Gerda Zimmerer

Best Practices in Alternative Dispute Resolution: Pilot Project in Bavaria for Administrative Courts*

This pilot project which took place from June 2009 to June 2011 was initiated to find out whether the consensual settlement of disputes in administrative matters could be enforced by a judge acting as mediator when the court proceedings had already started.

Before I start with my topic let me give you a very general overview of Germany´s legal and court system: Germany is a federal republic which consists of 16 federal states, the so called Länder. Our legal system includes federal law, state law and local law. We have five hierarchies of courts, each with its own specific jurisdictions and codes of procedure. Three of the courts are specialized in administrative law matters and two in private law matters. The finance courts have jurisdiction over federal tax matters, the social courts over social law matters and the administrative courts over all other administrative matters. The labor courts have jurisdiction over private labor law disputes. Finally the ordinary courts are competent in civil and criminal law matters. All jurisdictions but the finance courts have 3 levels, the first instance court, the high or appeal court and the federal court, whose judicature is restricted on the application of federal law. The administration of the courts (particularly the staffing) lies in the responsibility of the Länder.

I will focus on mediation at the administrative courts in the Land Bavaria, but the issues I touch are comparable with those in the other Länder. I won´t touch ADR in administrative procedures in which an administrative decision is reviewed by an administrative authority (internal or administrative review).

At first I would like to present you the pilot project itself and its results, then I will continue with the implementation of mediation at the administrative courts under the present legal framework and at the end I intend to give you an overview how mediation at administrative courts works. I won´t talk about other procedures of alternative dispute resolution because the pilot project concentrated on mediation. When I use the term mediation in this context then I´m talking of the procedure during an ongoing

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* Presentation for: EJTN Administrative Law Sub-Working Group Seminar on the topic of “Alternative Dispute Resolution in Administrative Law”, held in October 2015 at the Higher Administrative Court of Saxony, Bautzen, Germany.

legal proceeding where the person who conducts the mediation is a judge (in-court mediation or judicial mediation). Of course, there also exists mediation as a scheme for extrajudicial resolution of disputes (extrajudicial mediation) and we have court-annexed mediation when court proceedings have already started. The court is empowered to propose mediation or any other proceeding for out-of-court settlement of the dispute. If the parties agree to enter into such a proceeding, the court is entitled to stay the court proceedings. If the out-of-court mediation is successful, the court proceedings will be terminated.

I.

Mediation as a procedure for alternative dispute resolution wasn´t known in the German legal culture until the late 90s of the last century. Triggered by the success of the “Harvard-concept in the United States also lawyers in Germany showed interest in ADR and mediation. But mediation was only used as an extrajudicial procedure for the resolution of disputes (mostly family and commercial matters). That changed when at the beginning of the last decade the civil jurisdiction started a pilot project to test mediation as a procedure of dispute resolution in the practice of the civil courts. The main focus was on the voluntary mediation after judicial proceedings had started. Subsequently also pilot projects at the administrative courts all over Germany started. Due to the federal structure of Germany the Länder chose different models how to implement mediation. In Bavaria, the Ministry of the Interior, to whose area of responsibility the administrative courts in Bavaria belong, started the pilot project I´m talking of in 2009. 15 Bavarian judges from 4 administrative courts (3 first instance courts out of 6 und the High Administrative Court), who took part voluntarily in the pilot project, got a training in how to assist the parties of a dispute to reach an agreement on the settlement of their issues. The training was given by a free lance mediator who had no legal expertise and didn´t know anything about court proceedings and their procedural rules. The training mainly covered the basic principles of mediation, the procedure (5-stage-model), communication and negotiation techniques, the understanding of one´s role and the function of law in mediation. This training took 3 modules of 3 days. Privately we deepened our knowledge in theory and by role playing. Later, after we had already started the practical work, we participated in two workshops (each two days) led by judges who also practiced mediation.

When we started the training there didn´t exist any legal framework concerning mediation. The only code of procedure which had a legal provision for conciliation hearings was section 278 subsection 5 of the German Code of Civil Procedure (ZPO)

which said that the court could refer the parties of a contested case to a judge delegated for this purpose for the hearing. The Code of Administrative Court Procedure didn´t have a similar provision. Hence, there had been pilot projects which classified in-court mediation at administrative courts as executive work and others that said it belongs to the task of the judiciary. This classification was important, because the principles of executive procedures significantly vary from those of the judiciary. The qualification of in-court mediation as a task of the judiciary means that the task is fulfilled within the judicial independence and certain procedural principles have to be applied.

