
Volume 34
Number 2 *Symposium on Environmental
Alternative Dispute Resolution*

pp.403-421

Symposium on Environmental Alternative Dispute Resolution

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Recommended Citation

Jennifer Gerarda Brown, *Ethics in Environmental ADR: An Overview of Issues and Some Overarching Questions*, 34 Val. U. L. Rev. 403 (2000).

Available at: <https://scholar.valpo.edu/vulr/vol34/iss2/5>

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ETHICS IN ENVIRONMENTAL ADR: AN OVERVIEW OF ISSUES AND SOME OVERARCHING QUESTIONS

Jennifer Gerarda Brown*

I. INTRODUCTION

I want to begin this examination of ethics in Environmental Alternative Dispute Resolution ("ADR") by posing a central, and somewhat confrontationally formulated, question: what is so special about environmental disputes? What, if anything, should one have to say about the ethics of Environmental ADR that would not be true of any other kind of ADR? Do neutrals in environmental cases function differently from other neutrals, so that ethical quandaries arise requiring special ethical norms? Do the parties to environmental disputes categorically operate in a way different from other groups of disputing parties? Do they have distinct interests at stake that might raise special ethical problems? And what of the lawyers? Is there something about advocacy or problem solving in environmental cases that could fundamentally change lawyers' relationships with clients, opponents, neutrals, and third parties?

To answer this question, let us back up a bit. About fifteen years ago, Professor Owen Fiss published his essay, *Against Settlement*, in which he attacked the burgeoning field of ADR as being overly concerned with efficiency – the clearing of court dockets – at the expense of justice.¹ Many scholars and practitioners of ADR since then have challenged the assertions of Professor Fiss, arguing that ADR can claim superiority to standard litigation on grounds of quality as well as quantity. These proponents of ADR have claimed, in other words, that ADR can resolve more cases in less time and at lower cost than standard litigation can, but that, even if ADR fails on these efficiency grounds, the quality of the process and the results that emerge from it will, in the main, be superior to litigation as well.

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¹ Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085-86 (1984) (defining "justice" as a public judgment rendered according to public norms by a neutral who has in turn been chosen by the public).

The empirical claims about ADR's efficiency are as yet unproven. Nevertheless, Fiss's argument is normative, not empirical. No matter what the data on case processing might ultimately reveal, Fiss's concern for the quality of justice retains its salience. In no area do we see this more than in environmental law, particularly, though not exclusively, with respect to public disputes. Here, we can give great weight to Fiss's worries that public values will be lost in the private resolution of disputes. We can see the sense in his call for the guiding wisdom, not to mention coercive power, of a publicly chosen neutral, often a judge, and preferably one who enjoys substantial independence from changing political winds. It may be that Fiss's essay romanticizes litigation, the court system, and the justice obtainable therein. However, we cannot so easily dismiss the argument. Fiss's concerns about public values raise important questions not just about system administration, but also about the ethical legitimacy of removing environmental cases from more public judicial and administrative fora.

The thesis of this Article is that the central ethical problem in Environmental ADR is the problem of representativeness.² This problem springs from the task of insuring genuine, widespread, representative public participation. It arises when we try to set tolerable levels of harm to future generations, challenging us to ask whether anyone here and now is representing those future souls. It even comes into play when we ask who can legitimately represent the interests of other species and natural resources, with questions such as, "should trees have standing?"³ The public nature of environmental disputes necessarily implicates interests and values that might not be as salient in other contexts. This problem of representativeness is a start, at least, to answering the question I posed above, about what makes Environmental ADR so special as an ethical matter.

An outsider to environmental law might be tempted to minimize the aspects of environmental cases that make them unique sites for ADR. After all, one might argue that ethical norms remain constant; they can be applied with only minimal tailoring to different substantive contexts.⁴

² See generally J. Clarence Davies, *Environmental ADR and Public Participation*, 34 VAL. U. L. REV. 389 (2000) (outlining some of the practical problems involved in attempting to represent public views in environmental disputes).

³ See Christopher D. Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972).

⁴ I myself might be inclined to respond to the problem in just this way. I come to the topic of this symposium as a relative outsider to the field of environmental law. I teach and

Yet this generalist perspective takes us only so far. As those who practice in this area know so well, environmental disputes often implicate interests -- such as the interests of the general public in a clean and safe environment, for both this and future generations -- that might not be as prominent in other contexts. Thus, environmental cases offer a particularly challenging context for reconciling competing ethical claims: lawyers' duties to their clients versus their sense of public responsibility; mediators' need to remain impartial versus their desire to ensure the longevity and justice of agreements they facilitate; parties' desire to maximize their individual, short-term interests versus their sense of responsibility to absent parties, future generations, other species, and the beauty of this planet.

