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MEDIATION ETHICS

INTRODUCTION

The last two chapters introduced mediation techniques and the special problems that arise in the mediation of large disputes. Regardless of the scope of a dispute or the specific methods that are used to resolve it, the practice of mediation can raise difficult ethical issues. In this chapter, we will explore the ethical dimensions of mediation and, at least implicitly, of dispute resolution in general.

We shall consider first the question of accountability: Is the mediator merely obliged to lead the parties to agreement, or does he or she have a broader duty to society to see that the terms of that agreement are efficient and just? Whatever may be the mediator's responsibility for end results, should there be ethical strictures that limit the means that are employed? Moreover, we shall analyze the mediator's own motives and incentives, particularly those that may conflict with those of his or her clients. Finally, we shall consider the status of the "mediator with clout": Should such a person be regarded not as a mediator but either as another party or as an adjudicator?

Unlike most chapters in the book, this one does not include a major case study. These ethical issues should be considered in the context of the Brayton Point and Foothills cases.

THE CONCEPT OF ACCOUNTABILITY

In collective bargaining of labor disputes and in some other fields, the mediator is not generally expected to be concerned about the quality and impact of negotiated agreements, so long as the parties to it are satisfied. If management and the union can live with a dollar-an-hour wage increase, then the mediator need not worry about inflationary effects on the general consumer.

Some observers believe that whether or not this notion has currency elsewhere, it should not apply to the mediation of environmental disputes, particularly when social impacts may be felt for years—even generations. The excerpts below represent opposing views on this broader view of mediator responsibility. To what extent were David O'Connor and Tim Wirth accountable in their mediation of the Brayton Point and Foothills disputes, respectively? Should their responsibility for the terms of settlement have been more explicit? Should the same standards of accountability apply to a private citizen and an elected official?

Susskind, Lawrence. "Environmental Mediation and the Accountability Problem," 6 *Vt. L. Rev.* 1, 4–8, 1981; citations omitted.

> One of the questions raised is to whom and how will environmental mediators be held accountable: More specifically, how can those affected by the actions of mediators effectively chastise, sue, or fire them? Labor mediators must abide by the rules established by the Federal Mediation and Conciliation Service or the American Arbitration Association. Mediators' efforts are policed by these associations to ensure conformance to their codes. Failure to comply can lead to disaccreditation. Labor mediators can be sued if they violate statutes or judicial decisions regarding proper mediation procedure. They can also be discharged by the parties to a dispute, thereby making it harder for incompetent mediators to find work in the future.
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> There are no comparable statutes or judicial decisions that currently apply to environmental mediators. Most environmental mediation efforts have been undertaken by ad hoc mediation centers that are not bound by the codes of existing professional associations. Now, many environmental mediation efforts are undertaken by "one-time only" intervenors, so that attempts to discharge them will have little effect on their future mediation careers. In short, the moral, legal, and economic pressures that ensure the accountability of mediators in other fields do not apply to environmental mediators. This gap is of some concern.
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> Even if it were clear how environmental mediators could be held accountable, debate about what their responsibilities ought to be would continue. The success of most mediation efforts tends to be measured in rather narrow terms. If the parties to a labor dispute are pleased with the agreement they have reached voluntarily, and the bargain holds, the mediator is presumed to have done a good job. In the environmental field, there are reasons that a broader definition of success is needed—one that is more attentive to the interests of all segments of society.
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> If the parties involved in environmental mediation reach an agreement, but fail to maximize the joint gains possible, environmental quality and natural resources will actually be lost. If the key parties involved in an environmental dispute reach an agreement with which they are pleased, but

fail to take account of all impacts on those interests not represented directly in the negotiation, the public health and safety could be seriously jeopardized. If the key parties to a dispute reach an agreement, but selfishly ignore the interests of future generations, short-term agreements could set off environmental time bombs that cannot be defused. Although the key stakeholders in an environmental dispute may pay only a small price for failing to reach an agreement, their failure could impose substantial costs on many groups, who may be affected indefinitely. Finally, the parties to environmental disputes must be sensitive to the ways in which their agreements set precedents; even informal settlements have a way of becoming binding on others who find themselves in similar situations.

Stulberg, Joseph B. "The Theory and Practice of Mediation: A Reply to Professor Susskind," 6 *Vt. L. Rev.* 85, 110–114, 1981; citations omitted.

Why and how else, then, should the mediator pay special attention to those not represented, as Susskind is proposing? Presumably, the response would be along the following lines. In environmental disputes, decisions are being made that will irrevocably affect the future development and life-style that can occur. The widest possible consensus among those who will be affected by the development is therefore necessary, whether or not they possess the power as individuals or groups to block implementation of the agreed-upon plan. Susskind appears to suggest that it is the mediator's job to assure that all those interests are represented in the decision making process.

This procedure is hardly tenable, either conceptually or practically. Mediation is a dispute settlement process that requires the active participation of individuals or groups of people. They identify their concerns. They must find a way to work with each other once the solutions are identified and agreed upon. The nature of the solutions is not only context-dependent, but participant-dependent. The individuals participating in the process, both as advocates and mediators, are an important factor in what solutions are ultimately accepted. The mediator's role, as traditionally discharged, is to help those persons reach a resolution and then withdraw. He cannot deal with absent parties. He does not know who they are, what they would have said if they had been present, nor what their priorities are. . . .

Second, Susskind suggests that "[e]nvironmental mediators ought to be concerned . . . about . . . the possibility that joint net gains have not been maximized [and about] . . . the long-term or spillover effects of the settlements they help to reach." Susskind proposed that it is the mediator's responsibility as an objective observer to insure that the final solution secures the greatest overall net benefits for each party, without leaving any party worse off than it was in its original configuration (the Pareto-optimal princi-

ple). He further suggests that the solution agreed upon should have the least possible adverse impact on other aspects of present or future community life. Simply stating the proposed responsibility for the mediator in this way reveals how awesome the task is that Susskind is proposing for the environmental mediator. To insure the Pareto principle is met, the environmental mediator must be able to generate, or at least guarantee, consideration of every possible technical solution to the environmental problem. He must secure demographic information on all persons affected by the dispute and factor their interests, desires, aspirations, preferences and values into the solution. He must project alternative development plans for jobs, tax bases, population trends, aesthetic values, school development and recreational needs for each possible solution. He must calculate the advantages and disadvantages of each solution against retaining the status quo, including the costs involved in using alternative dispute settlement procedures. And the list goes on.

Although these tasks might constitute a city planner's dream, they involve a host of analytical problems concerning logical theories of probability, measurement, interpersonal comparisons, and contrary-to-fact conditionals. These problems catapult the mediator's task into an intellectual warzone which raises the serious possibility that Pareto-optimal outcomes in the context of an environmental dispute are not, in principle, possible. As such, Susskind's proposal that the mediator ought to insure such an outcome must, charitably speaking, be held in abeyance.

A more troublesome question arises, however, regarding the justification for a mediator to block an agreement that fails to meet the requirements of the Pareto principle. Who authorized the mediator to design or insure the attainment of the "optimal" outcome as so conceived? . . .

Susskind apparently contends that such a responsibility emanates from the nature of environmental disputes, particularly because the spillover effect of particular agreements could irrevocably preclude certain options from again being entertained. . . .

It is not unique to environmental disputes that decisions made today foreclose certain options for tomorrow. Life is replete with such instances. In the labor–management sector, for example, agreement on a particular wage settlement might retard the development of mass transportation and thereby irrevocably increase the level of air pollution resulting from the use of automobiles. . . .

If we were to accept the obligations of office that Susskind ascribes to environmental mediators with regard to insuring Pareto-optimal outcomes, then the environmental mediator is simply a person who uses his entry into the dispute to become a social conscience, environmental policeman, or social critic and who carries no other obligations to the process or the participants beyond assuring Pareto-optimality. It is, in its most benign form, an invitation to permit philosopher-kings to participate in the affairs of the citizenry.

McCrory, John P. "Environmental Mediation—Another Piece for the Puzzle," 6 *Vt. L. Rev.* 49, 77–79, 1981; citations omitted.

