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Mandated Mediation: A Contradiction in Terms - Lessons from a Recent Attempts to Institutionalize Alternative Dispute Resolution Practices

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MANDATED MEDIATION: A CONTRADICTION IN TERMS
LESSONS FROM RECENT ATTEMPTS TO INSTITUTIONALIZE ALTERNATIVE DISPUTE RESOLUTION PRACTICES*

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I. INTRODUCTION

THIS Article is an examination of the development and use of alternative dispute resolution (ADR) systems to resolve various types of social and public policy conflicts. Specifically, it seeks to determine the conditions, features, and ingredients which contribute to the successful development and operation of

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"institutionalized" ADR systems. Alternative dispute resolution systems refer to processes which use negotiation and/or mediation techniques to resolve disputes that otherwise would be resolved in court or in other adjudicatory proceedings. Institutionalized systems refer to statutory, regulatory, or other formal means of applying or making available negotiation and mediation for the settlement of disputes of like character that are expected to arise in a designated subject or policy area or other jurisdictional designation.[1]

Historically, there has been success in resolving "site-specific" environmental disputes through the use of negotiation and mediation, therefore it is only natural that these techniques are being tried in other arenas of complex multi-party disputes.[2] Articles, legislation, and experiments have appeared over the past several years describing the use of mediation in regulatory and siting disputes. These disputes arise in areas where "recurring" disputes come under the purview of the same political jurisdiction, administrative agency, or policy area.[3] This Article will examine the ingredients and obstacles to developing institutionalized systems that use mediation and negotiation to resolve these recurring disputes.

Environmental negotiation and mediation have their intellectual roots in labor-management negotiations. Yet labor-management negotiations are not one-shot affairs. They recur, usually among the same parties, when contracts expire. Still, there is a general expectation that certain types of labor-management disputes will occur over similar issues. As a matter of public policy, we have set up a variety of mechanisms to handle these disputes. Now, with substantial experience in mediating or negotiating single, site-specific labor disputes, professionals, academics, policy makers, and parties with problems to resolve are trying to institu-

1. An institutionalized ADR system refers to a dispute resolution system that can be applied to various unrelated disputes, while "site-specific" dispute resolution, which is also addressed in this paper, is the utilization of mediation, negotiation or arbitration to resolve a particular dispute. Site-specific dispute resolution is not intended to provide a transcendent system that may be applied to disputes that are similar to the one that led to its creation.

2. For a cataloguing of many of these site-specific examples, see G. BINGHAM, RESOLVING ENVIRONMENTAL DISPUTES: A DECADE OF EXPERIENCE (1986).

3. Use of ADRs in such proceedings have been well discussed. *See, e.g.*, Perritt, *Negotiated Rulemaking Before Federal Agencies: Evaluation of Recommendations by the Administrative Conference of the United States*, 74 GEO. L.J. 1625 (1986); Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1 (1982).

tionalize negotiation and mediation techniques in non-labor areas.

In various environmental, resource, and regulatory areas, there are characteristics that parallel the labor model: expectations of repetitive disputes, stable subject matter, similar parties, state-by-state effects of local politics. But there seem also to be some differences: effect of other political and regulatory jurisdictions, less defined boundaries of the disputes, special interest support or opposition, lack of cohesion of the parties, the relationship of the local governmental system to the parties or subject matter, and lack of understanding or acceptance of negotiation as a legitimate policy process. These differences appear to make the institutionalization of negotiation or mediation mechanisms in public policy areas, such as environmental concerns, more difficult than might at first seem probable.

In this discussion the optimism of those who seek to institutionalize negotiation and mediation in areas of recurring disputes will be examined. While many in the dispute resolution community believe that the complex issues encountered in the environmental arena can be better solved through negotiation than through regulatory and judicial procedures, creating and providing such mechanisms within an institutionalized framework, as opposed to the site-specific framework, is complex and difficult. Establishing such mechanisms poses challenges that require careful evaluation in each instance and suggests that institutionalized negotiations and mediation alternatives are not feasible in some circumstances.

Our research indicated that it is more difficult than anticipated to successfully institutionalize a dispute settlement mechanism which relies on negotiated settlements between conflicting interests. Essentially, three types of elements determine the possibilities for successful institutionalization of a dispute resolution mechanism. First, the political and institutional conditions surrounding the establishment of the system will be determinative. Second, design features are determinative of the mechanism's effectiveness in that they must relate well to the surrounding political and institutional conditions and to the types of problems the mechanism is intended to resolve. These surrounding conditions and the underlying problems can vary significantly among jurisdictions and disputes, even where the subject matter of the disputes is similar. The third set of factors relates to the way in which the system is actually administered, particularly in its early

stages. These three categories of elements permeate the development of ADR systems and are consequently addressed throughout the four case studies that follow.

The conclusions in this Article rely primarily on four detailed case studies of situations in which attempts were made to establish and operate—by statute, regulation, or similar means—a system that would employ negotiation and mediation techniques to resolve specific classes of disputes.[4] This Article examines the establishment and operation of two systems which were legally "on the books" and two systems which failed to make it to that stage.[5]

The overall conclusion is that the institutionalization of alternate dispute resolution mechanisms has certain inherent barriers, making it a less attractive way to encourage the use of mediation and negotiation than we originally would have predicted. It is probably more important and more fruitful (1) to find other means to make mediation more easily available and (2) to create a greater understanding and acceptance of negotiations and mediation processes in public policy arenas. Encouraging the use of alternative dispute resolution techniques also requires that people who run agencies, write statutes, and litigate on behalf of parties in government have a more sophisticated awareness of the

4. The full text of this research report and the accompanying case studies are included in J. BROCK & G. CORMICK, DEVELOPING SYSTEMS FOR THE SETTLEMENT OF RECURRING DISPUTES: FOUR CASE STUDIES, ANALYSIS, AND RECOMMENDATIONS (1984) (prepared for National Institute for Dispute Resolution) [hereinafter BROCK & CORMICK].

5. Two of the systems were involved with siting hazardous wastes, one with resource allocation, and the other with regulatory rate making. The two systems studied which were legislatively enacted were the hazardous waste siting mechanisms established by statute in Massachusetts and Wisconsin, respectively. Many of the difficulties with the Massachusetts process (the mechanism has to date not been used successfully) can be traced to the manner in which the system and statute were developed. Conversely, in Wisconsin, where the statute has been used in siting numerous solid waste facilities and expanding a handful of hazardous waste facilities, success can be traced in large measure to the processes and conditions surrounding its development.

The third system, which related to resource allocation, was as attempt to establish an ADR system to resolve fishery disputes in the Pacific Northwest. The mechanism was not established despite a federal law mandating its development. However, a subsequent effort, involving only a portion of the same fishery and conducted under more favorable conditions and with greater foresight, appears to have established a means of resolving the very same types of disputes.

In the fourth case, relating to utility rate making, individual negotiations proved successful in resolving several conflicts over rates and policy, but the system was never institutionalized because certain key ingredients for establishing such a system on a permanent basis were missing.

