detailed way.

Second, a more detailed description—though it might have been useful to a small number of officials concerned with the program under study or very similar programs—would be of limited interest and utility to others charged with carrying out different kinds of dispute resolution efforts.

Therefore, I have attempted to provide just enough texture for the reader to understand the program and its implementation and to focus on the feature of the program

In addition, each agency must name a "senior official to be the dispute resolution specialist of the agency," Pub. L. No. 101-552 § 3 (b), and provide training in dispute resolution for such person and for other agency officials who will be involved in implementing the policy. The Act requires every agency to consider amending its standard agreements to deal with alternative dispute resolution, and mandates the appropriate amendment of the "Federal Acquisition Regulation." Pub. L. No. 101-552 § 3 (d) ("Federal Acquisition Regulation" refers to 41 U.S.C. § 405(a) (1988)).

The statute also amends the Administrative Procedure Act, 5 U.S.C. § 551 (1988), in several ways to facilitate agency use of alternative methods of dispute resolution. It authorizes agencies generally to use ADR to resolve an issue in controversy if the parties agree, and provides that the Administrative Conference of the United States will establish standards for neutrals, maintain a roster of neutrals, enter into contracts for services of neutrals that may be used by agencies, and develop procedures that would allow agencies quickly to procure services of neutrals. In addition, it authorizes agencies to submit to arbitration, a reversal of a long-standing prohibition.

For a review of federal agency activity in alternative dispute resolution, see Charles E. Grassley & Charles Pou, Jr., *Congress, The Executive Branch, and the Dispute Resolution Process*, 1992 J. DISP. RESOL. 1.

7. Civil Justice Reform Act of 1990, Pub. L. No. 101-650, § 102.(5)(D), 104 Stat. 5089, 5090 (1990).

8. For a more extensive description of the program's implementation, see Leonard L. Riskin, *The Farmer-Lender Mediation Program: Implementation by the FmHA* (a Report to the Administrative Conference of the United States, 1991) [hereinafter ACUS Report].

that I think provides the greatest opportunities for learning about dispute resolution—the striking differences between the two types of mediation that developed.

I. Background

A. THE FARMERS HOME ADMINISTRATION

The FmHA is the successor to the Resettlement Administration, which was created in 1935, and the Farm Security Administration.⁹ Its “current mission statement directs [it] to ‘serve as a temporary source of supervised credit and technical support for rural Americans for improving their farming enterprises, housing conditions, community facilities, and other business endeavors until they are able to qualify for private sector resources.’ ”¹⁰ The Agency’s 11,558 full-time employees operate numerous loan programs through forty-six state offices, 264 district offices, and 1,904 county offices.¹¹ The Agency often is called a “lender of last resort” because it generally makes loans to persons who can secure no other financing.¹²

B. THE FARM CRISIS

The farm sector enjoyed a boom in the 1970s. In 1972–73 farm income rose greatly.¹³ Because of the widespread expectation that income would continue to climb, the price of farmland increased dramatically. As a result, many farmers borrowed to purchase machinery and to develop their land,¹⁴ a practice that was highly profitable during boom times.¹⁵ In the early 1980s, however, a rise in interest rates was accompanied by a precipitous decline in the prices of land and machinery. Consequently, many farmers were unable to service their debt, and delinquencies on loans to major farm lenders—principally banks, the Farm Credit System, life insurance companies, and the Farmers Home Administration—grew substantially.¹⁶ Because the FmHA is a lender of last resort,¹⁷ large numbers of farmers who were denied credit assistance by other sources turned to the FmHA for help, and the FmHA responded by increasing its portfolio.¹⁸ In the first six months of 1985, FmHA made \$763 million in new loans to over 7,000 farmers

9. FARMERS HOME ADMINISTRATION, U.S. DEPARTMENT OF AGRICULTURE, A BRIEF HISTORY OF THE FARMERS HOME ADMINISTRATION 4–5 (1990) [hereinafter BRIEF HISTORY].

10. *Id.* at 1. See also 7 C.F.R. Pt. 2003, Subpt. A, Exh. A, 6 (1992).

11. BRIEF HISTORY, *supra* note 9, at 4–5.

12. *Id.* at 2.

13. Emanuel Melichar, *Turning the Corner on Troubled Farm Debt*, 73 FED. RESERVE BULL. 523, 525–26 (1987).

14. *Id.* at 526.

15. *Id.* at 527.

16. *Id.* at 529.

17. See *Curry v. Block*, 541 F. Supp. 506, 511 (S.D. Ga. 1982).

18. U.S. GENERAL ACCOUNTING OFFICE, FARMERS HOME ADMINISTRATION: AN OVERVIEW OF FARMER PROGRAM DEBT, DELINQUENCIES, AND LOAN LOSSES (1986). During 1984–86, 50,033 of some 261,000 total FmHA borrowers were considered “continually delinquent” (i.e., delinquent as of June 30 in each of the three years). Delinquent payments totalled \$6.8 billion. U.S. GENERAL ACCOUNTING OFFICE, FARMERS HOME ADMINISTRATION: LOAN SERVICING EFFORTS FOCUS ON CONTINUALLY DELINQUENT BORROWERS (1986).

who were technically insolvent. It also made new loans to over 12,000 farmers who had extreme financial difficulties.¹⁹ Because FmHA borrowers tend to be greater risks than other borrowers, FmHA's delinquencies peaked earlier than those of the other major sources of farm lending. The FmHA was slower than other lenders to liquidate, because it is a public entity with a quasi-social function. During each of the years 1980, 1981, and 1982 the FmHA charged off less than \$50 million, but the charge off figures were \$.1 billion in 1983 and 1984, \$.3 billion in 1985, and \$.4 billion in 1986.²⁰ All four major sources of loans experienced heavy losses.

In the economic downturn afflicting the agricultural sector, FmHA borrowers were hit particularly hard. FmHA, in turn, began to exercise frequently its right to accelerate loans and foreclose on property securing those loans.²¹

Borrowers filed numerous lawsuits challenging the FmHA's procedures, with some success.²² And a widely seen motion picture, *Country*, starring Jessica Lange and Sam Shepard, dramatized the plight of a family treated roughly by the FmHA.²³

Accompanying the economic decline in the farm sector was a deterioration in family structures and the social fabric in many rural areas, especially in the mid-west. Rates of divorce, child abuse, depression, suicide, and drug abuse escalated, and many rural communities suffered community-wide depression marked by a feeling of hopelessness, exacerbated by a shortage and lack of coordination of social services.²⁴ A Wyoming rancher put it this way:

... imagine, if you can, what it feels like to be losing ranches or businesses that have been three, four, five generations in the making. Reflect on the personal

19. U.S. GENERAL ACCOUNTING OFFICE, FARMERS HOME ADMINISTRATION: FINANCIAL AND GENERAL CHARACTERISTICS OF FARM LOAN PROGRAM BORROWERS (1986).

20. Melichar, *supra* note 13, at 530.

21. Numbers of FmHA Farmer Program foreclosures for fiscal years 1982-88 are listed below:

Year	Foreclosures	Year	Foreclosures
1982	844	1986	111
1983	615	1987	233
1984	356	1988	33
1985	89		

FARMERS HOME ADMINISTRATION, SELECTED FARMER PROGRAM STATISTICAL INFORMATION (May 6, 1988).

In 1976, indebtedness to FmHA totalled about \$5.5 billion. By 1980, it was over \$19 billion, and in 1985 it was over \$28 billion.

22. Allison v. Block, 723 F.2d 631 (8th Cir. 1983); Curry v. Block, 541 F. Supp. 506 (S.D. Ga. 1982); Coleman v. Block, 562 F. Supp. 1353 (D.N.D. 1983); 580 F. Supp. 194 (D.N.D. 1984); 632 F. Supp. 1005 (D.N.D. 1986); 663 F. Supp. 1315 (D.N.D. 1987). See note 43, *infra*. For a review of some of the practices, see James T. Massey, *Farmers in Crisis: A Challenge to Legal Services*, 18 CLEARINGHOUSE REV. 702 (1984).

23. James T. Massey, *Country: A Good Movie, and True*, 18 CLEARINGHOUSE REV. 718 (1984). A legal services lawyer wrote that "... the FmHA practices and procedures depicted in the movies are right out of the agency's own regulations. The unilateral freeze and seizure of the Ivy's farm income, cutting them off from family living and farm operating funds; the file notation to 'work toward voluntary liquidation'; the thirty day acceleration/demand letter, and the auction are all specified FmHA procedures. In 1982 and 1983, 15,576 FmHA borrowers who were unable to farm or to fight were put off their farms, many of them through exercise of these practices and procedures." *Id.*

24. See NATIONAL MENTAL HEALTH ASS'N, REPORT OF THE NATIONAL ACTION COMMISSION ON THE MENTAL HEALTH OF RURAL AMERICANS (1988).

desperation and then try to remember that requesting assistance is seen as that last measure of defeat, since we have long measured accomplishment in terms of private enterprise and private problem-solving. We continue to believe we must sustain that individual approach in any turmoil or tragedy rather than draw upon any outside strength, especially assistance from human service programs since we are very skeptical of any agency or bureaucracy.

. . . we are not people who are going to go into mental health centers and fill out forms. We are not people who think of food stamps as an option, or low-income energy programs or public health care provisions.

. . . what happens to us when we cannot or will not avail ourselves of any of these avenues? Hopelessness and helplessness develop and make for a depression that fosters child and spouse abuse, separation and divorce, alcohol and other drug addiction, violence and suicide.²⁵

C. PRE-1988 FARM-CREDIT MEDIATION PROGRAMS

Iowa and Minnesota responded early to these conditions. The cornerstone of the efforts in both states was successful mediation programs that have greatly affected the development of farmer-lender mediation efforts in other states. Although these two programs were created in very different ways and have very different structures, they share, and have promoted, a common philosophical approach to farmer-lender mediation.²⁶

The Minnesota program grew from the work of a task force that was initiated by the Minnesota Department of Agriculture in 1984 and included both public and private agencies that provided services to farmers. It subsequently added bankers, farm advocates, church groups, educators, economists, and farmers.²⁷ As the crisis deepened, some farm advocates pressed for a one-year moratorium on foreclosures.²⁸ In November 1985, bankers agreed—at the Governor's request—to a voluntary ninety-day moratorium on foreclosures on agricultural property²⁹ and the creation of a farmer-lender mediation program under which the University of Minnesota Extension Service offered farmer-lender mediation to parties who requested it.³⁰ In short order, the Service located and trained over 300 mediators, and by December 1985 they began to conduct mediations.

25. Nedalyn Testolin, Wyoming rancher and founder of Wyoming Rural Support Group, testifying before the National Action Commission on the Mental Health of Rural Americans, NATIONAL MENTAL HEALTH ASS'N, REPORT OF THE NATIONAL ACTION COMM'N ON THE MENTAL HEALTH OF RURAL AMERICANS 19 (1988).

26. See *infra* parts III.A.1. & 2.

27. Frank Blechman, LESSONS FROM THE GROWTH OF FARMER-CREDITOR MEDIATION SYSTEMS, in NATIONAL INSTITUTE FOR DISPUTE RESOLUTION FORUM 17, 18 (Fall 1990). See also Micheal Thompson, *Crisis in Rural America: The Genesis of Farmer-Lender Mediation*, NATIONAL INSTITUTE FOR DISPUTE RESOLUTION FORUM 3, 3-4 (Fall 1990); Neil D. Willardson, *Alternative Dispute Resolution in Farmer-Lender Disputes: Mandatory Mediation in Minnesota*, 5 LAW & INEQUALITY 487, 487-491 (1987).

28. Telephone interview with Kathy Mangum, Farm Credit Mediation Program Director, University of Minnesota Extension Service (Sept. 20, 1990).

29. Blechman, *supra* note 27, at 19; telephone interview with Kathy Mangum, Farm Credit Mediation Program Director, University of Minnesota Extension Service (June 26, 1991).

30. This was part of a 4-H club farm family project and was developed with the assistance of the Minnesota State Office of Mediation, which was funded by the National Institute for Dispute Resolution. Thompson, *supra* note 27, at 3-4.

During the "moratorium" period, some lenders continued foreclosures.³¹ As a result, many legislators viewed the moratorium effort as a failure.³² In May 1986, the Minnesota legislature, "[i]n a remarkable bipartisan effort,"³³ enacted a statute to address the farm crisis.³⁴ Among other things, the statute established a farmer-lender mediation program that was "mandatory" in the sense that it prohibited persons from moving to enforce interests in farm property securing debts of more than \$5,000 without first serving the debtor with a notice of the availability of mediation.³⁵ The statute also provided that the creditor may not move against the property until ninety days after the debtor files a mediation request,³⁶ and it required the Agricultural Extension Service³⁷ to train and provide mediators, as well as credit analysts (to help the farmer prepare for mediation).

The Minnesota legislature appropriated \$360,000, for one year,³⁸ and the Agricultural Extension Service moved quickly to provide mediation along with credit analysis services. During the first six months, the service handled over 2,000 cases.³⁹ Since the program's inception, the Minnesota legislature has made annual appropriations for it.⁴⁰

In the first eighteen months of the program, it put 645 volunteers through an intensive two-day training program. The group includes retired and active farmers, retired bankers, teachers, ministers, and farm financial consultants.⁴¹

By its terms, the Minnesota statute applies to the FmHA as a creditor.⁴² But the FmHA refused to participate in mediations or to restructure loans in connection with mediations.⁴³ FmHA representatives were available, however, to meet with

31. Telephone Interview with Kathy Mangum, Farm Credit Mediation Program Director, University of Minnesota Extension Service (June 26, 1991).

32. *Id.*

33. Blechman, *supra* note 27, at 19.

34. MINN. STAT. §§ 583.21, 583.32 (1986).

35. MINN. STAT. §§ 550.365 (may not attach, levy on, or seize); 559.209 (may not begin to terminate contract for deed); 582.039 (may not begin proceeding to foreclose) (1990).

36. MINN. STAT. §§ 583.26(4)-(5) (1990).

37. The name of this agency was changed to Minnesota Extension Service in 1987. Telephone Interview with Kathy Mangum, Farm Credit Mediation Program Director, University of Minnesota Extension Service (June 26, 1991).

38. Minnesota Omnibus Farm Bill, 1986 Minn. Laws, Ch. 398, Art. 29, § 1(2).

39. Blechman, *supra* note 27, at 19.

40. Telephone Interview with Kathy Mangum, Farm Credit Mediation Program Director, University of Minnesota Extension Service (June 26, 1991).

41. See Ruth Grunke and Kathy Mangum, July 1, 1989-June 3, 1990, MINNESOTA EXTENSION SERVICE FARM CREDIT MEDIATION ANNUAL REPORT 6.

42. MINN. STAT. § 583.24(1) (1990) makes the statute applicable to creditors including "the United States or an agency of the United States."