This public interest gives rise to ethical issues that are tempting to ignore, but will actually require serious engagement if the quality of Environmental ADR is to remain high. Nevertheless, addressing those ethical issues will not always be easy. Doing so will muddy any clean, simple formulation of client welfare and attorney responsibility. Often, addressing the ethical issues will be impossible, unless we are willing to complicate our taxonomy of dispute resolution and our definitions of "mediation." If, to borrow the title of this symposium, Environmental ADR is to "work" in America -- that is, if it is to balance all the many values at stake when we tackle public disputes in relatively private realms -- then we must not shy away from complexity or compromise.

Now, if one thinks broadly enough about the "interests" of the parties to an environmental dispute, one can always reconcile what is "best" for an individual disputant with what is best for future generations or other parties not represented at the table. Mediators could stick to a traditional, "norm-generating"⁵ approach, secure in the knowledge that the parties have accounted for all relevant interests and that the agreement they reach adequately serves those interests. With a sufficiently broad conception of client interests, lawyers could incorporate the anticipated concerns of third parties or future generations, balance those against immediate, articulated self-interests of the particular client, and advocate for third parties and future

write about Alternative Dispute Resolution and Professional Responsibility, so I bring to the issues I will be addressing the perspective of a generalist; I see the characteristics and obligations of participants in Environmental ADR as having much in common with participants in any sort of dispute.

⁵ See, e.g., Ellen A. Waldman, *The Challenge of Certification: How to Ensure Mediator Competence While Preserving Diversity*, 30 U.S.F. L. REV. 723 (1996).

generations with the belief that such an approach is in the client's best long-term interests.

But, this is morals on the cheap. It is cheap for the lawyer, mediator, or analyst of the system generally to water down the firmly-held, deeply-rooted self interests of the parties to an environmental dispute. A passionate or, to put it more negatively, selfish party, whether an individual or an organization, will not so easily accept the proposition that a mediator can advocate for the interests of the public or future generations with no deterioration in the appearance of neutrality; nor will a client blithely sit by while its lawyer advocates for these third party interests. And yet, I will argue that significant ethical problems arise if these outside interests are ignored.

This Article will therefore consider what, if any, ethical obligations fall upon the various participants in Environmental ADR to ensure that the interests of outsiders are somehow accounted for and expressed. The primary focus will be on attorneys' professional responsibilities. It will review some of the norms provided by the American Bar Association to see whether they offer lawyers sufficient guidance in this area.⁶ The goal will be to piece together some support for the proposition that the rules foresee situations in which lawyers' absolute loyalty to the client is qualified by an overarching concern for public welfare. The rules generally do not go so far that they create room for much lawyer movement here; if public values are to come into mediation in significant ways, it will have to be the mediator who imports them. The Article will conclude by briefly considering the ethics of mediator activism in environmental cases.

II. LAWYERS' ETHICAL NORMS

In this examination of lawyers' norms, I will use as my basic text the American Bar Association Rules of Professional Conduct ("Model Rules").⁷ I select them not because they represent the only, or even the primary, set of ethical norms governing lawyers' conduct, but because, as they have been adopted by forty-one states and are under consideration in a few more, they come closest to representing the

⁶ For a more thorough treatment of the inadequacies of the ABA Model Rules in the context of mediation, see Carrie Menkel-Meadow, *Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibilities*, 38 S. TEX. L. REV. 407 (1997).

⁷ MODEL RULES OF PROFESSIONAL CONDUCT (1997).

profession's sense of itself. Even if lawyers' conduct often deviates from certain provisions in the Model Rules, the rules tell us a great deal about our aspirations and our view, most centrally, of the attorney-client relationship.

With respect to that relationship, the ABA generally subscribes to the view that a lawyer stands with her client "against the world," as an unquestioned ally in adversarial dealings with outsiders.⁸ As Professor Carrie Menkel-Meadow has argued, this view of a lawyer's role does not mesh well with what we know about ADR and the very important ways lawyers can facilitate their client's participation in it.⁹ Nonetheless, until they undergo substantial revision,¹⁰ the rules uphold a view of the attorney-client relationship based strongly on an adversarial assumption.