> The criteria for judging the fairness of a mediation process and the quality of the mediation agreement proposed by Professor Susskind are the following:
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> 1. "[T]he outcome is better if it is consistent with shared notions of equity and justice;"
> 2. The resolution should "well reconcile the interests of the parties;"
> 3. The resolution should be "consistent with principles reflecting pre-existing practice;"
> 4. The "agreement should set 'a good precedent for the parties involved as well as for other parties'";
> 5. The "agreement should be 'reached quickly at low cost'";
> 6. "The process of decision should be one that tends to improve rather than exacerbate the relationships among the parties;" and
> 7. The agreement should be readily acceptable to the parties to ensure acceptability and compliance with its terms.

For purposes of discussion the focus will be on the fairness and practicality of using these criteria as the basis for determining if a mediator should be liable for damages because the mediated settlement did not maximize joint net gains.

As a preliminary observation, Professor Susskind states: "Principled negotiation rests on the assumption 'that the proper standards for judging a process of conflict resolution are not those that may produce a particular result in a particular case, but rather those standards that will tend to produce desired results in an indefinite series of cases.'" Judging a process and judging an individual mediation effort are two different things, especially if the purpose of evaluation is to determine if the mediator will be liable for the payment of damages. When the focus is on a process, the concern is not an individual effort, which may or may not fit a pattern. When the focus is on judging the quality of an individual effort, the pattern is secondary. Thus, it is unclear how reliable those process-oriented criteria are for judging a single mediation effort. In addition, it is not stated whether, or how, the criteria would apply if the mediator's responsibilities were set forth in a contract establishing a different basis for judging his or her performance.

The explanatory comment which accompanies the first criterion states that emphasis should be on the results of the dispute-resolution effort. The explanation for the second criterion adds that a neutral observer must be convinced that joint net gains have been maximized. What emerges is a format under which liability would be determined in a judicial proceeding in which a judge, or a jury, must examine a settlement to determine if the best result were achieved. This evaluation would not be fair for at least two reasons. First, it must be remembered that the settlement is that of the

parties to dispute, not the mediator. Second, in context of the statutory scheme of environmental regulations, it would be inappropriate for a court to determine which result or decision would be best. It is likely that the court would have to deal with matters which have been delegated to an administrative agency by Congress or a state legislature. Under such circumstances, it would be the agency's job to seek the best solutions for the problem at hand. When a court engages in judicial review of the agency's determination, it applies a test of "reasonableness" not "rightness."

The fourth criterion relates to the precedential value of a settlement. Professor Susskind offers the following explanation: "It may well be, that the way to ascertain whether this criterion has been met is to see whether a precedent has been set that helps to achieve the first three criteria over time." This explanation suggests that the quality of a mediation settlement cannot be judged on the basis of information available to the mediator and to the parties at the time that it is made. Hindsight is always better than foresight. It would be unfair to determine the mediator's liability on the basis of information which was not available when agreement was reached.

With respect to the fifth criterion, Professor Susskind states: "When costs and benefits to the community-at-large are weighed, however, it is often difficult to prove that a particular outcome is efficient." Implicit in this observation is recognition of the highly subjective nature of environmental decision making. Reasonable minds may differ as to the solution to a particular problem. It would be unwise, under such circumstance, to have a judge [or jury] determine liability, thereby imposing his or her [its] notion of the best solution. It has been said that mediation is more reliable than a judicial proceeding for finding solutions for environmental problems.

In summary, it would not be fair, practical, or desirable to apply the criteria suggested in a judicial proceeding for the purpose of determining a mediator's liability. Recall that the agreement reached is that of the parties to the dispute. Professor Susskind says nothing regarding their responsibility or liability. In many cases, an administrative agency which has a regulatory function will be directly or collaterally involved in a mediation effort. Nothing is said in the explanation of the criteria regarding the mediator's liability when such an agency concurs in or adopts the mediated settlement.

Problems of Implementing Accountability

If you are persuaded in principle of the need for mediator accountability, you must next grapple with the problem of implementation. In the first excerpt in this section, Susskind outlines several different approaches. Which do you think would be most beneficial. Which would be the most costly to put in place? In the second excerpt, McCrory expresses strong disagreement with most of Susskind's recommendations. Which of his criticisms do you regard as most

substantial? Can you imagine other solutions that might satisfy Susskind's concerns without raising the difficulties McCrory identifies?

Lawrence Susskind. "Environmental Mediation and the Accountability Problem," 6 *Vt. L. Rev.* 1, 40–47, 1981; citations omitted.

> Whether environmental mediation becomes a matter of course in the United States, or occurs only rarely when an impasse has been reached, guidelines are needed to ensure that mediation efforts are structured properly. Enforcement of such guidelines needs to be institutionalized, and there are at least three procedural approaches to holding environmental mediators accountable. The first involves licensing, certification, or registration. This procedure might be done at the state or federal level. Licensed mediators would be expected to subscribe to an explicit statement of their responsibilities. A second approach would involve creating environmental mediation offices attached to regulatory agencies or to the attorneys' general offices at the federal or state levels. This second approach could be augmented by having administrative law judges require mediation before accepting challenges to the decisions or actions of regulatory agencies. A third approach would involve shaping the public awareness of the risks and opportunities associated with environmental mediation—a well informed public can demand accountability.
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> If environmental mediation proceeds under the auspices of an accredited organization such as the American Arbitration Association, their code of ethics could bind the mediators. For the foreseeable future, environmental mediation will probably not involve accredited mediators. Recent instances of environmental mediation have tended not to stress the formal credentials or the interventionists' skills of the mediators involved. Instead, mediators have had only to convince the parties involved that they might be able to provide assistance. Success to date has depended primarily on the mediators' capacity to maintain the trust of the participants. This capacity, and their ability to keep negotiations moving toward the preparation of written agreements, have been all that the participants have asked.
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> ### A. CREDENTIALS
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> The Office of Environmental Mediation in Seattle has suggested that the Code(s) of Behavior published by such agencies as the Federal Mediation and Conciliation Service and the Association of Labor Management Agencies could provide a basis for establishing standards for environmental mediators. Environmental mediators, however, require different standards which are tailored to their own situations. It is unlikely, therefore, that existing organizations which credential mediators would be helpful. Moreover, many environmental disputes are likely to be mediated by individuals called upon to intervene because of their positions and not their credentials as

mediators. Their success may well depend on their capacity to operate free from the constraints that mediators typically feel. Congressman Wirth and others like him will not be successful if they are bound by procedures promulgated by associations responsible for credentialing professional mediators.

Environmental mediators, to the extent that they adopt the broader view of their responsibilities suggested in this article, will probably need to possess substantive knowledge about the environmental and regulatory issues at stake. Effective environmental mediation may require teams composed of some individuals with technical backgrounds, some specialized in problem-solving or group dynamics and some with political clout. It would be difficult and probably inappropriate to credential such teams.

B. LINKS TO REGULATORY AGENCIES AND THE COURTS

Credentialing or licensing would probably be unimportant if environmental mediation were undertaken by independent agencies of government or by court appointed mediators. This agency involvement would also solve the financial problems that continue to plague ad hoc environmental mediation centers. Legislation could be enacted describing the circumstances and conditions under which mediation would take place. Those regulated and those doing the regulation would jointly select mediators. The mediators' responsibilities would be spelled out in the legislation. Potential and volunteer mediators could be required to disclose their views concerning the need to protect underrepresented groups, strategies for maximizing joint net gains, and the importance of considering the precedent-setting nature of mediated agreements. As mediation experience accumulates, mediation guidelines could be refined. Mediators could be paid as staff to the attorneys' general office.

Courts with responsibility for reviewing the administrative decisions of public agencies might rely more heavily on mediation. Indeed, judges could insist that mediation (or at least joint fact-finding) precede formal challenges to administrative actions. At the very least, this process would help narrow and clarify the issues requiring court review. Court appointed mediators would, of course, be accountable to the judges who appointed them as well as to the parties. The mediators would be paid in the same manner as judges.