43. Telephone Interviews with Kathy Mangum (Sept. 20, 1990 and June 26, 1991).

FmHA's reasons for taking this position are not clear. In one case, it argued that the supremacy clause preempted the Minnesota statute. Memorandum in Support of Defendant's Motion for Judgment on the Pleadings, or, in the Alternative, for Summary Judgment at 17, Hansen v. Lyng (D. Minn. 1987). Conventional wisdom is that this was a response to court decisions restricting the FmHA from moving against property that secured its loans unless it followed certain notification and other procedures. Coleman v. Block, 580 F. Supp. 192 (D.N.D. 1983), for example, enjoined the FmHA from moving against property of a national class of FmHA borrowers unless it gave the debtor 30 days notice that informs him of his right to contest the proposed action and establish eligibility for loan deferral pursuant to 7 U.S.C. § 1981a; gives a statement of reasons for the proposed action; informs the borrower of

FmHA borrowers who were in mediation with other lenders.⁴⁴ As a result of the FmHA's refusal to participate, many mediations in both Minnesota and Iowa were frustrated and, according to one commentator, "farmers began filing for bankruptcy because then FmHA would be forced to participate in bankruptcy proceedings."⁴⁵

The Iowa program also began with voluntary mediation, which legislation turned into a program that required farm lenders to participate in mediation requested by borrowers before proceeding against farm property.⁴⁶ A broad-based working committee under the leadership of Lieutenant Governor Bob Anderson, with help from the Conflict Clinic, Inc., held forums to discuss mediation. This group rejected the notions of locating the mediation service in a government agency, as had been done in Minnesota, or in a private organization, out of a concern that the providers would appear biased.⁴⁷ It decided to create a non-profit corporation that "represented farmers, creditors, mediators, attorneys, educators and business executives"⁴⁸ to operate the Iowa Farmer-Creditor Mediation Service. The principal goal of the program was to build commitment to the mediation process, rather than seek specific outcomes, such as keeping farmers on the land.⁴⁹

In the early days of the program, an FmHA employee served on the board of the corporation, and the FmHA participated in mediations until August 1987.⁵⁰ At that time, according to Micheal Thompson, Executive Director of the Iowa Mediation Service, the FmHA General Counsel became aware of the discrepancy between FmHA's practices in Iowa and in other states and called a halt to such participation.⁵¹

In short order, at least ten other states began efforts that culminated in the creation

the factors that determine eligibility for loan deferral and of the identity of the person who would preside at the hearing.

On May 7, 1987 the same court dismissed a number of plaintiffs' challenges to FmHA practices but also enjoined the FmHA from proceeding against agricultural property of borrowers without giving appropriate notice. *Coleman v. Block*, 663 F. Supp. 1315 (D.N.D. 1987). It also ordered the FmHA to submit a statement of the true basis and purpose of 7 C.F.R. § 1951.44(b)(5), *Block*, 663 F. Supp. at 1325, and ordered it to amend Form FmHA 1924-26 by adding "a statement . . . that complete explanations of the various options listed on the form, and the implications or effects of choosing or rejecting them, are available at the local county FmHA office" and to amend the form to allow borrowers to make a separate election of options and to include reasons for each proposed FmHA option. *Id.* at 1333.

In *Coleman v. Lyng*, 864 F.2d 604 (8th Cir. 1988), the Eighth Circuit held that the Agricultural Credit Act of 1987 mooted both the government's appeal and the farmers' cross appeal.

44. Telephone Interview with Kathy Mangum, Farm Credit Mediation Program Director, University of Minnesota Extension Service (June 26, 1991).

45. Thompson, *supra* note 27, at 5. See Richard Krueger, ET AL., *Farm Credit Mediation Evaluation Report*, in MINNESOTA EXTENSION SERVICE FARM CREDIT MEDIATION PROGRAM STUDIES (1986-90) at 3, 14 (Minn. Extension Serv., Univ. Minn. AD-BU-3920, 1990).

46. IOWA CODE § 654A.6 (1990).

47. Blechman, *supra* note 27, at 17.

48. Thompson, *supra* note 27, at 4.

49. Telephone Interview with Micheal Thompson, Executive Director, Iowa Farm Mediation Service (July 1, 1991).

50. *Id.*

51. *Id.* See *supra* note 43 and accompanying text.

of farm-credit mediation services.⁵² Most of these programs were voluntary and, perhaps as a result, had lower case loads, yet many enjoyed settlement rates even higher than those in Iowa and Minnesota.⁵³ But the FmHA did not participate.

D. THE AGRICULTURAL CREDIT ACT OF 1987

In response to these and related events, Congress passed the Agricultural Credit Act of 1987,⁵⁴ a massive attempt to deal with problems in the agricultural credit realm. Title V⁵⁵ established the mediation program. Much of Title VI was intended to respond to court-ordered changes in FmHA's treatment of delinquent borrowers,⁵⁶ and it has actually given more rights to FmHA borrowers than was required by the court.⁵⁷

1. Mediation

Title V propelled the Department of Agriculture into mediation by requiring the Secretary to certify and provide matching grants to state mediation programs that met certain criteria,⁵⁸ to participate in state mediation programs,⁵⁹ and to make "a reasonable effort" to contact and encourage creditors to take part in a restructuring plan.⁶⁰ To fulfill this last requirement, the FmHA included in its rules on restructuring a requirement that delinquent borrowers be offered a chance to participate in mediation or a voluntary meeting of creditors; in addition, it began a program to contract for mediation services in some states that lacked certified mediation programs.

Title V requires the Secretary to provide states that have "qualified" mediation programs with matching funds, limited to 50 percent of the cost of each program and to \$500,000 per year for each state.⁶¹ The Secretary must certify a state mediation program as "qualified" if the program:

- (1) provides for mediation services to be provided to producers, and their creditors, that, if decisions are reached, result in mediated, mutually agreeable decisions between parties under an agricultural loan mediation program;
- (2) is authorized or administered by an agency of the State government or by the Governor of the State;

52. Alabama, Kansas, Mississippi, Nebraska, North Dakota, Oklahoma, South Dakota, Texas, Wisconsin, and Wyoming. Thompson, *supra* note 27, at 4.

Many of these efforts were aided by the Conflict Clinic, Inc., which called and facilitated several gatherings of persons concerned with farmer-lender mediation. Memorandum from Bill Potapchuk, Conflict Clinic, to Friends of Farm Debt Mediation (Oct. 12, 1987) (on file with the *Administrative Law Review*).

53. Thompson, *supra* note 27, at 5.

54. Agricultural Credit Act of 1987, Pub. L. No. 100-233, 101 Stat. 1568 (1988) (codified as amended in scattered sections of 7 U.S.C. and 12 U.S.C.).

55. Agricultural Credit Act of 1987, §§ 501-12 (1988); 7 U.S.C. §§ 5101-5106, 2006 (1988); 12 U.S.C. § 2202e (1988).

56. S. REP. NO. 230, 100th Cong., 1st Sess. 6 (1987). See *supra* note 13, at 529.

57. *Coleman v. Lyng*, 864 F.2d 604 (8th Cir. 1988).

58. Agricultural Credit Act of 1987, §§ 501-502, 7 U.S.C. §§ 5101-5102 (1988).

59. *Id.* § 503, 7 U.S.C. § 5103.

60. *Id.* § 615(d)(2), 7 U.S.C. § 2001(d)(2).

61. *Id.* § 502, 7 U.S.C. § 5102.

- (3) provides for the training of mediators;
- (4) provides that the mediation sessions shall be confidential; and
- (5) ensures that all lenders and borrowers of agricultural loans receive adequate notification of the mediation program.⁶²

Section 503 requires that “with respect to each program under the jurisdiction of the Secretary that makes, guarantees, or insures agricultural loans,” the Secretary:

- (A) shall prescribe rules requiring that each such program shall participate in good faith in any state agricultural loan mediation program;
- (B) shall, on the date of enactment of this Act, participate in agricultural loan mediation programs; and
- (C) shall—
 - (i) cooperate in good faith with requests for information or analysis of information made in the course of mediation under any agricultural loan mediation program described in section 501; and
 - (ii) present and explore debt restructuring proposals advanced in the course of such mediation.⁶³

The statute also directs the Farm Credit Administration (FCA), an independent regulatory agency of the executive branch charged with regulating the Farm Credit System,⁶⁴ to prescribe rules requiring its institutions, “(1) to cooperate in good faith with requests for information or analysis of information made in the course of mediation under any agricultural loan mediation program described in section 501; and (2) to present and explore debt restructuring proposals advanced in the course of such mediation.”⁶⁵

In addition, the statute required the Secretary and the Farm Credit Administration to prescribe regulations to carry out these provisions⁶⁶ and directed the Secretary to report on the effectiveness of the program, recommendations for improvement, and “savings to the states” that resulted from such programs.⁶⁷

62. *Id.* § 501(c), 7 U.S.C. § 5101.

63. *Id.* § 503(a), 7 U.S.C. § 5103.

64. The Farm Credit Administration was established under the Farm Credit Act of 1971, 12 U.S.C. § 2241 (1971), and regulates a collection of banks, associations, affiliated service organizations, and other entities known as the Farm Credit System. The lending organizations—Farm Credit Banks, Banks for Cooperatives, the National Bank for Cooperatives, Federal Land Bank Associations, Agricultural Credit Associations, and Federal Land Credit Associations—“were established to provide adequate and dependable credit and closely related services to farmers, ranchers, and producers or harvesters of aquatic products; persons engaged in providing on-the-farm services; rural homeowners. . . .” THE UNITED STATES GOVERNMENT MANUAL 1989/90, at 566 (1989). Initially capitalized by the government, these Farm Credit lending institutions now are organized as cooperatives and are completely owned by their borrowers. Funds are raised mainly through the sale of securities. *Id.*

65. Agricultural Credit Act of 1987, § 503(b), 7 U.S.C. § 5103 (1988). Note that, in contrast to the DOA agencies, FCA is not explicitly required by the statute to require Farm Credit System institutions to “participate” in farm credit mediation. However, the requirement that it “present and explore debt restructuring proposals advanced in the course of such mediation” seems to imply participation, and the FCA apparently made that interpretation in promulgating rules. ACUS Report, *supra* note 8, at 9, 26–27.

66. *Id.* § 504, 7 U.S.C. § 5104.

67. *Id.* § 505, 7 U.S.C. § 5105. For the history of authorizations, appropriations, allocations, and obligations, see ACUS Report, *supra* note 8.

2. *Loan Servicing*

The Act included significant changes in the functioning of the FCA as well as the FmHA. The most important of these, for present purposes, were requirements that these lenders restructure loans where restructuring is in the government's financial interests and would help keep the farmer on the farm.⁶⁸ The FmHA is required to

modify delinquent farmer program loans . . . to the maximum extent possible—

- (1) to avoid losses to the Secretary on such loans, with priority consideration being placed on writing-down the loan principal and interest . . . and debt set-aside, whenever these procedures would facilitate keeping the borrower on the farm or ranch, or otherwise through the use of primary loan service programs . . . and
- (2) to ensure that borrowers are able to continue farming or ranching operations.⁶⁹

To be eligible for such assistance “the delinquency must be due to circumstances beyond the control of the borrower,” and “the borrower must have acted in *good faith* . . . and must present a preliminary plan . . . that contains reasonable assumptions that demonstrate that the borrower will be able to—(A) meet the necessary family living and farm operating expenses; and (B) service all debts, including those of the loans restructured.”⁷⁰

In addition, “(4) the loan, if restructured, must result in a net recovery to the Federal Government, during the term of the loan as restructured, that would be more than or equal to the net recovery to the Federal Government from an involuntary liquidation or foreclosure on the property securing the loan.”⁷¹

The Secretary is required to make such calculations within 60 days after receipt

68. Restructuring requirements for the FCA are found in the Agricultural Credit Act of 1987 § 102, 7 U.S.C. § 2202a (1988).

69. *Id.* § 615(a), 7 U.S.C. § 2001(a).

70. *Id.* § 615(b), 7 U.S.C. § 2001(b) (emphasis added).

71. *Id.* § 615(c), 7 U.S.C. § 2001(c). The Act also sets out rules for determining net recovery, recovery value, and the value of the restructured loan:

(1) Determination of net recovery

In determining the net recovery from the involuntary liquidation of a loan under this section, the Secretary shall calculate—

- (A) the recovery value of the collateral securing the loan, in accordance with paragraph (2); and
- (B) the value of the restructured loan, in accordance with paragraph (3).

(2) Recovery value

. . . the recovery value of the collateral securing the loan shall be based on—

- (A) the amount of the current appraised value of the property securing the loan; less
- (B) the estimated administrative, legal, and other expenses associated with . . . the loan and collateral . . .

(3) Value of the restructured loan

(A) In general

. . . the value of the restructured loan shall be based on the present value of payments that the borrowers would make to the Federal Government if the terms of such loan were modified under any combination of primary loan service programs to ensure that the borrower is able to meet such obligations and continue farming operations.

7 U.S.C. § 2001(c).

A new and more restrictive method for determining eligibility for restructuring is set forth in the Food, Agriculture, Conservation and Trade Act of 1990, Pub.L. No. 101-524, § 1816, 104 Stat. 3359, 3826 (amending 7 U.S.C. § 2001(b)(1)(1988)).

of a written request for restructuring and notify the borrower of the results. "If the value of the restructured loan is greater than or equal to the recovery value, the Secretary shall . . . offer to restructure the loan obligations . . . through primary loan service programs that would enable the borrower to meet the obligations (as modified) under the loan" and to continue farming.⁷²

The statute also provides an option for some borrowers who do not meet the above criteria to buy out their FmHA loan for its net recovery value.⁷³

Mediation is awarded a major role in the decision to restructure. The Secretary is to give *priority* to principal and interest write-down *only* if creditors "(other than those creditors who are fully collateralized) representing a substantial portion of the total debt of the borrower held by such creditors, agree to participate in the development of the restructuring plan or agree to participate in a state mediation program."⁷⁴ Further, the Secretary is required to "make a reasonable effort" to contact and encourage the creditors to take part in the development of a plan of restructuring,⁷⁵ a notion that later became known as a "voluntary meeting of creditors."

II. FmHA Implementation

As the FmHA began to implement this program in January 1988, it faced a daunting situation: 85,000 delinquent Farmer Program borrowers and another 33,000 in an "inactive" status, such as bankruptcy or foreclosure.⁷⁶ The loan portfolio of delinquent FmHA farmer program borrowers totaled \$11.4 billion (out of the total FmHA farm loan portfolio of \$26 billion, which represented fifteen percent of total farm debt); \$9.6 billion of the \$11.4 billion in payments were overdue.⁷⁷

In addition, and to make matters more difficult for the FmHA, it was operating under both federal court injunctions forbidding it to take further adverse actions until it revised the forms used to advise delinquent borrowers of servicing options and appeal rights⁷⁸ and Agricultural Credit Act requirements to revise substantially its procedures for dealing with delinquent borrowers.⁷⁹

The statute not only called for the Department of Agriculture to certify state mediation programs and to participate in those programs that it certified, but

72. Agricultural Credit Act of 1987 § 615(c)(5), 7 U.S.C. § 2001(c)(5) (1988).

73. *Id.* § 615(c)(6), 7 U.S.C. § 2001(c)(6).

74. *Id.* § 615(d)(1)(A), 7 U.S.C. § 2001(d)(1)(A).

75. *Id.* § 615(d)(2), 7 U.S.C. § 2001(d)(2).

