



*“Accountability for the quality of the outcome—
(providing training) for everybody and helping them
(maximize joint gains)—is the focus of my activism.”*

—Lawrence Susskind

Lawrence Susskind

Activist Mediation and Public Disputes

Lawrence Susskind fits no stereotype of a typical university professor. He teaches urban and environmental studies at the Massachusetts Institute of Technology, and he complements his steady stream of publications with an even more active professional life as a mediator who works to resolve massively complex public disputes. In any given year, Susskind literally is in the middle of a half dozen multi-party, multi-issue disputes—for example, the siting of hazardous waste facilities, designing controversial regional public housing plans, crafting city-suburb cost-sharing schemes to assure regional water quality, or devising toxic waste clean-up strategies involving industry, government, and community members.

Susskind's vision of public dispute mediation and his successful practice have made him a controversial figure in the dispute resolution community. Both his vision and practice pose a challenge to the popular wisdom of the field, which regards "neutrality" as sacred. Many mediators concern themselves with process alone, leaving the substance of agreements to the parties themselves. The demands of neutrality, according to most public dispute mediators, prevent them from focusing on power imbalances among negotiating parties. Other mediators working in the public eye wonder whether mediation can be a viable strategy when participants number thirty or more, when the process is

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highly political, and when parties vary enormously in their expertise, resources, and political experience.

Susskind rejects mediator claims to pure neutrality. He suggests, instead, a stricter notion of nonpartisanship and the provocative idea of activist mediation. He has argued that mediators must address power imbalances among the parties to public disputes by, for example, providing premediation negotiation training to all parties. *→ preparing unsophisticated parties*

The profile that follows presents Susskind's responses to a series of questions I raised to learn more about his views and practice of mediation. I guided our lengthy interview sessions with three primary goals in mind. First, I wanted to learn how his work had developed. Somehow Susskind's dispute resolution practice had grown from his earlier work on public participation in urban planning and policy-making processes. *begin* ~~How did this happen?~~ Second, I wanted to explore the controversial positions Susskind has taken regarding the ethical responsibilities of mediators working on public issues. If "being neutral," for example, was an inadequate, if not altogether deceptive, characterization of the responsibilities of public dispute mediators, just what alternative did Susskind have in mind? Third, I wanted to press him about actual cases and how he handled them. In the heat of practice, faced with angry, skeptical, politically contentious parties, what did Susskind find most challenging, most perplexing? What did he find most satisfying, most difficult?

The remainder of this profile presents Larry Susskind's story in his own words. For purposes of transition, however, I make a few observations in italicized type.

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I knew that Susskind had long been interested in the promises of active citizen participation in government, and I knew he had taught, written,

consulted, and practiced widely. But I did not know much about how these pieces of his professional life had developed, complementing or tugging at one another. So I began by asking Susskind about his roots, professionally speaking, and the subsequent development of his practice:

Let me describe what I do as public dispute mediation, and not environmental mediation. What I did in the late 1970s was environmental mediation, but I've tried to broaden it since then to be the mediation—the resolution or the management—of disputes in the public sector. I work on three types of public disputes: first, disputes over the allocation of scarce resources—like a piece of land or a body of water; second, disputes over policy priorities—Should we emphasize environmental protection in this context, or economic development? Should we emphasize meeting the needs of this group or that group?; and third, disputes over quality-of-life standards, environmental standards, human service standards—disagreements over the standards that ought to be set within a policy that has been made or is being made. I don't view the last grouping as primarily environmental any longer, though I did at one time.

Policy choices

When I was an undergraduate at Columbia, I majored in sociology and English literature. I was interested in studying drama and poetry. But I didn't act; I wrote and produced plays. If you look at my work on role-play exercises and simulations now, it traces directly back to my work in drama, particularly in stagecraft. I think this probably has a lot to do with the way I manage events within the context of dispute resolution. It has something to do with writing and producing plays too, as a matter of fact.

how?

The work in sociology led me into urban planning. I went to the School of Design at Harvard, and I thought I was going to become a city planner. I thought that had to do with design, which I had to learn, so I went to what was called the Design School. Little did I know that I was hitting the place at a moment in time when nobody knew what the hell they were doing or what

city planning was. At least that's the way it looked to me.

That first year in planning school I got involved in advocacy planning with Chester Hartman, who was my first instructor. We worked on a grass-roots project to try to get a rent control bill passed in Cambridge. I thought, "This makes sense to me." But the Harvard hierarchy was telling Chester, "You're not getting tenure; you can't stay here. What you're teaching is not going to count for credit." And I'm thinking: "Oh no, this is not right. What you guys are doing doesn't make any sense at all."

I transferred in the middle of the Harvard program and finished my master's degree at MIT the next year. My sense of planning, when I transferred, was confused. Having studied with Charlie Abrams at Columbia, I thought planning was going to be about how you develop cities—particularly in developing countries, and particularly neighborhoods within cities—in ways that respect both the politics and technical expertise that planners ought to be able to bring to things. I got to Harvard and they weren't talking about that at all. They had a notion that it had something to do with land use, and they had *rules* about land use.

I applied to the master's and Ph.D. programs at MIT at the same time. I said very clearly on my Ph.D. application that I wanted to teach urban studies. I wanted to work some in the university, and I wanted to get involved in how change happens in cities. But I also wanted to move back and forth between a scholarly role, a consulting role, and an activist role. I think I've done that, in my own way.

I wrote my master's thesis about the problems of planning new towns. I'd looked at the programs to build new cities, both in the U.S. and elsewhere. The problem was you couldn't talk to the people who were going to live in the place to find out what they wanted. You couldn't talk to them because you didn't know who they were. So you turned it over to some "experts," and the planning process just didn't work.

By the time I was doing my doctoral work, the Nixon administration had passed the revenue-sharing legislation of the early 1970s. I was primarily interested in a couple of questions: what level of authority should reside with whom? And what level of authority should match what spatial level?

These questions actually emerged from the "new towns" work that was going on then at MIT. In the planning of new towns, one reason that the damn thing didn't work was that you had too much of a centralized plan and you didn't have neighborhoods having control over how they evolve and grow. "Oh, but if you give them complete control, then the advantage of planning the new town, the economy of scale, would be lost," the argument went. My question was, when you switch the level of authority of the allocation of the block grant, do you increase or decrease the responsiveness, in the use of money, to the needs of different groups? That's a participation question. In other words, people knew how to lobby city hall under the old program because they could sort of play off the city and the feds. With this new program of revenue sharing, it wasn't clear whether low-income and poor people were going to be better off or worse off. I studied the gains and losses that the block grant programs meant for the poor. That was what my dissertation was about.

Because of that work, I was hired by groups on all sides of the question—the League of Women Voters, the Brookings Institute, Arthur D. Little, the Center for Community Change—who wanted to monitor what actually happened with these general revenue sharing and block grant funds. Everybody thought it was going to be either good or bad to make this change, and here I had written about it, and people said, "What would you look at, what would you watch?" Dick Nathan had put together these monitoring studies at the Brookings Institute, and then the citizen activist groups said, "We want to have our own *citizen* monitoring study." So I got hired by a lot of the grass-roots groups to

design citizen monitoring studies. For a while it seemed like I was working on every monitoring study everywhere.