C. CREATING AN INFORMED PUBLIC

The most effective way to hold environmental mediators accountable would be to increase the public's capacity to demand fair and effective behavior on the part of mediators. This strategy is long-term and could begin with the provision of government funds to ensure the representation of disadvantaged groups with a stake in a mediated dispute. To the extent that certain groups feel they are not competent to participate in technical aspects of negotiation, funds should be provided to appoint qualified agents to

represent them. There are numerous public interest groups that could provide such assistance. Representatives of all stakeholding interests ought to be given funds to caucus with the people they represent. These are some of the costs associated with creating an informed public.

Several elected officials should probably participate in every environmental mediation effort. The larger the number of elected officials involved as interested parties or observers and not as mediators, the more likely that interests, indirectly or adversely affected, can find someone to hold accountable.

The community-at-large must keep abreast of the negotiations' direction, or underrepresented groups will be unable to assert their concerns more forcefully. Although mediation efforts in the labor–management field are conducted in private, this practice should not be the case with environmental mediation. At least some scheduled sessions should be open to the public and to the news media. Closed meetings are more acceptable if the agreements negotiated are subject to public scrutiny during parallel regulatory hearings, as in the Brayton Point case.

In summary, credentialing should not be insisted upon in the environmental field. The institutionalization of environmental mediation through formal links to regulatory agencies or the courts is much more likely to produce situations within which the responsibilities of environmental mediators can be defined and monitored appropriately. The process of building an informed public should begin, but the task promises to be very long-term.

A note on the payment of environmental mediators is probably in order. The most desirable situation is one in which all parties contribute equally to the cost of compensating a mediator. In many environmental disputes, this cost-sharing will not be possible. Thus far, environmental mediators have volunteered their services, but this practice will continue only as long as foundation support holds out. Some observers have suggested the need for a superfund through which corporate and government contributions can be channeled to provide ongoing support for environmental mediation centers throughout the country. The financing problem stems from the assumption that environmental mediation ought to be handled by ad hoc centers that do not need to bill their clients. It would not be impossible to have the federal or state governments (or the courts) contract with these private centers, but it would be easier to situate independent mediators in government itself. Given the relatively small number of cases likely to go to mediation and the special circumstances surrounding the selection of mediators appropriate to each case, it is unlikely that many individuals will be able to build an entire livelihood around environmental mediation cases.

Accountability requires that the parties to a dispute as well as the members of the community-at-large be able to hold environmental mediators to their responsibilities. Assuming that those responsibilities are clearly articulated and agreed upon in advance, accountability can only be achieved if the mediators can be effectively chastised, fired, or sued by the parties

directly or indirectly involved. If a contract exists, accountability is easier to ensure. In the absence of a contract, the institutional framework within which the mediator is employed and rewarded is crucial. If mediators are licensed, accountability is presumably ensured by the licensing agency. If mediators were attached to courts or other government bodies that could effectively regulate their future employment, accountability would also be ensured. If most environmental disputes are mediated by individuals involved on a one-time basis, however, contracts detailing their responsibilities will be needed. Enforcement of such contracts would be much easier if mediators were bonded, but such insurance might be difficult to acquire. The means of institutionalizing the accountability of mediators will only be as effective as the parties to a dispute demand. If the parties fail to see the need for a broad definition of an environmental mediator's responsibilities, it will be difficult to ensure accountability on such a basis.

D. CONCLUSION

Environmental disputes will continue to erupt over the allocation of fixed resources, the setting of public priorities, and the setting and enforcement of environmental standards. All three types of disputes are susceptible to mediation although not in every case. Mediation will depend on the availability of a mediator or mediation team acceptable to all parties.

Environmental mediators ought to be concerned about (1) the impacts of negotiated agreements on underrepresented or unrepresentable groups in the community; (2) the possibility that joint net gains have not been maximized; (3) the long-term or spill-over effects of the settlements they help to reach, and (4) the precedents that they set and the precedents upon which agreements are based. To be effective an environmental mediator will need to be knowledgeable about the substance of disputes and the intricacies of the regulatory context within which decisions are embedded. An environmental mediator should be committed to procedural fairness—all parties should have an opportunity to be represented by individuals with the technical sophistication to bargain effectively on their behalf. Environmental mediators should also be concerned that the agreements they help to reach are just and stable. To fulfill these responsibilities, environmental mediators will have to intervene more often and more forcefully than their counterparts in the labor management field. Although such intervention may make it difficult to retain the appearance of neutrality and the trust of the active parties, environmental mediators cannot fulfill their responsibilities to the community-at-large if they remain passive.

The institutionalization of guidelines and procedures for holding environmental mediators accountable would be best handled by linking environmental mediation directly to the prosecutorial and judicial branches of federal and state governments. Efforts to license or credential environmental mediators are not likely to be effective. The long-term task of building the capacity of the public to participate in environmental mediation should begin in earnest.

John P. McCrory, "Environmental Mediation—Another Piece of the Puzzle," 6 *Vt. L. Rev.* 49, 64–68, 70–71, 73–99, 1981; citations omitted.

> Professor Susskind states that environmental mediators are not subject to the moral, legal, and economic pressures of accountability which apply to mediators in other fields. To fill this perceived void, he proposes that guidelines be established to ensure that mediation efforts are structured properly and that these guidelines be institutionalized so that they are enforceable.

A. CREDENTIALING

Credentialing of environmental mediators, whether by government or by private agencies, would provide an effective means for accomplishing an objective of the Susskind proposal. It could be used as a mechanism to institutionalize standards for environmental mediators. Although there would be danger of destroying the flexibility of the process if the standards were made too specific, a code of ethics for environmental mediation would be helpful. Such a code has been adopted by agencies which provide collective bargaining mediation services. A similar document might be devised for environmental mediators.

Credentialing agencies could also be used to ensure that there there is a readily available source of qualified mediators with adequate "substantive knowledge about the environmental and regulatory issues at stake" in a dispute. Agencies could catalog panelists according to their special knowledge, experience, and areas of interest to facilitate locating those individuals best able to handle particular types of disputes. Although it would be unwise to require that all environmental mediation be done by credentialed persons, disputants who need a neutral would have established sources and procedures for selecting a mutually acceptable person.

Credentialing agencies can also sponsor publications and programs to improve the quality of mediation services. Newsletters, printed summaries of documented mediation efforts, and similar publications containing information relating to current events and important developments could be distributed to mediators and other interested persons. Seminars and workshops at which mediators could share their experiences, discuss common problems, and focus on emerging issues and problems would foster an informed and studied development of the process of environmental mediation.

Educational programs could also be sponsored for potential consumers of mediation services. . . .

B. LINKS TO REGULATORY AGENCIES AND THE COURTS

In his discussion of linkages to courts and agencies, Professor Susskind suggests that potential mediators should be required to disclose their views in writing on certain ethical and procedural issues. These issues include the need to protect any underrepresented groups, strategies for maximizing joint

called "public interest representatives" have not been "duly appointed" by the interests they represent. If there is no homogeneous identifiable public interest, there are obvious procedural problems associated with appointing its representatives. Moreover, making a mediator legally accountable for protecting such vague and amorphous interests is difficult to justify. Such difficulty should not imply, however, that a mediator should ignore identifiable underrepresented interests or need not be sensitive to a broad sense of the public interest. These considerations are important and the parties to a dispute should be reminded of them at appropriate times.

D. SUING THE MEDIATOR

The most provocative aspect of the Susskind proposal is contained in the following statement: "Accountability requires that the parties to a dispute as well as members of the community-at-large be able to hold environmental mediators to their responsibilities. Assuming that those responsibilities are clearly articulated and agreed upon in advance, accountability can only be achieved if the mediators can be effectively chastised, fired, or sued by the parties directly or indirectly involved."

Mediators may always be chastised or fired. Making them suable adds a new dimension to the process of mediation. To explore that dimension, four questions must be answered: (1) suable by whom? (2) suable for what? (3) What remedies would be available? and (4) What standards would be used to determine if a mediator has breached his or her responsibilities so that a remedy could be imposed?

The foregoing quotation provides the answer for the first question. A mediator is accountable to the parties to the mediation effort and to anyone else in the community at large who is directly or indirectly affected by the settlement agreement. The pool of potential plaintiffs would be large and, very likely, undefined during the course of a mediation effort. Governmental agencies would probably be among parties which would be eligible to sue.