76. C. BAILEY, INTERIM FINAL REGULATORY IMPACT ANALYSIS, RESTRUCTURING PROVISIONS OF THE AGRICULTURAL CREDIT ACT OF 1987 1 (1988). [hereinafter 1988 IMPACT ANALYSIS].

77. *Id.*

78. *Id.*

79. See *supra* Part I.D.

The Government Accounting Office suggested that for those FmHA borrowers who showed little or no likelihood of succeeding, job training or other assistance might be more appropriate than continuing to afford them subsidized credit. U.S. GENERAL ACCOUNTING OFFICE, FARMERS HOME ADMINISTRATION: FARM LOAN PROGRAMS HAVE BECOME A CONTINUOUS SOURCE OF SUBSIDIZED CREDIT: REPORT TO THE HONORABLE JESSE HELMS, U.S. SENATE (1988).

also required that it make “a reasonable effort” to contact and encourage creditors to take part in a plan of restructuring. This led the FmHA both to encourage FmHA offices in states that lacked certified mediation programs (“noncertified states”) to contract for mediation services and to provide, in its rules, that delinquent borrowers in such states would have a chance to request mediation or a “voluntary meeting of creditors.”

After explaining the promulgation of rules by the FmHA, I will review the progress it made in both certified and noncertified states.

A. RULEMAKING

1. Mediation

A. CERTIFIED STATE MEDIATION PROGRAMS

The final rule establishing the certification process⁸⁰ provided that the FmHA will participate in mediations conducted under a State agricultural loan mediation program “under the same terms and conditions applicable to agricultural creditors generally, and will cooperate in good faith in such mediations by complying with requests for information and analysis, and in presenting and exploring debt restructuring proposals, wherever feasible, when that State is . . . a qualifying State”⁸¹

In setting out the requirements for certification of state programs, the rule imposed standards identical to those set forth in the statute. The FmHA rejected suggestions that the certification requirements be made more restrictive. Some comments on the proposed rule had urged that the FmHA impose minimum numbers of hours for training of mediators and detailed provisions as to “brochures, broadcast announcements, and notification of the mediators’ names, addresses and phone numbers on foreclosure notices.”⁸² The FmHA rejected these proposals that it “micro-manage,” stating that such provisions were not contemplated by the statute, and that varying local conditions could call for different activities in the states.⁸³ These decisions to defer to the state programs in the details of their activities seem not only consistent with the statute but also quite sensible. State programs, on the whole, appear to have carried out their tasks well, as described below.

B. CONTRACT MEDIATION IN NONCERTIFIED STATES

The rule also establishes mediation, or something approaching mediation, in states that do not have certified programs. It requires the state director to “provide the means of conducting a voluntary meeting of creditors, either

80. 7 C.F.R. §§ 1946.1-.50 (1991).

81. 7 C.F.R. § 1946.1(b) (1991).

In choosing to participate under the same terms and conditions as other creditors, the FmHA rejected a recommendation made in response to the proposed amendment that the rule should provide that the FmHA’s participation be mandatory. It stated that this was not required by the statute and that it would be “unusual for FmHA to decline to participate in a mediation” 53 Fed. Reg. 32,598 (1988).

82. 53 Fed. Reg. 32,598 (1988).

83. *Id.*

with a mediator or a designated FmHA representative,'⁸⁴ encourages the state directors to "contract for qualified mediators within their jurisdictional areas,"⁸⁵ and states that the "National Office will provide the State a list of qualified mediators for contracting purposes."⁸⁶ The rule goes on to provide that when a mediator is available, the County Supervisor will help the mediator schedule a meeting with the "borrower and all of the borrower's undersecured creditors holding a substantial part of the borrower's debt and encourage them to participate in such a meeting. The mediator will be responsible for conducting the meeting in accordance with accepted mediation practices and to develop an Agreement to assist the farmers in resolving their financial difficulties."⁸⁷

The rule also provides that when a mediator is not available, the State Director will designate an FmHA employee "to conduct a meeting of creditors and attempt to develop a plan with borrowers and their creditors that will assist the borrowers to resolve their financial difficulty."⁸⁸ This FmHA representative must not have been previously connected with the borrower's account and must "have demonstrated good human relations skills and ability to resolve problems and settle disputes."⁸⁹ The State Directors are to provide the training needed.⁹⁰

2. *The Place of Mediation in the Loan Servicing Process*

The original interim rules on how the FmHA would take part in mediation,⁹¹ restate that the FmHA will participate in certified state mediation programs "under the same terms and conditions as other creditors."⁹² These rules also explain debt servicing, which they describe as "a continuing process, not a single event," with two objectives:

- (1) To help the farmers manage credit so they can return to private sector credit sources, and
- (2) To minimize costs to the Government of providing this opportunity to farmers in financial difficulty. Borrowers' accounts must be managed with an overall objective of keeping the farmer in business and at the same time, minimizing loan costs and losses.⁹³

84. 7 C.F.R. § 1951.912(b) (1991).

85. *Id.*

86. *Id.*

87. 7 C.F.R. § 1951.912(b)(1) (1991).

88. 7 C.F.R. § 1951.912(b)(2) (1991).

89. *Id.*

90. 7 C.F.R. § 1951.912(b)(6) (1991).

91. 7 C.F.R. § 1951.912 (1991). An excellent explanation of the relevant FmHA rules is found in FARMERS' LEGAL ACTION GROUP, FARM SURVIVAL HANDBOOK: A GUIDE TO FmHA DEBT RESTRUCTURING AND APPEALS (1988).

92. 7 C.F.R. § 1951.912(a)(1) (1991). These rules were superseded by Farmer Program Account Servicing Policies and Availability of Loan Servicing Programs for Delinquent Farm Bureaus, 84 Fed. Reg. 18,612, 18,620 (1992) (to be codified at 7 C.F.R. pt. 1951) (interim final rule, proposed April 30, 1992). In this article, I refer only to the 1991 rules because they were in effect during the time period covered by the ACUS Report, *supra* note 8, on which this article is based.

93. 7 C.F.R. § 1951.902(a) (1991).

There are two basic kinds of loan servicing actions: primary loan servicing and preservation loan servicing.

Primary loan servicing includes: consolidation; rescheduling and/or reamortization; deferral of principal and interest payments; reducing the interest rate; writing down (reducing) amount of the debt; or a combination of these.⁹⁴

Preservation loan servicing may be available to borrowers who are ineligible for primary loan servicing. Preservation loan servicing includes: leaseback/buyback and homestead protection.⁹⁵

The rules explain that the FmHA will send a notice⁹⁶ describing these options and the methods of applying for them to farmer program borrowers whose loans were accelerated between November 1, 1985, and May 7, 1987, to all other farmer program borrowers whose loans have been accelerated, to borrowers with pending bankruptcy proceedings whose accounts had not been foreclosed or liquidated, to borrowers who were 180 days delinquent, and to borrowers who were less than 180 days delinquent and who the FmHA had determined were ineligible for primary loan servicing.⁹⁷

The farmer who wishes to apply for servicing must complete numerous forms, the most important of which is the "farm-home plan," on which the farmer is to set forth all information relevant to his cash flow situation. Once this is done, the FmHA will determine whether the farmer is eligible for any of the primary loan servicing options.

The farmer will be considered eligible for a servicing option if he

1. Is unable to pay his debts to the FmHA for reasons beyond his control;
2. Has acted in good faith; and
3. Has a feasible plan.⁹⁸

A "feasible plan" means that the farm-home plan shows a cash flow that allows the farmer to:

1. Pay necessary family living and farm operating expenses;
2. Pay all debts, including the restructured debt to FmHA; and
3. Pay FmHA an amount worth more than the "net recovery value" of the loan.⁹⁹

Such criteria demand very complex computations. To aid its county offices in making the determination of eligibility for primary loan servicing, the FmHA has developed DALR\$, the Debt and Loan Restructuring System, a computer program operated on the FmHA County Office computer systems.¹⁰⁰ The program

94. 7 C.F.R. § 1951.901 (1991).

95. *Id.*

96. 7 C.F.R. pt. 1951, Subpt. S, Exh. A and Attachments 1 and 2 (1991).

97. 7 C.F.R. § 1951.907 (1991).

98. 7 C.F.R. § 1951.909(c)(3) (1991).

99. 7 C.F.R. § 1951.909(d)(3) (1991).

The "net recovery value" of a loan is the amount that FmHA estimates it would obtain if it forced the borrower out of business. 7 C.F.R. § 1951.909(f) (1991). To determine whether the borrower would be able to pay an amount that exceeded the net recovery value the FmHA determines the "present value" of the restructured loan. 7 C.F.R. § 1951.909(g) (1991).

100. 7 C.F.R. Pt. 1951, Subpt. S, Exh. J (1991).

assists the FmHA loan officer in making a decision “about whether any combination of primary loan servicing options will make it possible for the borrower to develop a feasible plan and thus stay on the farm and avoid loss to the government.”¹⁰¹ DALR\$ considers the primary loan servicing options in the order listed above, that is, from the least to the most extreme.¹⁰² The borrower is not eligible for debt write off if he is eligible for any of the less drastic options.

The county supervisor makes decisions as to the input, based on the farm-home plan submitted by the borrower and other factors, and the DALR\$ program then quickly performs mathematical calculations which, if performed manually, would take a great deal of time and would run the risk of mathematical error. The DALR\$ program provides a printout for the FmHA and the borrower.

If the DALR\$ program shows that the borrower has a feasible plan, the FmHA will offer the primary loan servicing option for which the farmer is eligible. If, however, the DALR\$ program shows that the borrower is ineligible for primary loan servicing, the FmHA will send a notice, along with a printout of the DALR\$ program. This notice advises the farmer of the FmHA’s conclusion that the farmer has been unable to develop a feasible plan because of debts to “lenders other than the FmHA.”¹⁰³ It also includes one of the following two paragraphs:

(If a Certified State Mediation program is available)

We are requesting mediation under the (Name) State Certified Mediation Program. We will work with you and your creditors to determine if your debts can be adjusted sufficiently to permit you to develop a feasible plan of operation. If, with the adjustment of your debt, you are able to develop a feasible plan of operation which shows that you can make an annual payment to FmHA of at least \$_____, FmHA will reconsider your application for primary loan servicing.

(If a certified State Mediation program is not available)

We will schedule a meeting with you and your other creditors in an effort to reach agreements with them to adjust your debts sufficiently to permit you to develop a feasible plan of operation. The FmHA State Director will contract for a mediator or appoint an FmHA representative not previously involved in servicing of your account upon your written request to participate in the meeting with creditors.¹⁰⁴

Notice that under these rules, the FmHA does not request mediation until *after* it has determined that the borrower is ineligible for primary loan servicing. In addition, the notice seems to suggest that the only purpose of the mediation is to seek to have the lenders other than FmHA adjust their debts so that the borrower can have a feasible plan under the DALR\$ program. As explained below in Section III.B.2., this limitation has helped foster an inappropriately narrow focus in some mediations.

If the mediation produces debt adjustments that will permit the DALR\$ pro-

101. *Id.*

102. *Id.*

103. 7 C.F.R. Pt. 1951, Subpt. S, Exh. E (1991).

104. *Id.*

gram to show a feasible plan, the FmHA will offer the primary loan servicing option for which the borrower is eligible. If, however, the mediation does not produce those adjustments, the FmHA will send the borrower a notice that the FmHA intends to accelerate the loan and proceed against the property; this notice also explains that the borrower has appeal rights and an opportunity to purchase the land at its "net recovery value."¹⁰⁵

If the farmer does not appeal or does not win the appeal and does not elect the "net recovery buyout," the FmHA will automatically consider the farmer for the two preservation loan servicing options—homestead protection and leaseback/buyback. Homestead protection allows the farmer to either obtain homestead protection, which allows the farmer to purchase the homestead (the house and up to 10 acres) or get a lease with an option to buy the homestead.¹⁰⁶ Under the leaseback/buyback program, the farmer leases the property with an option to buy.¹⁰⁷

County supervisors are authorized to make all loan servicing decisions except write down of debt, which must be approved by the state director.¹⁰⁸ But county supervisors also have authority to consolidate and reschedule/reamortize loans one time only. Authority for subsequent consolidation, rescheduling/reamortization is vested in state directors.¹⁰⁹

B. STATE MEDIATION PROGRAMS

1. Funding and Structure

The FmHA certified and provided matching grants to 16 state programs prior to July 14, 1989.¹¹⁰ As of May, 1991, there were 17 certified state programs.¹¹¹

The statute provides minimal and sparse standards for certification of state mediation programs.¹¹² The FmHA adopted these same standards in its rulemaking¹¹³ and implementation, deciding not to control the details of the mediations or the mediation training in the certified state mediation programs. For that reason, and because of variations in local conditions, there are vastly different

105. 7 C.F.R. § 1951.909(h)(3)(iii) (1991).

106. 7 C.F.R. § 1951.911(b) (1991).

107. 7 C.F.R. §§ 1951.911(a), 1955.66(h) (1991).

108. 7 C.F.R. § 1951.903(b) (1991).

109. *Id.*

110. FARMERS HOME ADMINISTRATION, U.S. DEPARTMENT OF AGRICULTURE REPORT TO CONGRESS ON TITLE V—STATE MEDIATION PROGRAMS, SUBTITLE A—MATCHING GRANTS FOR STATE MEDIATION PROGRAMS 11 (1989). [Hereinafter 1989 REPORT TO CONGRESS]. Alabama, Indiana, Iowa, Kansas, Minnesota, Mississippi, Montana, Nebraska, New Mexico, North Dakota, Oklahoma, South Dakota, Texas, Utah, Wisconsin, and Wyoming. It subsequently certified Arkansas. Mississippi did not request certification for fiscal year 1991. Telephone Interview with Chester A. Bailey, Assistant to the Assistant Administrator, Farmer Programs, FmHA (July 12, 1990). The FmHA office then contracted for new mediation services with former employees of the same state office that provided mediation under the previously certified program. Telephone Interview with Chester A. Bailey (May 15, 1991). Oregon was certified in Fall 1990. Telephone Interview with Chester A. Bailey (Jan. 29, 1991).

111. For information on appropriations, allocations, obligations and expenditures, see ACUS report, *supra* note 8, at 9.

112. See *supra* text accompanying note 58.

113. See *supra* text accompanying note 76.

programs among the certified states. For example, the programs in Iowa and Minnesota, which predated the federal legislation, are “mandatory” in the sense that the farmer has the option of requiring certain creditors to participate in mediation before they may foreclose.¹¹⁴ These two programs also provide the farmer with much more extensive preparation services than some of the other certified programs.¹¹⁵

There is also much variety among the other certified programs. Only two of these—South Dakota and Arkansas—are mandatory.¹¹⁶ Many provide the farmers with significant support services, but they do so in different ways. In Kansas, an elaborate support service network called Farmers Assistance Counseling and Training (FACTS), a unit of the Kansas Board of Agriculture, helps the farmers prepare for mediation.¹¹⁷ Both the Texas¹¹⁸ and the North Dakota programs assign “negotiators” to help the farmers prepare for the mediations and to represent the farmers during the mediation.¹¹⁹

The programs were started in many different ways and are organized differently. As mentioned previously, the Minnesota Program is operated by the University of Minnesota Extension, and the Iowa program by a non-profit corporation created for this purpose.¹²⁰ The Nebraska program is conducted jointly by the Nebraska Legal Aid Society and the Interchurch Ministries of Nebraska under contract with the Nebraska Department of Agriculture.¹²¹ In Texas, the program is conducted by Texas Tech University.¹²² In Kansas, the program was originally operated by a non-profit corporation and then transferred to the State Board of Agriculture.¹²³ The Oklahoma Department of Agriculture contracted with the Oklahoma Conference of Churches to operate its certified program.¹²⁴ Several programs, including those in Alabama, North Dakota, South Dakota and Utah, are conducted directly out of state offices.