For a more complete discussion of these systems, see *infra* pp. 62-76.

appropriate application, availability, and features of successful dispute resolution alternatives.[6]

The reasons for this conclusion are several. First, most regulatory systems already permit negotiations at some stage of the process. Certainly, negotiated settlements are common in instances where litigation is pending or threatened. Therefore, a new regulation or statute may not be necessary in all instances. Second, establishment of a mediation service not connected to a particular subject area would be less likely to draw opposition and attention from indirect parties, which are typically a huge obstacle to successful institutionalization of a system and are usually concerned with specific subject matter. Availability of the service would not mandate or appear to mandate that anyone use the process, nor would it put aside existing processes, protocols, or expectations. Thus, the involvement of skeptical indirect parties would be minimized and the tendency to "overspecify" a system avoided. Third, in keeping with the principles of successful site-specific mediation, mechanisms tailored to the idiosyncrasies of each dispute could be applied by a mediation service but not through a statute. Fourth, the process would only be used where the direct parties to the dispute were interested in and agreeable to using it. Finally, rather than trying to anticipate and write down practices for all circumstances and time, the application of the mediation and negotiation techniques could evolve and improve with the growing experience in using it in any subject area.

It is hoped that one outcome of this Article is that naive attempts at application or development of institutionalized negotiation-type systems will be discouraged and that other means of encouraging constructive use of alternate dispute resolution sys-

6. While there may be circumstances under which dispute resolution systems can be institutionalized, those will be fewer than initially thought. Most attempts at and considerations of institutionalization centers around state-by-state, subject-by-subject establishment of a system for alternative dispute resolution. Extrapolating from the research, the subject-by-subject approach to establishing dispute resolution systems is susceptible to purposeful or unwitting sabotage by the indirect parties, i.e., those parties with legitimate legal or policy concerns but which are not the direct parties involved in the negotiation or mediation, attached to each subject area and their related due process concerns. Similarly, there is an apparent tendency to build into such systems rigidities or features to accommodate the desires of indirect parties that may make successful mediation or negotiation impossible in many particular circumstances under such systems. Rather, where these institutional difficulties are unlikely to be overcome, the availability of a mediation service or the ability of public officials to mediate on a state-wide or regional basis might encourage greater and more appropriate use of negotiated and mediated settlements than would ill-fated attempts at institutionalization of subject or policy-specific areas.

tems will be emphasized. In the long run, as greater awareness and understanding are developed through education and experience, it may become more attractive and possible to establish institutionalized systems while avoiding some of the self-defeating rigidities that such systems engender. Thus, we should not entirely discount the possibilities of institutionalizing alternative dispute resolution systems, rather, we should be more cautious.

II. INSTITUTIONALIZING MEDIATION AND NEGOTIATION

A. Four Examples and Their Lessons

The following case studies are examinations, experienced firsthand, of four attempts at establishing alternative dispute resolution procedures in three contexts: (1) allocation of rights or resources, (2) regulatory rate setting, and (3) siting. Also examined are mechanisms in these and other contexts through secondary sources or less systematic study. Looking across these examples, categories will be proposed that can be used in specific circumstances to (a) diagnose whether such a system has a chance of being established, (b) identify factors critical to the design and introduction of such a system, (c) describe operating characteristics that seem to help such systems work, and (d) draw some general conclusions about institutionalizing negotiated or mediated dispute resolution.

1. Resource Allocation

For decades, bitter conflict over fishing rights in the Northwest raged among state fish and game agencies, non-Indian fishermen, and nearly two dozen Northwest treaty tribes. After approximately ten years of court battles following the *Boldt*[7] decision, a federal advisory committee was appointed to devise an improved means of managing salmon and steelhead fishing in Idaho, Oregon and Washington. The Salmon and Steelhead Advisory Committee (SSAC) was established by a 1980 act of Congress[8] and included representatives of three tribes, a handful of federal agencies involved in Pacific Northwest fishing, state fish and game agencies from Washington and Oregon and a number

7. United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974); *aff'd* 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976). (The *Boldt* Decision).

8. The Salmon and Steelhead Conservation and Enhancement Act of 1980, 16 U.S.C. §§ 3301-3345 (1988).

of at-large, nonvoting members with interests in Northwest fishing matters.[9]

Fishery disputes in this arena fall into two basic areas. First are "technical" disputes where state fishery agencies would clash with tribes over such things as openings and closures of particular fisheries, clashes over policies set by the regulators such as hatchery location, and resource enhancement or interjurisdictional rivalries. Technical disputes typically affect the catch for a season and could affect the future of the resource. These are generally referred to as "emergency" disputes, requiring immediate adjudication. Second are "policy" disputes, while not ordinarily emergencies, nonetheless represent concerns of both sides and could affect the future viability of the resource.

More often than not, the parties found themselves before court-appointed advisors or the courts themselves to resolve the disputes, since few alternative channels existed for addressing their disagreements. The dispute resolution activities were not only expensive and embittering, but decisions were often rendered long after damage had been done to the resource or the parties. Violence was not unknown and the undercurrents of racism added an ugly tone to the fishery disputes.

The Salmon and Steelhead Conservation and Enhancement Act of 1980 charged the SSAC with developing a better dispute resolution system. The parties spend nearly two years trying to develop a dispute resolution system along with reforms in several other critical areas. However, while responsible leaders on both sides were interested in improving means of dispute resolution, the final report of this commission does little more than describe some goals and principles that might be embodied in a dispute resolution system. It says little about how to implement those goals.[10]

There are several reasons that the parties failed to institutionalize a dispute resolution system. First, the SSAC members were not able to reach consensus on a specific mechanism with which they were willing to live. Despite the congressional mandate to develop a coordinated management plan, the final report essentially maintained the existing institutional structure for fishery management. Thus, only some general principles gained agreement. Second, the tribes and agencies seemed to fear that

9. BROCK & CORMICK at tab 4 ("Salmon and Steelhead Case Study" by Nancy Cahill).

10. *Id.* Appendix C (excerpts from SSAC final report).

in establishing a new dispute resolution structure they might give up control or local authority, or full access to the courts. Third, although a loose coordinating structure was established to cause top officials to communicate, political inertia made it difficult for individual entities to yield any apparent authority, even in exchange for what would likely have been more actual control over the destiny of the fishery.[11]

a. Observations

Why did the SSAC's deliberations not yield an institutionalized dispute resolution mechanism?

First, the SSAC insufficiently represented some of the key groups that would be affected by an institutionalized mechanism that potentially would emerge. In particular, absence of key tribal leaders hurt the credibility, practicality, and acceptability of the effort. Overall, the effort lacked the clout of people whose views generally were respected on all sides and who had the capacity to forge a consensus.

As another drawback, there was not a sufficiently strong champion of the process who had the trust of all parties and who could build consensus and explore the differences between the parties. As in resolving complex site-specific disputes, a neutral usually has to help the parties find common ground. The chair of the SSAC served effectively as a presiding officer at the formal meetings, but could not have been expected to act effectively as a mediator behind the scenes actively seeking a consensus on a dispute resolution system or on other issues before them. He was not chosen or ratified by the parties as someone to lead them, leaving him at a considerable disadvantage and the process without sufficient leadership.