I tried to design these monitoring studies in a way that would leave people empowered to continue tracking and monitoring this stuff on their own. It wouldn't just be data gathering; it would be education in a way that would leave people with an ability to follow what was going on in their own communities on an ongoing basis. This was a very different approach to the issues from that of many economists. I wasn't interested in equity-efficiency trade-offs. I was interested in *power*. Do you get better allocation decisions—more accountable to the people that really know what they need—when you switch the locus of power from the federal level to the local level? All of this got me tagged as a citizen participation type.

Then I got invited into a small town on the north shore of Boston, where I knew the town and I knew a lot of the people, to help the citizens there do a plan for the town, since the town government wouldn't do one. This was in Rockport, and we did something called "Planning for the Future of Rockport," which was a completely citizen-based process for growth management and planning for the town. For me, that project was motivated entirely by the desire to find a new model of how to teach planning. I liked what I'd done as a student with Chet Hartman. So I brought in students from MIT as the staff from beginning to end. We had a community-based laboratory, with a real client. We had real political restraints; we had time pressures. And the students were the staff; I had undergraduates and doctoral students all working together.

That led to the town of Arlington, a Boston suburb that borders Cambridge. The town government invited us in, saying, "Look, you did this thing up in Rockport. We're interested in having citizens involved here too." What I learned from Rockport was that we hadn't left behind any institutionalized organization, because we were, in a sense, fighting city hall the

whole time. We weren't really working for the town government in Rockport; we were working for an ad hoc citizens' group. The group of folks who had been on the planning board, citizen members, had invited us. They said, "Look, the city government isn't going to do this. We want to get citizens from the whole town doing it."

In Arlington, we worked to create the Citizen Involvement Committee, and that's a group that still exists today.

About that time, something called the Citizen Involvement Network was created by the Rockefeller Foundation. They wanted to pick the twenty-five best examples of citizen involvement in the country, support them for several years, and document how citizen participation really works. Arlington's Citizen Involvement Committee was chosen as one of the twenty-five, and I got hooked up with the national Citizen Involvement Network. I started advising them, based on the work of the monitoring studies, about how they could have citizens monitoring this rather than having some evaluator come in and write it up. I felt the citizens could learn themselves by looking not just at their own community but at the other twenty-four, and they could pass ideas around. That was the key to the Citizen's Involvement Network.

In Arlington at that time we didn't have an "outside professor" problem. There wasn't a racial issue. There wasn't a problem, in moderate-size towns like Arlington, with outsiders coming in. They had no model cities history; nothing like that at all. There was this feeling of, "The university is agreeing to help us. Isn't that wonderful!" And there was tremendous respect for the university resources that were coming in. And we brought the money. We didn't ask them for a penny. I raised the money for all those projects and said that we would pay for them. And we actually provided money to the citizens' group.

The problem came in the next project, which is really where my mediation work begins. The Red Line, the subway, was about

to be extended out from the inner city, from Boston, to Route 128, with a major stop near the Alewife Brook Parkway in Arlington. The Citizen's Involvement Committee said, "You just can't do this. There has to be citizen involvement in this decision." And they went and lobbied the governor, and they had very strong state legislative representation from Arlington at the time. And out of that came a request that we create a regional citizen involvement process for the detailed planning of the Red Line extension.

It helped that I had been a gubernatorial appointee for the six years before that. The regional agency was put in charge of the planning process. Since I had good contacts in Arlington and with the state, when they said, "Let's do this," I turned it into another student involvement project.

The governor appointed me to chair the regional Citizen Advisory Committee for this process, with the concurrence of the four communities that were involved in the subway extension: Arlington, Cambridge, Somerville, and Belmont.

"Well, we need staff," I said.

"We have professional staff," various officials responded.

"I know," I said, "those are engineers. We need people to really work to help the citizens' group gather the information it needs to have some real input into this."

Fifty, maybe sixty people were appointed by the four towns, the governor, the regional park authority, all the ad hoc environmental groups, the watershed association, the business community. It seemed like everyone had a chance to appoint someone to be on this committee. We had this huge crowd turn out. The meetings went on for twelve or thirteen months, every Wednesday night. I will remember it for the rest of my life. From six to midnight, with preparatory stuff between meetings. It was an incredibly elaborate process.

What I kept trying to do in the meetings was to say, "Let's pick some topics; let's gather the information we need; let's

understand the assumptions, and then let's try to reach some type of agreement on what we want to recommend here." But then, halfway through the process, it dawned on me that the real problem wasn't getting everybody heard. The real problem was how to avoid having the whole citizen advice-giving process undercut by the fact that the citizen types couldn't agree on anything. So I tried to say then, "The real issue here for all of us is to get consensus." And I announced that to the group. Otherwise, the whole process was going to end up having no effect on what the engineers were telling the state to do. So I had to try to get an agreement among the people with different views.

I thought, "Geez, I've worked on all of this participation stuff starting back with getting rent control in an advocacy mode, and then I watched rent control erode in Cambridge a piece at a time. It's there on paper, sure, but it's not what it was intended to be in the beginning. There was really no way to hold it in place given the constant battle that was taking place politically." So the goal here was really to get some agreement on what was the smartest thing to do.

The Citizen Involvement Committee's main job was the environmental impact assessment, which for that project had to be done under federal and state law. The assessment rested on the choice of alternatives that the various people involved would consider. So we spent a lot of time trying to tell the engineers about new alternatives, like, "Don't extend the subway at all" or "Have buses down the same right-of-way instead of a fixed rail." And the engineers were saying "No, no, no. That's not a realistic option." The initial battle was over what alternatives to consider. And that's where I discovered the power of the impact assessment process as a way of structuring citizen participation.

The assessment process requires citizen participation. It requires that you scope out options. It requires that people have a chance to be heard and write their comments down and get reactions to their comments. So I then decided to try something that

was an absolute shot in the dark. I remember the issue got very hot and heavy about the size of the parking garage that was going to go with the subway station. The engineers projected that we needed to house ten thousand cars. The citizens' group wanted no parking, because that wasn't their idea of promoting mass transit. And the engineers wanted to pave over a sensitive environmental area too.

So I said, "Let's have a slide show showing us images of parking garages of everything from ten thousand down to nothing." The engineers who were working for us at the time, and paid by the state, said, "Where are we going to get slides like that?" I said, "I don't know. Call around the country, the world, and get pictures other engineering firms have worked on."

And so we had a slide show: "Well, here's a picture of a parking garage of ten thousand spaces: Logan Airport." People said, "There's no way you're going to put that many cars here." And the engineers said, "You know, that's probably right."

We had these images of different garages, and I then started using straw polls at the end of each meeting, and said, "This is not binding on anybody, but let's just see. Here are some ranges now. Could we get an agreement that the garage should not be more than twenty-five hundred cars?" Ninety percent of the people agreed after the slide show. So when we really had a sense of what this was about—and it wasn't just a symbolic debate—it was a lot easier to get agreement. That became the key turning point in the process.

The engineers backed off. Everybody backed off. It was fascinating. I hadn't expected anything in particular. I was trying to promote good discussion, an informed discussion.

The same thing happened with the discussion of the forecasting models. When you get behind the statement of what is and what isn't acceptable from the technical people to the assumptions they're making, you open the black box. You bring every-

body with you. You test the assumptions. You jointly generate the data. You jointly make the forecasts. You jointly *imagine* the image. . . .

But the project ended on a very sour note. By the end, we'd reached an accord on a new option for what should go where. And the option included a set of trade-offs that no one had envisioned in the first place, which was, could you *improve* the environment in exchange for allowing this development to go ahead—all the watershed improvements that you've always wanted, the bikeways you've always wanted?