114. IOWA CODE § 634A.6 (1990); MINN. STAT. § 583.26 (1986).

115. For descriptions of the origin and function of these programs, see *supra* Part I.C. and *infra* Part III.B.1.

116. S.D. CODIFIED LAWS ANN. § 54-13-10 (West Supp. 1992); ARK. CODE ANN. § 2-7-302 (Michie Supp. 1991) (mediation required if secured indebtedness is \$20,000 or more).

117. Memorandum from Don Reynolds, Chairman, Rural Assistance Corp., to Leonard Riskin (Sept. 4, 1990).

118. Gary Condra, Director, Texas Agricultural Loan Mediation Program, Statement at the Coalition of Agricultural Mediation Programs Meeting (April 11, 1991).

119. JAMES F. BALTEZORE, ET AL., EVALUATION OF NORTH DAKOTA'S AGRICULTURAL MEDIATION SERVICE 25 (Department of Agricultural Economics Staff Paper Series No. AE90009, Sept. 1990); Letter from Gary Condra, Director, Texas Agricultural Loan Mediation Program, to Leonard Riskin (April 3, 1990).

120. See *supra* text accompanying notes 46-49.

121. Interview with Kathleen Severens, Coordinator of the Nebraska Mediation Service, in St. Paul, Minn. (April 12, 1991).

122. TEXAS TECH UNIVERSITY, TEXAS AGRICULTURAL LOAN MEDIATION PROGRAM, 1989 ANNUAL REPORT (1989).

123. Interview with Earl Wright, Farm Financial Specialist in Farmer's Assistance, Counseling and Training, for the Kansas Board of Agriculture, in St. Paul, Minn. (April 12, 1991).

124. Telephone Interview with James Stovall, Jr., State Coordinator, Agriculture Mediation Program (April 10, 1990).

There is great variety in the manner in which the mediators were selected and compensated.¹²⁵

Notwithstanding these differences, these programs have something in common besides federal matching funds: They share a philosophy of mediation that differs from that which informs the mediation practitioners in some noncertified states, a matter discussed more fully in Section III.B.1., below.

2. *Benefits and Costs*

A. NUMBERS OF MEDIATIONS

The FmHA farm-credit mediation program plainly has accomplished a great deal and produced enormous cost savings to both the federal government and the states.¹²⁶ Unfortunately, however, it is extremely difficult—for two reasons—to give details to support that statement. The FmHA currently is unable to produce an accurate report or a good estimate of the numbers of cases that have been mediated in either certified or noncertified states.¹²⁷ Accordingly, it is difficult to estimate financial savings. Of course, it is virtually impossible to put the very important intangible benefits into a cost-benefit analysis.

B. FINANCIAL COSTS AND SAVINGS

Using the assumption described above, that 4,608 mediations were conducted by certified state programs as of November 30, 1989, the FmHA has estimated that the average cost to the government per mediation in the certified states was \$651,¹²⁸ a conclusion reached by dividing 4,608 into \$3 million, the amount of matching grant funding received by certified states¹²⁹ in fiscal year 1989.

The FmHA also has attempted to calculate benefits. The FmHA predicted that the net savings to states during fiscal year 1989 would be between \$18,191,761 and \$36,974,302¹³⁰ and that the federal government would save between

125. Statements submitted to me by certified state program leaders at the CAMP meeting on April 12, 1991 show a great range of compensation for mediators. The Oklahoma program pays only mileage. James Stovall, Jr., State Coordinator, Agriculture Mediation Program (April 12, 1991). Mediators in Arkansas receive \$55 per session. Richard S. Johnson, Farm Mediation Program Coordinator, Arkansas Development Finance Authority (April 12, 1991). The South Dakota program pays \$25 per hour in mediation sessions and \$10 per hour for travel. Russell L. Stone, Director, Mediation Services, South Dakota Department of Agriculture (April 12, 1991).

126. In its report to Congress in January, 1989, the FmHA listed several measures of the program's effectiveness: 1. heightened public awareness of mediation; 2. requests for mediation from both borrowers and creditors; 3. agreements reached in the majority of cases mediated and communications facilitated in many cases; 4. cost savings to parties; 5. high levels of party satisfaction; 6. increased awareness among farmers of opportunities for assistance in both financial and interpersonal matters as well as education. 1989 REPORT TO CONGRESS, *supra* note 110, at 5-6. The report describes some progress on each of these measures.

127. ACUS Report, *supra* note 8, at 26. FmHA, along with the leaders of mediation programs in certified states, has now developed a standardized reporting system. *Id.*

128. CHESTER BAILEY, JUSTIFICATION FOR THE EXTENSION OF THE SUBTITLE A USDA CERTIFIED STATE AGRICULTURAL LOAN MEDIATION GRANT PROGRAM AFTER FISCAL YEAR 1991, at 3 (Mar. 22, 1990).

129. *Id.*

130. 1989 REPORT TO CONGRESS, *supra* note 110, at 11.

\$6,600,000 and \$14,760,000. For the federal government, this means gross benefits of between \$3.20 and \$5.92 for each matching dollar.¹³¹ One can quarrel with the assumptions and methodology underlying these calculations, of course, but it is clear that the program has resulted in substantial savings to states, to the U.S. Department of Agriculture, and to private lenders.

There are other financial savings. Every mediation that prevents litigation also saves money for taxpayers and creditors, including the expense of loan administration, and in the case of a government lender, handling appeals.¹³² When a mediation results in a restructured loan or another outcome that keeps a farmer on the farm, there are many benefits to the local community or economy. Each job lost causes a "ripple effect" in the community and reduces the tax base.¹³³

C. OTHER BENEFITS

Other savings are impossible to measure but valuable nonetheless. Participants in farmer lender mediation in North Dakota and in Texas report high degrees of satisfaction with the process, though generally borrowers were more positive about the program than were lenders.¹³⁴

Studies in Minnesota have confirmed the beliefs of many mediators that farm-credit mediations have restored disrupted communications between farmers and lenders,¹³⁵ helped farmers avoid personal crises,¹³⁶ and promoted peaceful change in farm communities.¹³⁷ In addition, mediation has improved farmer's decisionmaking, not just in the mediation, but also afterwards, and, most fundamentally, helped keep farmers on their farms.¹³⁸

Other possible benefits of mediation are difficult to identify or measure. For instance, through mediation, farm families might learn of counseling or educational services that could reduce stress or lead to additional income. When media-

131. *Id.* at 12. This estimate was based on a then-in-progress study of the Texas state certified mediation program by researchers at Texas Tech University. The measure of savings used in that study was the difference between the value of the restructured loan and the net recovery value of the collateral. Using this measure, the Texas Tech study-in-progress found a gross savings of \$60,662 for each case that resulted in loan restructuring.

Subsequently, in the final version of that study, the authors determined, based upon a review of 75 cases mediated in Texas, that the benefits to FmHA averaged \$35,363 and the benefits to other creditors averaged \$19,187. DARREN S. EDWARDS & GARY D. CONDRA, A BENEFIT COST ANALYSIS OF THE TEXAS AGRICULTURAL LOAN MEDIATION PROGRAM (Texas Tech University College of Agricultural Sciences, ed., 1991); Letter from Gary Condra, Director, Texas Agricultural Loan Mediation Program, to Leonard Riskin (June 29, 1991).

132. 1989 REPORT TO CONGRESS, *supra* note 110, at 8-9.

133. *Id.* at 8.

134. BALTEZORE, *supra* note 119, at 28; MICHAEL L. STRATTON, ET AL., A SURVEY OF PARTICIPANT VIEWS OF THE EFFECTIVENESS OF THE TEXAS LOAN MEDIATION PROGRAM (forthcoming; review draft at 1, May 1991) (on file with author). Non-FmHA lenders were more positive than FmHA representatives, *id.* at 23.

135. Richard Krueger, et al., *An Assessment of Farm Credit Mediation in FARM CREDIT MEDIATION STUDIES 1986-1990*, at 1,4 (Minn. Extension Serv., Univ. Minn. AD-BU-3920, 1990); Richard Krueger, et al., *Farm Credit Evaluation Report for Pope County Minnesota*, in *FARM CREDIT MEDIATION STUDIES 1986-1990*, at 86, 88-89 (Minn. Extension Serv., Univ. Minn. AD-BU-3920, 1990).

136. Krueger, *Farm Credit Evaluation Report for Pope County Minnesota*, *supra* note 135, at 92.

137. Krueger, *An Assessment of Farm Credit Mediation*, *supra* note 135, at 4.

138. *Id.*

tion helps a farmer better understand his options, it may produce a resolution that is more satisfying and workable to the farmer, even if that means getting off the farm.¹³⁹

This program also fostered the development in 1989 of an important organization, the Coalition of Agricultural Mediation Programs (CAMP). It "provides a framework for people to work together on: (1) common legislative goals; (2) expansion of USDA's use of mediation beyond FmHA farm debt restructuring; and (3) representing and promoting rural/agricultural mediation."¹⁴⁰

Extending mediation services to rural matters other than farm credit is an explicit goal of CAMP.¹⁴¹ At CAMP meetings, the conventional wisdom is that both CAMP and FmHA should address not only the crisis in the farm sector, but also a chronic condition in rural America marked by a deterioration in the social fabric in many rural communities.¹⁴² In the words of Michael Thompson, Executive Director of the Iowa Farm Mediation Service:

When you are a community, being in court may be the worst thing for you. You are concerned that the court experience will not only destroy individuals, but the whole relationship which is needed to maintain rural ties and rural fiber. Rural fiber is made up of people working together . . . What happened with the farm crisis is that the social fabric was shaken and in some cases ripped. Mediation is helping to restore that fabric.¹⁴³

In some states, farm-credit mediation programs have begun to mediate other kinds of matters connected to rural communities.¹⁴⁴ In Kansas, for instance, farm-credit mediators have started a program to mediate with extended families that are coping with passing a farm from one generation to another.¹⁴⁵ And the Iowa legislature recently extended the Farm Mediation Service, which was subject to a July 1, 1990 "sunset" provision, and expanded its mandate to include other

139. See *infra* Part III.A.

140. Coalition of Agricultural Mediation Programs Mission Statement (Sept. 6, 1990) (on file with author).

The organization has greatly strengthened the FmHA's matching fund program by allowing members to share ideas about problems and solutions and join together in addressing these problems by working with appropriate federal agencies. In September, 1990, it co-sponsored, with the Administrative Conference, a program to acquaint federal agencies with farmer-lender mediation and encourage them to participate in mediation in cases in which they are involved.

Until the advent of farmer-lender mediation, most American mediators worked largely in urban areas. See American Bar Association Standing Resolution Program Directory (1990). CAMP represents a large corps of mediators experienced in rural matters, an important national resource, which has developed principally because of the farmer-lender mediation program.

141. *Id.*

142. For a discussion of this chronic condition, see *supra* text accompanying notes 24-25, and NAT. MENTAL HEALTH ASS'N, REPORT OF THE NAT'L ACTION COMMISSION ON THE MENTAL HEALTH OF RURAL AMERICANS (1988).

143. *Farm Mediation Service Director and Mediator Discuss Use of Process in New Rural Disputes*, 4 Alternative Dispute Resol. Rep. (BNA) at 198 (June 7, 1990).

144. Marsha Mueller, *Expanding Uses of Farm Mediation*, in NATIONAL INSTITUTE FOR DISPUTE RESOLUTION FORUM 13-14 (Fall 1990).

145. Interview with Joanne Katz, Kansas farm credit mediator (April 5, 1991). For a discussion of this problem, see DONALD J. JONOVIC AND WAYNE D. MESSICK, *PASSING DOWN THE FARM* (1986).

disputes involving farmers, such as care and feeding contracts and nuisance and conservation matters.¹⁴⁶

Before that statute was enacted, the Iowa Mediation Service had tested mediation in these areas.¹⁴⁷ In addition, it had used mediation or negotiated regulation in helping FCA, farmers, farm advocates and the FmHA work out the FCA's implementation of the 1987 Agricultural Credit Act.¹⁴⁸ More recently, in April, 1991, it facilitated a meeting of 35 rural service providers "to share their vision of Iowa today and to explore direction for the future."¹⁴⁹ The Iowa Mediation Service also is developing a project to help integrate the work of providers of credit and other services to farmers.¹⁵⁰

These developments exemplify mediation's potential for promoting more collaborative ways of planning and of resolving disputes in rural America.

C. CONTRACT MEDIATION IN NONCERTIFIED STATES

Numerous FmHA offices in states without certified programs—including Kentucky, Louisiana, Maine, Maryland, Mississippi, Missouri, New Mexico, North Carolina, Ohio, Tennessee, Washington, Wyoming and, probably, others—awarded contracts for mediation services to private individuals or organizations.¹⁵¹ Unfortunately, the FmHA does not have accurate records of the states in which its offices have contracted for mediation services.¹⁵² In addition, there is no readily available source of information on the numbers of mediations conducted in these states.¹⁵³

In 1989, the FmHA contracted with the Federal Mediation and Conciliation Service (FMCS) to provide pilot mediation services in Georgia, Maine, and New York.¹⁵⁴ In some states the FmHA arranged for its own employees to preside at "voluntary meetings of creditors."

The FmHA sponsored numerous mediation training programs for FmHA representatives or contractors in noncertified states. Trainers included the directors of the Minnesota and Iowa programs and representatives of the Federal Mediation and Conciliation Service.¹⁵⁵ As best as I can determine, all of these programs

146. IOWA CODE § 654B.1-.12 (1990). In a care and feeding contract, a farmer agrees to feed livestock owned by another; the compensation is a share of the profits from the sale of the animals. Sometimes an owner will pressure the farmer to make improvements and then, after the farmer has borrowed money to finance the improvements, the owner will back out of the contract, leaving the farmer unable to service the loan. *Farm Mediation Service Director and Mediator Discuss Use of Process in New Rural Disputes*, *supra* note 143, at 198, 199.

147. Telephone Interview with Micheal Thompson, Executive Director, Iowa Farm Mediation Service (May 15, 1991).

148. *Id.*

149. *Rural Providers Task Force Formed*, IOWA MEDIATION SPOTLIGHT (June 1991).

150. Telephone Interview with Micheal Thompson, Executive Director, Iowa Farm Mediation Service (July 1, 1991).

151. ACUS Report, *supra* note 8, at 22.

152. Telephone Interview with Chester A. Bailey (April 8, 1991).

153. ACUS Report, *supra* note 8, at 19-20.

154. Telephone Interview with Peter J.B. Swanson, ADR Coordinator, Federal Mediation and Conciliation Service (Feb. 22, 1991), *see also infra* notes 202-04 and accompanying text.