In Bavaria, we decided that in-court mediation should be judicial activity, but not an administrative one performed by judges. We applied section 278 subsection 5 ZPO by the way of analogy. We formed a separate unit for the administrative tasks in the mediation procedure at each participating court, which had to register the incoming cases, create new files to which only the chosen mediator had access and to assign the case to a mediator according to the distribution of the business plan adopted before as a consequence of the right to one´s legal judge.

The mediation procedure itself based on the main principles: voluntariness, confidentiality, self-responsibility (the parties themselves are in charge for the solution of their dispute), institutional separation of the mediator and the judge who decides the case.

As a consequence of the voluntary nature the judge responsible for the court proceedings (deciding or adjudicating judge) only referred the parties to the mediator if they agreed. To secure confidentiality the parties and the mediator had to sign an agreement where all participants assured not to take any information concerning the mediation procedure to the outside world. The mediator committed himself not to witness in a future judicial proceeding concerning the dispute in question and not to participate in the case any further if the case isn´t settled in the mediation and not to provide a solution for the dispute without being asked to do so.

During the pilot project from June 2009 to June 2011 135 disputes were referred to the judge-mediators. In every proceeding a standardized questionnaire was distributed to the complaining parties, their lawyers and the representatives of the authorities. They should assess the offer of mediation at administrative courts, the conduct of negotiations by the mediator and the result of the mediation. They were also asked

whether in case of a future dispute they would again choose a form of alternative dispute resolution (and which form) or prefer a court ruling.

Also the judges who practiced mediation and the deciding judges had to complete a standardized questionnaire concerning mainly the acceptance of mediation within the judiciary and the allocation of disputes to the mediators.

The assessment of the complaining parties was mostly positive (75%). The exact figures you find on the hand-out. They appreciated that negotiations weren´t concentrated on the aspects of the judicial proceedings and they could reveal the background of their conflict, that the mediator spent more time on their case than a judge in the judicial proceedings and that the judicial proceedings came to an earlier end. The conduct of negotiations by the mediator was rated positive or extremely positive almost without any exception, even in those mediations that had not been successful. 75% of the complaining parties would again choose a form of alternative dispute resolution. The evaluation of the lawyers´ questionnaires had approximately the same results. Quite interesting was that lawyers emphasized the importance of the authority of the judge acting as a mediator. They stated that the parties had more confidence in the skills of a judge-mediator than in those of an extrajudicial mediator. The critics of the lawyers focused on the time-consuming procedure and that the scale of lawyers´ fees doesn´t provide any additional fees for mediation.

The deciding judges emphasized the difficulties to decide whether a dispute should be referred to the mediator and the negative attitude towards mediation on behalf of the authorities. The authorities often didn´t agree with the proposal to refer the dispute to a mediator because in their opinion there wasn´t a margin left within the written law for a consensual agreement, as administrative decision-makers exercise powers that are strictly described by legislation (rule of law). Another reason might be that in direct negotiations between the citizen subjected to the authority´s decision and the authority it negotiates from a position of power and mediation is generally intended to balance out power between disputing parties, so that decision-makers don´t readily engage in negotiations with those subject to their decision.

During the pilot project the number of cases referred to mediation wasn´t significant. It was the deciding judge who asked the parties whether they agree solving their conflict in a mediation. Only 0, 7 % of the newly entered cases at the courts (without asylum) were referred to in-court mediation. The reasons for this very low figure in the

pilot project states the lack of appropriate cases, the missing consent of the parties and the efforts of the deciding judges to achieve a consensual solution of the case themselves (section 278 subsection 1 ZPO: In all circumstances of the proceedings, the court is to act in the interests of arriving at an amicable resolution of the legal dispute or of the individual points at issue). For administrative courts we don´t have a similar provision but nevertheless the deciding judges at the administrative courts try to bring the parties to a consensual settlement of the dispute during the court hearing. At the beginning of the pilot project there was also a sort of reluctance on behalf of the deciding judges to refer cases to mediation because they lacked an understanding of alternative dispute resolution procedure and couldn´t tell the difference between a court settlement (compromise) and a mediation.