The duty which environmental mediators would have, which could be breached and become the basis for suit, relates to "the fairness of the processes in which they engage as well as the quality of the agreements they helped to reach." The emphasis "should be on the results of the dispute resolution effort and not just on the fairness of the negotiations process." Thus, the answer to the second question is that a mediator could be sued on both procedural and substantive grounds.

Procedural grounds might include the ground rules established by the mediator, the nature and substance of his or her communications with the parties in joint or private meetings, the mediator's decisions regarding intervention of an interest group and the level of participation accorded to parties and nonparties during a mediation effort. Substantively, the agreements reached would be expected to maximize the joint net gains of various interests, including the interests not represented in the mediation effort. In

net gains and the importance of taking into account the precedent-setting nature of mediated agreements. This suggestion is impractical. The precise strategy for identifying interests to be protected, to the extent that they are identifiable, will vary from case to case. A mediator will not be able to devise strategies for achieving the optimal resolution of a dispute until he or she has become involved in the mediation effort. An attempt to make such decisions in advance, and premature disclosure, could destroy the procedural flexibility which a mediator must have. It might also limit his or her ability to interject innovative substantive proposals for resolution and to deal with unanticipated issues and situations which may arise after mediation is underway.

If mediation is to achieve acceptability as a technique for resolving environmental disputes, governmental linkages and support will be required. This aspect of the Susskind proposal is valid. Governmental support could satisfy two important needs: providing systems to deliver mediation. Due to the nature of environmental disputes and the parties involved, it is not realistic to expect that the parties can or will share the expenses of mediation. Most environmental mediation to date has been done by individuals or private agencies which were able to donate their services because they operate with funding from private sources or government grants. The use of mediation for environmental disputes will remain limited unless a broader base of support is established. . . .

A governmental mediation agency, whether at the state or federal level, could also serve important administrative functions. It could screen disputes according to established criteria to determine if free or partially subsidized services should be provided, or if referral should be made to a private agency. The agency could also resolve initial questions regarding identification of parties for mediation and could insulate mediators from making decisions during the course of mediation. For example, an interest group may seek to intervene after mediation is underway. Having to rule on the entry of a new party may jeopardize the credibility and perceived impartiality of the mediator. A decision permitting or denying intervention may be seen as favoring one faction or another. The need to cope with the issue could also be a significant distraction to the mediation effort. If the agency could make the intervention determination, it would preserve the mediator's credibility and insulate the process from time-consuming and distracting influences which might diminish the quality of the mediation effort.

C. AN INFORMED PUBLIC

There can be no quarrel with the notion that there is a vital public interest which should be considered in environmental decisionmaking. The extent to which the mediation process and individual mediators can and should be responsible for protecting that interest is, however, another matter.

Professor Susskind is critical of environmental mediation because so-

other words, the mediator must help the parties find the best balance for all of the competing interests. The broad sweep of the Susskind proposal would suggest that the remedies available in the suit against a mediator would include an order enjoining or requiring certain mediation procedures, an order requiring a mediator to allow intervention, an order setting aside a mediated settlement, and recovery of money damages resulting from the implementation of a settlement agreement that did not maximize joint gains.

The most complex inquiry relates to the standards which would be applied in determining when a plaintiff would prevail in a law suit against a mediator. Professor Susskind states that a mediator's responsibility could be spelled out in legislation or in a contract between the parties to a dispute and the mediator. He also proposes specific criteria for judging the fairness of the mediation process and the quality of settlement agreements. The following discussion examines the feasibility of establishing mediators' responsibilities by statute or contract and the utility of Professor Susskind's proposed criteria.

It is unlikely that an enforceable statement of a mediator's responsibilities could be set forth in statute. If mediation is to maintain its character as a flexible process, rather than a structured procedure, a rigid statutory framework will do more harm than good. Due to the nature of environmental regulation, substantive standards by which to judge the quality of the mediated agreement and the potential liability of a mediator would be even more difficult to establish by statute.

The suggestion that a mediator's responsibilities can be defined in an enforceable contract is also troublesome. It would indeed be optimistic to assume that parties who cannot resolve their dispute could agree upon a contract that would spell out, with enforceable precision, mediation procedures to be followed or standards for judging the quality of the mediated agreement. Even if such an agreement could be drafted, there remains the matter of protecting the interests of the underrepresented. Must the mediator represent those interests when the contract is drafted? If so, he or she would be placed in an awkward position for two reasons. First, the interests which need protection may not be identifiable, if at all, until after the mediation is underway. Second, the mediator's status as a neutral, actual or perceived, would be jeopardized. He or she would have to represent interests which might be adverse to those of disputants who would be parties to the contract. . . .

Even if the foregoing problems could be overcome, the idea of specifying a mediator's responsibilities in a contract is inconsistent with the nature of the mediation process. A mediator needs the flexibility to adjust procedures to meet specific needs which may arise from time to time, including the intervention of new parties and the interjection of new issues. Flexibility is also needed with respect to the substantive outcome of the mediation effort. An important part of the mediator's job is to reorient the thinking of the parties so that they will be more receptive to new ideas and compromise.

He or she must have the latitude to move the parties toward solutions which they could not anticipate.

Study Questions

1. What economic and social forces are likely to make one form of institutionalizing accountability more likely than others?

2. Will accountability stifle mediation? Some observers believe that potential Good Samaritans are somedays deterred from rescuing people in peril by the fear of a lawsuit, should their efforts fail. In response, some states have enacted laws to insulate Good Samaritans from suits in cases involving anything short of wanton recklessness on their part. In seeking greater mediator accountability, is Susskind moving in the opposite direction? Is it possible to impose mediator liability without discouraging intervention? What solutions to this dilemma can you fashion?

3. Is the analogy to the Good Samaritan an apt one: Should mediators, instead, be likened to lawyers, who are retained by clients to resolve disputes? Lawyers, after all, are supposed to be accountable for their errors. (To give this question full attention, you should consider the note below on mediators' incentives.)

4. Lawyers who are accused of malpractice or unethical conduct may defend themselves against such charges, even if doing so means revealing confidential client statements. What defenses should a mediator have? What if the mediator can justify his or her action, but only by revealing the confidences not of the complainant but of the other parties to the agreement?

5. Statutes of limitation apply in most areas of law, so that a wrongdoer is liable only for a stipulated number of years. When the impacts of an important environmental decision may be felt for decades, should the mediator continue to be responsible?

6. What remedy should be available in the case of mediator malpractice? Making the mediator personally liable may be of little use where his or her assets are modest and the damage enormous. Should the injured party be able to repudiate an agreement that was poorly mediated?

Related Ethical Issues

Incentives to Mediate

Much negotiation literature postulates that mediators must be strictly nonpartisan, but mediators clearly have their own goals and priorities, some of which

may conflict with those of their clients. The nature and impact of these incentives must be identified if the mediation process is to be understood.

What factors may induce a third party to intervene in a dispute? Some conflicts, after all, are so destructive that no one wants to get caught in the cross fire. Even where there is some hope for reconciliation, the mediator must determine whether the prospects are worth the effort. Essentially, the mediator must weigh the costs and benefits of involvement. In some instances, the mediator must share the costs even though others will reap most of the important benefits.

One inducement is financial. In the Brayton Point case, the parties agreed to underwrite a $20,000 mediation fund, a portion of which was for the mediator. If the dispute requires substantial time and energy, the mediator simply may not be able to forego compensation. No matter how payment is arranged, however, some conflict with the interests of the parties will exist. If, for example, he or she is paid by the hour, the mediator profits from a protracted dispute. (It is small comfort to note that lawyers frequently bill on the same basis, for they have long been accused of fomenting and prolonging conflict for their own benefit.) A lump-sum payment is not necessarily better for the parties, however, for then the mediator has no monetary inducement to spend more time on a problem even when the parties' interests require it. A third possibility—the provision of mediators by an independently funded servie—mitigates this problem but does not eliminate it. Salaried mediators still must measure the extent of their involvement in any one case against the value to them of participating in other disputes.

Dedicated mediators often say that it is their duty to put the interests of their clients ahead of their own. To note that a mediator's professional well-being does not always coincide with the interests of his or her clients is not to say that personal well-being will dictate conduct. Nevertheless, it does underscore the need for other incentives that will encourage the mediator to enter disputes and facilitate settlement even when doing so may not be personally advantageous.

