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ENVIRONMENTAL MEDIATION: HOW VALID AN ALTERNATIVE?

by William J. Magavern

I. INTRODUCTION

During the last twenty years a sharp rise in the frequency and intensity of environmental conflict has coincided with increasing experimentation with informal methods of dispute resolution. These developments have spurred interest, over the past decade or so, in efforts to resolve environmental disputes outside of the realm of formal adjudication. Public officials, environmentalists, corporations, attorneys, scholars, foundations and journalists have contributed to a growing body of literature on the topic, and various methods of alternative dispute resolution have been applied to environmental conflicts.

Alternative environmental dispute resolution attempts to respond to the perceived inadequacy of formal adjudication in dealing with complex environmental problems. Its proponents are skeptical of the ability of legally trained judges to resolve intricate scientific questions.¹ The environmental movement has forced consideration of the costs and limits of abusing our natural and human resources, and many of the resulting battles have been fought through litigation. Advocates of informalism argue that the disputants themselves are better positioned than judges to understand environmental problems, explore solutions that address substantive issues, and ultimately reach and implement agreement.²

The significance of the many proposals for alternative dispute resolution is difficult to gauge because, as Bryant Garth has observed, "informalism is a banner under which different persons and groups can pursue their own substantive ends."³ Those marching under the banner have included both defenders of the *status quo* and advocates of radical social change.

Of the various methods of dispute resolution, the alternative most favored for resolving environmental conflicts has been mediation. An experienced environmental mediator describes mediation as, "a voluntary process characterized by the intervention of an impartial third

party."⁴ From Gerald Cormick's mediation of the Washington State Snoqualmie River flood control project dispute in 1973 through mid-1984, more than 160 environmental disputes were mediated.⁵ Organizations have been established to offer mediation services and powerful institutions have sponsored research and practice of environmental mediation.

The purposes of this article are, first, to demonstrate the weaknesses of one type of environmental mediation and, secondly, to suggest another type of mediation.

II. LEGALISTIC MEDIATION: THE WORST OF BOTH WORLDS

Much of the environmental mediation literature describes a process that actually resembles litigation. This legalistic type of mediation is usually touted for its ability to do what courts aim to do, and it has a symbiotic relationship with the judicial system.

Advocates of quasi-legal mediation advance several rationales for its superiority to litigation as a method of resolving some disputes. Many adopt the efficiency argument, asserting that mediation is cheaper and quicker than environmental lawsuits that often drag on for years at great expense.⁶ Another rationale for mediation is that it reduces caseloads and enhances the effectiveness of the courts.⁷ The result of a system of informal justice existing side-by-side with traditional formal justice, according to this scenario, would be more efficiency all around.

Resolving Environmental Disputes by the Conservation Foundation's Gail Bingham debunks the myth that alternative environmental dispute resolution is much cheaper and quicker than litigation. That myth, though never tested previously, had become accepted as fact simply because its advocates had repeated it so many times.⁸ The available facts indicate that the number of environmental lawsuits in federal courts declined slightly between the mid-70s and the early '80s, that over 90% of the environmental suits in federal court during a twelve-month period in 1982-83 never went to trial, and that the median time for all environmental suits from the same sample was ten months from filing to disposition. For the available information on cases resolved informally, the median duration was five-to-six months, hardly an enormous time saving. Although Bingham lacks sufficient data to draw direct

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comparisons of expenses, she notes that mediators' time and expenses are costly, and that some citizens and environmental groups have found that mediation may cost them more than litigation.⁹

Whether environmental mediation could ever handle enough cases to substantially reduce judicial caseloads is also questionable. Several experienced environmental mediators, who stand to gain from the use of mediation, agree that about ten percent of environmental disputes can be successfully mediated.¹⁰

To the extent that widespread use of environmental mediation would divert cases from the traditional legal system, it would reproduce litigation's power inequalities in an even more distorted form. Informality based on efficiency criteria may well further disadvantage poor and underprivileged parties, who would lose the protections (inadequate as they often are) of formal procedure.¹¹ The problem of power will return later, as it is a major drawback to informal justice.

Mediation's proponents claim as an asset its ability to balance the rights and interests of the parties. That claim reveals how dependent quasi-legal mediation is on the American legal model of adjudication, with its basis in rights theory and its reliance on balancing.