And we reached an accord in which we had a new option to study in the impact statement. Everyone said that's the option, that's what we should do. Everyone, the whole committee, agreed. . . . So we took our recommendation to the state. And they picked an option without all of the promised compensation in the form of bikeways and the waterway improvements. The state included some of the ideas, but not all. So we said, "What's going on here? We put all this time and energy in." We called in the Massachusetts secretary of transportation. He said, "It's beyond the scope of this group to tell us to do this."

And then, acting on behalf of the group, I said, "We're going to file legislation to formalize this group as the ongoing manager of this process." The group wanted to do it, but the city manager of Cambridge, who had worked out this deal with the state for the option he wanted, wrote a letter asking that I no longer be chair of the group and saying that he didn't want some new ad hoc authority that would take away the power of the cities. He didn't mind an advisory group, but not an organization with power.

I thought the only way the group was going to get what it wanted was to get some institutionalized standing. So we drafted legislation that challenged the authority of those in power. And those in power unappointed me, declared the task force's work over, and thanked us for our work. But we had the agreement.

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The Alewife project went ahead pretty close to our option, but without a lot of things that had been promised—embittering a lot of people who'd worked very hard to generate this new option, and who had thought they had given away a huge amount to agree to not litigate against the whole thing. That's the only reason the Alewife station on the Cambridge-Arlington town line got built; otherwise it would still be in court today.

There was a lesson here: you needed to have a clear mandate. I'd started with Chet Hartman, with the advocacy work, completely on the outside of the establishment. Then I moved to the monitoring studies, and then to institutionalized citizen participation; so the next step was to move completely within the circle. I started completely out of the circle, got closer and closer, and now I'm in it, but I want to change what goes on in terms of the understandings in the circle. I want to be in a relationship that clearly establishes who has what authority to make what decision, and where we are going to get those in power, in the beginning, to say, "Rather than have gridlock, rather than be in conflict forever, we are going to try to work this out."

Now, I didn't know you called that mediation. Nobody did. It wasn't called that; it didn't exist as mediation. When I wrote about this experience, I called it consensus building in the land-use planning process. But, having done that, having seen that you could convert citizen participation, I then said, "Look, I want to look at some other models of citizen participation."

That led to the European study, reported in my book *Paternalism, Conflict and Co-Production* that I edited with Michael Elliot. The model of co-production was, I realized, what I had created in the Alewife station case, but there were all these European antecedents of it. So we did all these case studies, we discovered these antecedents, and I said, "Co-production—that's what I'm going to call it." But nobody knew what co-production was; it was too awkward a term. But the European study did convince me that this idea wasn't crazy. What I learned from

Rockport, Arlington, Alewife, and the monitoring work was that you can stand on the outside being an advocate throwing bombs . . . and you can win some victories. But those victories will probably be short-lived, and they won't really redistribute power.

Then I got a call from the Kettering Foundation, saying they had this experiment they want to try called a negotiated investment strategy (NIS). They were going to have a federal team, a state team, and a local team in three different cities trying to come up with a long-term development plan. Kettering had had me out several times to talk about my work on citizen participation. They had come up with this idea of the negotiated investment strategy, and they had gone to the Carter administration and asked for support. . . . Marshall Kaplan in HUD suggested maybe they should get one urban planner in one of the three cities. Bill Uery, the former secretary of labor, was the mediator for St. Paul. Jim Laue was the mediator for Gary, Indiana, and I was the mediator for Columbus, Ohio. They called us facilitators. Frank Keefe (former Massachusetts secretary of administration and finance) and I did that together, and it worked. . . .

What we did was help the federal, state, and local teams, each with twenty to twenty-five people, to agree on long-term public and private actions to promote development in the cities, including ways to coordinate all the federal programs. These three groups met in a big room, with three big tables and a little table for the facilitator. Our job was to get an agreement on a five- to ten-year public and private investment package for each city. I wanted Frank there because I felt I didn't know the inside operation of government well enough. Because this was really involving the details: the nitty-gritty of federal contracts, with letters going to the state, "Could the state do this?" The policy debate was incredibly elaborate. It was unbelievable, just unbelievable.

We negotiated the agenda. We negotiated the ground rules. That's where it occurred to me that these people were not going

to let someone decide what the agenda was going to be. We're talking about having the most senior people that you could have in that situation.

We said, "Frank and I will meet privately with each group and ask them what the issues are that they're concerned about." We'd write a summary of that and hand it out at the next meeting to see if we could get an agreement on it with everybody. The next meeting would come, and everybody would have rearranged it, and so we negotiated the agenda.

Then we asked each group to prepare a position paper on each issue on the agenda. We divided the next several meetings into periods for discussing the collection of those papers.

We met and people presented their papers. Frank and I then tried to look for the points of agreement and disagreement, sharpened the agreements and disagreements another time, and then said, "Look, here is what we agree and disagree on, but don't close on this issue until we look at the next issue."

We went through all of that and began to develop a single text. Then we looked for trades across issues, and then we developed one overall document. Then those groups all took it back for ratification. Basically, we went through the set of steps we now go through—prenegotiation preparations, then negotiation, then postnegotiation follow-up.

Nobody "walked," because huge amounts of federal money were contingent on the consensus. HUD's Kaplan had good connections to Eisenstadt (in Carter's office), who said, "You guys reach an accord and you're going to be first in line. You're going to free up a lot of discretionary funds. We want to demonstrate that this can work." So there was a very clear incentive.

I wrote a report that summarized the agreement that went into effect. I then wrote a report about the process, which was the first thing ever written about the negotiated investment strategy process. I was reflecting on this, thinking, "This is different from Alewife—all these groups accepted the fact that the product was

going to be the thing that got implemented.”

It was the natural next step. I thought, “The agreement is going to hold, the agreement is going to be, because we have all the powers that be here, and we also have representatives of citizen groups and others. What we come up with is going to be the agreement, and my job is to help them get an agreement.”

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I also wanted to explore how and why Susskind had come to be a controversial figure in the world of public dispute mediation. I knew he had challenged the virtue of “neutrality” as the essence of mediators’ practice. I knew he had also touched off a flurry of debates when he argued that public dispute mediators should be held accountable for their work. So I probed to learn more about both Susskind’s claims and his efforts to shape the evolving field of public dispute resolution. If neutrality was an unworkable or even misleading ideal for mediators to aspire to, what alternative did Susskind have in mind? Susskind had written about “activist” mediation. Was that a contradiction in terms? What could activist mediation mean? Susskind began by characterizing the central controversies in the field:

Four debates permeate the practice of environmental, or more broadly, public dispute resolution. The first has to do with the timing and mode of entry. The second has to do with the activism of the neutral. The third concerns the expertise of the neutral about the subject matter and the institutional terrain, not just the subject matter. And a fourth involves the ongoing responsibilities and accountability of the mediator for the quality of the outcome. These are the dimensions along which there are substantial ideological and practical differences in the field.

I can describe my own practice to illustrate the issues. With regard to entry, my interest has been in creating some sort of first-order neutral auspices to market the notion of dispute

resolution—the State Offices of Mediation, or legislation creating legitimacy around the use of mediation in the siting process, or the Administrative Conference of the United States legislatively having the authority to say, “Now it’s time for negotiated rulemaking.” In other words, creating an institutional legitimacy for the use of mediation and auspices that will not *do* the mediation but that will alert people to the possibility and the advantages of it and get it started. I think that’s absolutely crucial.