Moreover, most of the detail work and investigation of dis-

11. This resistance to change is somewhat surprising since Washington State reportedly has lost some 250 court cases over fisheries matters to the treaty tribes. The internal politics and history of the issue were stronger than the court record, and there was little perceived incentive on the state's part to change.

At the same time, though unhappy with their minimal direct role in the management of fisheries, the tribes did rather well in court. In fact, one of the most frequently cited criterion of all parties for any new fisheries dispute resolution system was to maintain access to the courts. At this time, there was simply not sufficient pressure on either side to compel the parties to look for a new dispute resolution system. In the words of Fisher and Ury, the tribe had an acceptable, if not attractive, BATNA (Best Alternative to a Negotiated Agreement) and so did the state. R. FISHER & W. URY, GETTING TO YES: NEGOTIATING WITHOUT GIVING IN 101 (1981).

pute resolution and of other issues was done by staff "task teams" drawn from several federal and state agencies with only intermittent tribal involvement. The task team, comprised of competent people with an interest in better dispute resolution, worked creatively and diligently and itself reached consensus. But the task teams were not spokespersons for the relevant parties, therefore were ineffective in developing a comprehensive ADR system upon which all the direct parties could agree.

The SSAC attempts at developing an institutionalized ADR mechanism illuminated the fact that dispute resolution through mediative mechanisms can be extremely complex and confusing. The SSAC was trying to join together fisheries management from these disparate state systems, each with its own bureaucratic, political, cultural, technological, historical, and jurisdictional characteristics. It was too much to expect that such diverse and independent entities would come together even on the important and narrowly defined issue of creating a dispute resolution system alone. Hence, the periodic formal briefings of key officials and leaders were hardly adequate. There was a need for principals, who accurately represent the key interests, to understand and shape the dispute resolution mechanism to fit the political and substantive circumstances they faced.[12] The geographic, legal and political boundaries of the problem were too complex to be drawn in one sitting by a committee, such as SSAC, with a large agenda, short time, and a rigid communications structure. As with site-specific disputes, the means of institutional dispute resolution must also be the product of the collective concerns of the principals representing the views of communities at interest.

b. Progress from failures

Despite the initial results, the SSAC process was not a wasted effort because parties who were previously on poor terms found that they could have constructive discussions on important issues. While substantive progress was not made, substantial education about dispute resolution possibilities took place, and some important ideas became part of the vocabulary of many of those involved and are found in the committee's final report.

After the winding down of the SSAC process, environmental impacts on the fisheries changed. *El Niño* (an unusually warm ocean current) caused a veritable disaster in the Northwest

12. J. BROCK, BARGAINING BEYOND IMPASSE 225-29 (1982).

salmon fishery, thus placing substantial external pressure on the tribes and Washington State to cooperate. Under this pressure, a well-respected, neutral party, who enjoyed preexisting creditability and access not just with the parties but with key members of the state and federal governments, was brought on the scene. As a consequence of the external pressures, a smaller Washington and Puget Sound-focused group requested assistance from this neutral in finding alternative means of resolving conflicts and developing better fisheries management policies. Interestingly, one condition of the resulting "Salmon Summit" was that only principals were to be invited.[13]

The Salmon Summit effort was confined to the thirteen Puget Sound treaty tribes and the Washington State Department of Fisheries. There were now more natural boundaries for determining the issues and actors to be included in the dispute resolution system. Since the Salmon Summit was attended by those who were prepared to seek agreement and since there was a greater alignment of natural interests and legal jurisdictions, there was a greater chance for successful development of a workable mechanism. This effort illustrates the importance of having on hand the proper grouping of parties, issues and related boundaries in trying to formalize a dispute resolution system.

To summarize, unlike the SSAC effort, in the later Puget Sound-Salmon Summit effort an external event transpired which generated pressure on the parties to risk change; a strong, acceptable neutral was available; key leaders on both sides actively joined in; and the frustration of the slow moving SSAC process created the conditions for some treaty tribes and the fishery agency in one state to form a more effective alternative to the destructive ways of the past. The clearest lesson may be that one cannot bring about agreement until the principals perceive it is in their constituents' self-interest to personally develop the system under which they will later live.

2. *Rate Setting*

After the Washington State Utilities commissioner took over her position, she suggested that the Washington Utilities and Transportation Commission (Commission) experiment with negotiations as a means of rate setting and rule making. Issues in the regulatory business used to be relatively black and white, but

13. This was unlike the SSAC effort whose failure was due in part to a lack of such principals' being present.

things had changed rapidly in energy and telecommunications. Existing processes and staff capacity that were adequate in the past no longer seemed to meet the Commission's needs. First, the Commission's staff capacity and practices reflected a world where each utility filed for rate increases only once every couple of years. Now, utilities were filing frequently as a result of energy price fluctuations, increased construction costs, and the changes looming in the telephone system due to deregulation. Second, the traditional contested case hearings were not entirely satisfactory forums for exploring complex issues of public policy in rapidly changing regulatory industries.[14]

Recognizing the need for better information, policy making and staff allocation, the Commission authorized an experiment: A rate case would be handled on an experimental basis by "principled" negotiation. Significantly, the Commission did *not* establish an institutionalized policy of negotiated rate setting. Rather, it authorized an experimental negotiation to be carried out within the existing regulatory structure.

Initially, the various parties to the negotiation were selected. These parties included the three member Commission that acted as an arbitrator and the Commission staff (staff) which represented the Commission's views and expectations. Additionally, a company was selected that was small, with a good service reputation, and one whose president was a leader in the independent phone company community. As an expert in telecommunications policy, technology, and law, a neutral facilitator with significant credibility within the regulatory agency and the selected company was hand picked.

Moreover, consumer groups and key elected officials in the service territory were alerted that negotiations were about to begin. A number of state legislators and staff members with an interest in telecommunications were also alerted, although this phase of the effort was less extensive.

The negotiations started without a lot of preparation. Although a large part of the time was spent establishing and getting used to using the process, the negotiations led to an agreement within six months, about half the usual time for a contested case.

The resulting rate increase was generally considered less than might have been expected had the case been handled in the

14. BROCK & CORMICK at tab 6 ("Using Negotiation and Mediation as an Adjunct to Utility Regulation and Rate Setting" by Jonathan Brock).

usual format; consumers had substantial input into the process and the commissioners didn't have to spend the usual days on end in hearings. The negotiated settlement was presented as a normal filing by the company and staff to the Commission. The company's filing was extensive, including a summary of the negotiations process.[15] The staff's filing primarily consisted of an assent to the company's tariff filing, a common procedure in cases where there is no argument between staff and company.[16]

Consumers were involved in two informal hearings held in the service territory. There, the quality and interactive nature of the informal discussions among consumers, commissioners, company, and commission staff seemed to surprise everyone. The feeling was virtually unanimous that those hearings, with their lack of constraining quasi-judicial protocols, were more useful for information-gathering than the usual formal contested case hearings.

As a negotiated rate case, the Commission was satisfied with the experiment's results: its ability to permit a company to become accustomed to the Commission's requirements, the potential for resource saving in rate making, the improvement in the quality of consumer input, the lack of acrimony, and the constructive nature of Commission-level involvement. Hence, the commissioners invited leaders in the telecommunications community, the commission staff, and consumer interests to try to develop a standard ADR process for selecting cases for negotiation in which the rights and responsibilities of each party would be defined and protected. That effort, however, was effectively stopped due to outcries and opposition from several influential external quarters including legislative staff, several members of the legislature, and consumer groups.