155. ACUS Report, *supra* note 8, at 23.

were directed toward the broad, open process that was adapted to farmer-lender mediation by the Iowa and Minnesota programs and which served as a model for certified state programs. However, for reasons I will discuss below, many mediations conducted in noncertified states apparently tended to embrace a different and narrower vision of mediation.¹⁵⁶

D. IMPLEMENTATION PROBLEMS

This program has encountered three major problems: The first two—an absence of reliable data on numbers of mediations¹⁵⁷ and a lack of participation in mediation by some other creditors, including other federal agencies¹⁵⁸—are covered elsewhere. The third—the development of, and tension between, two different notions of the nature and purposes of mediation—is discussed in Part III of this article.

III. Two Concepts of Mediation

The farmer-lender mediation effort is infused with a tension between two different conceptions—which I will call “broad” and “narrow”—of the goals, purposes and, perhaps, very nature of mediation.¹⁵⁹ I define these conceptions as follows:

The *broad approach* assumes that the goal of farmer-lender mediation is to reach a wise agreement that deals with the underlying interests of the parties. There are any number of possible outcomes, and the process is open to discussion of whatever seems to be relevant.

The *narrow approach* rests on the assumption that the only appropriate focus of a farmer-lender mediation is to discuss the possibility that creditors *other than FmHA* will adjust the borrower’s debts sufficiently to allow a rerun of the DALR\$ program that will allow the farmer to “cash flow,” which will permit the FmHA to offer the farmer primary loan servicing.¹⁶⁰ A mediation so conceived allows only two possible outcomes: (1) The non-FmHA creditors make sufficient reductions and the FmHA offers primary loan servicing to the farmer; or, (2) the creditors do not make sufficient adjustments and, subsequently—not at the mediation session—the FmHA informs the borrower

156. See *infra* part III.B.

157. See ACUS Report, *supra* note 8, at 26.

158. See *id.*

159. The legal philosopher Felix Cohen wrote that “[a] definition of law is *useful* or *useless*. It is not *true* or *false*, any more than a New Year’s resolution or an insurance policy. A definition is in fact a type of insurance against certain risks of confusion.” Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 835–36 (1935). Cohen’s idea applies equally to my dichotomy. For purposes of this study, I find the distinction between broad and narrow useful. Elsewhere I have applied other dichotomies—e.g. facilitating “adversarial” or “problem-solving negotiation”; “raising a fist” or “extending a hand”—to judicial settlement conferences. Leonard L. Riskin, *The Represented Client in the Settlement Conference: The Lessons of G. Heileman Brewing Co. v. Joseph Oat Corp.*, 69 WASH. U.L.Q. 1059, 1081–85 (1991).

160. See *supra* notes 94–99 and accompanying text.

of his other options, such as net recovery buyout, preservation financing, and voluntary conveyance of the land.¹⁶¹

Speaking generally, the certified state mediation programs employ a broad approach. Among the noncertified programs of which I have knowledge, the narrow approach seems most common, but I have found illustrations of both approaches and of mixtures of the two approaches in the work of individual contract mediators. In addition, some FmHA representatives involved in farmer-lender mediation take the broad view and others the narrow. The dichotomy is observable also in the FmHA literature.

A. MANIFESTATIONS OF THE TWO CONCEPTS

1. "Broad" Mediation

The essence of the "broad" approach is an openness to dealing with whatever issues are important to the resolution of the difficulties between the borrower and the lenders.¹⁶² Often this means searching for and dealing with the underlying interests of the parties through a problem-solving process that could include explicit attention to developing and understanding options.¹⁶³ Thus, the mediator might encourage the parties to think about alternatives in addition to primary loan servicing, such as net recovery buyout and lease/buyback. The mediator might help a farmer consider, or reconsider, whether to make additional changes in the farm operation or in off-farm employment, which could change the farm-home

161. See *supra* text accompanying notes 92-93.

162. For extensive explanations of mediation following a broad approach, see JAY FOLBERG & ALISON TAYLOR, *MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION* (1984); CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* (1986).

163. Another way to categorize approaches to mediation is by the types of negotiation that they facilitate. The most generally useful breakdown of negotiations is "adversarial" v. "problem-solving." Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem-Solving*, 31 *UCLA L. REV.* 754, 756 n.3, 758 (1984). The broad approach to farmer-lender mediation attempts to facilitate a problem-solving negotiation. It cannot be said so plainly that the narrow approach to farmer-lender mediation facilitates adversarial negotiation, but the two are philosophically consistent. See Riskin, *supra* note 159, at 1078-87.

Commentators have used numerous systems to categorize negotiations, and this can cause confusion. Fisher and Ury see "hard," "soft," and "principled" (which is comparable to problem-solving) negotiation. ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (1981). Donald Gifford identifies three types of negotiation strategies: "cooperative," "competitive," and "integrative." Donald G. Gifford, *A Context-Based Theory of Strategy Selection in Legal Negotiation*, 46 *OHIO ST. L.J.* 41, 43 (1985). Lowenthal and Williams both distinguish between "competition" and "collaboration." Gary Lowenthal, *A General Theory of Negotiation Process, Strategy, and Behavior*, 31 *U. KAN. L. REV.* 69 (1982); GERALD R. WILLIAMS, *LEGAL NEGOTIATION AND SETTLEMENT* (1983). Raiffa describes "distributive" and "integrative" bargaining. HOWARD RAIFFA, *THE ART AND SCIENCE OF NEGOTIATION* (1982). Lax and Sebenius distinguish between negotiating to "create value" and to "claim value," and they make an important contribution to the literature by demonstrating that virtually all negotiators use both approaches and must deal with the tension between them. DAVID A. LAX & JAMES K. SEBENIUS, *THE MANAGER AS NEGOTIATOR* (1986).

I group together and label as "problem-solving" those of the above approaches that share the objective of trying to meet the underlying needs of the parties: Fisher and Ury's "principled" negotiation; Raiffa's and Gifford's "integrative" bargaining; and Lax and Sebenius' "creating value."

Of course, none of these conceptions fully capture the complex reality of negotiation.

plan.¹⁶⁴ It also means, of course, that a mediation could deal with barriers to negotiation, such as: (1) emotional problems within the family (which could be addressed directly or through referral); (2) communication problems between borrower and lenders; and (3) disputes between lenders.¹⁶⁵

This broad conception of mediation was well developed in the first two farm-credit mediation programs—those in Minnesota and Iowa. The Minnesota program includes goals of improving “communication and relationships between farmers and lenders”; encouraging “full discussion of debt restructuring options”; and improving “the relationship among agencies and organizations working with farm families to increase profitability in agriculture.”¹⁶⁶

Micheal Thompson, Executive Director of the Iowa Farm Mediation Service, also had a broad definition of success:

- clarification of the impasses including the recognition that the issues cannot be resolved;
- management of the communication system so that the parties can interact effectively;
- resolution of the goals and issues . . . ; and
- reconciliation of the relationship so that both parties’ interests, issues and goals are met.¹⁶⁷

A good depiction of the openness of this view is provided by Kathy Mangum, Director of the Minnesota program, in Figure 1.

Stephen Erickson and Marilyn McKnight explain the importance of dealing with the emotional aspects of the farm crisis, on both sides of the negotiating table:

164. Memorandum from Don Reynolds, Chairman of Rural Assistance Corporation to Leonard Riskin (Sept. 4, 1990). The Rural Assistance Corporation operated the Kansas certified mediation program under a contract with the Kansas Department of Agriculture until late 1990. See Robert Friedenbach, *Mediator Perceptions, South Dakota Farm Loan Mediation Program (Interim Report of Evaluation Activities)* (Dec. 1990) (on file with author).

165. I do not mean to suggest that every mediation in every certified state program displayed such openness, but that this attitude seems to ground most of the certified programs and is expressed in them in varying degrees.

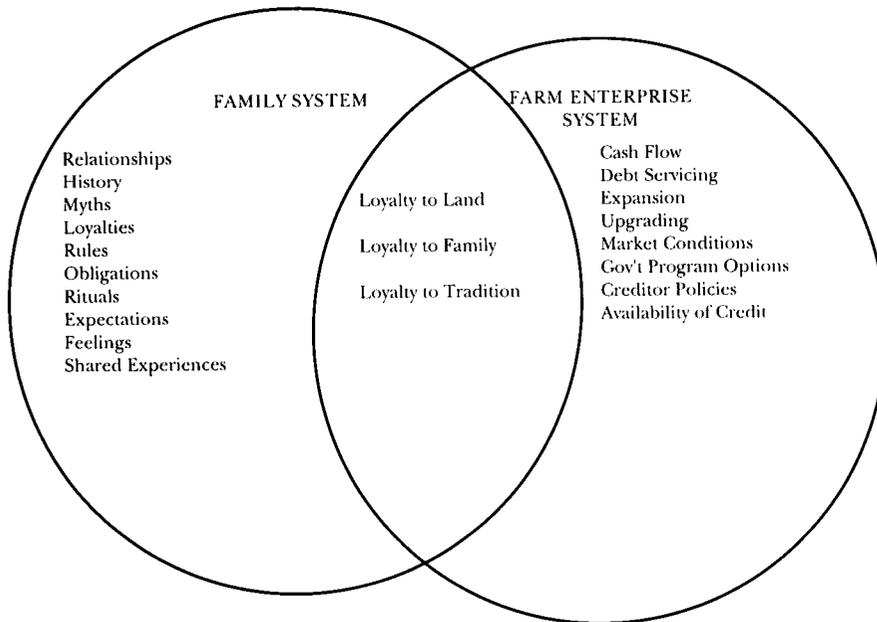
166. Ruth Grunke & Kathy Magnum, 1989-1990 MINN. EXTENSION SER’V. FARM CREDIT MEDIATION ANN. REP. at 3.

167. Thompson, *supra* note 27, at 7. The Iowa training manual emphasizes that mediation “systematically isolates points of agreement and disagreement, develops options and works toward a final agreement”; is “oriented toward problem-solving”; and “examines fact, feelings and behaviors.” Among mediation’s benefits, it lists a “healing quality; and participatory nature, which results in a strong commitment by the disputants to adhere to the agreements reached.” And it lists the following goals of mediation:

1. To help the involved parties resolve their conflict in a manner that is compatible with their abilities both to commit themselves to and follow through on an agreement;
2. To identify facts and feelings that personify the conflict and to establish a means for resolving the conflict without resorting to violence;
3. To encourage the involved parties to work further on those issues that cannot be resolved in individual negotiations;
4. To identify the communication patterns that emerge during the mediation and to note the destructive behaviors that result from those patterns; and
5. To offer conflicting parties an alternative to the court system.

MICHEAL THOMPSON, ET AL., *MEDIATION MANUAL FOR IOWA FARMER/CREDITOR MEDIATION SERVICE* 30 (1985).

FIGURE 1
FARM FAMILY: BASIS FOR DECISIONMAKING



* Prepared by Kathy Mangum based on PAUL C. ROSENBLATT, *FARMING IS IN OUR BLOOD: FARM FAMILIES IN ECONOMIC CRISIS 69-76* (1990).

The financial condition of the farmer is only one side of the problem. Most farmers have families that are directly effected [sic] by the problems. The emotional issues tend to be kept secret within the walls of the family home, and are often far more complex than the finances. The fact that the family problems are not discussed within or outside of the immediate family makes the burden sometimes unbearable for the farmer and/or his wife. The children feel the tension, and when they are not told what is happening, are left to their fantasies. They fear the loss of the family farm which includes the home, and become less attentive and uninterested in school. They may fear that their parents will divorce. It is not unusual for the wives to be kept totally in the dark about the problems, though they feel the stress of their husbands and also fear the worst. The husbands are proud and believe that they should be able to handle everything, for them to be unable to manage is admitting failure. Hence, there have been suicides of farmers, divorces, depression, and possibly delinquency or at least psychological dropping out of school by the children.

It is important to realize that the lender may also experience emotional stress. The lender is often the person who helped the farmer to obtain the loans in the first place, and may feel some responsibility or guilt about the present state of affairs. The lender is usually a well respected member of the community, and may be plagued with depression about what is happening to the entire community, his friends, and those with whom he worships in the same church on Sundays. Some lenders have found themselves ostracized by those close to him because of his role in the rural finance crisis.

The mediator of farm issues needs to understand the emotional side of the problem. Both the farmer and the lender may be experiencing the anticipation of a loss, be it the farm or close friends. Their process of dealing with the loss is similar to that of grieving a death.¹⁶⁸

In the broad view of mediation, the “emotional side” has at least two aspects. First, a mediator must be able to help the parties deal with their emotional difficulties to the extent necessary to allow them to make decisions required to resolve their financial problems and to enable them to operate the farm profitably so as to fulfill loan obligations. At a minimum, a mediator might show empathy by acknowledging the emotional difficulty the client is facing. At the other extreme, the mediator might help the participant (normally the farmer) think through whether he needs other assistance, say, from a counselor (psychological, financial, agricultural) or a divorce lawyer. Of course, it is common in farm credit delinquency situations for emotional difficulties to impair relationships and communications between borrowers and lenders, or, more commonly, lender’s representatives. Accordingly, mediators with a broad perspective structure the mediations so as to allow the participants to work to improve or repair their relationships or communications. This often will involve an emphasis on face-to-face discussions between borrower and lender, rather than the private meetings or “caucuses” between the mediator and the participants, which tend to characterize the narrow approach.¹⁶⁹

Second, the emotional difficulties—particularly as they are manifested in impaired relationships—can take on a special significance. In a broad mediation these issues can be seen as more than barriers to resolution of financial problems. Relational problems between borrower and lender can themselves become issues in the mediation. And resolution of those issues has a value that is independent of whether the mediation results in a satisfactory conclusion with respect to the delinquent loans. Such resolutions can also improve the quality of life in a community.

Certified programs generally have taken a broad approach. For example, Robert Friedenbach asked South Dakota mediators to identify their “primary objective”;¹⁷⁰ a majority of responses indicated an open orientation, and several showed particularly strong forms of it:

Encouraging participants to be aware of communication’s possibilities & consequences—to aid parties in identifying & modifying disruptive communication.

To bring farmer & banker to the point of hearing the other even if they don’t “agree.” To acknowledge [the stories] of both as equally important. To, hopefully, help them “settle” with a realistic agreement. To show them that yes, it is their problem but if we make it “our” problem it becomes easier to develop options and eventually a settlement.