Perhaps no set of ethical rules more clearly defines the attorney-client relationship in this way than those pertaining to confidentiality. Under those rules, in the absence of client consent, lawyers may not reveal any information "relating to the representation."¹¹ Exceptions to this rule are few. A lawyer may, however, reveal information in order to prevent the client from committing a crime likely to result in serious bodily harm or death, or to allow the lawyer to defend against allegations of wrongdoing.¹²

Some states have extended the exceptions, and these extensions may reflect some compromise in the absolutist view of the lawyer and client "against the world." One sort of extension appears in state rules that present broader circumstances justifying disclosure. In these states, rather than restricting the justified disclosure to cases in which a client is about to commit a violent crime, the rules permit disclosure when a

⁸ I jokingly refer to this as the "Helen Reddy" view of lawyering, in honor of her corny but memorable song from my early adolescence, *You and Me Against the World*. HELEN REDDY, *You and Me Against the World*, on GREATEST HITS (AND MORE) (Capital Records 1975).

⁹ Menkel-Meadow, *supra* note 6, at 431. Current ethical codes require "zealous conduct where it may be dysfunctional." *Id.*

¹⁰ As part of the American Bar Association's Ethics 2000 project, some of the Rules of Professional Conduct may be revised, and new provisions added. See Bruce Lyons, *ABA Section Reports: Criminal Justice: Joining Forces with the DA and Defense*, NAT'L L.J., Aug. 9, 1999, at 89 ("In the coming year, the ABA Commission on Evaluation of the Rules of Professional Conduct (Ethics 2000) will keep revising ABA ethics rules that are used as a model for state ethics codes.").

¹¹ MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(a) (1997).

¹² MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1)-(2) (1997).

client threatens to commit criminal fraud,¹³ a non-criminal fraud likely to injure property,¹⁴ or, in some states, any crime.¹⁵ In other states, the exceptions to confidentiality have been extended by making disclosure under certain circumstances mandatory rather than discretionary.¹⁶ Florida and New Jersey are two examples of the principle described earlier in the paragraph. In the Florida rules, for example, a lawyer “must” disclose confidential information to prevent a client from committing *any* crime – whether a violent crime or property crime.¹⁷ In one popular Continuing Legal Education (“CLE”) program,¹⁸ the New Jersey rule is cited in a hypothetical case involving illegal dumping of industrial waste, suggesting that lawyers’ duties of confidentiality might not protect information related to such environmental harms.

In mediation, to the extent that the process requires a lawyer to be more forthcoming, to share information or to make concessions, progress might be impeded by the lawyer’s general duty of confidentiality. At least as the ABA envisions it, that duty of confidentiality seems to arise from the “you and me against the world” dynamic. Exceptions create a small crack in that wall, but they are so narrowly drawn that they are unlikely to arise in the context of an environmental mediation.¹⁹ Though, at one time, commentators and even courts promoted a “public

¹³ Arizona, Colorado, and Connecticut take this approach. See THOMAS D. MORGAN & RONALD D. ROTUNDA, 2000 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 136-37 (2000).

¹⁴ Alaska, Hawaii, and Maryland are examples of this approach. See *id.* at 135, 138, 141.

¹⁵ New York, Pennsylvania, and Vermont take this very broad approach. See *id.* at 144-45, 147.

¹⁶ Florida, New Jersey, Virginia, and Wisconsin, for example, all require disclosure to prevent a crime that will result in serious bodily injury or death. See *id.* at 137, 143, 148-49.

¹⁷ See *id.* at 137.

¹⁸ See CENTER ON PROFESSIONALISM UNIVERSITY OF PENNSYLVANIA, CONFLICTS AND CONFIDENTIALITY: TROUBLE AT UPPER BLACK EDDY 22-23 (1991).

¹⁹ Some of the comments to Model Rule 1.6 reinforce this view that the duty of confidentiality is not absolute. According to comment 16, when a lawyer withdraws from representing a client, the lawyer may withdraw or disaffirm earlier documents the lawyer prepared or filed on the client’s behalf, and may send a notice of withdrawal to other parties or to a neutral. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 cmt. 16 (1997). This is referred to as a “noisy” withdrawal and, though it formally preserves the substantive confidentiality of client information, it nonetheless allows a lawyer to send a strong signal – one that could be adverse to the client’s interests. *Id.* Again, we see some compromise of the sacrosanct duty of confidentiality, but only when client misconduct is leading a lawyer to sever the relationship; withdrawals can be “noisy” but ongoing representation cannot.

interest" exception to the duty of confidentiality,²⁰ the current rules governing lawyers provide no basis for such public spiritedness.

In addition to Model Rule 1.6, other rules protect lawyer/client confidentiality. The prohibition on a lawyer's communicating with a person the lawyer knows to be represented in a matter is another way of safeguarding confidences between lawyer and client; the rule protects clients from exploitation by other people's lawyers when they are represented but their lawyers are absent at the time of the communication.