The resistance centered on claims by some *ad hoc* consumer groups and due process advocates that there was, or would be, insufficient consumer involvement or protection. Some of the

15. *Id.*

16. During the formal public rate hearing before the Commission, only the public counsel raised a serious objection. The public counsel is an independent counsel appointed by the attorney general in each rate case to represent the "public," and who was not appointed until after the negotiators reached agreement. His objection was to one of the details of the settlement. If the counsel's objection had been considered during negotiations, a valuable contribution to the settlement might have been made and the issue probably resolved in another way. Interestingly, the Commission sought to have public counsel as a party to the negotiations, but resistance to this experiment at mid-levels in the state's Attorney General's office precluded appointment.

complaints parallel concerns expressed by some Commission staff. Public counsel raised concerns relating to its ability to become involved on behalf of the public in a timely and constructive way. It was strongly rumored that the Commission staff, which was opposed to the ADR procedure, encouraged opposition in the legislative branch.

Thus, the effort to establish an ADR system to handle rate cases lies stillborn. Why did the experiment work and the attempt to establish a system fail?

a. Observations

The organizational and legal structure of the Commission and staff contributed to the success of the experiment. In rate cases, the three-member Commission sat much like an arbitrator to whom the company and the staff presented their respective cases as relatively equal bargainers. Were the Commission and the staff linked more closely organizationally, the staff would have been in an unmanageably powerful position as a negotiator.

Naming a neutral to fit the circumstances of a specific dispute was of central importance and was a key to the experiment's success. The credibility and acceptance of the neutral in this case was crucial to successful conclusion of negotiations. A poor choice would not only have harmed the case but also the credibility of the process itself.

However, there were several problems with the experiment that prevented its being the precursor to an institutionalized ADR system. For example, the quick start-up precluded a sufficient degree of education of those who might be unfamiliar with the process of regulatory negotiation and provided insufficient opportunity to address the concerns that might prevail among them. These parties included important indirect parties who, because of their not being properly informed, were forced to agree or acquiesce to the results without any interaction with the direct parties. As a result, those who favored the traditional contested case hearings were able to convince legislative staff and officials, who were equally uninformed, that the negotiation process was exclusionary and therefore not in the best interest of the legislators' constituency.[17] Provision of better information to these indirect parties might have averted some of the pressure to stop the development of the system. The pity of it is that the objective

17. In addition, judging from the negative reaction of a few key legislators, there was an insufficient degree of communication with the political community.

indicators of the negotiation were overwhelmingly positive, but perceptions of several key indirect parties were not.

The lack of public counsel (the representative appointed to represent "the public" at regulatory proceedings) involvement left the negotiations open to charges of insufficient consumer involvement, which would likely evoke strong political backlash by legislators who represent angry consumers. Representation of the public must be addressed in many regulatory settings, therefore, if negotiated dispute resolution is to obtain the consensus necessary for its success and institutionalization, the system must include all relevant parties to a conflict, including the public, thus avoiding the political trap experienced here.

Effective negotiations depend upon the willingness of all directly relevant parties to participate. In this case, the staff was an integral party because it represented the Commission's interests. Some staff members thought they would lose too much power to the company and others thought they would have too much power. Both camps were, therefore, uncomfortable with the negotiation process and unwilling to develop the successes of the experiment into a mechanism for resolving other disputes.

Working with both staff and companies to develop a satisfactory negotiations process is crucial to the success of such an endeavor. Here again, informal preparation time and development of negotiation protocols were important, because the political rhetoric and key indirect parties favored quasi-judicial proceedings and because the direct parties were accustomed to dealing with formal procedures.

It is significant that this negotiation procedure operated within the existing regulatory and administrative framework, as a complement to, not substitute for, existing procedures. The parties adhered to established regulatory and administrative practices and retained the freedom to use alternative tools to resolve issues so long as they did not violate existing legal and regulatory practices.[18]

Although not exploited well in this case, the use of an experiment, rather than a wholesale policy change, was a feature that

18. The company's financial records are an example of the inappropriate use of informal proceedings. These records were not in a format familiar to the regulatory agency. Thus, a lot of useful and informal effort was expended to develop a data set that conformed to the current practices of the Commission. Future examination of this company's books would now be simpler, without the mutual suspicion that might have developed had the more formal and less informative process been used.

positively set this effort apart from many other attempts to adapt negotiations to recurring dispute resolution. Experimental negotiations can help address and allay staff, public, consumer, and political concerns if used as a showcase and learning tool. Failure to institutionalize the process suggests the need to educate, inform, and involve, if necessary, parties other than the negotiating parties. The need for gaining such broad acceptance to the process is ordinarily not a factor in site-specific negotiations. But when permanently altering an established practice, those who see themselves as keepers of the process may (legitimately) feel the need to be involved.

3. Siting

The two case studies compared in this section concerned the formation in Wisconsin and Massachusetts of mechanisms designed to handle recurring disputes over hazardous waste siting.[19] Both states have statutes which set forth guidelines to be used by direct parties in negotiating a siting mechanism. Generally, both siting mechanisms were based largely on the use of negotiation between citizen groups and developers but have shown markedly different results. In Wisconsin, sixteen negotiations were begun with several successfully concluded. In Massachusetts, no serious negotiation has gotten underway, and the current state administration has all but abandoned the effort to site facilities under its statute.

Although both are plagued by some similar problems, there are clear differences in outcome and approach. The relative performance of the two mechanisms appears to be traceable to key aspects of the development and the design of the mechanism, and to less identifiable aspects of political traditions in the two states. It is important also to point out that the Wisconsin statute had been used (as of the writing of this paper) exclusively to site non-hazardous (but nevertheless controversial) waste facilities. While at first glance this distinction would seem to negate comparison, the analysis suggests that it may be a telling difference in the success of siting.

Both statutes created siting boards to oversee the negotiations process, but the Massachusetts board, because of its compo-

19. BROCK & CORMICK at tab 7 ("Siting Hazardous Waste Facilities in Massachusetts" by Robert Been, Jonathan Brock & Gerald Cormick); *Id.* ("Siting Hazardous and Solid Waste Facilities in Wisconsin" by Robert Been, Jonathan Brock & Gerald Cormick).

sition and less refined process, became embroiled in ponderous and often raucous proceedings, used by opponents to prevent useful discussions over specific sitings.[20] The design of the Wisconsin statute kept the siting board out of technical decisions. Thus, negotiations have proceeded successfully in Wisconsin but not so in Massachusetts.[21] It is these siting boards that are the key to the success of the siting mechanism, i.e., negotiations between direct parties.

The major differences, which account for the disparate results within the two states, come from three areas. First, the legislative committee processes used in both states to develop the statutes were different in their operation and character, leading to a more acceptable statute in Wisconsin. Second, partly as a result of this development process, the Wisconsin statute more appropriately channeled technical and political activity into separate arenas where they could be handled effectively. Third, the Wisconsin mechanism created clearer incentives to bargain in good faith.

a. Observations

Why have the two attempts, both based on the use of negotiations, had such different outcomes?