For some people, the nonmonetary rewards for mediating may be significant. Successful resolution of seemingly intractable disputes may bring the mediator prestige—a commodity that may be valued for itself or that may be exploited for advancement in other fields, notably law and politics. Yet here, too, the interests of the parties and the mediator are potentially at odds. One of the tenets of mediation practice is that the mediator should keep a low profile. Timothy Sullivan has observed that parties in mediation must trust the mediator to honor their confidential disclosures. As a result, "strong professional taboos exist discouraging the mediator from revealing either the course of negotiations, the communications between the negotiators, or even the actions which he took to promote a settlement" (see Sullivan, *Resolving Development Disputes through Negotiations*, New York: Plenum Press, 1984). Thus, mediators who fashion an ingenious settlement may be in a catch-22 situation: If they seek to take credit for their success, they risk spoiling their reputation by appearing indiscrete.

Conflict between the mediator and his or her clients may be even more pronounced in other circumstances. Sullivan notes that it is sometimes necessary for negotiators to "scapegoat" the mediator so that they can preserve their reputations with one another or with their respective constituencies.

> In the etiquette of bargaining, yielding to an adversary's demands can convey weakness, but yielding to a mediator's request shows statesmanship and reasonableness. . . . Negotiators [can] return to their constituents and claim that circumstances required the concessions. (Sullivan, p. 102)

This can enable them to gracefully move away from their previous positions. If settlement can be reached only if the mediator agrees to take the blame for forcing the parties to accept it, he may be committing an act of professional harikari.

Mediators sometimes intervene, not for personal gain, but out of a sense of social responsibility. Even without arguing the metaphysics of altruism, it is important to distinguish the mediator who has some interest, albeit indirect, in promoting settlement from the mediator who is truly disinterested. A public official who intervenes in hope of saving jobs or lessening pollution may be considering personal political gain. In a sense, such a person becomes a party in interest. None of us is purely neutral. We all feel the consequences of unemployment, higher energy costs, and dirty air, even if only slightly and indirectly. Of course, there are many cases in which the mediator is only minimally affected by the terms of a particular settlement. As a general matter, a party in interest will more likely be concerned with the substance of settlement, whereas a mediator's prime interest is in the process by which those ends are reached.

The weighing of these incentives to intervene, tangible and otherwise, clearly is an individual matter. The calculation of costs and benefits of involvement necessarily depend on a person's opportunity costs: Is there a better use of his or her time? Then, too, mediators may have different utility functions; prestige may be more important to one than to another. Finally, as a mediator's decision to enter a dispute may rest heavily on his or her estimate of the chances of success, the judgment necessarily is subjective.

Thus, some mediators might walk away from disputes that others would attempt to settle. It is also conceivable that there are conflicts that everyone would agree were ripe for intervention. In this later circumstance, parties theoretically could bargain with potential mediators to get the best service at the most favorable terms. In practice, however, market imperfections make this kind of shopping unlikely.

Mediators themselves may not agree on what constitutes successful intervention. Parties who fail to settle their principal conflict may still be able to narrow their differences and create the basis for future negotiation. If it is hard to define successful mediation, then it is at least as difficult to judge a mediator's

performance. Clearly, a mediator's record cannot be reduced to a simple settlement/no-settlement percentage because some disputes are much more amenable to resolution than are others. Then, too, not all settlements are equally just or efficient. A person who subscribes to Susskind's notions of "accountability" might avoid a dispute that appears likely to produce a socially undesirable outcome, whereas other mediators who feel no responsibility for the terms of settlement would not hesitate to intervene.

The same considerations that may draw a mediator into a dispute may affect his or her conduct as negotiation transpires. Assessment of particular costs and benefits may change, however, as negotiation proceeds. As the mediator learns more about the issues in dispute, he may revise the prospects for settlement. Even if he concludes that his participation will prove fruitless, however, contractual obligations and matters of reputation may make it difficult for him to withdraw.

In sum, any complete analysis of mediated disputes should take into account the fact that the mediator, even if scrupulously *neutral* in the commonly understood sense of that term, will have his or her own goals and priorities. To say that a mediator operates merely out of loyalty to the process avoids this truth only by falsely distinguishing between means and ends. To be loyal to the process of mediation, one must either believe that in the long run it tends to produce better results or that as a process it has value in itself. Often these beliefs will, in the abstract, be compatible with the interests of disputing parties, but the means by which the beliefs are put into practice carry costs that someone must bear. Time and money are scarce resources. How they can be applied in any one dispute will depend on competing private and public demands. To state that intervenors have their own priorities and must work within certain limitations is to clarify the mediation process, not to disparage it. Just as negotiation can be encouraged by enhancing disputants' incentives to bargain and diminishing obstacles, mediation can be promoted broadly or, in particular cases, by manipulating the incentives to intervene.

Ethical Standards for Mediators

In the second section, we encountered the notion of *mediator accountability*. There, the focus was on the mediator's responsibility for the settlements he or she facilitates. In the materials that follow, the emphasis is more on the ways in which mediation is carried out, though, as we shall see, the distinction between substance and procedure is not always easy to respect. Moreover, examination of ethics requires consideration both of the moral implications of various mediation techniques and of their effectiveness.

Much of the environmental mediation that has taken place has involved free-lance mediators, who are not guided or constrained by any professional

standards. Although there is increasing sentiment in support of a formal ethical code, there is little agreement on what it should require. The problem lies with the elusive nature of the mediation process. Means must be judged, not ends. The outcome in any case may be idiosyncratic; it is not necessarily the mediator's fault if the parties cannot come to agreement. Medical malpractice may offer a parallel. The quality of a doctor's performance is determined not by whether the patient lived or died, rather, by whether the attending physican followed established medical practice. The ethical standard thus might be good mediation practice. As mediation is even more an art than the practice of medicine, however, it is even more difficult to establish professional consensus on what constitutes proper procedure.

Gerald Cormick, founder of the Insitute for Environmental Mediation in Seattle, Washington, poses some general principles in the next excerpt. They rest on the premise that there are three central concerns to the mediator: achieving a settlement, the justice of that settlement, and its stability.

Cormick prefaces his list of principles with the observation that the extent of the mediator's ethical responsibilities may vary from dispute to dispute.

> 1. The more naive the parties, the greater the ethical responsibility of the mediator.
> 2. The greater the impact of the issues in dispute on parties not at the table, the more critical the responsibility of the mediator.
> 3. The less proportional the relative power equation between the parties, the greater the ethical burden on the mediator.

Thus, in collective bargaining, where the parties are experienced and have a continuing relationship, the mediator need only be concerned with achieving settlement, particularly if impacts on others are minimal. By contrast, environmental negotiations often introduce one or more of the variables that Cormick believes require greater ethical responsibility.

To what extent are the criteria Cormick enunciates moral precepts, to be valued for their own sake? Are they simply procedural rules for efficient action? To the extent they are of the latter, do you agree that they are effective? Finally, are his criteria consistent with one another? Other questions follow the excerpt.

Cormick, Gerald. "The Ethics of Mediation: Some Unexplored Territory," Unpublished paper presented to the Society of Professionals in Dispute Resolution, 1977.

> [Cormick notes that the first five criteria relate to the "justice" of possible settlements and the next four to "stability." The tenth relates to both justice and stability.]

1. The mediator should be explicit as to the basic elements of the mediation process.

Mediation should be demythologized. To call mediation an art or to suggest that what the mediator does cannot really be described because it is so highly personal in nature is to make the parties less able to control the negotiation process when a mediator intervenes. On the other hand, perhaps the most important single control over the activities of the mediator would be to make the parties themselves more aware of what mediation can and cannot accomplish and what types of actions are likely to result in what ends.

Any mediation tactic or strategy which relies on the naivete or ignorance of the parties for its effectiveness must be rejected.

2. The mediator should foster and protect the proportional relative power relationship between the parties in decisions regarding entry, strategy and tactics, and the shaping of agreement.