Someone calls you and says, “I’ve got a dispute. Can you help be the mediator?” That’s how most private dispute resolution has worked. Most dispute resolvers wait to be called by one of the parties. But it’s too hard to create legitimacy when you’re invited in by only one side. I wanted to solve that problem, and that is why I pushed the concept of state offices of mediation. That is why I think we need rosters of mediators, preapproved. That’s why I worked with the EPA and the Administrative Conference on the federal legislation creating negotiated rulemaking.

I had this idea of the state offices on the plane out to a meeting in Colorado, and so in my talk there I said: “Look, I’ll give you an illustration of what I mean by institutionalizing a demand.” And I proposed something called “governors’ offices of mediation.” I wrote about the idea, and started talking it up to various groups, including the National Institute for Dispute Resolution. NIDR, which was just getting started at the time, decided to take the idea and run with it, and so they offered grants to the first four or five states that would put in proposals. I worked with the state of Hawaii, the state of Massachusetts, the state of Minnesota. The only early ones I didn’t work with were Wisconsin and Alaska. Gerry Cormick worked with Alaska, and Howard Bellman worked with Wisconsin, and most of these states put in proposals and got the money from NIDR to create the state offices. Those were the seeds.

Back then, I was also working with Massachusetts and other states to get siting legislation, and I was working with the EPA to

get negotiated rulemaking, and now I'm trying to work with public utility commissions to get negotiated rate setting around the country. It's institutionalizing the demand to solve the entry problem.

Of course, there are clearly cases that shouldn't be mediated, and that is where these state offices also help; they save the time. Len and Suzann Buckle [professors at Northeastern University] wrote a wonderful report on the New England Environmental Mediation Center before it went out of business, showing that it had to go sniff out twelve to twenty cases before it found one that you could actually get. And it used up all of its resources looking into cases, meeting with the parties, trying to get this side to accept mediation even though they got called by the other side. That's what is killing these centers: no one is paying for that overhead. That really struck home.

So the first issue is, What is your theory about entry? It's not that I wouldn't come in if one side called me. But that's not my view about how we ought to organize the field, and it is not my view of what's going to make it possible to be successful more often.

But institutionalizing demand doesn't mean that mediation is a panacea or the cure-all for everything. What a state office can do is look at fifteen cases to find the one you ought to mediate. It has the institutionalized support to pay for that.

My metaphor . . . for the state offices is that they match up dispute "have-ers" with dispute resolvers when it is appropriate. They have a roster of the resolvers; they get a call from the have-ers, or they go find them, because it's legitimate. It's in the state's interest to go snoop around. When they see a situation where it might work, they tell the parties all about it. The mediator isn't there selling a service, so it's a lot more legitimate; you're not a consultant selling your wares.

I need to say, categorically, that at the local, state, and federal levels there are disputes over scarce resources, over policy, and

over standards that are not handled fairly, efficiently, wisely; nor do they produce stable results when you use the conventional approaches to handling them legislatively, administratively, or judicially. I can document it; I can demonstrate it. There is no question that that is true.

We just don't do as well as we could on those four standards of effectiveness. I know it. Fairer, wiser, more efficient, more stable outcomes: that's the logic of it.

I am not prepared to abandon dispute resolution because it doesn't achieve the ideal. Especially when I can demonstrate that it does *better*, for those that the critics say they're most concerned about, than all of the other options currently available to those groups, including direct action and the law. If we care about relatively powerless groups, we have to recognize when they're going to do better compared to what they're likely to get from court or from direct action. The "as compared to what" argument is a pragmatic one.

I'm not making any argument in principle against courts or against direct action. Not at all. I'm not prepared to say that in every situation dispute resolution will do better. I'm prepared to describe the attributes of situations when we shouldn't use it. But many times, it *is* better. I do try to be sensitive to the issues of power, precedent, and the vulnerability of the powerless, and I tried in the last chapter of my 1987 book, *Breaking the Impasse*, to address the issue. I'm still in the same groove on this one, though maybe it's a rut. It's the "as compared to what?" point of view.

It's true that some practitioners have made statements which have damaged the credibility of the dispute resolution profession. Some have made understated claims about mediator activism, for example—that mediators have no business being concerned with power imbalances or unrepresented parties.

But in my view, mediator activism is appropriate. First, it is appropriate for a potential neutral, a neutral who may potentially be acceptable to all parties, to go out and recruit parties. To go

out and recruit representatives of interests who the parties already at the table feel should be present but aren't. I think it's appropriate for a neutral to go out and round up representatives, or even help groups coalesce, to become enough of a group to name a representative, to know that their interest is at stake. That's activism on recruitment.

There's a second kind of activism. The parties are there. They've framed the agenda narrowly. They don't see a potential linkage. It is, I think, appropriate for a neutral to ask in the form of a question whether they might want to expand the scope of the agenda, because other cases or other experiences might suggest possible trades. That's activism.

It is appropriate, third, for the neutral to provide skill-building training to parties who need it, as long as the offer is made to *all* parties, to enhance the prospect of maximizing joint gains. That's activism.

It is appropriate in my view, too, for the neutral, when meeting with the parties privately, to push them to consider their best alternatives to a negotiated agreement, their BATNAs, and the ways of improving their BATNAs and thus to clarify their attitudes toward what the option of no agreement really means to them.

It is appropriate to question people, to cross-examine them in private. "Do you really know what you're going to get if you don't accept this? Have you thought about that? Is there anything you can do to improve your walkaway if you get no agreement?" To push them hard, to cross-examine them, to help them understand whether and when they should agree or not agree to certain packages. That's activism. It's appropriate to suggest items to put on the table that the parties themselves haven't suggested—things to trade.

It's appropriate to do this either in caucus or together, by asking questions, adding possibilities, to open up new options: not to advocate any one, but to raise possibilities, to broaden what's

available to work with, and to be the initiator of that and not to pretend that you're not. That's activism.

You ask questions: "Have you thought of this? Have you considered this? What about that? Have you taken these three steps down the line and thought about what this will mean to you? Did you know about this thing over here? Might that be relevant?" I'm not pretending that by asking it as a question, you're not being activist. Quite the contrary. I'm saying that's the form of activism that I would personally prescribe, and I would say that I would be an advocate for the agreement back with the constituents of the parties. So, we work together at the table, and one guy says, "Well, I see why this is reasonable. Will you come and help me sell it back to my people?" You bet I'll go and represent the interests of the whole group, if told by the whole group it's okay—back with the constituents of one group, or with the press. That's activism.

So there's activism in recruiting parties, in raising other issues, in asking about the issues, in providing skill building, in cross-examining parties about their alternatives, even in suggesting items to explore that no one has yet brought up. The rest of the environmental mediation or public dispute resolution community are scattered along the continuum of views on activism, starting from, "Don't do any of those things at all, because the parties won't own the agreement. . . . It will fall apart, they'll disavow it, they'll think it's yours," or "Who the hell are you to interfere? It's their dispute, not yours."

This kind of criticism sometimes comes from scholars with a labor orientation. But the most experienced labor mediators I know say, "That's wrong. I do all the things you said." It's a myth about the labor realm that you don't meddle because the parties won't own the outcome, that they won't feel it's theirs, that you'll be injecting your values inappropriately, that it's unethical.