During the pilot project we found out, that mediation is a time-consuming procedure. The time needed for a hearing was about 4 hours in average, but the preparation of the case took at least about the same time. A court hearing at a first instance court takes about 1 hour in average. On the other hand the parties of a mediation agreed that one of the advantages of in-court mediation was that the mediator spent more time with their case and included subjects which were not of importance in a court hearing and that they could reveal the background of the dispute.

The conclusions of the pilot project were the following:

- Mediation can be a method to solve conflicts even when the court proceedings had already started

- The possibilities to perform mediation at administrative courts are restricted, because at one side of the conflict stands an authority that has to fulfill public concerns and is subjected to legal provisions, procedural rules, common principles as the principles of equality and proportionality including budgetary laws that reduce the scope for individual solutions where the focus is on the interests of the parties

- Nearly all participants who completed the questionnaires approved mediation as an additional method of dispute resolution at the courts

- The procedure of mediation was causal for the solution on which the conflict parties agreed

- Of importance for the agreement were the training of the judges and how they conducted the negotiations, the setting and the time spent with and for the parties

- The method chosen by the mediators to conduct the negotiations didn´t influence the successful resolution of the dispute. It was reported frequently that a solution proposed by the mediator was the reason for the settlement of the dispute.

The recommendations for the Bavarian Ministry of the Interior were:

- to provide a legal framework for alternative dispute resolution by judges who don´t decide the dispute after the start of the judicial proceedings

- to establish a coordinating office that examines whether the cases at the court are suitable for mediation and give a recommendation to the deciding judge

- to include elements of mediation in the general procedure

II.

At the time when Prof. Dr. Greger who did the scientific support for the pilot project presented his report to the Bavarian Ministry of the Interior in October 2011 the draft bill for the implementation of the Directive 2008/52/EC of the European Parliament and the Council on certain aspects of mediation in civil and commercial matters had already been presented to the parliament. The draft had the title: Gesetz zur Förderung der Mediation und anderer Verfahren der außergerichtlichen Streitbeilegung (Act to advance mediation and other procedures of alternative dispute resolution; Mediationsförderungsgesetz (Mediation Act). In its section 1 the draft defined 3 forms of mediation: extrajudicial mediation, court-annexed mediation conducted by an extrajudicial mediator and in-court mediation performed by a non-deciding judge. The deciding judge had the possibility to refer the parties to an in-court mediator as defined in section 1. The regulations of the Mediation Act should have been applicable to in-court mediation. But this draft wasn´t enacted.

It was partly criticized by the bar associations that judges were involved in ADR and that the courts offered mediation free of additional charges. It was also argued that an efficient legal system with good procedural rules should not be diluted by the inte-

gration of an interest-non-legal-based system. Some held also the view that judges should stick to judging and not to venture into the mediation field. The question on whether or not to include a separate concept of in-court mediation in the Mediation Act, along with out of court mediation, was a major controversial issue which resulted in a delay of the enactment by several months.

Finally, after the invention of the German Federal Council (Bundesrat,) the idea of in-court mediation was revived, but restated in a modified manner. Instead of being an independent concept in the Mediation Act it is now mentioned as one potential method for judicial conciliatory proceedings. The new Section 278 subsection 5 ZPO allows in-court mediation under a new label called Güterichter (conciliation judge). This provision is also applicable in proceedings at administrative courts.

Section 173 Code of Administrative Court Procedure
Unless this Act contains provisions with regard to the proceedings, the Courts Constitution Act and the Code of Civil Procedure, including section 278 subsection 5 and section 278a, shall apply *mutatis mutandis* if the fundamental differences between the two types of procedure do not rule this out.

Section 278 Code of Civil Procedure
(5) The court may refer the parties for the conciliation hearing, as well as for further attempts at resolving the dispute, to a judge delegated for this purpose, who is not authorized to take a decision (Güterichter, conciliation judge). The conciliation judge may avail himself of all methods of conflict resolution, including mediation.

Section 278a Code of Civil Procedure
Mediation, alternative conflict resolution
(1) The court may suggest that the parties pursue mediation or other alternative conflict resolution procedures.
(2) Should the parties to the dispute decide to pursue mediation or other alternative conflict resolution procedures, the court shall order the proceedings stayed.

This legal framework, which came into force on 26 July 2012, put an end to the mediation procedures established in the pilot projects at the end of July 2013, the conciliation judge being the only tool for ADR at the courts.