Model Rule 4.2 exerts an interesting constraint on lawyers' ability to take a problem-solving approach in some cases. In a forthcoming book on lawyers as negotiators, Professor Robert Mnookin, Scott Peppet, and Andrew Tulumello discuss the problems a lawyer faces when she would like to take a problem-solving approach to negotiation, but her own client, as well as the lawyer and the client on the other side, all reject such a problem-solving approach.²¹ I would argue that the problem is even more complex than Mnookin and his co-authors acknowledge, because Model Rule 4.2 makes it difficult to distinguish this prototypically difficult case from a case in which lawyers and clients are, in a sense, mismatched. The problem-solving lawyer may not be the only person at the table who wants to cooperate; the client on the other side might agree. However, because Model Rule 4.2 allows the lawyer on the other side to act as a sort of screen between his cooperative client and our problem-solving heroine, the rule can actually impede nonadversarial attempts to resolve disputes.²²

In addition to confidentiality rules, the ABA provides several rules that enforce lawyers' general duty of loyalty to their clients. Model Rule 1.7, the general rule on concurrent conflicts of interest, states that lawyers are forbidden to "represent a client if the representation of that

²⁰ See STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 57-59 (5th ed. 1998).

²¹ ROBERT MNOOKIN, ET AL., BEYOND WINNING: HOW LAWYERS HELP CLIENTS CREATE VALUE IN NEGOTIATION (forthcoming 2000) (manuscript at 175, on file with author).

²² See MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 (1997). Granted, this dire situation is less likely to arise if all lawyers are following the Model Rules; even a competitive lawyer should, it seems, capitulate to his client's clearly stated views on the appropriate approach to take in negotiation. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 (1997). The trouble is that not all clients will be able or permitted to articulate this preference clearly.

client will be directly adverse to another client"²³ or "if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests."²⁴ This prohibition is qualified, however, by the fact that, if the lawyer reasonably believes the representation will not adversely affect relationships with each client and each client consents after consultation, the representation can go forward.²⁵ Of course, in some cases, disclosing enough information to fully inform one party will necessarily require divulging another client's ethically protected information. Getting the client's consent to reveal this information can be tricky. How can the client know whether to approve disclosure if the client does not know much about the person or entity who will receive the information? The problem can become somewhat circular, and the lawyer may find these curative consents difficult to obtain.

Nevertheless, the ABA provides a good prophylactic in the comments to Rule 1.7. If a "disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent."²⁶ The circular sort of situation described above could easily be one in which a disinterested lawyer would conclude that the client should not give consent. If the situation is so sensitive that the lawyer fears disclosing even enough information to obtain the parties' informed consent, that alone might be a sign that the conflict is irreconcilable and withdrawal from the representation of one or both clients is in order.

In environmental cases, Model Rule 1.7 could arise in a myriad of ways, but most direct conflicts would be similar to the analysis in tort or commercial cases. Environmental cases might present uniquely challenging contexts for the application of Model Rule 1.7's prohibition of *indirect* conflicts – those cases in which the lawyer's representation of a client could be materially limited by the lawyer's own interests or the interests of third parties. In these cases, obtaining client consent would be relatively simple, requiring only that the lawyer confess her own interests or describe the interests of the third party to whom, presumably, the lawyer owes no duty of confidentiality, and explain to the client the consequences of going forward with the representation.

²³ MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(a) (1997).

²⁴ MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(b) (1997).

²⁵ MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(a), (b) (1997).

²⁶ MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 cmt. 5 (1997).

The most difficult part of the process might be the introspection necessary for the lawyer to realize that her own interests and values could compromise her service to the client.

It is not as if the Model Rules fail to recognize that lawyers' preferences and perspectives will sometimes diverge from those of their clients. Lawyers are not required to be such unquestioning boosters that they align with all of their clients' interests. Although Model Rule 1.2 makes clear that "[a] lawyer shall abide by a client's decisions concerning the objectives of representation," the rule and its comments also permit lawyers to "limit the objectives of the representation if the client consents after consultation."²⁷ In addition, the rule clearly states that "[a] lawyer's representation of a client . . . does not constitute an endorsement of the client's political, economic, social or moral views or activities."²⁸ Model Rule 2.1 also weighs in here, requiring lawyers to "exercise independent professional judgment and render candid advice," including, at the lawyer's option, some analysis of the "moral, economic, social and political factors" relevant to the client's situation.²⁹

While these rules make some room for lawyers to speak for the interests of the public or third parties when advising their clients, it is another matter entirely to suggest that the ABA rules would countenance lawyers' advocacy of such interests in mediation. A vision of lawyers' professional responsibility that significantly folds in protection of these outside interests diverges from the profession's view of itself, at least as that view is reflected in the ABA Rules. Thus, the problem of

²⁷ MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a), (c) (1997).