Quasi-legal mediation's resemblance to formal legalism is further demonstrated by its practice, which seeks to narrow the issues through a structured process.¹² The mediator plays a directing role in this process, and the disputing parties rarely communicate with each other face to face. For example, in the Foothills Water Project dispute in the Denver area, Representative (now Senator) Tim Wirth brought the parties together and pushed them to an agreement.¹³

Professor Lawrence Susskind attributes Wirth's success in the Foothills case in great part to his political clout, and recommends that mediators be persons with clout that can be exercised to bring recalcitrant parties into line. He also proposes that mediation be tied into the legal system by making mediators legally accountable, with their responsibilities spelled out either in legislation or a contract. Susskind's criteria for a successful mediation bear significant resemblance to adjudicatory standards; he maintains that the mediation must reconcile the interests of the parties, should be reached quickly and at low cost, and should set a good precedent.¹⁴

Susskind's idea of accountability tied to contract or statute would impose a rigid structure that would preclude the flexibility needed to raise new issues or seek new solutions. In addition, making mediators liable to lawsuits would inhibit the mediation process by giving the mediator such a large personal stake in the outcome that she would have serious personal interests of her own to protect.¹⁵

Maximizing the role and clout of the third-party intervenor raises problems of power and coercion. A mediator with political pull might have real or perceived conflicts of interest. Also, if the mediator can use the stated

or implied threat of coercion in another forum to bring the parties to agreement, as Rep. Wirth did in the Foothills case, the "voluntariness" of the settlement is dubious. At what point does an agreement to accept a powerful mediator's intervention become just a concession to greater political power? Such a process may not even be one legitimately characterized as mediation.¹⁶

Even when the mediator does not have personal power to coerce, most environmental mediations are conducted with the threat of litigation looming overhead. The connection between formal and informal justice again becomes evident. Since a breakdown in the mediation process will almost inevitably lead to litigation, the parties' relative resources will play a part in determining their positions. In this way the mediation process is similar to the settlement of a lawsuit, where the judge's coercive power overshadows negotiations and consent is often coerced.¹⁷

Like settlement, mediation is often a function of inequality in the parties' ability to finance litigation. The poorer party may be disadvantaged in bargaining by a lesser access to knowledge, may be forced to mediate by an inability to afford litigation, or may be in a position of needing an agreement right away.¹⁸ Even if the facts do not support the idea that mediation is quicker than litigation in general, it is quicker than suits that actually go to trial.¹⁹

In the arena of environmental conflict, though, the threat of delay and prolonged litigation sometimes benefits a party with relatively smaller resources. Citizens groups are often able to obtain concessions from corporate developers by threatening to stall proposed projects. On the other hand, in a toxic dump controversy like that at Love Canal, delays in cleanup and compensation harm the interests of resource-poor citizens who are victims of corporate and governmental malfeasance. So the threat of potential suit can work both ways.

What must be recognized is that mediation is "by its essence a process of power exchange."²⁰ To provide the incentive to negotiate, each side must have some power over the other. If the power is not evenly balanced, one side will be able to coerce the other.

Even some advocates of environmental mediation concede that individuals and small citizens organizations might be better off using litigation against powerful corporations and governmental agencies. The lawsuit provides leverage, can educate the public and galvanize opinion, may influence legislation, and has the potential to strengthen environmental organizations; "litigation offers empowerment."²¹

Informal procedures, on the other hand, "may turn into tools for the advantaged."²² The claims of the politically and financially weak may fall victim to the *status quo*. In any dispute resolution process with a strong third-party intervenor, the latter must have some idea of fairness as a basis for settlement. If that notion of fairness is not based on law, there is a danger that raw power will become the dominant force. That danger will be present whenever the mediator actively directs the process or exercises

authority.²³

Only the naive would maintain that raw power is absent from the formal adjudicative process. The powerless would fare even worse in informality, though, as Garth points out:

Informality eliminates procedures that can have an impact on results independent of relative power relationships. Formalities create barriers, but they also provide a shield behind which it is possible to achieve a politically unpopular result.²⁴

Environmentalists who challenge the *status quo* should also be suspicious of another property of informal justice — its capacity for neutralizing conflict. When mediation is conducted in the legalistic mode, by narrowing issues and bargaining for a one-time exchange of rights and benefits, it responds to specific grievances in ways that inhibit the development of a critique of the broad social causes of problems or the empowerment of a community. Rather than handling disputes in a public courtroom with its openly adversarial style, mediation employs backroom bargaining to reach decisions that, especially in the environmental area, may have major public significance.