First, the development of the mechanism: While they both appointed legislatively sponsored committees, with industrial and citizen groups represented to develop the statutes, there were some important differences in the respective characteristics of the committees.

In Wisconsin, the chair was a strong, well-respected "environmental" legislator, with a proven ability to forge consensus. She enjoyed the trust of industry and environmental groups, so much so in the latter case that the local environmental groups gave her their proxy. Interestingly, some of the beneficial relationships and reputation held by the chair had developed out of previous, failed attempts to develop siting legislation. In Massachusetts the key environmental legislator was not the chair, and the committee's activities do not reflect the supervision of a strong chair.

In contrast to the Wisconsin group, the Massachusetts com-

20. Massachusetts Hazardous Waste Facility Siting Act, MASS. GEN. LAWS ANN. ch. 21D, §§ 1-19 (West 1981 & Supp. 1990).

21. For summary of this statute, see BROCK & CORMICK at tab 8 (exhibit A(2)).

mittee was not selected to include parties with pre-existing relationships that would facilitate problem solving under a short deadline. Nor did the parties possess the clear capacity to represent the views of the group from which they were drawn and to make commitments on their behalf.[22] The pre-existing relationships on the Wisconsin committee dated back to a previous attempt to develop a siting law. Thus, there appears to have been a greater shared perception of the facilities siting problem, and Wisconsin quickly eliminated the preliminary problem of identification and spent more time exploring and refining options. Massachusetts spent more time identifying the problems and issues. Although both states identified the same basic difficulties, Wisconsin developed the more refined and practical mechanism, partially reflecting a more advanced stage of understanding the problem within the anointed group.

Another advantage of the pre-existing relationships was that the Wisconsin committee was able to operate more informally and flexibly, permitting it to add or drop issues and to add members as it became necessary. The ability to explore the problem and alter the course of discussion was crucial to developing the siting mechanism.

As a practical matter in Wisconsin, experienced principals dominated the discussion and development of ideas. In Massachusetts, staff and outside experts were more involved in the development process. This, coupled with other prior experience, indicates that the dominance of people other than principals may result in less practical and acceptable mechanisms than those systems developed by those who must use them.

The more effective developmental nature of the process in Wisconsin seems to have resulted in a mechanism (negotiations led by strong, committed individuals who were accustomed to each other) that would better address the key problems in siting. Both states realized that the greatest difficulty in siting facilities would be local opposition over technical issues, i.e., safety and other concerns related to social and economic impact. Thus, the issue became one of ensuring that localities had sufficient control over safety and the socio-economic impact of siting, but not the ability to simply zone out or otherwise prevent a facility from being sited, unless the facility was, in fact, technically dangerous to the public's health, safety and welfare. In the Wisconsin process,

22. However, both committees suffered later opposition by not having key political leaders from the municipal community as members.

the technical and the socio-economic issues are more clearly delineated, while the Massachusetts group became critically entangled in a manner that precluded serious progress in policy discussions over siting.

Through design features of its statute, Wisconsin provided strong incentives for local parties to negotiate with developers, thus facilitating the development of a negotiated dispute resolution system. Part of the incentives lies in the fact that discussion over the "need" for a facility is restricted. A municipality is empowered to negotiate with a developer only over the socio-economic impact of the facility, i.e., seeking appropriate mitigation and compensation. Simultaneously, the Department of Natural Resources performs separate studies and holds public hearings to develop a feasibility report, which determines the technical competence of the proposed siting and the developer. The technical process, which has significant public input, can prevent a siting whereas a municipality cannot. Because the statute does not permit a municipality to prohibit the siting of a facility, a municipality is encouraged by the statute to negotiate with developers to ensure that the site, if it is accepted by the Department of Natural Resources, is safe and economically advantageous.[23]

While these technical and socio-economic processes are essentially separate, thereby keeping politics out of the technical arena to a substantial degree, there is opportunity for constructive crossover. However, in Massachusetts an intended "quick" technical decision made at the outset of each proposal by the essentially political and representational Site Safety Council mixed the technical and political. This blending of technical decisions with politics has become the focus of the opposition to every proposed site. Since negotiations need not begin until that hurdle is passed, they have not begun at all.

As a political body, the Massachusetts board had neither the technical capacity nor the protection from community pressure to resist local opposition. The thoughtful negotiation incentives and the separation of technical and socio-economic decisions have helped make for better results of the Wisconsin statutes. Wisconsin's development of the dispute resolution mechanism

23. As an additional incentive in Wisconsin, the deadlines and default provisions of the law encourage negotiations to begin while the feasibility report is being developed. Otherwise a community could end up with an unwanted, "unmitigated" facility.

and statutory design better reflect political, economic and technical realities of the situation.

There are problems faced by both states. First, should either state come to the point of having a serious negotiation about a hazardous waste facility (Wisconsin has only negotiated about non-hazardous waste facilities), the composition and operations of both state's boards may weaken each mechanism's ability to assist. Neither board expressed the intention to provide mediative assistance to parties in negotiation. The need to assist inexperienced parties in a controversial negotiation is necessary in siting hazardous waste facilities. The lack of mediative capacity in mechanisms based on negotiations is more than a bit surprising.

A second problem is a need for strong leadership and continuity in order to maintain the integrity of an institutionalized dispute resolution mechanism. For example, although the success of the Wisconsin mechanism is attributed to the effective leadership of those parties involved in the negotiations, the Wisconsin statute has been challenged in ways that more leadership by the Board might have blunted. Also, it would be helpful in implementing complex dispute resolution processes to maintain some continuity during the shakedown period between the group that created the mechanism and the operating body.

It is difficult to assess the practical success of the Wisconsin efforts because the Wisconsin statute left its Board out of the early technical decisions, therefore, it has not yet been tested in a case. Moreover, neither board has exerted leadership in the community at large, with key constituent groups, or with the legislature during several attempts in each state to undo or amend their respective statutes. Left to the various interests with no attempt to maintain a consensus that developed the initial statute, the integrated mechanism created by knowledgeable and reasonably representative parties in Wisconsin could weaken.[24]

24. The fact that developers of the Wisconsin statute were able to include solid waste siting in this process may have helped establish the credibility of the mechanism. By going through a number of solid waste sitings and getting attorneys, environmental, municipal and bureaucratic groups used to the process, the process may withstand the additional buffeting that would likely accompany a hazardous waste siting. Just as the siting board was fortunate that the first proposals were not hazardous facilities, they will probably do best by choosing a less controversial facility and developer in the first hazardous cases. Massachusetts was not so lucky: The first proposal for a hazardous waste site came from a developer whose record in other states was less than convincing. Many argue that this poor first case spelled the demise of the Massachusetts mechanism. While important, we believe the problem is broader. The initial handling of non-hazardous facilities siting in Wisconsin, however, may have provided a way

Despite the similarity of the issue or the parallels in the two states' approaches to the problem, a comparison is not exactly a controlled experiment. The political traditions, relationships between state and local governments, and the reputations and credibility of regulatory agencies in each state differ. Any number of these factors could account for the different experiences with the waste siting as much as the factors that this analysis identifies.