This “Güterichter” is not a mediator. He may make use of the mediation techniques, but is allowed to evaluate the legal position of the parties and make his own proposals for a settlement of the dispute. He may also suggest to the parties that they settle their dispute by making use of other alternative conflict resolution procedures like arbitration and he is not limited to the techniques used in a mediation procedure.

The legal provisions of the Mediationsförderungsgesetz do not apply to the Güterichter. The Mediation Act stipulates basic duties of the mediator to adequately inform the parties and ensure that they are aware of the principles and the course of the mediation. It sets out a number of disclosure obligations and restrictions on activity to protect the independence and impartiality of the mediator. The act also imposes strict confidentiality obligations on the mediator and those involved in the administration of the case, who also have the right of refusal to testify in court proceedings.

But the legal framework in the Code of Civil Procedure includes provisions to secure confidentiality and to separate conciliation hearing and court proceedings .

Section 42 Code of Civil Procedure
Recusal of a judge from a case
(1) A judge may be recused from a case both in those cases in which he is disqualified by law from exercising a judicial office, and in those cases in which there is a fear of bias.
(2) A judge will be recused for fear of bias if sound reasons justify a lack of confidence in his impartiality.
(3) In all cases, both parties shall have the right to recuse a judge.

Section 48 Code of Civil Procedure
Self-recusal; recusal ex officio
The court competent for conclusively dealing with the motion to recuse a judge is to decide on the matter also in those cases in which such a motion is not appropriate, **but in which the judge notifies the court that a relationship exists that might justify his recusal, or in which other reasons give rise to concerns that the judge might be disqualified by law.**

Section 383 Code of Civil Procedure
Refusal to testify on personal grounds
(1) The following persons are entitled to refuse to testify:
1. The fiancé of a party, or that person to whom the party has made a promise to establish a civil union;
2. The spouse or former spouse of a party;
2a. The partner or former partner under a civil union with a party;
3. Those who are or were directly related to a party, either by blood or by marriage, or who are or were related as third-degree relatives in the collateral line, or who are or were second-degree relatives by marriage in the collateral line;
4. Clerics, with a view to what was entrusted to them in the exercise of their pastoral care and guidance;
5. Persons who collaborate or have collaborated, as professionals, in preparing, making or distributing printed periodicals or radio or television broadcasts, if their testimony would concern the person of the author or contributor of articles or broadcasts and documents, or the source thereof, as well as the information they have been given with regard to these persons' activities, provided that this concerns articles or broadcasts, documents and information published in the editorial part of the periodical or broadcast;
6. **Persons to whom facts are entrusted, by virtue of their office, profession or status, the nature of which mandates their confidentiality, or the confidentiality of which is mandated by law, where their testimony would concern facts to which the confidentiality obligation refers.**
(2) The persons designated under numbers 1 to 3 are to be instructed about their right to refuse to testify prior to being examined.
(3) Even if the persons designated under numbers 4 to 6 do not refuse to testify, their examination is not to be aimed at facts and circumstances regarding which it is apparent that no testimony can be made without breaching the confidentiality obligation.

By means of the agreement signed at the beginning of the conciliation hearing where the conciliation judge commits himself not to witness in a future judicial proceeding concerning the dispute in question and not to participate in the case any further if the case doesn´t settle it is ensured that the knowledge acquired in the hearing will not influence the decision in the judicial proceeding.

In addition there exist legal provisions which secure that the conciliation hearing is not public and the hearing is only recorded when the parties agree.

Section 169 Courts Constitution Act
The hearing before the **adjudicating** court, including the pronouncement of judgments and rulings, shall be public. Audio and television or radio recordings as well as audio and film recordings intended for public presentation or for publication of their content shall be inadmissible.

Section 105 Code of Administrative Court Procedure
Sections 159 to 165 of the Code of Civil Procedure shall apply *mutatis mutandis* to the minutes.