I'm not neutral with regard to the outcome. I'm *nonpartisan*. That's a big difference. I refuse to adopt the interest of one side as

being more important than the interest of any others. I will not side with any party, including the least powerful. If only for pragmatic reasons—I wouldn't be able to maintain my role in a dispute if I'm viewed as partisan.

But I'm not neutral with regard to the quality of the outcome. I want an outcome that maximizes mutual gain, that doesn't leave joint gains unclaimed. I want an outcome that takes the least amount of time and that saves the most money for the parties. Maximizing joint gains means that you haven't left something on the table that would have been better for both sides, even if the parties didn't propose it.

In any event, the rest of the dispute resolution community arrays itself along this continuum of activism and there are little markers that move up and down on bringing parties in. Some people are with me on that. On generating options, no way. On generating data, on bringing your experience to them from other cases, no way. On offering to be an advocate for the thing, out there in the public and the press—no way: "Hey, you don't want to get identified with any one proposal. Then you won't be viewed as neutral by other people who might not like it later, and you might hurt your reputation. You're just a process person. No substantive involvement." That's their view.

But the patronizing tone of some of the critics gets to me: "These dispute resolvers are coming up with stuff that's just cooling off these people who would get more if only they would go to court."

Wait a minute: Who decides this? The people can't decide for themselves whether this is okay? Only you, the great paternal observer, knows? I have a lot more confidence in people's ability to know their own interests, to make comparisons, or to make risk assessments for themselves than the critics do. So when anyone objects to my activism, I want to remind them about the voluntary nature of the agreement. Also, because some people have relatively few resources and may be there because they don't have

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a better alternative, I want to remind the critics that activism can also mean training.

That's why I want another piece of activism—bringing resources to the table—to ensure that nobody is disadvantaged. We create the resource kitty in negotiated rulemaking cases, in which any group that can't pay the fare to come to Washington can dip into that fund.... We do it with the concurrence of the parties already in. Everybody has to agree to every move. You have to have a resource kitty; you've got to have an equal playing field.

The people who bring up the issue of cooptation suggest that a resource kitty and training may look attractive in the short run, but they coopt weaker parties. But what they're really saying is, "These dumb people." You have to follow the logic here, that "these dumb people" are being conned into accepting something that they don't realize isn't as good for them as something else.

You can't believe in cooptation without being patronizing. That's it in a nutshell. Because then you're saying that you see it, and they don't—that they're giving something away, that they're being fooled, tricked, sold a bill of goods. That's what cooptation means. But people know their own interests. Even if they begin with insufficient information, expertise, or organizational capacity, they're likely to do better in a public dispute resolution process than if they go through the normal process.

Bringing people into a process, giving people a feeling of participation, and then not empowering them to have any say was the problem with citizen participation; it didn't really promise anything. But in dispute resolution, participants have a veto. They can always step out. They can take whatever position they want. They can go back and use the other options available to them. I don't think the critics are paying enough attention to that, as compared to every other option available.

Another dimension of activism involves expertise. There are people who believe that neutrals sell process. They go in and

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don't need to have ever worked in that institutional context. They don't need to know the system of rules, laws, and informal understandings. They don't need to know the technical language; they can learn it. Only the parties need to know; it's their agreement. The neutral is not supposed to know the issues well enough to contribute substantively. You're only a process person.

But first, you're a drag on the inventing process if you don't know what they're talking about. They can't stop to educate you. You've got to know at least what they're talking about. Second, you're less than a helpful advocate of a good outcome if you can't bring to them the experience of others that they don't know, with regard to the range of solutions they might invent. I got involved in a land use case, for example, where the people never understood that you could have property value insurance as part of a siting process. I said, "Well, here's a case, here's a case, and here's a case of property value insurance." And they said, "You mean we can do that? Wow, that solves a big problem for us."

It's perfectly appropriate, even necessary, for a mediator to do this kind of thing. It is, certainly, if we care about the efficiency of the outcome, meaning maximizing joint gains, stability of the outcome, and the wisdom of the outcome, as measures of whether we did a good job. The wisdom of the outcome, here, simply means that, in retrospect, the parties did not forgo available technical knowledge with regard to the options they considered. In retrospect, the parties won't say, "Oh God, are we dumb. We didn't even know that possibility existed."

So the notion that the mediator or facilitator shouldn't have any expertise doesn't make any sense. It's only if you say, "My job is to help the parties reach an agreement amongst themselves. I don't care about the agreement; I have no responsibility for the agreement. I'm neutral! I'm neutral with regard to the quality to the outcome. I don't care about the outcome; I'm a process person." Only if you say that do you then argue, "I don't need any expertise except process expertise." That's nuts.

This leads to the issues of responsibility and accountability, which are terribly confusing. I got myself in a lot of trouble with a *Vermont Law Review* piece on the accountability of mediators. People said, "Oh, you mean you're so concerned about the quality of the outcome that you would *advocate* the interests of those least able to advocate their own interest? Well, then you're clearly not neutral, and you're not a mediator."

I said, "Now look. When I say I'm committed to the best possible outcome, it means several things. It means the outcome's viewed as fair by all parties; it means I ask questions; it means I help put more options on the table; it means I help train people to advocate their own interest, but I offer the same training to everybody. It *doesn't* mean I take sides."

It's very hard to find a way of saying that the interventions that you make, while offered equally to everyone, help some disproportionately, particularly those least able to help themselves. So you *are* having a disproportionate effect on those people's abilities to pursue their interests, but what you're doing, you're doing equally for all, except that it has a more beneficial effect for some. That is a very hard point to get across.

So, when I say I'm accountable for the quality of a mediated outcome, people say, "Well, then you're not neutral, because then you're trying to steer the outcome toward a particular outcome *you* think is good." And I say, "No."

Accountability for the quality of the outcome—providing training for everybody and helping them maximize joint gains—is the focus of my activism. It's all in the phrase "maximize joint gains."

Efficiency is a function of not leaving potential joint gains on the table. That means that the mediator must have an absolute concern about the quality of the outcome, the substance of the outcome. You can say, "Oh my God, they're not maximizing joint gains. I have to say something to help them squeeze out all possible mutual advantage." I'm accountable for helping to man-

age a process that will produce those gains for the parties.

I'm partly to blame if it doesn't work out. If the agreement doesn't get implemented later, because we didn't anticipate a boulder in the road, I'm partly to blame. I had a responsibility to help them think clearly about the prospects for implementation. But many of my colleagues will take no blame—"I'm not responsible for implementation. That's the whole point," they'll say. "It's the parties' agreement. It's not mine."

This is a very hard point to get across, particularly within the community of mediators, because it's such a sensitive issue. You say words like *accountable* or *responsible*, and they explode before they hear the rest of the sentence.

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My conversation with Susskind next turned to the issues I most wanted to explore: his "feel" for his own practice—the difficulties and challenges, the satisfaction or worry, his own emotional and reflective response to the complexity and movement of mediation practice. How, I wondered, would Susskind feel about dealing with angry and doubting parties, with the irrationalities of politically charged public conflicts? How would Susskind make sense of the real messiness of practice?

The work itself is enormously satisfying—to work out a resolution in some contentious public dispute—because it basically achieves what I organize my life around trying to do. I set out to stay involved with issues on the ground in everyday life, people's struggles in their everyday life, to find a way, by working at the intersections between theory and practice, of doing that while still keeping my eye on the bigger picture, and still remaining primarily an educator. No small chore. I want it all. I want to stay in the university; I want the satisfaction of being an educator. I want to be a theory builder, but I want my theory to come from practice; and I want my practical intervention to solve problems

in the world. Then I'll be happy. And I think I'm getting that. That's what's satisfying.