There is a myth that “mediation is a good way to avoid conflict,”²⁵ that it is non-adversarial and can resolve basic difference. That image can foster the idea that, “if we just get together in private and talk over our disputes, we can reach agreement.” Informality inhibits the addressing of the fundamental causes of environmental conflict and prevents essential differences from reaching public attention.²⁶ The result is usually that significant changes in environmental problems are stymied.

The CERCLA, or “superfund,” mechanism for handling toxic-waste liability provides an example of how informality (though not mediation in this example) can deflate conflict. Like workers’ compensation and no-fault compensation for automobile injuries, CERCLA simplifies rules of liability and entitlement, increases the proportion of claims paid, and reduces the amounts paid; anger is defused by money, not by public participation.²⁷ Environmental mediation could have a similar effect when it seeks to satisfy individual grievances by avoiding open conflict over what is happening to the ecology.

The balancing-of-rights-and-interests model for environmental mediation also has the effect of influencing disputants to curtail some of their demands in the interest of reaching an agreement and moving toward some common ground. That approach ignores the fact that, for the environmentalist group, the way to resolve the conflict is for the polluter to stop polluting.²⁸ In any dispute, each party will claim that its right outweighs the other’s, and mediation offers no better solution than does judicial balancing. Mediation will often offer a worse solution, in fact, by asking a party to compromise on an uncompromisable posi-

tion. For example, an environmental group taking a firm no-discharge stand against toxic effluents in the Niagara River might sacrifice too much credibility and principle if it negotiated an agreement allowing a specified level of discharge.

In *Settling Things*, published by the Ford Foundation and the Conservation Foundation, Alan Talbot acknowledges that most environmental disputes can not be mediated and that determining which disputes can be mediated is not easy to do.²⁹ Talbot concludes that mediation is a “supplement, rather than an alternative, to legal action in environmental disputes,” recognizes that the threat of court action provided the impetus for mediation in most of the conflicts he studied, and praises the participation of lawyers in each of his six case studies.³⁰ The vision of mediation that emerges is a procedure that serves as a kind of adjunct to the formal legal system, to be called on in certain undefined circumstances, with the knowledge that the dispute will end up in court if the process fails.

The need for such a new mechanism is questionable, however most environmental disputes are already resolved without a formal adjudication, either because the developer obtains agency and citizen consent before a formal licensing proceeding, or because a settlement is negotiated before litigation moves beyond the preliminary stage.³¹ If informal processes in the shadow of litigation are already resolving disputes that are capable of being negotiated, there seems little point in creating new institutions and funding mechanisms to do the same thing with a fancier name. The cases that are fully litigated are usually those that are especially important to both sides or that require a judicial statement of what the law is, so are probably not amenable to mediation.³² In sum, the negotiable cases are already being settled out of court, and the non-negotiable cases, almost by definition, can not be settled out of court. Although a nonlegal mediation process that seeks to expand issues and find creative solutions might be able to resolve some of the latter cases, the legalistic, issue-narrowing approach would not.

Another problem with environmental mediation is that it privatizes decisions that often carry important public consequences. In adjudication, public officials, whose powers are defined by law, settle disputes according to the values encoded in statutes and state and federal constitutions.³³ Parties in private mediation will be under no obligation to consider public policy, as judges are. Our method of resolving fundamental policy differences, no matter how unsatisfactory it often is, involves governmental institutions. Private environmental settlements may not follow legislative or agency-mandated standards, to the detriment of the public.³⁴ Judge Harry Edwards warns that, “environmental mediation and negotiation present the danger that environmental standards will be set by private groups without the democratic checks of governmental institutions.”³⁵ True, agencies are often “captured” by the private interests they were established to regulate, but moving environmen-

tal decision-making even further away from public accountability does not appear to be a step in the right direction.