III. LOOKING ACROSS THE CASES: WHAT CAN BE LEARNED?

While there has been a decade of successful and significant experience using negotiation and mediation to resolve "site-specific" disputes in various public policy areas,[25] it has been far more complex, and consequently less successful, to institutionalize (i.e., make use of such techniques available through established institutions and rules) the use of such techniques. The dynamics and process of institutionalizing a dispute resolution mechanism are similar to those necessary to resolve an individual site-specific dispute: To be viable, a negotiation/mediation mechanism requires the agreement of those who will use it and the specific techniques used must fit the situation and parties in each individual dispute. However, institutionalization, as opposed to site-specific dispute resolution, requires a larger number of preconditions in order to establish the ADR system so as to cover all the possible disputes arising under the statute or regulation that implemented the system. Consequently, that larger number of pre-conditions often restricts the flexibility necessary to resolve individual disputes, thus rendering the institutionalized system nonviable.

As was previously discussed in the case studies, one of the most important difficulties in establishing a useful institutional ADR system is that institutionalization of the system requires not only the agreement of directly affected parties such as bona fide representatives of constituencies and parties who will use the mechanism (direct parties), as does the resolution of a site-specific dispute, but also the agreement or at least the acquiescence

to work the bugs out of the system. This lends strength to the hypothesis that starting new dispute resolution slowly, selecting the early cases well, building up systems, activities, and scope step-by-step, enlisting strong and perceptive leadership with a well-designed and flexible mechanism can help the system adjust and survive in the early going.

25. For a cataloguing of many of these site-specific examples, see G. BINGHAM, RESOLVING ENVIRONMENTAL DISPUTES: A DECADE OF EXPERIENCE (1986).

of a group of parties referred to as "indirect parties." These indirect parties include key legislators, attorneys general, and others who will assert their legitimate, if not statutory, interest in due process issues or other subjects which fall under their charter.

Separate professional values or practices, as well as electoral and bureaucratic politics, will enter into the decisions of the indirect parties in ways that may, in the extreme, be entirely divorced from the purposes of the dispute resolution mechanism. Thus, it may be most difficult to gain their agreement without imposing conditions that threaten the viability of the mechanism or the agreement of the direct parties. For a variety of reasons that this Article identifies, it also is difficult to identify or obtain agreement even from legitimate representatives of potential direct parties. A greater number or range of direct parties would be affected by or concerned with an institutionalized mechanism than would be with a site-specific process. A site-specific process affects certain individuals and groups in the relevant community of interest who can be identified. In the institutionalized situation, is it realistic to be able to identify them ahead of time?

In addition to these reasons, there is a level of underlying suspicion and even opposition to alternative processes in political and quasi-judicial structures where such alternative systems would be institutionalized. Thus, to mitigate the suspicion, the process of institutionalization tends to result in language and practices more rigid than would be desirable or necessary for later use in particular individual disputes.

The above analyzed examples of attempts to use negotiations to handle recurring disputes seem to have a number of common themes and lessons. Not surprisingly, many of these are parallel to the principles commonly applied to the negotiability of site-specific disputes. Much like the stages in resolving a complex site-specific dispute, the parties must agree to and participate in the process of alternative dispute resolution. They develop ground rules, then they seek agreement on issues. When seeking to institutionalize a mechanism, the structure of the system is the issue in dispute. The major advantage of a negotiations process is its ability to adapt to the circumstances of the issue and the parties.

However, in the larger world of institutionalized dispute resolution, bringing those conditions together to establish a mechanism seems generally to be more difficult. First, an institutionalized mechanism will require agreement on the param-

eters for its use by a broader array of interests than would a site-specific mechanism. Second, the structure of an institutionalized mechanism must hold up and retain support for a much longer period of time than must a site-specific negotiations forum. Third, the dangers of overly standardized processes and bureaucratization lurk in the formations of institutionalized dispute resolution systems and threaten to limit the flexibility and workability of site-specific negotiations under the statute or system. The risk of institutionalizing a negotiations process is that it may have to be defined in language and form akin to the more rigid procedures it was intended to replace. Such specification negates the very strength of ADR, namely flexibility to adapt the procedures to fit the problem.

Can alternative systems to resolve recurring disputes be developed and operated successfully? Sometimes. Drawing on the lessons from the cases described, we shall summarize considerations for establishing an institutionalized system for recurring disputes, for designing and structuring a system that is likely to work, and for key operating characteristics.[26]

A. Establishing a System for Recurring Disputes

First, the more public, political, or controversial the problem, the more difficult it will be to establish the system. In "hot" topic areas like hazardous waste siting during the years after Love Canal or telephone rates in the wake of the AT&T divestiture, new approaches to problem solving are likely to be subject to simplistic rhetoric and slogans. Apparently processes like mediation or negotiation will seem to many to be less open and flexible than the familiar administrative and adjudicatory processes. Yet, to become usefully institutionalized, the relevant political system and actors must be prepared to consider these alternative mechanisms. Otherwise, institutionalization will be blocked, made rigid, or undone *de jure* or *de facto* by its opponents.

Second, there must be sufficient dissatisfaction with the *status quo* to force otherwise disparate interests together to form a new mechanism and to sustain that coalition during early stages of a system's operation. The "Salmon Summit" succeeded after the SSAC failed, and Wisconsin had more success with its siting stat-

26. For a further discussion of characteristics affecting the success of an alternative dispute resolution system, see J. BROCK, BARGAINING BEYOND IMPASSE at 217 (1982).

ute than Massachusetts owing to the shared sense of dissatisfaction with the *status quo* among key principals.

Third, there must be a confluence of interests among the parties with substantive interests at stake and any other actors or institutions who must act or acquiesce in the establishment of a new mechanism; for example, legislators, executive branch leaders, and community activists. The attempt at institutionalization in telecommunications, for example, lacked this confluence.

Fourth, the institutionalized mechanism must be developed by individuals who represent the parties which will have to live with the mechanism that emerges. Also, there must be sufficient cohesion within parties so that their representatives can bind the party to the mechanism that is developed. It is imperative that the representatives come prepared to successfully conclude negotiations, not merely to appear as a token representative of a disunified party. The SSAC and, to some extent, Massachusetts failed on these grounds. Development of the mechanism by the leaders or representatives of key parties not only helps lead to its acceptance through the early period of operation and during later controversy, it is more likely to lead to a practical mechanism because these are the people who must use the system. Wisconsin's siting process met this test in its development and early operation.

Fifth, development of these mechanisms takes time. Not only are the design issues complicated, but the necessity to build consensus and handle the concerns of the user groups is also complex. In addition, many key parties outside of the dispute resolution system have concerns that must be addressed. State or local elected officials are a prime example, along with public intervenors, the local department of justice, and others whose interests lie in protection of rights. There must be sufficient time to educate and to hear the concerns of those who will have good reason to be suspicious about the workings of alternative dispute resolution processes. Part of the difficulty in institutionalizing the utilities negotiation process stems from these requirements. The SSAC and telecommunications examples each contain an element of seeking to move too fast and avoid the necessary groundwork in the face of the existing political and institutional environment.