Section 159 Code of Civil Procedure
Recording the hearing
(1) A record is to be prepared of the hearing and of all evidence taken. All records of the clerk of the court registry may be involved in order to keep the record if this is required due to the expected scope of the record, in light of the particular complexity of the matter, or for any other grave cause.
(2) Subsection (1) shall apply mutatis mutandis to hearings taking place outside of the session of the court before judges of a local court (Amtsgericht, AG) or before judges correspondingly delegated or requested. **Records of conciliation hearings or of further attempts made at resolving the dispute before a conciliation judge (Güterichter) pursuant to section 278 (5) will be prepared solely based on a petition of the parties in congruent declarations.**

The essential element of in-court mediation – the judge who tries to settle the dispute by ADR is a judge who doesn´t decide the case himself – rests part of the Güterichterverfahren (conciliation judge procedure). This is important for two reasons: If the parties know that the conciliation judge will not decide on the merits the personal responsibility of each participant is challenged because he has to find a solution himself. Furthermore, the parties don´t have to fear that something they say in the conciliation hearing is used against them if it happens that finally their case has to be decided by the deciding judge because the conciliation procedure is not successful.

It is also possible that people who are not party of the dispute participate in the conciliation hearing and the conciliation agreement if mutually agreed by the parties. The

contents of the settlement are not restricted to the matter in dispute. The conciliation judge doesn´t use procedural rules for court proceedings and the hearing follows the structure the judge applies.

The main difference between the mediator and the conciliation judge, who chooses mediation as a procedure of ADR, is that the conciliation judge may give legal advice, propose solutions, and advise the parties how to solve their dispute. This may have adverse impact on the self-responsibility of the parties which should be encouraged by the methods of mediation and the idea of an interest-based agreement emphasizing personal concerns and not enforceable rights.

According to the wording of section 278 subsection 5 ZPO the deciding judge is allowed refer the parties to the conciliation judge without asking them whether they agree with a conciliation hearing if he decides the conciliation hearing being the appropriate and most effective dispute resolution system. That happens very rarely. In fact, it isn´t of any use to refer the parties to the conciliation judge, if they don´t aim at a consensual solution of their conflict, because the success of a mediation depends on their positive cooperation.

As a summarizing assessment it is to say that the legal framework that implemented the Güterichterverfahren instead of in-court-mediation didn´t change the procedure applied during the pilot project remarkably. The deciding judge refers the parties to conciliation judge, if the parties agree, they sign a confidentiality agreement, the procedure follows mostly the methods of mediation and if we are lucky the parties solve their dispute and end the court proceedings. But we may make use of the possibility to evaluate the legal positions of the parties and propose solutions ourselves.

To prepare this presentation I have asked my colleagues at the administrative courts how they came to agreements settling the dispute. Their answer was that they mostly avoid proposing a solution of the conflict, but they very clearly work out and evaluate the legal problems of the disputes to give the parties an idea whether they would be successful in a court ruling. Even though the judge in a conciliatory role has no authority to render binding decisions or issue a legal indication, a proposal submitted to the parties could in fact give guidance to the parties and provide valuable support to determine whether a settlement is appropriate and in the parties´ best interest.

III.

One main problem for the conciliation hearing is to get appropriate cases. It is the deciding judge who refers the parties to the conciliation judge. As I mentioned above the final report on the Bavarian pilot project suggested to establish a “coordination judge” who should examine whether a case is suitable for mediation and recommend the deciding judge to refer the case to the mediator if appropriate.

That didn´t happen. Of course, meanwhile we have at every administrative court in Bavaria judges who participated in a professional training for alternative dispute resolution who could advise their colleagues whether a case should be referred to the conciliation judge or be decided by a court ruling more effectively, but this works on an informal basis. After more than 6 years of practice most of the deciding judges who accept mediation or any other form of alternative dispute resolution to be an integral part of a system of dispute resolution developed some knowledge and experience on which cases are appropriate. We can also state that some successful mediations in matters of public interest were a kind of advertisement for mediation. Parties sometimes asked themselves whether their case could be referred to the conciliation judge and of course the deciding judge won´t refuse that request. At the first instance administrative court at Munich we practice a model which helps to get the cases directly from the parties: When an action is brought to the court the plaintiff and the defendant receive the notification that the action is registered, which is the file number and within which period of time they have to respond. In the same notification we inform the parties that the court offers mediation as a method of alternative dispute settlement and publish a link to the court´s website with further information. Meanwhile the colleagues at this court get 80% of their cases, because the parties themselves suggest to solve their conflict this way.