²⁸ MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(b) (1997).

²⁹ MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.1 (1997). One comment to this rule states:

A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.

Id. at cmt. 3.

As I have stated elsewhere, it has always seemed strange to me that this comment seems to assume some correlation between legal experience and moral, economic, or social understanding. In many cases, the relationship between legal knowledge and wisdom in other areas is an inverse one. It is not at all clear that the lawyer should heed a request for "purely technical" advice when it comes from a legally sophisticated client, but ignore such a request when it comes from one less well versed in legal affairs. See Jennifer Gerarda Brown, *Rethinking "The Practice of Law,"* 41 EMORY L.J. 451, 464, n.58 (1992).

representativeness in Environmental ADR does not find an easy solution in lawyers' own norms of self-governance.

III. RECONCILING COMPETING CLAIMS: MACRO AND MICRO

When environmental disputes are to be resolved outside the standard public fora generally entrusted with adjudication or administration of claims, then, we can see the double-edged nature of the change: 1) the *privacy* available through ADR could free parties to make concessions to which they might not agree in more public settings, but it could also serve to screen disputes and negotiated agreements from the concerned eyes of the public who also have interests at stake, often related to fundamental health and safety;³⁰ 2) the *informality* available through ADR could give the parties license to conceive their dispute expansively, bringing in parties and interests that might be excluded by court standards for joinder, relevancy, and standing, but it could also deprive interested parties of the procedural safeguards that ordinarily guarantee them access to information and the opportunity to be fully heard by decision makers.

Thus, two issues may arise in environmental ADR more pointedly than they do in other areas. First, who is absent from the table who ought to be there? Second, once these missing parties are identified, who among those present can represent them at the table?

A. Macro Competition: Procedural Norms in Mediation vs. The Nature of Environmental Disputes

Ethical problems in Environmental ADR arise because the procedural ground rules in mediation can seem inconsistent with the substantive interests at stake in environmental disputes. If Environmental ADR is to "work" in the U.S., we must find a way to reconcile these two sometimes-inconsistent values.

³⁰ See Aseem Mehta, Note, *Resolving Environmental Disputes in the Hush-Hush World of Mediation: A Guideline for Confidentiality*, 10 GEO. J. LEGAL ETHICS 521, 522 (1997):

In order to promote settlements and thus relieve overcrowded dockets, courts promote mediation, and mediation receives more confidentiality protection than traditional settlement negotiations. Opposing the trend towards greater confidentiality are citizen suit provisions in the major environmental statutes, 'Sunshine Acts', which require government actors to open meetings to the public, and the realization that the settlement of environmental disputes often affects people who are not represented in the underlying litigation.

Id.

1. Mediation Models and Ground Rules

In its "purest" form, mediation is not an occasion for the neutral to introduce and advocate for any particular substantive norms. Instead, the mediator focuses on process and permits the parties to select the legal and non-legal values bearing on their dispute. As Professor Ellen Waldman explains, "the leitmotif of the [traditional,] norm-generating model, then, is its inattention to social norms. In an effort to spur innovative problem-solving, the model situates party discussion in a normative tabula rasa. The only relevant norms are those the parties identify and agree upon."³¹

Waldman echoes Lon Fuller, who has asserted that "traditional or norm-generating mediation 'is commonly directed, not toward achieving conformity to norms, but toward the creation of the relevant norms themselves.'"³² Some mediators go further, introducing substantive norms to the discussion, explaining their consequences, but not arguing for or against their appropriateness to the dispute.³³ This "norm-educating" model does not rely upon the parties to supply all of the standards or rules relevant to the dispute, but it does assume that the parties can assess the applicability of the norms without significant mediator input.³⁴

2. The Special Nature of Environmental Disputes

Norm-generating and norm-educating mediation models are not always appropriate, however, as Waldman explains:

In some contexts... the norm-educating model is insufficiently protective of party and societal interests. This is true when the power imbalance between the parties is so extreme that one party cannot provide a trustworthy waiver, when the institutions administering mediation have a mandate to enforce statutory law, and/or when the dispute involves public resources or implicates public values in such a profound way that their enforcement outweighs the disputants' interests in

³¹ Ellen A. Waldman, *Identifying the Role of Social Norms in Mediation: A Multiple Model Approach*, 48 HASTINGS L.J. 703, 718 (1997).

³² *Id.* at 718-19 (quoting Lon L. Fuller, *Mediation - Its Forms and Functions*, 44 S. CAL. L. REV. 305, 308 (1971)).

³³ *See, e.g., id.* at 730.

³⁴ *Id.* at 731-32.

achieving settlement. In these instances, a norm-advocating model better suits the task at hand.³⁵

In environmental cases, particularly, mediators do not always find that the parties are able or willing to generate all of the norms that might apply to the dispute.