So, for example, I get a call in the Hartford case: "We've never tried this before, but we're trying to get all these communities in the Hartford region to agree on an allocation of affordable housing responsibilities. What do we do? Are you interested?"

The first exciting part for me is trying to construct an image of what the process would be like, costing it out, putting a team together, and selling it to the people involved. In this case, they had a review committee that had eight, ten, maybe twelve practitioners and companies invited to come and make presentations. So I knew I was one among many, and I thought, "Look, I'm going to tell them," as I always do, realistically, "this is what it is going to take. This is one model of the process. These are the choices you'll have to make. This is why the team I can put together can do the job. These are the issues that are going to come up. This is what I've worked on that's like this that is helpful. These are the problems that I don't think you've addressed yet. Are you sure you want to do this?" I don't pull any punches when I come and do those interviews. In a way, we're back to stagecraft....

It's a challenge to convince people that there's a right way, based on experience so far, to think about the questions they need to ask themselves, and I try to turn those occasions into a situation in which, even if I don't get the job, they'll know a lot better what they need to get and why and how they need to do what they need to do.

I really relish those occasions; I'm never the least bit nervous about them. I look forward to them; I enjoy them. I've never walked into a situation where I've had any stagefright at all having to do with dispute resolution. I'm nervous about lots of other things, but not about this. In just about any situation now, I really believe I'm going to have a sense of what I ought to do, based on a lot of experience at this point.

The frustrations and satisfactions emerge in different kinds of ways. In this Connecticut case, for instance, we get the contract, we agree to do it, I put the team together, I go down, and we meet with all the parties, and it's a high. I'm doing what I want to be doing. I see the possibilities; I know this can work. I'm excited to meet a brand new set of people, all of whom have strong views. All of whom are very able, who have never heard of dispute resolution before, for the most part, who don't see what's coming and I do—what the process is going to lead to, the problems that are going to come. But I can't tell them about it all at the beginning because it won't mean anything.

We start, and then there's six, eight, ten, twelve, twenty-four months of exhaustion, and many let-downs, because I see very clearly the steps we have to go through, the problems we're going to have to resolve, the confrontations we're going to have to have, the learning that has to go on, and they don't.

I may not know anything about the particulars; I just know there's a set of dynamics that are going to have to work themselves out. Some people are going to emerge as strong speakers and others aren't. Someone is going to throw a bomb somewhere along the way. Someone is going to have a bright light turned on and decide that dispute resolution is the greatest thing that ever happened. There are going to be moments of real anger; there are going to be moments when someone is going to leave, and we're going to have to fight to get them to come back, because they think leaving is the only choice they have. I know that all that is going to happen.

It's like having this ability to predict the future and trying to figure out what to tell another person. You come down from another planet. You know their whole history, and you know where it's going to go, and you come from the future, you come back. You can't tell them what's going to happen! It isn't going to have any meaning. After a while, it's very much like being a time traveler, if you do enough of this stuff.

I can see what we have to resolve. It's grueling. It's absolutely grueling, sitting in a room with twenty, fifty, one hundred, two hundred people. They're all just paying attention to what they're concerned about; I'm trying to pay attention to what all of them are concerned about.

I'm watching all the nonverbal stuff. I'm trying to keep a script in my head; I'm trying to be responsive; I'm trying to watch every face; I'm trying to watch the relationships between the people; I'm trying to keep tabs on the clock; I'm trying to worry about how I'm being perceived. And in the end I'm exhausted; I'm sweaty; I'm tired; I come home and I go into a deep sleep. It's an incredible outlay of energy. . . .

And doing it, week after week after week, when you *know* that you could consolidate it if you could just fast-forward. But then you know that you can't. You want to, but you can't. They have to live it; it's theirs. It's their dispute; they have to live it. But it's *frustrating* a lot of the time. And you can't let on any of the frustration. You can't *share* it with any of the people in the group, which makes it even more frustrating.

Even when you think something is going to a dead end, you have to let it go. Unless they know it's a dead end, it isn't a dead end. So, there's great frustration because of the commitment of the time and energy, yours and theirs, that in one respect you know might be shortened but in another you know can't be.

You're constantly trying to keep it moving, but you have to be very deft at those interventions. I'm constantly editing what I'm saying; I'm on a delay loop. I have to think about how it will be perceived, if it will help or hurt.

I make mistakes all the time; I still do. I guess my thinking outdistances my ability to talk, and my ability to talk outpaces my ability to listen. So I'm constantly thinking ahead; I'm half listening, and I'm then trying to speak. Sometimes I'm talking too fast for them to get it, or I'm trying to run the whole thing on slow

motion for them, when I want to speed it fast forward for me. It's very crazy.

I try to use humor more than anything else to deal with mistakes. Say I said something, someone's getting angry, and I realize that it's because they thought I said something that I didn't mean. But they *think* I said it, and they're just going to get angrier. So I stop and I say, "Maybe this is a good time for us to run this back and start over again. Could I be allowed to edit out what I just said, because obviously I just screwed up." Or I'll say, "Maybe I ought to ask this person to come here, and I'll go over there and sit down and listen, because obviously I'm not hearing how I sound very well."

A lot of the time I use sarcasm as a form of humor, because it's the easiest form of humor for me; I'm not much good at punch lines, so it's sarcasm—but with myself as the butt of the joke. I'll try to make light of what is going on, to ease the tension in the room. If there's going to be anger, I want it aimed at me if it's going to be aimed at anybody, rather than at the process. I want to be able to soak it up, absorb it like a pillow; I don't ever hit back.

If someone is angry at what is going on, I want them to get angry in a way that doesn't hurt their relationship with another person in the room. Getting angry's okay, but getting angry and out of control isn't. People often get out of control in these circumstances, and so I have to try to find a way to wrap some humor around it and let the person save face and not have them walk or ruin the relationship.

They might stand up and make a speech, and everybody will start their eyes rolling, and they're saying, "Get this jerk out of here," and I know that that person is going to have a hard time gaining any respect from the rest of the group, and yet I work for that person as well as the rest of the group, and I want this person to be able to recoup their respect from the rest of the folks there.

So when they're done, I'll say, "Gee, I really agree there's a concern that you have about this, this, this, and this," and I will try, as best I can, in a pithy way to take the most legitimate part of what they said and say it again to the rest of the group on their behalf so the rest of the group will see, "Gee, there was really some important meaning in that."

I'm trying to keep everybody working on the problem rather than going at each other. It's not easy—it's hard. A lot of these situations involve incredible stakes for a lot of people, and they're very highly charged.

But it's not the meetings part that's hard; it's the part that's between the meetings, after the meetings, writing it up, organizing the staff. The drag for me is managing the administration of it. A lot of stuff happens between meetings. All the phone calls, all the follow-up review of the material, writing the press releases, making sure that arrangements are all set for the next time. I used to do all of that, but I don't anymore. I now have staff to do all that. But fatigue is a big issue.

In the meeting—getting it to work, dealing with the flow of things—I'm not worried; I assume it's all going to work out fine, and I'm going to know the right thing to do. I'm prepared; I've thought about this stuff.