Proponents of environmental mediation are trying to make a case for public funding of their private method of dispute resolution,³⁶ so the question of who would benefit from such funding must be addressed. Demand for environmental mediation has come, not from a grass-roots public movement, but from the professional elite. As Cormick says, "the strongest boosters of alternative dispute resolution tend to be those who are 'third parties' — or would like to be."³⁷ A new "profession" of mediation may be developing. Lawyers need not fear for their fees, either. Many attorneys will probably become mediators themselves, while others will represent clients in mediation. It should not be too surprising, then, that the organized bar has not been hostile to mediation; not only are lawyers experienced negotiators, but they are in the best position to assess the relative strength of their client's position in the legal or administrative proceeding that will follow if mediation fails.³⁸ As long as mediation functions as an adjunct to the formal legal system, with the threat of adjudication ever present, lawyers will be crucial to mediation.

A legalistic type of mediation process that operates in the shadow of the courtroom, relies on the direction of a strong third-party intervenor, and seeks to narrow the issues and balance the rights and interests of private parties offers the worst of both worlds. Such an approach combines the coerciveness, rigidity and issue narrowing of adjudication with the power imbalances, unaccountability and privatization of informal justice.

III. AN ALTERNATIVE KIND OF MEDIATION

Mediation does have the capability to resolve some disputes more satisfactorily than litigation does, and environmental mediation has indeed scored some victories. What mediation offers that adjudication does not (at least not as well) is the potential to expand the issues involved, as well as a recognition of the importance of ongoing relationships.

Issue-expanding mediation justifies itself not by a rationale of efficiency but by idealism, the search for new and better solutions. Instead of narrowing issues and balancing rights and interests, it tries to expand the range of possibilities. And rather than supplementing the formal legal system's ability to adjudicate individual grievances, it may develop a critique of the broader social causes of environmental problems and may empower the community involved to take an active role in protecting the environment, though these elements do not always emerge.

A good example of a successful issue-expanding mediation is the controversy over siting of a new ferry landing in Port Townsend, Washington.³⁹ Before the mediation a stalemate prevailed, with the State Transportation Department and some residents proposing one site and a group of newer residents opposing it. After several experimenting mediation meetings, one of the negotiators pro-

duced a completely new plan that met with unanimous agreement. The mediator, George Yount, described his role as "part conductor and part psychologist." Yount did little more than ask questions, open and close meetings, and call breaks when frustration was mounting. He succeeded in facilitating communication until the new solution emerged.

Successful and innovative mediation processes are built on relationships. Cormick says that the word "mediator" itself "describes a relationship between the intervenor and the disputants."⁴⁰ Rather than emphasizing political clout, he stresses trust:

Mediation is a fragile process built on trust, first, of the mediator and subsequently, between those directly involved. It is this trust that can lead to sharing confidences, exploring alternatives and reaching and implementing an agreement.⁴¹

Unlike adjudication, mediation is more about process than structure.⁴² Mediation built on relationships strives for mutual understanding between the parties and open expression of feelings and attitudes, rather than bargaining for trade-offs of interests.⁴³ Rather than trying to impose his own solution, the mediator should encourage the parties to communicate directly. In fact, mediators with personal expertise in a particular area under dispute are less likely to be effective than those without expertise, because the former will try to lead the parties and rely on their own assessments, values and assumptions.⁴⁴ Mediators who are "part conductor, part psychologist" can avoid many of the problems of the mediator with clout and legal accountability. The accountability proposal reinforces the myth that mediators are responsible for the quality of the agreement, but actually the parties will be better at finding solutions than the mediator is.⁴⁵

Although the possibility of litigation can not be completely removed from any dispute resolution process, mediation can be conducted in a way that, if successful, makes the prospect of litigation irrelevant. Mediation based on relationships aims to reach a collective agreement that recognizes the parties' shared interests and ongoing relationship and enforces itself.⁴⁶ Many environmental disputes, even those that have been litigated, involve ongoing relationships, so the parties often have incentives to talk with each other — each knows it will be dealing with the other in the future.