Lawrence Susskind summarizes the situations in which this might occur and the consequences if the failure of norms goes unaddressed:

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 negotiations, 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.³⁶

These serious consequences lead Susskind to conclude that, compared to other fields in which mediation might occur, environmental mediation requires the participants to pay "much closer attention to the interests of those unable to represent themselves... [to] attempt to understand the complex ecological systems involved and to generate appropriate compromises that go beyond their self-interests."³⁷ When the parties fall short of these goals, he asserts, the mediator must take responsibility for representing and protecting these outside interests.³⁸

And what are the interests that may be unrepresented? Some communities affected by environmental decision-making might be unaware that a dispute affecting them is under negotiation. Even if individual members of an affected community know about the

³⁵ *Id.* at 742.

³⁶ Lawrence Susskind, *Environmental Mediation and the Accountability Problem*, 6 VT. L. REV. 1, 7-8 (1981).

³⁷ *Id.* at 16.

³⁸ *Id.* at 18 ("[E]nvironmental mediators ought to accept responsibility for ensuring (1) that the interests of parties not directly involved in negotiations, but with a stake in the outcome, are adequately represented and protected . . .").

mediation, collective action problems and scarce financial resources might prevent the community from mobilizing to become involved in the negotiations. The nature of the environment as a "public good" can create disincentives for individual members of the public to absorb costs in protecting resources that will be available to the public generally. If the affected interests are plant or animal species that might be threatened by a proposed activity, those non-human interests may lack a spokesperson to articulate their position in the negotiation.

Future generations are sometimes strongly affected by proposed resolutions of environmental disputes; yet, they cannot participate in current negotiations. Even when the interests of future generations are, in theory, to be accounted for, the law often carries an inherent bias against them.³⁹ As Thomas McGarity and Sidney Shapiro explain:

The practice of discounting future benefits to present value . . . biases cost-benefit analysis against future generations. A high discount rate clearly biases the analysis against future benefits, even though "it is not clear why the later-born should have to pay interest to induce their predecessors not to exhaust [depletable resources]."⁴⁰

An ethic seeking "sustainable development" might better reconcile the interests of current and future generations.⁴¹ But who will advocate for such a norm?

³⁹ See Richard L. Revesz, *Environmental Regulation, Cost-Benefit Analysis, and the Discounting of Human Lives*, 99 COLUM. L. REV. 941 (1999). Although "[m]ost policy planning discussions assume full altruism – future citizens are given equal weight with present citizens – and discount solely for the time value of money," this practice of discounting "privileges the interests of the current generation to a very large extent." *Id.* at 997-98. Revesz illustrates the impact of this discounting practice with some powerful examples. *Id.* at 998.

⁴⁰ Thomas O. McGarity & Sidney A. Shapiro, *OSHA's Critics and Regulatory Reform*, 31 WAKE FOREST L. REV. 587, 629 (1996).

⁴¹ Richard Revesz explains that sustainable development can be equated with "intergenerational equity," defined by reference to three principles:

First, the principle of conservation of options requires each generation to preserve the natural and cultural resource bases so that the options available to future generations are not unduly restricted. Second, the principle of conservation of quality requires each generation to prevent a worsening of the planet's environmental quality. Third, the principle of conservation of access requires each generation to provide its members with equitable rights of access to the legacy of past

One might argue that if parties could negotiate before the situation becomes a "dispute," the ethical tensions might be eased. But interest-based negotiations are not always simpler to conduct from an ethical perspective. Consider, for example, the EPA's Excellence in Leadership Project, popularly known as Project XL. Project XL is designed to "allow regulatory flexibility in return for superior environmental performance at selected facilities on a facility-by-facility basis."⁴² The cornerstone of the project is negotiation among regulators, facility owners, and the affected community, resulting in a "Final Project Agreement" (FPA) governing environmental performance at the facility.⁴³ This agreement usually relaxes some statutory standard – leading one EPA staffer to remark, "'if it ain't illegal, it ain't XL.'"⁴⁴ The purpose of the negotiation then is, at least in part, to draw affected parties to the table and get all of them to sign off on this illegality. The goal is not only to effectively prevent governmental enforcement action through the EPA or the state, but also to forestall citizen enforcement actions.

It does not always work out this way, however. The difficulty in identifying the relevant community can undermine the ability of the negotiations to prevent subsequent enforcement actions. In a recent law review article, Charles Caldart and Nicholas Ashford relate the story of the Intel Corporation's newest semiconductor production site in Chandler, Arizona. A five-year project agreement covering operations at a 720-acre site was negotiated among the company, federal and state regulators, and five Chandler residents. The participants in the

generations, and to conserve this access for the benefit of future generations.