Sixth, in the development process, there will generally be a need for a strong neutral or other champion, one who has access to the key parties and has clout with the political system. The development of the Wisconsin law provides a good example as

does the subsequent action in the fisheries arena under the leadership of the new neutral.

Seventh, the forum for developing the system should be flexible, making it possible to openly negotiate over a wide range of options and to behave in a collaborative way. Here again, Wisconsin provides a good example. The SSAC forum, on the other hand, was rigid, making progress and creativity difficult. To a lesser extent, the Massachusetts legislative forum lacked flexibility in this regard.

Eighth, the forum for development should be dominated by principals, not staff or outside experts. Useful ideas and analysis may come from staff and experts, but the mechanism must be a product of agreement among those who must use, support, and sell it. On the other hand, an institutional staff group that will be a party to negotiations should logically play a role in the development process, as did the Department of Natural Resources in Wisconsin. The process that led to Wisconsin's siting law and the Salmon Summit are examples of good balance of staff and principal input. The failure of the SSAC and the Massachusetts siting law reflect an inappropriate balance.

Ninth, the geographic and legal boundaries that relate to the issues must be considered carefully. If the boundaries between, say, institutions, laws, and critical issues are not congruent, it may be difficult to reach agreement, as the SSAC found in trying to deal with salmon fishing disputes across non-congruent state lines, fishing regions, tribal areas, and regulatory boundaries. As the later efforts in Washington State suggest, simplifying the boundaries of a complex problem may make it easier to develop a system.

Tenth, the efforts of the key persons must be focused substantially on developing and using the dispute resolution system. It is ordinarily too complicated an undertaking to permit the attention of key leaders to be spread too thinly, as was the case under the SSAC. Similarly, as the Massachusetts process suggests, during the early stages the key parties must focus their energy in using the new negotiations forum, rather than on challenges to it. Also, as in Wisconsin, local negotiations may stop while parties await the outcome of challenges to the overall system. Without the agreement of those who have something at stake, energy and resources may be directed against the mechanism, making if difficult to survive a shakedown period.

Eleventh, it is useful to think in terms of pilot projects, in

building a system for recurring disputes so that bugs can be worked out, confusion minimized, and positive experience built upon. The use of pilot efforts can serve to build consensus. A step-by-step or building block approach appears prudent and safest. Wisconsin used this approach by including non-hazardous waste facilities in its statute, and the Washington Utilities and Transportation Commission did so by trying out several negotiations before proposing a system.

Twelfth, any system should be developed to fit the issues at hand. Therefore, simply borrowing mechanisms that have been tried elsewhere may not be successful. An important success ingredient is that the key parties agree on developing a mechanism to fit the circumstances within which they live. This necessity may make success especially difficult, given the variety of disputes such mechanisms might be expected to handle. That the mechanism be acceptable to those who will use it suggests the need for unique development in each circumstance as well as flexibility in application in individual cases.

Finally, it is important to remember that failed efforts often contribute to future successes in developing a new process. The failure of an effort can contribute also to the sense of crisis that may be necessary to bring parties together. The genesis of Wisconsin's siting law and the success of the Salmon Summit suggests this principle.

B. Structural and Design Issues

First, some agencies may be unable to support a negotiation mechanism because of the relationship of the policy decision maker to the parties who will be negotiating. Unless the parties can be set up to be equivalent bargainers, negotiations are unlikely to be fruitful. In the rule making example and in the utility rate negotiations, the regulatory agency was able, under existing authority, to permit parties to bargain essentially as equals. In none of these cases was the public agency the ultimate authority at the table, thereby allowing the adversaries to seek an acceptable accommodation for presentation to the agency. The agency provided the parties with latitude to work out an acceptable settlement by helping to define the parameters within which accommodation could fall, but retained its jurisdiction and authority to make a decision in the public interest.

Second, where an existing agency has responsibility for policy and regulatory decisions, it will have to carefully graft negotia-

tions onto existing regulatory requirements. There is likely to be too much opposition to removing existing systems to permit negotiation systems to be established otherwise. Further, negotiations are not likely to be appropriate in all circumstances and may not be able to handle all issues. Alternative mechanisms are "a compliment not a substitute" as Sandy Jaffe of Rutgers University has said. Wisconsin, for example, establishes a formal, rigid system for deciding the technical issues.

Third, to encourage individual disputes agreements that are consistent with agency policy, yet give the parties sufficient room to negotiate seriously, the sponsoring agency must provide policy guidance or principles to the negotiators on a case-by-case basis. Such guidance before negotiations will be important to keep agreements from arising among the parties that are anathema to the agency's perception of the public interest. A protocol which permits the neutral to communicate between the "adjudicator" and the parties appears to have been a beneficial means to avoid surprises that could dampen enthusiasm for the dispute resolution process.

Fourth, an existing agency's role in the process must be clearly defined. For example, in Wisconsin, the Department of Natural Resources was given an explicitly technical role. In the rule making case and in the rate case, the agency sponsored negotiations but retained power to make the regulatory decision.

Fifth, there must be a means to oversee the negotiations process, select appropriate cases, identify and invite necessary parties, and select neutrals. It is not clear how the agencies involved would be able to perform these functions on a regular basis, except in the results of the Salmon Summit.

Sixth, where a separate board must be established to oversee the negotiations, attention must be paid to the composition. It must be of a workable size with membership drawn from those who can make it work in accordance with its objectives. Probably, it would have members who reflect the views of those who will use it and be leaders in respective communities of interest, so the mechanism can more easily adjust to changes in the environment. Similarly, such individuals are more likely to be able to generate support or tolerance for the system during controversial periods. It is also of some importance for these members and/or the chair to have access to and influence in the local political system. Preferably, this board will be comprised of individuals instrumental to

the establishment of the mechanism in order to ensure proper interpretation and application of the system.

Seventh, credible neutrals must be available to fit the negotiating circumstances that will arise. Therefore, these neutrals must have access to the oversight agency during the course of the case.

Eighth, it is important to maintain the flexibility of the institutionalized system to respond to issues in each dispute with tools (and neutrals) that fit those problems and to have the flexibility to alter its general practices as experience suggests. The challenge in design will be to assure that rights of identifiable parties and the public are safeguarded, and at the same time flexibility in selecting dispute settlement tools and forums is maintained.

Ninth, the system must be structured so that there are clear incentives and opportunities to negotiate in good faith. Wisconsin provides an example of such design. The regulations governing the process and the relationship to the overseeing regulatory body will be important in this respect. The designers and policy makers must be made aware of the incentive effects their decisions and policies have on parties to the negotiations process. "Making it safe to negotiate" depends in part on the quality of neutrals, giving the parties latitude to work out a settlement that will be adopted, avoiding surprises to either party, and adapting the process to fit the real issues at stake.

C. Some Key Aspects of Operating

First, by its decisions, neutrality, effectiveness and behavior of its keepers, the system must maintain its credibility and support among the key parties who use it and those who oversee it.

Second, where a board, commission, or steering committee is part of the mechanism, credibility can be enhanced by appointment of a distinguished board (or where there is an existing adjudicatory agency, a credible neutral for each case) with standing in the relevant communities of interest and especially by appointment of a strong chair.