Although issue-expanding mediation based on relationships has the potential to turn some "zero-sum" conflicts into "everybody wins" situations, the problems of power inequality, depoliticization of conflict and privatizing of decision-making will remain troublesome in most environmental conflicts. Consequently, mediation should not be institutionalized as a regular method of settling environmental disputes. One of its premier practitioners has

expressed concern over:

the danger that mediation can and will be used to replace or short-circuit existing processes. It is our view that mediation must remain an extraordinary process applied to carefully selected situations in order to maintain its credibility and viability. Should it ever become another "hoop to jump through," it will inevitably be destroyed.⁴⁷

Efforts to provide government funding for environmental mediation or to establish it as an adjunct to the judicial system should be rejected.

Public funds would more effectively serve the environmental cause if used to strengthen enforcement of existing regulations, pressure polluters to clean up toxic hazards, and develop important new ecological programs like recycling and renewable energy. Rather than spending money and time on an unnecessary mediation mechanism, governments and citizens groups should work to wield the power of the state as an unambiguous force for environmental protection.

NOTES

1. See generally, 1 L. Bacow and M. Wheeler, *Environmental Dispute Resolution* (1984).
2. *Id.* at 19.
3. Garth, *The Movement toward Procedural Informalism in North America and Western Europe: A Critical Survey*, in *The Politics of Informal Justice* (R. Abel ed. 1982).
4. Cormick, *Mediating Environmental Controversies: Perspectives and First Experience*, 1 *Earth L. J.* 215 (1976).
5. 1 G. Bingham, *Resolving Environmental Disputes* 7 (1986).
6. *Alternative Dispute Resolution Gaining Prominence as Way of Solving Environmental Issues, Avoiding Rising Litigation Costs*, 16 *Environment Reporter* 908, 933-936 (1985).
7. H. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 *Harvard L. Rev.* 668, 673 (1986).
8. Bingham, *supra* note 5, at 127.
9. *Id.* at 132-146.
10. 1 Talbot, *Settling Things* 91 (1983).
11. Edwards, *supra* note 7, at 669.
12. S. Silbey and S. Merry, *Mediator Settlement Strategies*, 8 *Law & Policy* 7 (1986).
13. L. Susskind, *Environmental Mediation and the Accountability Problem*, 6 *Vermont L. Rev.* 1, 30-37 (1981).
14. See generally *id.*
15. J. McCrory, *Environmental Mediation — Another Piece for the Puzzle*, 6 *Vermont L. Rev.* 49, 75-80.
16. *Id.* at 51, 80-81.
17. O. Fiss, *Against Settlement*, 93 *Yale L. J.* 1073, 1075 (1984).
18. *Id.* at 1076.
19. Bingham, *supra* note 5, at 136.
20. Cormick, *supra* note 4, at 215.
21. Bacow & Wheeler, *supra* note 1, at 12-13.
22. Garth, *supra* note 3, at 200.
23. *Id.* at 198.
24. *Id.* at 198.
25. G. Cormick, *How and When Should You Mediate Natural Resource Disputes?* 12 (July 26, 1985) (paper presented to Alternatives to Litigation seminar, Washington State Bar Association).
26. R. Abel, *The Contradictions of Informal Justice*, in *The Politics of Informal Justice* (R. Abel ed. 1982).
27. *Id.* at 281.
28. See generally *id.*
29. Talbot, *supra* note 10, at 91.
30. *Id.* at 97.
31. D. Schoenbrod, *Limits and Dangers of Environmental Mediation: A Review Essay*, 48 *N.Y.U.L. Rev.* 1453, 1457 (1983).
32. *Id.* at 1457.
33. Fiss, *supra* note 17, at 1085.
34. H. Edwards, *supra* note 7, at 678.
35. *Id.* at 677.
36. Talbot, *supra* note 10, at 100-101.
37. Cormick, *supra* note 25, at 3.
38. *Id.* at 8-11.
39. Talbot, *supra* note 10, at 86-89.
40. Cormick, *supra* note 25, at 8.
41. Cormick, *supra* note 4, at 216.
42. J. McCrory, *supra* note 15, at 56.
43. See generally Silbey and Merry, *supra* note 12.
44. Cormick, *The Theory and Practice of Environmental Mediation*, 2 *Env'tl. Profession* 1, 24, 28 (1980).
45. Cormick, *supra* note 25, at 13.
46. See generally Silbey and Merry, *supra* note 12.
47. Cormick *supra* note 4, at 4.