A basic social principle is that proportional power provides individuals and interest groups a basis upon which to pursue their own best interest. Mediators, in their decisions relating to their entry into, behavior within, and exit from a conflict situation should be conscious of the need to protect this proportional power relationship.

Where the proportional power relationship is sufficiently unequal that a mutually acceptable agreement is unlikely to emerge, the mediator should not enter the dispute. To do so might only result in lending credibility to a unilateral solution imposed by one party on another.

3. The tactical decisions of a mediator should be based on an explicit, conscious rationale capable of later explanation and evaluation.

"Seat-of-the-pants" mediation is just not good enough. Perhaps the worst enemy of parties involved in a conflict is a benign "do-gooder" who fails to carefully assess the impacts of his or her intervention on the parties, their relationship or the perceptions of the broader public. It is only by perceiving mediation as an intervention process that the mediator may properly consider the cumulative effects of his or her actions or the way in which a person's action-choices may preclude later opinions.

4. The mediator must be concerned with enhancing the ability of the parties to jointly administer any agreement which is reached.

This criterion is of particular importance where, as in many community and environmental disputes, there is no pre-existing relationship between the parties to the dispute. In such a case, the mediator may find it necessary to prolong the negotiation–mediation process in order to give the parties an opportunity to develop a working relationship. In some instances, the mediator may even find it necessary to assist the parties in finding third-party sponsorship and/or funding to underwrite and support joint implementation of an agreement over the longer run.

5. The mediator should not permit him or herself to be a party to any agreement which violates the basic principles of freedom, justice and proportional empowerment.

Simply put, the mediator should not permit him or herself to continue

as intervenor in a situation where the goal of the parties is to reach an agreement which abrogates these basic principles either for one of the parties in the dispute or for some party not at the table. The mediator should withdraw.

6. The primary responsibility of the mediator is to enhance the collective bargaining or other relationship existing between the parties.

This criterion goes to the very nature of the mediator's role as an intervenor. That is, his or her insertion into a relationship can change that relationship for better or for worse. A mediator is merely an extension of the negotiating relationship. The ultimate aim of any intervention into that relationship should be to enable it to emerge better able to proceed without further intervention by the mediator.

7. The mediator should promote the ability of the parties to negotiate joint agreements.

This criterion may require a conscious effort by the mediator to train one or more of the parties in such basic negotiation skills as organizing a negotiating team, phrasing demands, or listening to the other party(ies). It may also involve providing one or more of the parties with access to enter into good-faith agreements, or otherwise better equipping the parties to operate on a good-faith, knowledgeable level in their dealings with one another.

8. The mediator must familiarize him or herself with the specific dynamics of the dispute situation in which he or she is intervening.

In the labor–management sector there are important differences in the attitudes of the parties toward one another and toward the broader public interest. Such differences occur both between the public and private sectors and between blue-collar employees and professional or semi-professional employees in the public sector itself. In disputes in which race is a factor, there are certain dynamics with which the mediator must be familiar if he or she is to recognize certain basic concerns of a minority population in the larger society. Mediators can worsen situations by actions as simple as using specific "trigger words" which can set off a chain of actions and reactions. The mediator in non-labor management disputes should be familiar with the complexities inherent in developing viable relationships and agreements in relatively unstructured situations and where decision-making authority is unclear or diffused.

9. The mediator must have a concern with the viability of any agreement reached by the parties in his or her presence.

The viability factors in an agreement are fourfold: (1) technical feasibility, (2) legal feasibility, (3) political feasibility and (4) financial feasibility. Clearly, these are of varying importance and arise in different combinations in different dispute arenas. Settlement or accommodation per se is not the only responsibility of the mediator. Where an agreement is reached which is not viable it may discredit the negotiation–mediation process. It may also serve to cripple any party whose power is based on its ability to confront an established institution and who finds the apparent legitimacy of the process

has decreased public sympathy, making it more difficult to mobilize supporters.

10. The mediator should keep before the parties a consideration of the realities of the broader public interest.

This criterion is related to the concern with the viability of agreements discussed above. It is not suggested that the mediator attempt to impose the interest on the parties, but, rather that he or she has an ethical responsibility to ensure that the parties consciously consider the public interest and ways in which it may affect any arrangement which they might reach.

Study Questions: Incentives and Ethics

1. Using Cormick's list as a guide, identify the ethical decisions David O'Connor encountered in mediating the Brayton Point dispute, described in chapter 8. Did O'Connor honor all of Cormick's principles? Should he be faulted for not insisting on greater participation by consumers of electricity and neighbors affected by its generation?

2. In that dispute, the four principal parties agreed to make equal contributions to the $20,000 mediation fund. There certainly will be cases, however, in which parties with a large stake in the dispute simply cannot afford to pay for mediation. In such instances, it might seem equitable to allocate the expense according to ability to pay. What problems would this raise? How might they be solved?

3. There was no similar financial pool in the Foothills case, described in chapter 9. What were the costs of mediation in that instance and who bore them?

4. Representative Shroeder tried to get an environmental mediator involved in Foothills; indeed, Gerald Cormick was one of the nominees. The Denver Water Board was opposed to mediation at that point. Suppose, however, that Cormick had been invited to intervene. In what ways would his ethical principles have caused him to follow a different course than that taken later by Tim Wirth? Who properly might have carried the costs of such a mediation?

5. Should we regard Cormick's list as simply a private statement of principle or are his criteria precise enough to be the foundation of a code for environmental mediators generally? One can imagine several ways in which such a code might be applied: A dissatisfied disputant might claim he or she was injured by a specific violation. A mediators' association might wish to expel an unethical member. Or, the mediator's employer might wish to use a code to evaluate his or her performance. To which context could Cormick's criteria be most easily adapted?

6. Cormick suggests in his second criterion that a mediator must not disturb the power relationship between the parties. Yet, where inequality in power stems from historical injustice, how is it ethical to perpetuate the imbalance? To remain "neutral" in such a situation is really to side with the more powerful interests, is it not? Cormick declares that if "the proportional power relationship is sufficiently unequal that a mutually acceptable agreement is unlikely to emerge, the mediator should not enter the dispute." Does this solve the problem?

7. The basic concerns of the mediator may be in conflict. What, for example, is the mediator's responsibility if he or she realizes that a party has miscalculated the impact of the terms it is about to accept. A company may have vastly underestimated the cost of an antipollution device; a regulatory agency may have overlooked an incidental by-product of the proposed solution. Should the mediator raise the mistake when doing so will require a recalculation that may jeopardize the settlement? Is it relevant that the negotiators are experienced or naive, or that they enjoy substantial technical resources or none? Does the mediator's duty depend on whether the miscalculation will merely diminish profits or bankrupt the company?

8. What, if any, leverage does a mediator have to avoid being placed in a compromising position? For example, if the mediator feels that one side is stonewalling or trying to subvert consensus, what countermeasures may he take? If the mediator feels that the agreement the parties are about to ratify is irresponsible, is it enough for him or her to walk away quietly? Are there any instances in which it would be proper for a mediator publicly to repudiate a proposed settlement?

The Mediator with Clout

Introduction

Professional mediators often claim complete neutrality in the disputes they handle. Although the mediator may have no stake in the outcome, however, it is hard to imagine a case where he or she is neutral in every respect. At the least, the mediator's intervention usually reveals a bias in favor of settlement: even mediators who profess absolutely neutrality tend to measure their success by whether they have enabled the parties to reach closure. Peace, of course, does not always come without a price. Moreover, as we have seen, mediators who are utterly indifferent as to outcomes invariably must have their own agendas about process: Other cases compete for their attention. Time can be costly. Their

reputations may be enhanced or diminished, depending on the outcome of the mediation.

Thus, even in the purest of cases, the term *neutral* does not describe the mediator's role with complete accuracy. As a matter of common usage in the field, the term stands for the proposition that the mediator has little or no interest in the substance of the dispute. The word *neutral* also reenforces the image of the mediator as a person skilled in the negotiation process, but powerless to impose a solution on the disputing parties.

In this section, we consider instances in which the mediator's "neutrality"—as commonly understood—is somehow compromised. This may occur when a person who has an identifiable interest in the outcome of a dispute tries to serve as a mediator or where the mediator has the power to order an outcome if the parties cannot find resolution on their own.