Revesz, *supra* note 39, at 1010-11 (paraphrasing EDITH BROWN WEISS, IN FAIRNESS TO FUTURE GENERATIONS: INTERNATIONAL LAW, COMMON PATRIMONY, AND INTERGENERATIONAL EQUITY 40-45 (1988), and Edith Brown Weiss, *Intergenerational Equity: A Legal Framework for Global Environmental Change*, in ENVIRONMENTAL CHANGE AND INTERNATIONAL LAW: NEW CHALLENGES AND DIMENSIONS 385, 401-05 (Edith Brown Weiss, ed., 1991)).

⁴² Charles C. Caldart & Nicholas A. Ashford, *Negotiation as a Means of Developing and Implementing Environmental and Occupational Health and Safety Policy*, 23 HARV. ENVTL. L. REV. 141, 182 (1999).

⁴³ This is different from the kind of negotiation that occurs in the context of the permitting process, where the negotiations generally focus on the appropriate way to apply current regulations to the facility in question. Project XL negotiations can replace current standards with a new, negotiated standard, actually making new environmental policy – though, as Caldart and Ashford observe, it is policy on a "facility-by-facility basis." *Id.* at 182 n.219.

⁴⁴ *Id.* at 183.

negotiations were presumably satisfied with the agreement, but there is reason to believe that they did not represent all of the relevant interests.

For example, the agreement has been vehemently criticized by the Silicon Valley Toxics Coalition, a California-based group that addresses pollution problems in the semiconductor industry, as well as the Natural Resources Defense Council (NRDC), a national environmental group. The interests of these organizations and their constituents are apparently broader than those brought to bear in the negotiations; they have industry-wide or national concerns rather than a focus on local impact. As Caldart and Ashford point out, the five community representatives who participated in the negotiations were members of a pre-existing Intel Community Advisory Panel, generally representative of a community that values Intel's contribution to the economic life of Chandler, AZ. This could be quite different from a perspective of those that "place[] environmental and public health protection... at the forefront."⁴⁵

However, would Intel have consented to participate in negotiations that included environmental groups such as the Silicon Valley Toxics Coalition or the NRDC? When these and other environmental groups asked Intel to augment the agreement with legally enforceable pollution prevention requirements, Intel was not receptive. In a Washington Post column, Intel's government affairs manager was quoted as asking, apparently with some indignation, "Citizens are going to make decisions... that are binding on Fortune 500 Companies?"⁴⁶ The same sort of skepticism could emerge in mediation.

The problem, of course, is that any attempt by a mediator to bring the public interest into the discussion could appear to run against one of the bedrock values of mediation: mediator neutrality. Indeed, Joseph Stulberg has argued that when Lawrence Susskind merely calls upon mediators to "be concerned about" the impact of negotiated agreements on "underrepresented or unrepresentable groups in the community" or "[t]he long-term or spillover effects" of settlements, Susskind is arguing that mediators should not be neutral.⁴⁷

⁴⁵ *Id.* at 184-85.

⁴⁶ *Id.* at 185-86 (quoting Cindy Skrzycki, *Some State Environmental Chiefs Want EPA Off the Stage*, WASH. POST, June 20, 1997, at G1).

⁴⁷ Joseph B. Stulberg, *The Theory and Practice of Mediation: A Reply to Professor Susskind*, 6 VT. L. REV. 85, 86 (1981) (citing Susskind, *supra* note 36, at 46).

Stulberg claims that his disagreement with Susskind is more than just a “terminological quibble,”⁴⁸ and yet I wonder what is really at stake in their debate. What turns on this question seems, in some ways, to be little more than a claim to pedigree: is the accountable neutral Susskind describes a real mediator, or something else? Perhaps this debate is a creature of the time in which it occurred. In 1981, mediation was just starting to expand outside the labor field, and practitioners and theorists alike were understandably a bit prickly about labels. More than a turf war, this was a battle for legitimacy; with such a limited performance record, the reputation of mediation and mediators could be damaged if lower-quality processes and practitioners, touted as mediation, yielded bad experiences or dissatisfying results. Eighteen years later, the Stulberg-Susskind debate blurs when viewed through the lens of ADR’s absolute explosion and enthusiastic reception by courts and disputants alike. From this vantage point, it is easy to think that Stulberg was being a bit too persnickety about titles when he declared that “a mediator publicly committed to a particular substantive outcome with the power to move the contesting parties toward an agreement” may be an effective intervenor, but that person assumes “a different kind of intervention posture from that of a mediator.”⁴⁹

Still, the fact that “public participation” is set forth as an independent mode of resolving public environmental disputes suggests that, in some cases at least, such participation will not be possible. This raises the question: what, if any, responsibility do the parties at the table have to insure that unrepresented interests are accounted for in their agreement?