To promote communication between creditor and debtor and to see that all possible

168. STEPHEN ERICKSON & MARILYN MCKNIGHT, FARM FINANCIAL MEDIATION 57–58 (4th ed., Univ. Minn. Extension Serv., 1987).

169. See *infra* text accompanying notes 186–90.

170. Friedenbach, *supra* note 164, at 29.

options and alternatives have been discussed and considered. Once this has been done I try to help them resolve their differences.¹⁷¹

The broad approach generally emphasizes encouraging and empowering the participants to make their own decisions.¹⁷² Accordingly, programs using a broad approach *tend to* provide extensive help to farmers in preparing for and, in some states, participating in, mediations. Thus, both mediators and participants normally spend more time in preparing for and participating in these mediations than their counterparts in narrow mediations.¹⁷³

The Kansas mediation program, for example, provides farmers with extensive financial and legal counseling in connection with the mediation process through the Farmers Assistance Counseling Training Service (FACTS), part of the Kansas State Board of Agriculture.¹⁷⁴ The goal of the Kansas program is for the parties to reach agreement as to how they will resolve the major issues in one four-hour session, preceded by extensive submissions of information to the mediators. The outcome is embodied in a document called a "Basic Understanding."¹⁷⁵

Kansas mediators average about five hours plus travel time preparing for, conducting, and wrapping up each mediation.¹⁷⁶ In addition, Farm and Ranch Mediation Service (FARMS), the unit of the Rural Assistance Corporation that operated the mediation program until late 1990, employed "processors" (neutral financial specialists, not mediators) who solicited and interviewed participants before the face-to-face meetings and prepared a written overview of the financial situation. They put in three to four hours per mediation.¹⁷⁷

171. *Id.*

172. Robert Friedenbach's study includes findings that support this assertion, but quite weakly. As indicated above, South Dakota mediators tend to follow an open approach to mediation. Fourteen South Dakota farm-credit mediators responded as follows to his questionnaire inquiry:

"The distinction has often been made between mediators who are 'orchestrators' and 'deal-makers.' Orchestrators focus more on the process and are less active in the negotiations of the parties. Deal-makers focus on getting an agreement and are more active in the negotiation. Circle the number that best corresponds to your style."

Orchestrator						Deal-maker	
1	2	3	4	5	6	7	
2	3	3	1	3	2	0	(# resp.)

Friedenbach, *supra* note 164, at 24.

173. Note, however, that in both certified and noncertified states, borrowers may retain the services of farm financial consultants or lawyers to help them prepare for or participate in mediations.

174. Memorandum from Don Reynolds, Chairman of the Rural Assistance Corporation, Shawnee, KS 1 (Sept. 4, 1990) (on file with author). The Rural Assistance Corporation operated the Kansas certified mediation program under a contract with the Kansas State Board of Agriculture until late 1990 when the Kansas Board of Agriculture brought the program under its direct supervision. Statement of Gregory P. Krissek, Director of Mediation Services, Kansas Board of Agriculture, at CAMP meeting, St. Paul, Minn. (Apr. 11, 1991).

175. Reynolds, *supra* note 174, at 5.

176. Telephone interview with Don Reynolds, Chairman of the Rural Assistance Corporation (Apr. 5, 1990).

177. *Id.* Earl Wright of the Kansas Board of Agriculture states that these individuals, charged with gathering information, were neither neutral nor financial specialists. Memorandum from Candace Fowler, Administrative Conference of the United States, to the author (Nov. 7, 1991) (on file with author).

Mediators in Minnesota spend an average of 10 hours per mediation;¹⁷⁸ 75 percent of that time is devoted to mediation sessions and the remainder is in preparation, correspondence and telephone calls.¹⁷⁹

In the Iowa program, a mediation coordinator spends an average of four to five hours orienting the parties to the mediation process and, where appropriate, referring the farmer to additional sources of assistance—such as lawyers and financial specialists—and two hours in follow-up activities. The mediators average almost three hours in mediation, but one case took 28 hours, another 40 hours.¹⁸⁰

Mediators in South Dakota report that they spend an average of 2.3 hours in mediation sessions and 3.3 hours in preparation and follow-up activities, including travel.¹⁸¹

2. “Narrow” Mediation

Under a “narrow” view of the purposes of farmer-lender mediation, the principal—and sometimes the exclusive—issue is whether the creditors will adjust their debts so that a rerun of the DALR\$ program would show a feasible plan. A feasible plan would allow the FmHA to provide primary loan servicing so that the borrowers could continue farming, and owning, the land.¹⁸²

A number of directors of certified state mediation programs have indicated that some of the FmHA representatives in their states held this narrow view so strongly that it severely limited FmHA’s participation in mediations. In some noncertified programs, this narrow view of mediation not only dominated FmHA’s participation, but also controlled the outlook of the mediators.¹⁸³ The mediations under these programs tended to be much shorter and more formulaic than under certified state programs.

One example of the narrow approach in noncertified states is the mediation model developed and promoted by Ted W. Spiegel, Executive Director of United States Arbitration and Mediation Midsouth, Inc., of Louisville, Kentucky (U.S. A. & M. Midsouth). U.S. A. & M. Midsouth has had contracts with the FmHA to provide mediation in Kentucky, North Carolina, and Tennessee and operates under contracts with FmHA in Kentucky and Tennessee.¹⁸⁴

178. Telephone Interview with Kathy Mangum, Farm Credit Mediation Program Director, University of Minnesota Extension Service (Sept. 20, 1990).

179. *Id.* (Sept. 21, 1990).

180. Telephone Interview with Micheal Thompson, Executive Director, Iowa Farm Mediation Service (May 30, 1991).

181. Friedenbach, *supra* note 164, at 3.

182. *See supra* Part II.A.2.

183. I cannot say that this was the situation in all noncertified states in which FmHA contracted for mediation services. There is no way, within the confines of this article, to gather such information on all such FmHA efforts. In several state FmHA programs of which I have knowledge, however, this narrow view seemed to predominate. As a consequence, the mediation services provided under such programs had goals that were significantly narrower than the goals of most of the certified state mediation programs.

184. U.S. A. & M. Midsouth is a Kentucky corporation and an independently owned and operated affiliate of United States Arbitration and Mediation, Inc., a Washington corporation headquartered in Seattle. Telephone Interview with Ted W. Spiegel, Executive Director, United States Arbitration and Mediation, Midsouth, Inc., Louisville, Ky. (Jan. 29, 1991).

The process was limited to debt reduction by non-FmHA creditors.¹⁸⁵ It employed a highly structured format¹⁸⁶ that allowed significantly less room than would a broad approach for problem-redefinition, option development, or direct communications between the borrower and the lenders. Spiegel believed—understandably, as I shall illustrate below—that mediation between the farmer and the FmHA is “prohibited by the regulations.”¹⁸⁷ Under this format, before each mediation, the mediator obtains the DALR\$ program and sets a goal for debt reduction by non-FmHA creditors that would allow the farmer to qualify for primary loan servicing.¹⁸⁸ In contrast, mediators using a broad approach in Iowa would often mediate over what figures should be used in the DALR\$ program.¹⁸⁹ In other words, under Spiegel’s narrow approach the mediator accepts the outcome of the DALR\$ program, but under the broad approach used in Iowa the mediator allows the farmer and the FmHA representative to negotiate over the appropriate input into the DALR\$ program.

The mediator—either Spiegel or a person he had trained—begins with an opening statement and does not allow the farmer to “say anything to all the people *in the beginning*”¹⁹⁰ because he “does not want to embarrass the farmer, does not want him to appear to be begging. Everyone knows what the farmer wants.”¹⁹¹ After the opening statement, the mediator meets with each non-FmHA creditor privately. In these sessions, he “stresses compassion and confidentiality.”¹⁹² He keeps the creditors separate and asks them to give concessions, not knowing what the other creditors will do. “If that fails,” Spiegel says, “I ask them to give contingent concessions.”¹⁹³ When Spiegel develops “something that looks like it might work,” he calls the farmer back in.¹⁹⁴ Spiegel allocated two hours for each mediation, but some were completed in just 15 minutes.¹⁹⁵

Other units of U. S. Arbitration and Mediation won contracts with FmHA to

185. The notice sent to the farmer under this program provided that “a mediation session and meeting of creditors has been scheduled for the purpose of discussing settlement of your farm and non-farm debt *which is not directly owed to the USDA-Farmers Home Administration.*” Technical Proposal from U.S. Arbitration & Mediation, Midsouth, Inc., to the FmHA North Carolina office 55 (undated) (emphasis added) (on file with author) (transmitted with letter from Ted W. Spiegel, Executive Director, United States Arbitration & Mediation, Midsouth, Inc., to Leonard Riskin (Mar. 18, 1991)).

186. Telephone Interview with Ted W. Spiegel, *supra* note 184.

187. *Id.*

188. *Id.* The mediator also ensures the farmer understands foreclosure and the need for a lawyer if foreclosure were initiated. *Id.*

189. Telephone Interview with Micheal Thompson, Executive Director, Iowa Farm Mediation Service (July 1, 1991).

190. *Id.* Other mediators who practice a narrow approach do offer the farmer an opportunity to make a statement in the beginning. Telephone Interview with Judge Laurie Smith, mediator with U.S. Arbitration and Mediation, Midwest, St. Louis, Mo. (May 29, 1991); Telephone Interview with Lawrence J. Robertson, mediator with U.S. Arbitration and Mediation, Midwest, St. Louis, Mo. (May 30, 1991).

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

provide mediation in other states.¹⁹⁶ And Spiegel's model, which is consistent with U.S. A. & M., Inc.'s approach to mediation in personal injury insurance claims, has influenced the conduct of mediation by at least some of these other units. For instance, mediators in local affiliates of U.S. A. & M., Inc. that secured mediation contracts with the FmHA in Missouri in 1988 were highly influenced by the model developed by Spiegel;¹⁹⁷ thus, they believed, for example, that two hours typically was ample time for a mediation. One of the mediators almost always completed mediations in less than an hour and was able to conduct some mediations in just a few minutes each.¹⁹⁸ Another, who conducted about 30 mediations—all but one of which resulted in restructuring—generally spent 45-60 minutes in mediations, following roughly 30 minutes of telephone contacts with non-FmHA creditors.¹⁹⁹ Both of these mediators believed that all parties generally left mediations feeling pleased. It is important to recognize that although narrowly focused mediations generally pay less explicit attention to interpersonal aspects of the situations they are dealing with, such processes may have the effect of improving feelings and relations.

The emphasis on gaining concessions from the non-FmHA creditors shown in these mediations leads me to question whether either the farmer or the FmHA are really "participating" in such mediations or are just attending them. (As explained above, the obligation to mediate imposed by the Agricultural Credit Act upon the Department of Agriculture applies only to certified state mediation programs.)²⁰⁰

Although the narrow approach generally has an ideological base, sometimes mediators who begin with such an approach will broaden it in response to perceived

196. The Washington state office of United States Arbitration and Mediation has contracted with the Washington State FmHA to provide mediation services. *Id.* Two Missouri affiliates have had contracts for portions of Missouri. Telephone Interviews with Carolyn Crowe, Director, United States Arbitration and Mediation, Midwest, Inc., St. Louis, Mo. (May 9, 1990) and Richard Routman, President, Midwest Arbitration and Mediation, Inc., Kansas City, Mo. (April 5, 1990).

197. Telephone Interview with Carolyn Crowe, *supra* note 196. Crowe's organization provided mediation services in parts of Missouri under contract with the FmHA in 1989. *Id.* Spiegel advised other "office-holders" of opportunities to obtain farm-credit mediation contracts with FmHA, and he informed them of the approach to farm-credit mediation that he developed. *Id.* Richard Routman, President of Midwest Arbitration and Mediation, Inc., Kansas City, Mo., which provided mediation in 1988 under contract with the FmHA in Missouri, stated, however, that these mediations were "not necessarily" modeled on Spiegel's and always took at least 90 minutes. Telephone Interview with Richard Routman (July 2, 1991).

198. This mediator, who once conducted six mediations in two days, stated that the mediations were scheduled at roughly two-hour intervals and while she often spent up to one hour preparing, she never spent two hours conducting a mediation. Telephone Interview with former Judge Laurie Smith, a mediator with U.S. Arbitration and Mediation, Midwest, Inc., St. Louis, Mo. (May 30, 1991).

199. Telephone Interview with Lawrence J. Robertson, mediator with U.S. Arbitration and Mediation, Midwest, Inc., St. Louis, Mo. (May 30, 1991).

Robertson normally talked with at least the major creditors by telephone to explain the purposes of mediation and to suggest the creditors bring a proposal to the mediation if they were willing to adjust the debt. Before the mediation commenced, he talked with the farmer to learn whether the farmer wanted to stay on the farm. If so, he asked the farmer's permission to work with the creditors to reduce their debts. If the farmer agreed, he then opened the mediation and asked the creditors where they stood. In some cases, the creditors had already worked out an arrangement with the farmer, and the mediator then spent only about 30 minutes confirming it.

200. *Supra* note 63, and accompanying text.

needs of the parties. Thus, mediators with the local affiliate of U.S. A. & M. in Kansas City, Missouri reportedly have mediated crop changes in the farm-home plan, and “would have” mediated a smooth transition off the land if that had been desired by a farmer.²⁰¹

Another example of a narrow approach was that employed by the Federal Mediation and Conciliation Service (FMCS). Although its training programs apparently included a problem-solving orientation, which is almost synonymous with a broad approach to mediation,²⁰² in conducting mediations in several noncertified states the FMCS seemed to accept unquestioningly severe limits on the scope of mediation.²⁰³ But the FMCS mediators apparently went a step further than their counterparts at U.S. Arbitration and Mediation. After determining that the non-FmHA creditors could not make sufficient adjustments, the FMCS mediators tried to persuade the farmer to sell the land. In the words of FMCS Commissioner Ira Lobel of Albany, New York:

In the states we have mediated cases—New York, Vermont, and Maine—the farms are small, often under \$100,000 in total farm indebtedness and under \$50,000 yearly income . . .

While the small farms, in and of themselves, are not a detriment to mediation, there are some practical implications of small farms that have a negative effect on the mediation process. First of all, in most cases, the FmHA is the primary lien holder. Under FmHA programs, they have investigated many financing alternatives before the mediation step ever takes place. Secondly, other creditors are usually so small in both number of creditors and dollar amount that there is not sufficient flexibility to allow for a restructuring of the debt.

The impact of the “small farm syndrome” is that in New York, Maine and Vermont . . . very little mediation takes place, in the traditional use of the term. The FmHA does a great deal of the financial work before it ever gets to the mediation step. Since FmHA holds most of the secured debt on the property and since their programs require them to delineate the various restructuring options available to the farmer, they have already indicated all their flexibility before the mediation ever occurs. The other lienholders usually do not have sufficient loans outstanding in which a restructuring of the payback will have any impact on the farmer’s ability to continue operating with a positive cash flow.

The ability of a mediator to be creative at this stage is extremely limited, since there is simply no sufficient dollars or creditors to be creative in settlement. (Parenthetically, I know from my own labor experience some of the most difficult cases are those single issue cases where the settlement is all one way of [sic] the other.)

Accordingly, the actual mediations, in non-mandatory states such as New York, Vermont, and Maine, where the farms are small and creditors are few, have been a vehicle to convince farmers that they must sell part of their land, which, while it may not be a desirable end result, does make for a successful mediation—an agreement that

201. Telephone Interview with Richard Routman, *supra* note 196 (July 2, 1991).

202. Memorandum from John A. Wagner, Director of Mission Support for the Federal Mediation and Conciliation Service, to Dispute Resolution Trainers (1989) (regarding Farmer/Lender Dispute Resolution Training Programs, with attached training materials).