The experience we meanwhile gained enables us to define certain criteria which indicate that a case should be referred to a conciliation judge:

- A litigation is obviously the consequence of a conflict on the interpersonal level, mostly neighborhood disputes where the authority stands between neighbors. This we have in many legal fields, the main fields are: building law and pollution control law (noise)

- The parties of the dispute have a long-lasting personal relationship: civil service law, local affairs, school legislation

- Disputes where third persons who are not party of the legal proceedings should be involved

- One plaintiff brings more actions at one court or a higher number of plaintiffs file suits against one authority measure

- Cases which should be solved quickly and/or in camera

- The dispute can only be settled in consideration of legally non-relevant issues.

We are also able to say that there are a few legal fields where mediation seems to be the more effective dispute resolution: civil service law because the controversial issue is mostly not a legal question but a disturbance in the personal relationship of the civil servant and his superior (secondment, staff report, advancement) and cases where neighbors are involved, but we perform mediation in all legal fields when the parties agree to try to solve their problem in a conciliating hearing and want to come to a fair agreement.

Now that conciliation hearings are a small but vibrant part of the work at administrative courts often cases which are very complex are referred to the conciliation judge. One of my colleagues started with an action on the right to information according to the Environmental Information Act. It turned out that background of this action was air pollution caused by a plant recycling electric waste. Participants of the conciliation hearing were the community where the enterprise was based, the authority responsible for the official permit, the enterprise and a local citizens´ initiative and their lawyers. The result of the hearing was an agreement on a new official permit including strict regulations on air pollution control. The results of the mediation were reported in the local newspaper which stresses the importance this agreement had for the parties and was of course a good advertisement for alternative dispute resolution. We had a conciliation hearing on an Air Pollution Control Plan for a town with 60.000 inhabitants where representatives of the different ministries, the mayor of the town and chosen representatives of the affected residents participated, all in all about 20 persons, which we brought to a successful end. Of course there are conciliation hearings which fail. We had several actions against permits for events in a street in the center of a town in the immediate vicinity of residential buildings. As the events were annual also the actions were annual. At a conciliating hearing we came to an agree-

ment with one of the plaintiffs which wasn´t unfortunately accepted by the other plaintiffs. But even if a mediation is not successful it is beneficial in demonstrating the authorities´ concern for the problems of the citizens and in balancing out the power between the disputing parties.

Nonetheless the number of cases which are referred to the conciliation judge compared with the cases which stay at the court is insignificant (about 1 % without asylum). That did not change since the end of pilot project. But in-court mediation is not a substitute for the so long applied judicial dispute resolution system at administrative courts but just an additional tool and a method of quality management.

After the dispute is referred to the conciliation judge he invites the parties to the conciliating hearing. To prepare the hearing he reads the case file and analyses the conflict. He prepares working hypotheses on the relationship of the conflict parties, the development and the background of the conflict. He also tries to find out what is important for the parties on the first hand. Therefore we ask the parties, not their lawyers, to describe their conflict in their own words without any legal assessment.

When the conciliation judge wants to give legal advice he has also to answer the legal relevant questions in his preparation. This may cause problems because the Güterichter is not the judge who decides the case. As the judges at administrative courts are specialized on a certain working field the conciliation judge may not be a specialist on the subject that is legally relevant for the case and therefore needs some time for the legal preparation of the case. At the administrative courts we don´t have conciliation judges who perform conciliation hearings in special legal fields. That differs from the civil jurisdiction where the conciliation judges get a training in certain legal fields and do only conciliation hearings in this field (family law). We lack a sufficient number of cases to specialize on certain legal fields for the conciliating hearing. At the High Administrative Court we have 7 conciliation judges and each of us works on about 3 cases a year for the conciliation hearing. At the 6 first instance courts we have at each court 2 judges for the conciliation hearing who deal with 5 to 10 cases a year.

For the conciliation hearing there are no procedural rules. If we decide to work with the method of mediation we try to follow the stage-model. Since we have the Güterichter established by law we tend to help to work on solutions ourselves and give also legal advice. Sometimes it is necessary to warn the parties that a solution

they think of is not permitted by law. My personal experience is that in the opinion of the parties a judge who works with the methods of alternative dispute resolution rests a judge although he doesn´t decide the case. So they expect him to help solve their dispute. The authority given by his professional position is an advantage in bringing the dispute to a successful end.