Some students of mediation might insist that whatever such parties should be called, they should not be regarded as mediators. In the realm of practice, however, where the roles of the parties may shift in the course of a negotiation, semantic distinctions often break down. From a functional analysis, it is clear that stakeholding negotiators do sometimes engage in a process that looks very much like mediation, no matter what we choose to call it. In the same vein, a judge or bureaucrat who has the ultimate power to settle a dispute may nonetheless try to prod the parties into reaching agreement on their own. Our focus in this section will be on the special issues and problems that arise when a mediator also has another significant role in the dispute.

Some experienced observers believe that good negotiators often function as quasi mediators. This can be particularly true when a member of a bargaining team must mediate differences among his or her own colleagues. In a case of collective bargaining, for example, some union representatives may wish to settle whereas others are intent on holding out. The lead representative may have to shuttle from constituent to constituent to fashion a unified coalition. Even when he or she deals with the other side, he or she may be both a negotiator and a mediator. In public, such a figure may stake out strong positions, but in private meetings with the other side, he or she will work jointly to try to facilitate agreement. Just as a negotiator may be required to use the skills of a mediator, so does a mediator depend on negotiating techniques. The successful bargainer often prevails by getting the other side to doubt its position. For example, a plaintiff strengthens his hand by demonstrating to the defendant the risks to him of going to court. Similarly, the artful mediator gets parties to move from impasse by raising doubts about the consequences of sticking to their current positions. A review of the principal cases in the preceding chapters should demonstrate the common elements of negotiation and mediation.

Mediators also serve dual roles when they have the ultimate capacity to impose a resolution on the disputing parties. In some fields, there has been

growing interest in the practice of *med-arb*, a hybrid process in which the intervenor who is selected is given the power to settle the dispute if mediation fails to yield agreement. Judges traditionally have been reluctant to try to mediate cases that they may ultimately be required to decide, though some members of the bench are now taking a more active role in trying to help the parties reach agreement.

What are the advantages of having one person serve as both mediator and arbitrator? Are there any drawbacks? How might it affect the strategy and behavior of the negotiating parties? Think back to the Brayton Point case in chapter 8: Would the mediation process have been different if David O'Connor had held the power to impose a resolution? Are there particular kinds of environmental disputes that are appropriate for med-arb and others that are not? Does it matter whether the parties have chosen to undertake med-arb or have had it imposed by law?

Comparison Case: Gospel-Hump

The following case is adapted from Timothy Sullivan's *Resolving Development Disputes through Negotiations*, New York: Plenum Press, 1984. It involves an Idaho land use dispute in which Frank Church, then a United States senator, intervened. Sullivan terms Church a "powerful mediator"; Susskind similarly might call him "a mediator with clout." Read the case and decide whether Church should be thought of as a mediator, stakeholder, or adjudicator. How was his role different from that played by Congressman Timothy Wirth in Foothills, described in chapter 9.

> Gospel-Hump is a roadless area of national forests located in Idaho. After an initial lawsuit over the use of this land in 1972, the Forest Service agreed to prepare an environmental impact statement before taking any action in this region that could reduce the area's wilderness potential. For the purposes of study and management and to comply with their agreement, the Forest Service divided the region into eight planning zones, and prepared land management plans for these zones. Idaho conservationists challenged two of the land management plans. This challenge halted the Forest Service decisions affecting any part of this whole region while the appeals of the two management plans were in process. Sawmills in the region were running out of harvestable trees, and without some Forest Service action, they would have to shut down.
>
> In a decision on March 8, 1977, the Chief of the Forest Service reviewed the original study plan, disallowed the Forest Service's piecemeal approach, and required the development of a comprehensive plan for the whole region. No action was possible before completion of this study. This new comprehensive study would take at least four years to finish, and could also face appeals and possible litigation. The length of this process threatened to shut down the sawmills in this region since the supply of harvestable

trees would remain frozen during the preparation of these new studies. The lumber industry is the major employer in this remote region; closing the lumber mills would bring substantial economic hardship to the region.

Members of the local Chamber of Commerce asked Senator Frank Church to try to help them resolve the dispute. One member asked if the Senator could help them by incorporating the core of the area into the national wilderness system while freeing peripheral lands. Senator Church sat on the Committee on Energy and Natural Resources which originates legislation which can determine the use of federal lands, and he had the power to help them. Church decided to convene a meeting between a committee of local members of the Chamber of Commerce who represented the wood products industry and conservationists to see if they could work out an agreement. At the first meeting, both sides found that they had much in common. They all enjoyed the outdoors and shared love for the wilderness. They immediately decided that 45,000 acres of the most productive timberland should be excluded from wilderness designation. They agreed to try to negotiate a full solution.

Senator Church left members of his staff to mediate the dispute between the two parties. Negotiation focused on topological maps, with each side drawing lines to include and exclude areas from the wilderness region. In the course of negotiation, the dispute was reformulated, changing from an ideological confrontation over land use to a cooperative planning endeavor aimed at maximizing joint benefit. Topological maps served as a natural negotiating text.

After a long period of negotiation, 220,000 acres, consisting mostly of high alpine country, were classified as wilderness. This land had little timber value. The most heavily forested portions, about 123,000 acres, were allocated for timber harvest and development; 45,000 acres of forest were made immediately available to wood products industries. In addition, a seven member citizens' advisory committee was formed to work with the Forest Service to plan development for this region.

This compromise plan underwent revision during the legislative process. The original groups did not represent mineral interests; this apparently was a simple oversight. Senator McClure, Idaho's other senator, added an amendment addressing this problem. The Forest Service requested a change in the boundary of the area under consideration, and the senate committee deleted 14,000 acres for the provisions of this act. Finally, other revisions enabled the Secretary of Agriculture to allow snowmobile use in certain regions of the wilderness area. The legislation was passed by Congress and it solved a problem that had been trapped in agency reviews for several years.

The Gospel-Hump Wilderness Dispute illustrates how a mediator with power can change the nature of a conflict, and make new alternatives available to the disputants. Senator Church had great prestige with the conservationists groups in his state because of his sponsorship of the original wilderness legislation. The Chamber of Commerce request for help offered

the Senator the possibility of expanding his base of support in the Idaho business community. His senate committee position gave him the power to resolve the conflict. Without his legislative intervention, the dispute would have twisted slowly through agency studies and judicial reviews. Thus, his involvement made possible a settlement that the conflicting groups could not achieve on their own.

The argument, in the following excerpt, states that there are costs as well as benefits when an elected official serves as mediator. Which of these costs do you regard as most substantial? Are they more likely to be felt in certain kinds of cases than in others?

Stulberg, Joseph B. "The Theory and Practice of Mediation: A Reply to Professor Susskind," 6 *Vt. L. Rev.* 85, 107–109, 1981.

Susskind explicitly states that the Congressman who served as the mediator in the Foothills Water Treatment Project discussions was publicly committed to a particular position advanced by one of the parties prior to his entry as a mediator. . . .

Susskind is very candid on this point: "Wirth's political position gave him clout, even when he chose not to use it. This clout was apparently respected by all the participants." The message is obvious: if the parties [did] not cooperate, the Congressman could hurt them in Washington on this or some other matter. That is, the Congressman who intervened had the power by virtue of his position to prevent any party from obtaining its goals. Hence, they agreed to negotiate with him in order to secure a desired objective. Certainly, there is nothing wrong with proceeding in such a manner, and the account of the resolutions suggests that his intervention was successful. One must question, however. how the parties thought that Wirth's intervention was most helpful. They might have been uncomfortable sharing confidential information with him regarding the lack of group consensus on a particular proposal. A party may not have informed him of all possibly acceptable alternatives, knowing that his legal or political posture might be compromised. The need of the parties to talk and work together would be substantially reduced if the simple persuasion of the other parties by the mediator to [his] one viewpoint would be sufficient to gain resolution. If the Congressman's political power is an ingredient necessary to the implementation of the agreement, then the agreement is only as stable as the Congressman's continued political success. The parties can legitimately wonder how the Congressman's political needs affect his efforts to prod the parties into an agreement. And the parties surely cannot be criticized if they view the Congressman's intervention as an opportunity to secure a variety of political objectives, thereby making trade-offs on the environmental matters in dispute in order to gain benefits on other matters of personal interest.