203. Ira Lobel, *Farmer Lender Mediation, Dispute Resolution and Democracy*, Proc. 17th Ann. Conf. Soc’y of Professionals in Disp. Resol. 199, 200 (1989).

will avoid foreclosure. Being the outside expert, mediators have been able to convince farmers that a land sale was their only alternative.²⁰⁴

My own experience with the contrast between narrow and broad approaches to mediation, though assuredly not typical, illustrates one difference in practice:

In 1987, well before I undertook the present study, I conducted two farm-credit mediations for FmHA contractors who generally operated under a narrow view of the purposes of these mediations. At one of these sessions, the only persons in attendance were the farm couple, the FmHA county supervisor, and me; none of the several non-FmHA creditors appeared. Accordingly, it was plain that the session could not produce adjustments in non-FmHA debt, which, I had been informed, was the purpose of the mediation. Had I followed one of the narrow conceptions of mediation, I would have ended the session immediately; had I followed a different conception of narrow mediation, I would have let the farmer talk about his problems or tried to persuade him to give up the farm.

But I believe it is generally appropriate for a mediator to help the parties define their difficulties as broadly as they wish.²⁰⁵ So I spent the next three hours mediating, not “the debt,” but the situation. In the joint session, the farm husband proudly asserted that he wanted to keep the farm and that he could improve his farming sufficiently to make his payments to FmHA—even if the DALR\$ program indicated the contrary. The FmHA supervisor concluded that he was bound by the outcome of the DALR\$ program. In private caucuses, I was able to get behind these public postures. I learned that the farmer had decided to give up farming but wanted to keep his homestead and 160 acres. However, he had never communicated this to the FmHA supervisor, largely because of anxiety, depression, and confusion as to his options.

Next, I learned that the FmHA supervisor was unwilling to lend the farmer additional money or to restructure the debts. He felt extremely tense and guilty, however, about the possibility of running this family off the land, and he wanted to be as cooperative as possible. But he believed the farmers were not being open with him.

I brought them back together to exchange this information, and to discuss options, including bankruptcy. It became plain that both parties needed this discussion in order to understand their own and one another’s situation. The farmer and the FmHA representative reached no specific agreement about how to treat the delinquent loan. Instead, the farmer agreed to keep the FmHA supervisor apprised of his plans, including the possibility of bankruptcy. And the FmHA supervisor promised to give the farmer as much time as possible before the FmHA moved against the property. But there were other, more subtle outcomes: The session greatly reduced the tension between the participants, and it laid the groundwork for future cooperation and communication.

204. *Id.* at 201–202.

205. See Leonard L. Riskin, *Toward New Standards for the Neutral Lawyer in Mediation*, 26 ARIZ. L. REV. 329, 353–59 (1984).

3. *Effects of the Divergence in Approaches to Mediation*

The divergence in views on the proper approach to mediation has manifested itself in several ways. First, as already indicated, the mediations typically conducted under certified programs differ greatly from those conducted in at least some contract mediation programs. Second, in some certified states, at some times, while mediators yearned or pushed for a broad approach, FmHA representatives at mediations clung to the narrow view, believing or maintaining that they had no authority to discuss options other than primary loan servicing, and that the DALR\$ program was the only avenue toward that approach.²⁰⁶ At CAMP meetings, directors of state certified mediation programs have reported difficulties resulting from such restricted participation by FmHA, including resentment by other creditors of FmHA's inflexibility. They stressed that the mediation process could be improved if more discretion were vested in FmHA representatives. However, some of these state program directors also reported that many FmHA representatives were willing, sometimes "with some nudging," to interpret their mandates generously.

Third, in noncertified states, some contractors who were imbued with a broad mediation vision may have spent much more time as mediators—in preparing, conducting, and following up—than they or the FmHA anticipated. One example is Jack Dawson, whose firm was awarded a mediation contract by the FmHA Colorado state office in 1990, under which it was paid \$200 or \$240 per case, all inclusive, depending on difficulty of travel.²⁰⁷ He submitted such a low bid in the belief, which he still holds, that this was the only way to win a contract. But because Dawson subscribes to a broad notion of mediation, he spent an average of 14 hours on each case, which meant an hourly rate of about \$14.30. Before each mediation, he devoted a good deal of time to educating the participants about options and referring them to support services or providing such services, functions outside his official mandate. He also helped some farmers deal with the FmHA months after the mediation ended. An experienced lawyer, Dawson rationalizes this by considering that he donates some of his time.²⁰⁸

Like several certified state program directors, Dawson reported that at first FmHA representatives had a very narrow view of the goals of mediation, but that

206. There are, of course, many individual variations. One mediation coordinator remarks:

In Wisconsin, our Farm Mediation and Arbitration Program takes the "broad" approach to mediation. This approach sometimes conflicts with the "narrow" approach to mediation taken by the FmHA State Director, and many FmHA County Supervisors. On the other hand, the State FmHA Mediation Coordinator and many FmHA County Supervisors take a more expansive view towards mediation, while other FmHA County Supervisors can be "nudged" toward a "broad" view of mediation. Conflict between the "broad" and "narrow" approach to mediation in Wisconsin, particularly in FmHA cases, affects outcomes of cases as well as the parties' perceptions of the success (or failure) of the mediation process.

Memorandum from Dennis P. McGilligan, Coordinator, Wisconsin Farm Mediation and Arbitration Program to Charles Pou, Jr., of the Administrative Conference of the United States (Oct. 31, 1991).

207. Telephone Interview with Jack Dawson, Director, Conflict Resolution Resources, Boulder, Colo. (Feb. 5, 1991).

208. *Id.*

once he realized that the mediations “were his shows to run,” he found the FmHA officials responsive to discussion of underlying interests.²⁰⁹

4. *Advantages and Disadvantages of Each Approach*

Each approach to farmer-lender mediation has its own internal logic and advantages and disadvantages. The narrow approach accepts the definition of the problem that is implicit in FmHA rules: will non-FmHA creditors adjust their debts sufficiently to allow primary loan servicing? The broad approach seeks out underlying interests and works with the parties to define the problems and identify options as broadly as they wish. Thus, the narrow approach is more predictable and, in a sense, efficient. The objective is clear, the types of outcomes limited. It demands less involvement of the participants. All concerned spend less time, so the costs to the government and to participants *should be* lower, though neither I nor, so far as I know, the FmHA, have attempted this calculation. If the burdens of participation are lower in narrow mediations, perhaps some borrowers and lenders would find participation more appealing.

On the other hand, the narrow approach may cause all concerned to miss opportunities to develop solutions that will meet the needs of the parties and to improve relationships and communications. It can provide a convenient myopia for a FmHA representative who has decided against primary loan servicing.

The broad approach offers the opportunity to develop a diverse array of problem-solving solutions that better meet the parties' actual needs. Where this is effective, it produces superior results. In such cases, the broad approach has a bigger payoff than the narrow. It also has an important educational function and can lead to problem-solving approaches to community-wide problems.²¹⁰ Potential disadvantages of the broad approach are that it can demand more of the time and energy of all concerned and may call for some interpersonal skills in the mediation that are less necessary in the narrow approach.

B. WHY THE TWO CONCEPTS DEVELOPED

1. *The Disparity Between Certified and Contract Mediation Programs*

It is easy to see why the broad mediation conception developed more readily in certified state mediation programs than in some of the mediation programs that were created in noncertified states through contracts with FmHA state offices. The two kinds of programs were created and developed quite differently. Many of the certified programs were launched before FmHA began participating in farm credit mediation in 1988. Creditors with whom the programs dealt did not have the kind of rigid requirements for adjusting loans that govern the FmHA. The programs

209. *Id.* The contract mediator in Ohio has expressed a frustration with the narrowness of mediations conducted at such a late stage in the loan servicing process, but has noted, as did Jack Dawson, that sometimes FmHA representatives are willing to “go along with” the mediator. Telephone Interview with Benne Straughn Herbert, President, Arbitration and Mediation Services, Cleveland, Ohio (March 5, 1991).

210. See *supra* text accompanying notes 134–50.

often grew out of efforts that had strong community and high level political support. Many of the people who became mediators in such programs did so on a semi-volunteer basis, i.e., for small fees, and had strong connections to the agricultural sector and to rural communities.

Thus, many of the leaders of these programs began with concerns not just to keep farmers on the land, but also to help farmers—and rural communities—cope with economic and social deterioration. These concerns, as well as the mediation philosophies of the leaders of these groups, helped shape a broad concept of mediation. The Iowa and Minnesota mediation programs, the first and probably the largest, became prototypes for most of the other certified programs, though all of the certified programs differed from them in significant ways.²¹¹

Thus, the certified programs developed their own concepts of mediation in response to concerns, such as those listed above, and the Agricultural Credit Act of 1987 directed the FmHA to participate in those programs.

In contrast, in the noncertified states, the FmHA set the terms for mediation. And in doing so, the FmHA has shown a deep and understandable ambivalence. Recall that the Agricultural Credit Act of 1987 requires the FmHA to participate only in the mediations offered by certified state programs.²¹² It does not direct FmHA to offer or participate in mediation in other states. The statutory basis for the contract mediation program is a requirement that the FmHA make “a reasonable effort” to contact and encourage creditors to take part in a restructuring plan.²¹³ In addition, implementation of a broad form of mediation is more time consuming and expensive, and the certified programs generally were better funded.

2. *Within the FmHA*

One reason why a narrow concept of mediation evolved in some FmHA offices is the place assigned to mediation in the FmHA’s procedures for reviewing the status of delinquent borrowers. Under the FmHA’s rules, the delinquent borrower is officially notified of the mediation option only after the FmHA has determined—normally through the DALR\$ program—that the farmer is ineligible for primary loan servicing.²¹⁴ Many FmHA officials apparently feel that, at this stage, their only option is to attempt to arrange for other creditors to adjust their debts, and to do this through a mediation or a voluntary meeting of creditors, both of which they see as limited to such narrow purposes.

According to program administrator Chester Bailey, the FmHA located mediation late in the loan servicing process for two reasons: (1) Comments from farm advocacy groups that feared that if mediation occurred earlier, the FmHA might

211. The directors of the Iowa and Minnesota programs, Micheal Thompson and Kathy Mangum, conducted numerous training programs for FmHA personnel and for mediators in both certified and contract mediation programs. Interview with Micheal Thompson, *supra* note 49; interview with Kathy Mangum, *supra* note 28.

212. Agricultural Credit Act of 1987, § 503, 7 U.S.C. § 5103(a) (1988); 12 U.S.C. § 2202(e) (1988).

213. Agricultural Credit Act of 1987, § 615(d)(2), 7 U.S.C. §§ 2001(d)(2), 2006 (1988).

214. *See* art. II.A.2.

use mediation to delay carrying out its obligation to restructure if the borrower met the statutory criteria, and (2) FmHA's perception that some lenders would not want to participate in a mediation if they thought there was still a chance that the farmer's situation could be improved by FmHA restructuring.²¹⁵ Mr. Bailey does not object to timely, broad, professional mediation and believes that mediation should occur earlier in the loan servicing process with all concerned creditors.²¹⁶

Yet the narrow vision is reinforced by several official FmHA pronouncements, including the notice sent to the farmer, which suggests just one purpose for the mediation, an attempt to persuade other creditors to adjust the farmer's debts:

If you cannot show a feasible farm plan because you owe too much to other creditors and suppliers, FmHA will help you try to get your other creditors to adjust your debts. This will be done by FmHA asking for mediation if your state has a mediation program approved by the United States Department of Agriculture. If there is no state mediation program, FmHA will try to set up a meeting with your other creditors and suppliers if it can be shown that a reduction in these debts can provide a feasible farm plan.²¹⁷

On the other hand, some FmHA statements appear to acknowledge a reasonably broad notion of mediation. The Report to Congress of December 1989, for example, explains mediation as follows:

Once the parties are assembled, the mediator confirms that all agree to a few simple ground rules. Each tells his or her story to ensure that all points of view are covered. The mediator then helps the parties identify information that might be needed to evaluate the situation, sources of expertise, and steps to be taken. Options are developed and recorded so each can be considered and a narrowing down of the options began [sic].

Preliminary agreements are reached about which possibilities might work and which should not be discussed further. The farmer and the creditors might talk with others. Caucuses might be called. Finally, the mediator helps the parties put all of their agreements in writing, signed, and made available to all participants. . . .

The mediator does not hold evidentiary hearings as in arbitration. The parties are invited to come to the mediation conference prepared with all of the evidence and documentation they feel will be necessary to discuss their respective cases. The mediator gathers the facts and clarifies discrepancies and acts as a neutral third party and assists the parties in exploring alternatives that the borrowers and creditor(s) might not have considered on their own.²¹⁸

This is a description of the kind of mediation that the FmHA believed took place under the certified state programs, a relatively open process. When the report talks

215. Telephone Interview with Chester A. Bailey, *supra* note 110.

216. *Id.* Letter from Chester A. Bailey to Leonard Riskin (June 17, 1991).

217. 57 Fed. Reg. 18,612, 18,654 (interim final rule April 30, 1992) (to be codified at 7 C.F.R. pt. 1951, subpt. S, Ex. A).

An FmHA instruction to field offices on participation in mediation gives only one basis for the development of a feasible plan that: "[t]he borrower's other creditors agreed to make adjustments to their loans so that a feasible plan could result." FARMERS HOME ADMINISTRATION, MODULE SIX: HOW TO PARTICIPATE IN MEDIATION OR VOLUNTARY MEETING OF CREDITORS § 1 at 3 (undated).

The narrow approach also is reflected in proposed rules published in 1991. 56 Fed. Reg. 54,970, 54,988 (1991) (to be codified at 7 C.F.R. § 1951.909) (proposed Oct. 23, 1991).

218. 1989 REPORT TO CONGRESS, *supra* note 110, at 3.

about developing options, it must recognize that there are alternatives other than primary loan servicing.²¹⁹

A broad, open, notion of mediation also appears in the FmHA rules: "the purpose of mediation is to participate with farm borrowers, and their creditors, in an effort to resolve issues necessary to overcome the borrower's financial difficulties."²²⁰

In one sense, the FmHA has tried to make the contract mediation services comparable to the mediation services provided by certified programs.²²¹ The brochures describing the two programs would give no hint of a substantive difference.²²² But the FmHA has given certified programs great leeway in the conduct of mediations and—deliberately or not—may have imposed limits on the way in which contract mediators defined their tasks.

The contracting process also may have encouraged the development of narrow mediations. In this process, the FmHA generally spoke the language of broad mediation in seeking contractors, but frequently wound up with narrowly focused mediations.²²³

I am aware of a wide range of prices paid for contract mediation services. A contract mediator in Colorado received \$200 per mediation and \$240 for cases that require travel to less accessible regions.²²⁴ These figures include expenses. Organizations that had contracts with FmHA in Kentucky, North Carolina, and Tennessee received a flat fee ranging from \$375 to \$675, depending on travel time.²²⁵ One of the early contractors in Missouri received \$500 per case,²²⁶ which included travel and any other expenses.

But most of the successful bidders to whom I spoke believed—both before and after they were awarded contracts—that, aside from minimal qualifications, price

219. Notice also that the FmHA's objectives may differ somewhat from the objectives of certified state mediation programs, such as those in Iowa and Minnesota. See *supra* text accompanying notes 159-73.

According to the 1989 REPORT TO CONGRESS,

USDA lenders participate in the mediation process with three primary goals:

1. to explore all options to keep the family in farming,
2. to work with the farmer and other creditors to develop a plan which will benefit the borrower and the creditors, and
3. to make the process of debt reorganization more efficient by reaching an agreement, which can reduce the number and length of reviews and appeals.