But I do get very frustrated when somebody can't express their own views well to the rest of the group and the rest of the group is pouncing on them. I know that if I intervene, the person would take it as an insult, and yet I know I could express that person's view in a succinct way that would help them. Then I have to call a caucus or call a break, and during coffee, go over and talk with the person and try to say, "God, I know if I were where you are, I would have been really upset with this group. Maybe you could try it this way, or that way." You can't do it publicly, and then it takes more time, and so you're constantly fighting the clock.

The clock is the worst enemy because you know people want more time to talk about things, but you also know that they don't

know that the last item on the agenda needs a half an hour, and there's only twenty minutes left. If you cut it off, they're going to be angry, but if you don't take the last item up, you're going to mess up the whole process. So you say, "Hey look, guys, I really think we've got to go on to the next issue," and you start to talk like you've gone on to it, and wait to see if you can get away with it. There is always an immense amount of adrenalin flowing because I'm fighting the clock.

I'm operating on some other plane when the mediation starts. It's like I'm having a conversation with each person simultaneously. Partly I'm teaching. But how do you teach without being pedantic? How do you teach without being explicitly Socratic? How do you teach without giving lectures? How do you teach without appearing to teach?

I do it by saying, "If I were in that situation . . ." or "Might you . . . ?" or "Imagine if . . ." "What if . . . ?" "Could that be construed as . . . ?" Everything is questions. It's all questions. It's not questions in the Socratic sense, where I'm manipulating what comes next, because the parties often tell me to shut up, and that's it, and they're going to go ahead and do this.

I'm not fishing for anything. I'm just saying, "God, have you thought about this?" I'm just talking about it as I'm thinking about it, and I'm trying to reveal a thought process that I'm going through. That's the teaching. I'm trying to let my thought process come out loud with them. Some people will say that a lot of this is the force of personality, that I'm underestimating the extent to which the individual mediator's personality has a lot to do with how this process works. But I'm not underestimating it—I know it's important. But I can't do anything about it. I may as well just be who I am.

There are a lot of issues here about general trust building. Take the Maine low-level waste siting process, a case I worked on through Endispute. After the first meeting of the stakeholders, there were a bunch of letters to the editor saying, "This group of

professional manipulators from Endispute, Inc., has been hired by the Authority to coopt the members. . . . People should refuse to join the advisory group, they should boycott the process." And the press showed up at the next meeting with television cameras and everything else, and I had to figure out a way to start off the meeting in a way that would build trust.

So I said, "Before we begin today, I want to make a statement. I want to respond to some of the letters that have been published this week in the newspapers, and to some of the concerns that have been raised. If *anybody* in this group at *any* point in this process thinks that I am trying to steer this toward a particular outcome, call me on it. Point it out. Interrupt. Say that you think it's the case. If I don't make an adjustment in response that satisfies you that I'm not partisan, I'm out of here. I don't need this. You don't need me."

And the headline the next day was "Mediator Promises to Withdraw if Bias Detected." All the rest of the discussion—all the substantive stuff that we thought was going to be the debate—they picked up, and after that I didn't have any problems. I said, "I work for you. Hold me accountable."

I did have a private go-to with the most obnoxious, difficult person up there last time, and I said, "You know, I'd like to help you."

And he says, "Sure you would."

"I'd like to help you get your interest in this process," I said. "I know you don't believe that. You think I'm working for the power authority or the nuclear plant or something, but *try me!* Call me during the week. Tell me something that you want on the agenda. Tell me something before the meeting, *before* you write a broadside to the paper. Give me a chance. Test me on it. Give me one opportunity to demonstrate that I mean what I say. If I mess up, then don't believe me any more. *I work for you.*"

He toned down the rhetoric dramatically. He's still writing his letters, because he uses it as an organizing tool, and I said to him,

"I know you need to do this to keep visibility, you have to keep your members abreast of what you're doing, and you want to raise money. I understand that, that's fine. I don't have a problem with that. I don't take it personally. I'd just like to see you get more of what you want; I think I can help you do it." And I said, "And I'm making the same statement to everybody here, and I know that doesn't fit your model of how things get done. Try me."

In the Hartford case, a guy who was very important to the process came but said nothing for the first two meetings. Finally I tried to move an item off the agenda, and I said I thought we had an agreement on something, and he said, "We don't have any agreement on that. What do you think, this is *your* agenda? I thought that was going to be the case. I don't need to be here if you think you know what the answer to this whole thing is." And I said, "Hey, look. I thought we had an agreement on that." I took a magic marker and put a big X through the page where I had written the agreement. I took off the page, crumpled it up, and threw it in the garbage can, and I said, "Here, come up and write what you think you agreed to. I missed it. I'm sorry, I missed it."

He came up and said what it should be, and he became one of the key supporters of the process for the rest of the time. It was a very crucial moment. I misconstrued what the group had agreed to. I thought I heard one thing—he heard it right, I heard it wrong. And he took my writing it wrong as an effort to say that that's what they had agreed to when they hadn't. The group said that he had it right, and I had it wrong. After I made the corrections, I didn't have a problem dealing with him the whole rest of the time. In fact, he became an activist for the process. He said, "This process is really and effectively accountable to people. We have a chance here to shape this policy. Let's do it."

A lot of people have become almost embarrassingly supportive of a process that they only partly understand. "Oh, we should do everything by consensus. We should always have processes like

this. We need neutrals for all of our public meetings." They do this because they feel a sense of efficacy. It's not like going to a hearing where you say your piece, you leave, and you have no idea whether there is any take, or you know it's getting done behind closed doors.

They see the embodiment of an ideal they have, which is that people can sit, reason together in the political world, and an intelligent outcome that takes account of everybody's concerns will emerge. I think most people in the public sector would like to believe that's possible.

People know what's happening. They come in to the public policy mediation process skeptical. They come in realists, not cynics: realists, with skepticism and cynicism floating around, and they wait to see what happens. And, if they get an agreement and feel they've been heard, and they've watched something that works to get everybody involved, and the strongest didn't necessarily prevail—logic prevailed, interests were served, politics weren't ignored, the thing has a chance of being implemented—it's enormously positive. Why wouldn't they become advocates of mediation?

There are two light bulbs that come on. You can see them flashing around the table at key moments. One is, if you don't like what someone just suggested, don't just say you don't like it, try to suggest an alternative that meets their concerns but that's also better for you too. They stop saying, "That's crazy! We're not going to do that. I'm opposed to that." They realize that the way to get what they want is to offer the others something that, in fact, responds to their needs but also responds to the speaker's own needs, whereas what they heard didn't.

The first couple of meetings, and for some of the people most of the time, it's, "No, no way! We'll never go for that." That's all they say. To get past that attitude, I try to say, "Well, what if that person had said this and this and this, would that be better?"

They'll respond, "Yeah, that would be better, but it's still not there." Then I say, "What would you add to it to make it better?"

That's the question-asking process. I am modeling the process that I'm hoping they're going to use in dealing with each other. I'm taking this person's side when he says "No," and I'm saying, "You're saying 'No' to him. I can see why you're saying, 'No,' but what else could he have said that would have satisfied you?" I'm getting him into the mode of making proposals in response to things that he doesn't like rather than negative statements, and the participants see that that's the way to deal with others they disagree with in this kind of process.

At some point I see the light bulb go on. The next time something comes up that this person doesn't like, he or she says, "I don't like that as much as this and this. Could you live with that?" and the person looks over and smiles at me. You can just see it; it is a very obvious event. They get it, and it's very intriguing.