In about 60% of the cases the parties find an agreement in the conciliation hearing which ends the dispute and also the judicial proceedings. The rest ends without an agreement. The reasons therefore are different. The conciliation judge may end the hearing himself because he is convinced that the parties in truth don´t want to achieve a settlement of their dispute but use the hearing to delay the judicial proceedings or to improve their position by demanding an advantage which the legal provisions do not concede. Or the situation threatens to escalate when one party is becoming abusive towards the other. Or the parties do not find a solution for their conflict, on which they can both agree. In these cases the files are given back to the deciding judge without any further information why the parties did not find a consensual solution. But we observe that in cases where the parties had been close to a settlement of their dispute in the conciliation hearing finally the deciding judge achieved a court settlement. The willingness to make concessions increases when the parties get the information that the deciding judge does not follow their legal position.

When the conciliation hearing is successful the parties sign a final agreement. The legal provisions enable the conciliation judge to record an enforceable settlement. An official copy of this recording may be used for enforcement of the settlement or the results of the conciliation hearing.

Section 160 Code of Civil Procedure
Content of the hearing record
(1) The record of the hearing shall set out:
1. The place and date of the hearing;
2. The names of the judges, of the records clerk of the court registry, and of any interpreter who may have been involved;
3. The designation of the legal dispute;
4. The names of the parties appearing, of third parties intervening in support of a party to the dispute, of representatives, attorneys-in-fact, advisers, witnesses and

experts, and, in the case provided for by section 128a, the place at which they are attending the hearing;
5. The information that the hearing was held in open court or in camera.
(2) The record is to set out the essential course of the hearing and actions taken therein.
(**3) The record of the hearing is to set out:**
1. Any acknowledgments, abandonments of claims, and settlements;
2. The petitions;
3. Any admission and declaration as to a petition for the examination of a party, as well as any other declarations the determination of which is required;
4. The testimony by witnesses, experts and parties examined; in the event of a repeated examination, the testimony need be included in the record of the hearing only insofar as it deviates from the testimony previously given;
5. The results of taking visual evidence on site;
6. The decisions (judgments, orders, and rulings) of the court;
7. The pronouncement of the decisions;
8. The withdrawal of legal action or of appellate remedies;
9. The waiver of appellate remedies;
10. The results of a conciliation hearing.
(4) The parties involved may apply to have specific actions and events, or statements, included in the record of the hearing. The court may refrain from so including them if the determination of the actions and events or of the statements is not relevant. Such order shall not be contestable and is to be included in the record of the hearing.

In practice the parties very rarely choose this form to bring their dispute to an end. The reason is that the contents of the final agreement often are arrangements which are not enforceable. The found solution may be legally elusive. A conflict on the interpersonal level is not solved by legally binding rules but often simply by apologizing for misbehavior or by fixing rules how to react and deal with similar problems in the future. Also the principle of self-responsibility and the fact that the agreement embodies an interest-based solution of the conflict has the effect that the parties fulfill the liabilities they incurred willingly and an enforcement is not necessary.

The final agreement also includes the declarations of the parties how to end the judicial proceedings. Mostly they declare the matter terminated and the court issues only

an order on the costs. Sometimes the plaintiff withdraws his action. In consequence he is under obligation to bear the costs.

I mentioned above that in the field of administrative law the margin left for an interest-based agreement is limited because the participating authorities are subjected to the rule of law. Hence the representative of an authority would never sign an agreement which doesn´t comply with the legal requirements. The solution has also to be in compliance with the regulations for the administrative procedure (participation of the public, other authorities). German administrative law offers discretionary powers, undefined legal terms and margins of judgement which can be clarified and substantiated in the interests of the parties. The solution found in a conciliation hearing can also prepare, trigger and support the administrative procedure which is necessary to put into practice the final agreement. But mostly the settlement of a dispute by the method of mediation does not result in the compensation of opposing legal positions but in a solution beyond these positions. This is possible because mediation offers the chance to include aspects which are not issues of the legal proceedings and balances out the interests of the parties and therefore offers a wider range of solutions and more flexibility in the solution.

Let me end with the following conclusion.

- In-court mediation offers a possibility of reaching a fast settlement of a dispute in accordance with the interests of the parties also in administrative law

- Meanwhile in-court mediation is institutionalized at administrative courts

- In-court mediation in administrative law cannot relieve the clogged dockets of the courts to a substantial extent but is a mean of quality management

- The role of a judge conducting mediation is not in contradiction to his statutory authority and mandate in court proceedings, because the conciliation judge is not authorized to render binding decisions and is submitted to strict confidentiality obligations.

Gerda Zimmerer
Judge and Conciliation Judge
High Administrative Court of Bavaria