1989 REPORT TO CONGRESS, *supra* note 110, at 3.

220. 7 C.F.R. § 1951.912(a) (1991).

221. Memorandum from Glenn J. Hertzler, Jr., Assistant Administrator, FmHA Farmer Programs, to Michael J. Wilkerson, Deputy Administrator, Program Operations (Sept. 26, 1988); Telephone Interview with Chester A. Bailey (July 12, 1990).

222. FARMERS HOME ADMINISTRATION, FmHA FARMER-CREDITOR MEDIATION, A GUIDE FOR USE IN STATES WITH CERTIFIED AGRICULTURAL MEDIATION PROGRAMS (Program Aid Nos. 1454, 1455, 1989). In fact, they are written in such a way that either kind of mediation might be acceptable. *Id.*

223. ACUS Report, *supra* note 8, at 42-44.

224. Telephone Interview with Jack Dawson, Director, Conflict Resolution Resources, Boulder, Colo. (Feb. 5, 1991).

225. Telephone Interview with Ted W. Spiegel, Executive Director, United States Arbitration and Mediation, Midsouth, Inc., Louisville, Ky. (Jan. 29, 1991).

226. Telephone Interview with Richard Routman, Director, Midwest Arbitration and Mediation, Inc., Kansas City, Mo. (April 5, 1990).

either was, or was almost, an overriding consideration in the award of contracts. It is difficult, however, to determine to what extent this emphasis on cost might have contributed to the use of a narrow approach by contract mediators.

In 1988, the FmHA state office for Missouri arranged for a farmer-lender mediation training to be provided by Micheal Thompson of the Iowa mediation program. An official of an organization that was awarded a contract in that state, and who attended that training workshop, told me that she felt that the Iowa model was inapplicable in Missouri given the small amount of money available.²²⁷ In addition, the bid she submitted had been based on the narrow conception of farmer-lender mediation.²²⁸

I cannot conclude, however, that the cost pressure alone pushed contractors toward a narrow view. Mediators tend to subscribe to one of the two models of mediation I have set out above. Where a mediator subscribes to the narrow model, additional money probably will not substantially influence his or her approach to the mediation, which will continue to value speed of processing. On the other hand, a mediator who is inclined toward an open, facilitative approach, but who is given inadequate funding, may be driven by cost factors to do less preparation and digging for underlying interests in the mediation.

It also is possible, however, that cost factors may have inclined FmHA state offices to select contractors who had a narrow conception of mediation. It is doubtful that FmHA officials selected contractors based on the contractor's approach to mediation. It seems unlikely—at least in the early days of the program—that the persons involved would have recognized such differences. However, it is possible that persons holding narrow views of mediation could more easily submit lower cost proposals.

C. ADDRESSING THE DICHOTOMY²²⁹

How should the Department of Agriculture and FmHA react to the problems created by the existence of these two alternative views of farmer-lender mediation?

First, it seems plain that research on the outcomes of the two approaches sponsored by the Department of Agriculture could foster understanding and improvement. I believe that the broad approach is generally preferable—that it is more congenial and usually produces superior outcomes.²³⁰ But I have no empirical data to back up that conclusion, either from this program or another, and so I am relying on my own experience and discussions with others, both of which are filtered through my own values.

Choosing one of these approaches may boil down to a question of values. How-

227. Interview with Carolyn Crowe, Director, United States Arbitration and Mediation Midwest, Inc. (May 9, 1990).

228. *Id.*

229. The Administrative Conference adopted recommendations, based upon the ACUS Report (*supra* note 8) that are consistent with these suggestions in this section and with the recommendations in the ACUS Report. Administrative Conference of the United States Recommendation 91-7, 1 C.F.R. § 305.91-7. See *infra* text accompanying note 232.

230. See Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 119 (1982); see also Riskin, *supra* note 159, at 1059, 1075-97 (discussing perspectives on settlement conferences).

ever, the choice could be aided by research into such issues as the extent to which mediators put these philosophical approaches into practice and the extent to which these approaches—as practiced—produce different outcomes. The results of such studies would help officials improve the farmer-lender mediation program and other government efforts in dispute resolution.

Second, the FmHA cannot wait for the results of such research. It should move quickly to foster a broad approach to mediation in the certified states. In the noncertified states, it should either foster a broad approach to mediation or articulate the differences between broad and narrow mediations for FmHA officials and for contractors.

1. In Certified States

In states that have certified programs, the FmHA should do what is necessary to ensure that its representatives are willing and able to participate in broad mediations. When Congress enacted Title V of the Agricultural Credit Act of 1987, mandating “good faith” participation by agencies of the Department of Agriculture, the only existing state mediation programs were based on the broad approach; thus, to the extent that a congressional intent on this point could be inferred, that intent must have been to require the department to participate in a broad type of mediation.²³¹

2. In Noncertified States

I believe that the FmHA also should promote broad mediation in noncertified states, though the case for this proposition is less clear. In addition to the likelihood of better outcomes, one reason for doing so is to provide services in the noncertified states that approximate those provided in certified state programs.²³² To achieve such parity, the FmHA would have to take steps to ensure that contractors understand and are capable of delivering broad services. In addition, to compensate contractors reasonably for their services might require significantly more than is currently paid by the FmHA in some states.

I must also note, however, that the FmHA could choose not to pursue the goal of providing equivalent services. As mentioned above, the FmHA is not required by law to participate in or offer mediation services in states that do not have certified programs. Second, providing equivalent services in noncertified states might work against another important DOA objective—encouraging such states to develop mediation programs that will qualify for matching funds. Thus, it may be advisable for the FmHA to consider other options. One is the possibility of simply ensuring that the personnel in the FmHA state offices are sufficiently familiar with the differences between and advantages and disadvantages of the two

231. Agricultural Credit Act of 1987, § 501, 7 U.S.C. § 5101 (1988). Note, however, that although certified mediation programs tend to follow a broad approach, the standards for certification set out in the statute are general and would allow for either approach to mediation. *Id.*

232. Memorandum from Glenn J. Hertzler, Jr., Assistant Administrator, FmHA Farmer Programs, to Michael J. Wilkerson, Deputy Administrator, Program Operations, (Sept. 26, 1988); Telephone Interview with Chester A. Bailey (July 12, 1990).

approaches so that they can make an intelligent choice about the type of mediation services they wish to procure; and announce that to potential contractors.

3. *Moving Toward Broad Mediation*

Moving uniformly toward broad mediation will not be simple. Each model of mediation has its own values and internal logic.²³³ Yet in practice, it may sometimes be difficult to distinguish one approach from the other. Good mediators are sensitive to the participants' needs. Accordingly, sometimes a mediator who starts with a narrow approach will broaden it, and one who starts with a broad approach will narrow it in response to developments in the mediation.

In my experience, however, persons who are drawn to one model often have trouble recognizing the strengths of, or the need for, the other; what one sees depends upon what one is seeking.²³⁴ In addition, the narrow model of mediation has the virtue of simplicity, whereas the broad model may call upon FmHA personnel to exercise judgment and to develop new and innovative solutions. Some government officials might fear that this sort of endeavor—requiring the exercise of greater discretion—could jeopardize their careers. Moreover, the FmHA's farm lending programs are very large and require hundreds of people in their administration. Therefore, the need for efficiency, fairness, uniformity, and order makes understandable the allure of a narrow approach to mediation, sometimes with exclusive reliance on the DALR\$ program. For all these reasons, there may be a great deal of internal resistance to change in the direction I am proposing.

FmHA could consider a number of activities, however, that would enhance the likelihood of success in moving toward a broad mediation approach, such as:

- Modifying the rules of loan restructuring so that mediation takes place earlier, or otherwise giving more discretion to FmHA representatives than some believe they currently have. For example, the FmHA could take appropriate measures to reduce the tendency of the DALR\$ program to limit the purposes of mediation, such as encouraging the FmHA county offices to initiate mediation proceedings at an earlier stage in the processing of delinquent loans.

- Providing additional training to FmHA personnel who will be connected with mediation and who will be supervising mediations. Such training sessions should emphasize broad approaches to mediation and stress problem-solving negotiation.

- Developing demonstration videotapes that can be used in training FmHA personnel and mediators in both state certified and FmHA contract mediation programs. Such videotapes could promote mutual understanding of the goals and possibilities in farmer-lender mediation.

IV. Implications for Others

The development of two radically different types of mediation in the FmHA's program bears several implications for other organizations and individuals who

233. See *supra* parts III.A. and B.

234. For a discussion of this problem centering on lawyers, which I think has validity in other situations as well, see Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 43-48, 57-59 (1982).

participate in mediation or other alternative forms of dispute resolution. What is most remarkable is not that two forms of mediation developed, but that this seemed to happen without anyone within the FmHA desiring such bifurcation or trying to foster it. In seeking to procure "mediation services" through local contracts, the FmHA apparently either intended to procure the same broad kind of mediation that was provided in the certified programs or had no idea that there were different types of mediation.

The same sort of mixup can occur elsewhere: in other government agencies, as they develop and implement alternative dispute resolution policies under the Administrative Dispute Resolution Act of 1990²³⁵ or Executive Order No. 12,778,²³⁶ federal district courts, many of which will develop and implement alternative dispute resolution projects under the Judicial Improvements Act of 1990;²³⁷ and in countless private organizations and law offices around the country, as they search for alternative ways to resolve disputes. In all these organizations, individuals at every level need education and training so they can appreciate the flexibility of mediation and other dispute resolution processes.

Based on my earlier report, the Administrative Conference has recommended that the "FmHA . . . take steps to remedy the problems associated with the inconsistencies between the broad and narrow approaches to mediation . . . by fostering a better understanding of the potential of the broad model of mediation in both certified state mediation programs and FmHA contract mediation programs."²³⁸ To accomplish that goal, ACUS urged the FmHA, *inter alia*, to give its representatives greater discretion and additional training that "should include approaches to mediation and emphasize . . . negotiation skills."²³⁹

What does all of this imply for the lawyers, judges, and executives who will be educated or trained in mediation and other forms of dispute resolution because of the new legislative and executive initiatives described above?²⁴⁰

I mean to suggest that they need to know something more than the differences between broad and narrow forms of mediation. Indeed, I identified broad and narrow forms of mediation in the farmer-lender mediation program only because these categories seemed most useful in understanding this program; other systems of categorization may work better in other mediation efforts.²⁴¹ Moreover, in my

235. The Administrative Dispute Resolution Act, *supra* note 6.

236. Exec. Order No. 12,778, 3 C.F.R. 359 (1991), *reprinted in* 28 U.S.C.S. § 519 (1992).

237. Civil Justice Reform Act of 1990, Pub. L. No. 101-650, § 102.(5)(D) 104 Stat. 5089, 5090 (1990).

238. Administrative Conference of the United States Recommendation 91-7, 56 Fed. Reg. 67,140 (1991) (codified at 1 C.F.R. § 305.91-7).

239. *Id.*

240. Exec. Order No. 12,778, provides that "litigation counsel should be trained in dispute resolution techniques and skills that can contribute to the prompt, fair, and efficient resolution of claims." Exec. Order No. 12,778, *supra* note 236, § 1(c)(1). The Administrative Dispute Resolution Act of 1990 provides, *inter alia*, that each federal agency must appoint a "dispute resolution specialist" and provide training to them. The Administrative Dispute Resolution Act, *supra* note 6, § 3(C). The dispute resolution specialist is required to recommend "other agency employees who would benefit from similar training." *Id.*

241. Riskin, *supra* note 159.

view, the most generally useful distinction is not that between narrow and broad conceptions of mediation but between adversarial and problem-solving approaches to defining and resolving a dispute or planning a transaction.²⁴²

Lawyers, judges, and others who participate in or foster mediation or other dispute resolution efforts must understand that they have choices among various goals and processes that they can employ in a mediation.²⁴³ The same holds for other dispute resolution mechanisms.²⁴⁴ The idea of a mini-trial, for instance, is that the procedure is designed to fit the specific situation in each case.²⁴⁵ And even arbitration, the most established of the alternatives, can be customized or combined with other procedures to address the circumstances.²⁴⁶

ADR should not stand for “*alternative* dispute resolution” but “*appropriate* dispute resolution.”²⁴⁷ The participants in the dispute, with the help of their lawyers, should select the most appropriate method for resolving a dispute. But in selecting that method, it is not enough to choose a generic process, such as mediation or arbitration. The parties and their lawyers can, and should, customize any of these processes to meet their needs. But first, they must understand the possibilities.²⁴⁸

242. Carrie J. Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 795-801 (1984). In adversarial negotiation (remember that mediation is simply facilitated negotiation), the parties assume that they are bargaining over a fixed resource, such as money or land; what one wins, the other must lose, and the parties rely on positions (what they demand) rather than underlying interests (the needs that inspire those demands). In problem-solving negotiation, on the other hand, the parties seek to respond to each others' underlying interests and to seek creative solutions. (Problem-solving is the essence of the broad approach to mediation described in this article. It cannot be said with as much confidence that adversarial negotiation is the essence of the narrow approach, but they share the same spirit.) Of course, nearly every negotiator experiences a tension between the use of adversarial and problem-solving strategies. DAVID A. LAX AND JAMES K. SEBENIUS, *THE MANAGER AS NEGOTIATOR: BARGAINING FOR COOPERATION AND COMPETITIVE GAIN* (1986).

243. See generally LEONARD L. RISKIN AND JAMES E. WESTBROOK, *DISPUTE RESOLUTION AND LAWYERS* 207-214 (1987).

244. *Id.*, *passim*.

245. John H. Wilkinson, *A Primer on Mini trials*, in DONOVAN LEISURE NEWTON & IRVINE ADR PRACTICE BOOK 171, 171-80 (John H. Wilkinson ed., 1990).

246. See RISKIN AND WESTBROOK, *supra* note 243, at 250-306, 324-402.

247. This is a major premise of an innovative program to teach dispute resolution in standard first-year courses at the University of Missouri-Columbia School of Law. Leonard L. Riskin and James E. Westbrook, *Integrating Dispute Resolution Into Standard First-Year Courses: The Missouri Plan*, 39 J. LEGAL EDUC. 509, 510 (1989).

248. When it comes to substance or procedure, a person who thinks he knows the answer is likely to pass up opportunities. This is the point of the story, familiar in religious circles, about a man sitting on the roof of his home as a flood swept through his town.

The water was well up to the roof when along came a rescue team in a rowboat. They tried hard to reach him and finally when they did, they shouted, “Well, come on. Get into the boat!” And he said, “No, no. God will save me.” So the water rose higher and higher and he climbed higher and higher on the roof. The water was very turbulent, but still another boat managed to make its way to him. Again they begged him to get into the boat and to save himself. And again he said, “No, no, no. God will save me! I’m praying. God will save me!” Finally the water was almost over him, just his head was sticking out. Then along came a helicopter. It came down right over him, and they called, “Come on. This is your last chance! Get in here!” Still he said, “No, no, no. God will save me!” Finally his head went under the water and he drowned. When he got to heaven, he complained to God, “God, why didn’t you try to save me?” And God said, “I did. I sent you two rowboats and a helicopter.”

CHARLOTTE JOKO BECK, *EVERYDAY ZEN* 69-70 (1989).