Third, careful selection of the early cases can build a record of success and provide an easier educational experience for those who will use or manage the process.

Fourth, most successful mechanisms seem to have an active neutral staff available to work with the parties. This staff assistance takes the form of mediation or technical assistance. The ap-

pointed members of the neutral body or regulatory agency usually will not be able to spend time in the trenches working with the disputing parties. Thus, a competent, neutral staff is likely to be important in helping parties to resolve problems. The specific staffing arrangements will depend upon the needs of the situation. Most of the more successful mechanisms had some way of helping inexperienced parties to negotiate.

Fifth, the body that oversees the mechanism must have a means to resolve its internal differences. A fractious overseer may have difficulty running a system intended to help disputing parties come to agreement.

IV. CONCLUSION

A. Caveats

The design complexity, political controversy, and intersection with existing regulatory and administrative practices makes institutionalizing alternative dispute resolution mechanisms more difficult than using ADR to resolve individual site-specific disputes. Some of this difficulty may stem from the fact that less is known about large scale, institutionalized systems. However, it is clear that there will be indirect actors and institutions who must agree to an institutionalized process who would not be involved in setting up site-specific processes in the same policy area. Many of these indirect parties will not have any stake in the outcome of any of the disputes handled under the mechanism. Rather, their interest will be in considerations like due process or unrelated policy or political reasons. If establishing the mechanism requires rule making or approval by a body whose area of concern is much wider than the issues in the individual disputes in the proposed system, their priorities may be quite different from those of the parties who will be involved in the subject disputes, thus defeating the attempted institutionalization.

Second, the bureaucratic and political interests of such actors will probably tend towards over-specifying the process in the interest of equity, due process, and legal niceties. Such rigidity will make it difficult to discriminate among cases for likely success in negotiated processes. Moreover, it will be difficult to ensure that the appropriate parties are there, that each site-specific negotiation under the system is shaped to fit the problems and the parties, that the confidentiality of negotiations is preserved so as to promote candor, that mutual exploration is encouraged, and that

changes are permitted in dispute resolution practices as experience accumulates. The mechanism must be useful to a much wider variety of interests than for even the most byzantine site-specific dispute. Additionally, broad support for the overall process must be maintained over a longer period of time than most site-specific processes require. The more diverse the interests of the direct and indirect parties, the more difficult it will be to create a flexible negotiation system that will be long-lasting and applicable to a variety of issues.

With these structural problems and the long list of success ingredients specified in the three categories above, what is the prognosis for development of mechanisms for recurring disputes? From this research, which started with a hefty degree of optimism, it does not appear hopeful, at least until the use of mediation is more widely understood and accepted. Each of the mechanisms here examined had a degree of failure. None of those which sought to institutionalize themselves is clearly established. One failed after the law was passed to establish it. Another was unable to institutionalize because of political and interest group opposition, despite very successful experimental negotiations. The only one with a modicum of success has faced serious threats to its existence in two legislative sessions and has yet to take on a dispute in the area of its primary purpose for existence.

Such attempts at ADR may continue by looking for areas that have the necessary conditions and by designing the systems with all of the proper incentives and safeguards to negotiation. That will require expanding and specifically identifying key development and design principles. It may be necessary to seek alternative models for gaining the use of ADR to resolve recurring disputes. Where should we look? All of the difficulties discussed here pertain to systems within the confines of a particular policy or issue area. It is in trying to create flexible mechanisms within existing rigid systems that the benefit of negotiation processes risks opposition and dilution. Hence the very idea of pursuing ADR in a particular policy area faces the risk of opposition and dilution by indirect parties.

B. Hopes

Is there a framework that will permit negotiations over individual cases in a policy area to take place in a way that properly fits the parties and problems in each? The use of mediation in

recurring disputes might successfully be structured in a manner that avoids connections to specific policy or subject areas, which have specific interest groups and the existing political and regulatory "dogma" attached to them. Rather, if mediation were easily available, but answerable to some less specific or restrictive set of interests, perhaps the unprescribed strengths of site-specific mediation could be preserved, yet made available to policy or regulatory areas which have recurring disputes.

Would a broad-scale, generic mechanism work? This analysis suggests such an option be examined carefully. If set up as an agency of government and subject to the establishment and design problems described above, it would likely be no more successful than a system based on a particular policy or subject. A generic system would either not be able to neutralize opposition or it might be too inflexible to meet the conditions of successful negotiations and the needs of the parties in individual circumstances.

A less rigid form of locally available mediation might have some promise. If offered at a state or regional level, an independent mediation service might provide services to as wide a variety of programs as the agencies and parties permit. The usefulness and acceptability of the process would be essentially on a site-specific, voluntary basis. Further, such a centralized but not overly-specified mediation service would not require overt political approval by interests in subject areas unrelated to the substance of any site-specific problem that came before it. With any luck, such a generic service might not attract the same concentrated negative attention that a single interest group might focus on a subject-specific mechanism that sought to become institutionalized.

With a broad charter and perhaps a distinguished and savvy board enabling the existence of mediation, well-selected mediators could offer services to parties or sponsoring agencies on a case-by-case basis. Where the mediation service develops an ongoing practice with a particular agency or set of problems, learning and start-up time in individual cases would be minimized, yet the parties in each given case would be free to establish their own process within the policy bounds of the agency. In addition, the mediators could refuse to take a case if it did not appear negotiable, thus avoiding delay and agitation.

Without agency-specific political and bureaucratic constraints on negotiations, tools to fit the problems at hand could be em-

ployed without the restriction that would be imposed if the negotiations process were directly subject to a particular agency's procedural biases or to the over-specification of the indirect parties.

Could this structure withstand the pressure to develop rigid procedures better than an agency-established or issue-specific mechanism? It would depend on the leadership of those who run the mechanism, its financial independence, its personal and professional relationship to the most powerful actors in the local political system, and on how wisely it chooses and handles cases. It would also depend upon how much independence it had from the state bureaucracy. If it were simply a state agency or if mediation were somehow "required," establishment of the generic version of mediation probably would become subject to the same rigidities and resistance that makes establishing subject-specific or agency-specific systems difficult.

A fruitful look might soon be taken at recent efforts to establish generic mechanisms to see how complicated they are to establish and maintain, if an independent mediation provider is more successful, and if mediation and negotiation are equally useful in this less institutionalized, less subject-specific form. The political climate and the receptivity of key leaders to the idea of mediation would be partly determinative. The fact that the availability of mediation services would not then present a direct threat to any program, agency, or group might mitigate some of the opposition that arises when institutionalized mediation is suggested for specific agencies or policy areas.

Recognizing the paucity of experience and the fact that first attempts at new, complex things often fail, the profession should continue to observe and experiment. The ideas in this final discussion barely touch the level of complexity at which such systems must be designed and considered. Advocacy and establishment of such generic systems should be embarked on cautiously and the basic principles of site-specific dispute resolution should pertain to establishing an institutionalized mechanism just as in successfully working on individual cases under such regimes.

Where all of the key direct and indirect parties can agree on a flexible institutionalized mechanism in a specific policy area, it can be a useful public policy tool and should be pursued. Where the ground seems fertile for establishing a generic mechanism, mediation may have greater opportunities to demonstrate its worth.