Clearly, this type of intervention is quite different from that of a medi-

ator who derives his power from his very commitment to neutrality. This difference is more than a terminological quibble about what constitutes "mediating." At issue is an understanding of, and respect for, what the parties to the mediation sessions are entitled to expect from the intervenor. Will confidences be honored? Who sets the agenda in terms of issues to be discussed? Will the order in which the issues are discussed be skewed so as to insure the mediator's desired outcome? Will meeting times be scheduled for the convenience of the parties or might they be arranged by the intervenor in order to make it difficult for some (i.e., "obstreperous") parties to attend and voice objections to the intervenor's preferred position? Will the mediator refuse to schedule meetings if the one party whose position the mediator supports demands that future meetings be conditional upon the other parties having made particular concessions?

One can certainly offer answers to these various problems, but Susskind's burden is more substantial. First, he should demonstrate how a mediator committed to neutrality cannot render effective service in an environmental dispute. Second, he should explain the obligations of office that the "mediator with clout" assumes when he renders his services. Is it appropriate, for example, for the "mediator with clout" to threaten a recalcitrant party with political retaliation? If not, why not? Third, Susskind should illustrate the value derived, if any, by labeling such intervention "mediation," since it differs in so many striking ways from mediation in labor–management collective bargaining, community dispute negotiations, court-diversion programs, and countless other private dispute settlement systems. Clarification is necessary to insure a degree of consistency in program posture and purpose among those encouraged to experiment with "mediation" programs as an alternative dispute settlement procedure.

Conclusion

The following fable was written—probably in triplicate—by Peter Lovi, town planner of Ithaca, New York. It nicely poses the broad social and philosophical issues raised by mediation.

To: Solomon, Mediator
From: The Enemy, Religion
Re: Your Mediation Efforts

I believe that our group has a fundamental disagreement with your method. How can you expect us to fairly sit down and discuss these important issues with people who are wrong? It is as if we do not speak the same language. Answer me one question and I'll reconsider mediation: where do we begin; what first principles should we establish which will not hopelessly compromise our efforts from the outset?

To: Solomon
From: The Enemy, Ethics
Re: Your Mediation Efforts

I really don't know if I should write this letter. After all, what right have I to speak for the group of which I am a member? In making the effort to speak for the present members, I also speak for future members, for they will have to live with the history of our actions. Some people may not join us as a result of the actions we take; others will. Not only do I presume to speak for these people, I have the weight of our group's history to consider. Should I be true to the ideals of our founders or should I break with tradition, just as they once did in response to a new and ever changing world?

Anyway, we in the groups have a problem with your method, even though we believe that you would be willing to sacrifice goodness upon the altar of fairness. We are looking for an outcome which is fair, not only for the present members, but for those yet to come and those who have passed on. Who speaks for these people? Who has the right to judge our actions ethically legitimate? Answer these questions and we will return to negotiations.

To: Solomon
From: The Enemy, Politics
Re: Your Mediation Efforts

Let me begin by stating that, regardless of my feelings towards any other people in this bitter difficulty, I respect and admire you a great deal and trust your judgment completely. However, in discussions with others in the negotiations and members of the interested news media I detect a restlessness, an uneasy air, a doubt that your process is moving us along toward any substantive agreement. Let me be frank—are we making any progress? I am a practical man, unused to treading the rarefied theoretical heights you so nimbly scale. Like a tyro I feel myself lagging behind, panting and sweating. I fear that my group may decide to drop out of this intellectual steeplechase; not because the scenery isn't lovely, but because we are getting the familiar sense that the course is leading us nowhere. We're not engaged in some idle game for the amusement of the public and the exercise of their commentators. Again, and I write this note as a friend and in the strictest confidence, shouldn't we consider pressing the opposition into giving ground? Beware! The mandate is slipping from your grasp. Already we hear talk in the shops and markets, denouncing these proceedings as a charade and a gross waste of the taxpayers' money.

Answer me one question and I'll be willing to continue bargaining. When will we get to vote on something?

To: Solomon
From: The Enemy, Aesthetics
Re: Your Mediation Efforts

I know you mean well, and your efforts to mediate this quite intractable problem are laudable and unique. However, I regretfully inform you that my group and I must withdraw from the negotiations. As you are evidently a man of good faith and great wisdom I will state our complaint simply—what is the purpose of our efforts if the solution, though workable, lacks beauty? Should we all labor these many days and nights only to bring forth a camel; a graceless misshapen beast obviously designed by committee? If the solution we must bring forth is to be something for everyone, it is apt to do little for any.

I, sir, believe that fairness is not enough. The solution should have elegance, that wedding of function to form which ennobles the human spirit and separates the artist from the cipher. We will not allow the consideration of beauty to be sullied by the rough hand of the economist, the sharp tongue of the lawyer, or the arched brow of the philosopher.

Answer me but one question and I will return to the table. Where does your principle leave the pursuit of beauty?

To: All the Enemies
From: Solomon
Re: Our Mediation Prospects

Recently, several of you have written to me individually, expressing personal reservations about the state of our mediation efforts. I am taking the opportunity to respond to your criticisms collectively; not only will this save time and effort on my part, but it reduces the possibility for misunderstandings between us. Reducing misunderstanding is the name of the game here—if nothing else, I want every one of you to be able to walk away from these negotiations with a greater and more subtle appreciation of the issues involved in this dispute. In the end I hope that a fair solution will be proposed. However, experience has taught me not to hold my breath waiting for it. Agreement is the most evanescent of gifts; part of this procedure's aim is to allow each of you to demonstrate to each other that you are worthy recipients. When that time comes, we will move quickly. Until then we must talk, play, work, and think deeply about which aspects of our problems are most important to us. Equally important is the ability to listen carefully to what others have said in order to understand which aspects are most and least important to them.

One of you has asked, "Where do we begin . . . how do we establish first principles?" To this question I must first answer that we have already

begun. Our first principles are intimately bound up with the acts of speech and the process of active listening. The active listener does not regard the words of others lightly. Rather, the listener assumes that the speaker has something new and important to say. If the words or phrasing are awkward, ask for clarification. If the meaning is indistinct, request greater precision. If no word is expressive of a concept, jointly invent one. Part of the mediation process is the creation of a language common to all the participants. This language will have its own vocabulary and syntax as befits the peculiar needs and requirement of the case.

Another of you question, "who are we to discuss these issues and what authority gives us the presumption to speak for those who may not be here?" To this person I ask, "Are you not a man like other men; do you not have joys and fears, anger and anguish? Do you not laugh and cry?" The decisions we make here are not written in stone; we are only men, not gods. It is sufficient merely that we be representative of those who might discuss the issue. This is why we try to get as many people involved as possible in our discussions. We will make errors in our solutions; we should accept our fallibility graciously but not shirk our responsibilities because of it.

A third approaches me in confidence and fears the process moves too slowly. This person wishes we could take sides, make proposals, platforms and agendas. The ballot box is this person's altar; he worships the fickle god Polis. To this believer I counsel patience; do not try to create your god through the artifice of majority rule. Rather, wait for HIM or HER to appear. Perhaps the appearance will be in a word or phrase which sets our negotiations in a new light, a light in which everyone's position is better illuminated.

The last of you asks me perhaps the most difficult question. How do we, as a group, select that which is not beautiful and elegant? In our pursuit of the fair do we abandon pursuit of the beautiful? The example of the camel is mentioned as what can happen to a project designed by committee.

Of course, I consider the design of the camel to be an extremely elegant adaption to the harsh necessities of its native environment. If our group proves as wise as the committee responsible for the camel, then we shall truly have accomplished something remarkable. I make this point to emphasize that beauty is not only in the eyes of the beholder but in the act of creation. If the sole criterion is the passive beauty of the finished product, then we may be judged well or badly on the merits of our work. But if our search for beauty extends to the act of mediation itself, to leave the mediation is shirking of one's aesthetic responsibilities. Rather than asking where our procedure leaves the pursuit of beauty, I would rather say that it is a beautiful pursuit of a fair compromise.