B. Micro: Lawyer and Mediator Ethics in Environmental ADR

The “Accountable” Mediator

When Lawrence Susskind calls upon mediators to be mindful of interests not represented at the table, to “attempt to understand the complex ecological systems involved,” and to “generate appropriate compromises that go beyond [the parties’] self-interests,” he is sketching in broad strokes the “accountable mediator” model.⁵⁰ This accountable mediator is much more activist – and substantively interventionist – than mediators in the standard model. Susskind and others have argued that

⁴⁸ *Id.* at 87.

⁴⁹ *Id.* at 87-88.

⁵⁰ See Susskind, *supra* note 36, at 16.

such accountability is necessary in order to insure that environmental dispute resolution serves the public interest as well as the interests of the parties.

According to Donald T. Weckstein, however, mediator activism can be reconciled with traditional norms in mediation. He argues that "a key professional role of the mediator is to maximize self-determination based upon informed consent, exercised within the confines of the societal purpose of the dispute resolution context."⁵¹ The social purpose of the dispute resolution context has to include some sense of the substantive law in the field.⁵² Sensitivity to context is crucial, he observes. Thus:

[p]ursuant to this professional obligation, in certain circumstances, the mediator's role to assure the disputant's informed self-determination would ethically justify a greater degree of activist intervention. Among the circumstances favoring enhanced interventions are: (1) when the parties request their use or appear to need or expect activist assistance from the mediator, and (2) when the dispute resolution context calls for accountability by the mediator to third parties or overriding legal principles.⁵³

Although Weckstein is writing about mediation in general terms, environmental mediation could frequently give rise to the second set of circumstances he describes – where the substantive context creates relevant third party interests or overriding legal principles. If a mediator consults with the parties to a dispute and informs them about the mediator's usual style of mediation, and if the parties choose to go forward with the mediator upon that understanding, then "the mediator should be free to offer such interventions as he or she deems appropriate."⁵⁴

Perhaps we should go even further and say that the mediator should not only be free to offer these interventions, but should be compelled to do so as a matter of good practice. Let me be clear: raising these outside

⁵¹ Donald T. Weckstein, *In Praise of Party Empowerment – And of Mediator Activism*, 33 WILLAMETTE L. REV. 501, 557 (1997).

⁵² *Id.* Mediators should help disputants resolve, "or choose not to resolve," their differences "in a manner not inimical to the law or social purpose of the dispute resolution." *Id.*

⁵³ *Id.* at 559.

⁵⁴ *Id.*

420 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 34

interests will often complicate the negotiations and require the parties to surrender some "gains of trade" not just to the other parties at the table, but to parties and interests absent from the negotiations as well. We can expect that incorporating these outside interests will make the mediation more difficult for everyone involved, and that, if left to their own devices, disputants as well as neutrals might prefer to neglect them. It may well be that, in order to prevent a race to the bottom, we must compel rather than permit mediators to advocate for norms and interests not otherwise represented.

IV. CONCLUSION

In a fable written by Peter Lovi, a town planner in Ithaca, New York, various parties involved in the mediation of a public dispute express concerns to the mediator, explaining why they want to withdraw from the process. The "ethicist" demands:

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.⁵⁵

The mediator replies:

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.⁵⁶

Perhaps it is significant that in this fable, the mediator refers to "our solutions" and decisions that "we" make. The mediator tells the ethicist

⁵⁵ LAWRENCE BACOW & MICHAEL WHEELER, ENVIRONMENTAL DISPUTE RESOLUTION 278 (1984).

⁵⁶ *Id.*

that if "we" are "representative of those who might discuss the issue," the mediation will be ethically "sufficient." In this model, the mediator becomes actively engaged in the mediation, not just as a facilitator of the parties' solutions, but actually claiming ownership of the solutions himself.

This Article has pressed a similar thesis: in an effort to ground environmental mediation in the public interest, both the parties and the mediator will have to look outside their own roles and interests, narrowly defined, and attempt, as best they can, to represent the interests of absent parties. The rules governing lawyers leave little room for protection of outside interests if that protection diverges from the interests of the client. This may call for a more activist approach from the mediator, one that exceeds a purely facilitative approach and includes some evaluation or norm advocacy. In this way, the mediator might fill in the gaps if the parties neglect some of their representative responsibilities. The mediator is more likely than the parties' lawyers to be able to reconcile this norm advocacy with the ordinary functions that accompany the role.