And then you'll get a lot of people along the way saying, "You know we had a thing at home last week, and I tried doing this process, and it really worked with my kid." I get it all the time in the sidebar conversations—people taking the same approach to consensus building and trying to apply it in their personal lives or at work.

The essence of the process is acknowledging the other's needs as well as your own, and making proposals that respond to both. Arguing that you don't like what the others want, and you want something else instead (which is the old model of bargaining), doesn't produce agreement. Remember, we're trying to get an agreement. We're not done until we get agreement.

When people stay in the mode of "no, no, no," I have to act on their behalf with the rest of the group, as if they were getting it. I say, "Well, John said, 'No.' I think we can all understand why he's not completely enthralled by Jane's idea, but perhaps, John,

what if Jane had said this and this and this? Would that have been better?"

He'll grudgingly say, "Yeah, it's better."

I'll say, "Could you live with it?"

He says, "No, I can't live with it."

"What would it take for you to live with it?" I ask. "You don't have to commit to anything, but just help us understand what's bothering you about it." Those are the kinds of interventions a mediator makes.

John either moves or he doesn't. If he doesn't, I say, "Well, John, if I were you, my God, I might suggest this and this and this. Would that be moving in the right direction?"

He says, "Yeah."

I say, "We're not committing John to anything but let's work with this for the moment. What about the rest of you, if John had said this?"

It's all "If this, if that, what if . . . ?"; "Could you . . . ?" I don't think I ever make declarative statements about what the group should or shouldn't do, or has or hasn't done.

We take breaks when people can't sit anymore. One of things I'm bad at, I know, is releasing people soon enough for breaks. I could sit for the whole day. I don't need breaks. It's part of being impatient. I don't want to waste the time.

But people need more time, just to get up and walk around and socialize. So, every break I turn into caucuses between me and someone, or I just motion a few people over and say, "That was great, what you did. That was a super proposal; that really broke the logjam. Can the two of you add anything to what she has been saying that will get those guys over there who won't budge on this to . . . ?" I don't call it a caucus—it's a mini-mediation within a mediation.

The time to deal with just one party is between meetings. We don't do it at meetings. We distribute a lot of written proposals and summaries. I will put a draft together and send it to every-

body and ask them to send their individual comments back. This way, I'll know where everybody is on every proposal beforehand.

I get back completely contradictory comments, but at least I know where everybody stands. Then I try to formulate something, or to lay out two poles, and say to the group, "We got all your comments back, and we got a bunch of you here and a bunch of you here. I don't see that it makes sense to just put one of these up. We have to do something about this. Who's got a suggestion?"

The parties are there for lots of reasons. They're in the process because someone from their organization told them to come. They're in because they don't want the embarrassment of having to explain why they didn't come in. They don't want to get hassled by someone above them or at the same level. They're in just out of curiosity. They're in for a thousand different reasons. And some aren't in at the beginning, and some drop out during. We have to go and get them back, or decide to go ahead without them. . . .

You can sometimes look ahead and know that somebody is going to threaten to walk. It's a source of power, they think. I can make a list of tactics that someone is going to use with almost 90 percent certainty in every dispute. I know what they're going to do; I know how people will respond. There are always surprises, but basically I know what to expect.

There's the person who goes to the press and announces that the group did this or did that, and it's not true. And then the next meeting they don't want to come; they don't show. So the others are really angry.

I ask, "What do you think we should do, group, about John and the article in the paper?" Someone will respond, "That wasn't true. We had an understanding, we had a ground rule: No negotiating through the press. He broke the ground rule."

And I say, "What should we do?"

"Oh, screw him, who needs him?" is the response.

"Well, I think we really need him," I'll say. "We need him back."

"Well, you call him," a participant will say. "You get him to come. I'm not calling him."

"You want the mediation team to call him? Okay, we'll call him," I'll say. "What should we tell him?"

It's the subject of negotiation, with the group, what to do. Everything is negotiated.

Now, anyone can go to the press any time they want. They can say anything they want as long as they don't attribute something to the rest of the group or to someone else. You can't tell political people that they can't talk to the press. But you can have a ground rule: Don't attribute something to someone else. You can say anything you want for yourself.

We do a press release after every meeting. Even if we meet for ten months, we do a press release after every meeting. We always give a public notice of every meeting. Every meeting is open. You can't have a meeting like this and not have it open to the public or the press. There is no secrecy.

What about between meetings? I don't announce my phone calls to the press. We do a lot between meetings. But I want to know, by what comparison is this process secretive? Compared to what?

I do have a sense of the limits of this model and my own style. I am an inappropriate person for many disputes. I'm an inappropriate guy for disputes in which the parties are looking for therapy, personal therapy. I'm just not good at that kind of endless sidebar conversation about how you feel and how I feel. I'm focused on solving the problem. I'm not in the therapeutic mode; I'm in the problem-solving mode, to use Sally Merry and Susan Silbey's distinctions about mediator styles.

I'm probably guilty of not listening carefully enough to the possibility that there's no solution. I just work and work and work on the assumption that there is one. I keep pushing and strug-

gling. The other thing is that some people are truly put off by the pace at which I go. For instance, I'll ask them a question, then another question. I'll say, "Okay, I hear you," and before they finish the sentence, I say, "Yeah, yeah, I know you're going to say this, and then they're going to say that. But if you do that, then they'll do this, and then what are you going to do about that?" I can be too fast, and people are put off by it.

The closer we get to a solution, the greater propensity I have to say, "You're going to say this, and they're going to say that, and this one will say that, and the only choice you'll have is this, because you're concerned about that." And people don't want to hear all that. They want to live it. They don't want me to live it for them. They want to live it. And I'm probably wrong some of the time, which is even worse.

So the pace has to be controlled, but for those that want a much slower pace and a personal touch along the way, I'm the wrong guy. I don't have the time. I'm probably the wrong guy when the parties know each other really well, and they're rehashing all this old stuff—they're reliving all these old battles. I just don't have a lot of patience for that. When I say that I don't have a lot of patience, basically I opt out. I try not to stay with disputes or get involved with disputes where I don't feel that I'm the right person, and I try to recommend other mediators.

I'm very, very selective, and I can afford to be, because I don't have to make my living doing this. But I imagine if I were to try to make my living at this, and I had to take assignments that I thought were boring, I'd be really awful. My mind would be on other things.

There are times in the process when we try to keep people from rehashing history. The point is not to interpret what happened but to get an agreement on what to do. So I'll say, "Why don't we give each person a few minutes to give their account of what happened, and there will probably be real differences. You'll probably disagree. But we'll understand more about what people

are proposing if we understand where they're coming from, so let's listen. But once we hear it, let's not try to get agreement about what happened. We want an agreement about what's to be done."

People start this process with needs, desires, wants, concerns, ideology, uncertainty, and interests. All of them. And I expect people to change—to alter their sense of what they would or wouldn't like to have happen by listening to what other people say. Mediation is not a question of plugging answers to questionnaires into the computer and printing out the optimal joint gain resolution. Learning and inventing goes on, reconsideration goes on, and argument matters.

People discover something about their own interests along the way. That's why you encourage disclosure, as opposed to just connecting the microphone into the computer. People are not just collections of preset interests; they also have all kinds of tacit wants and needs that come into play.

As a negotiator, you know that if you're representing a community, there's a diversity of views within that community, not just a single hierarchy of weighted interests. There's what's spoken and what's unspoken; things you would like to admit, things you won't admit; there are things you realize and things you don't yet realize; there are a lot of inchoate concerns.

You listen; you hear what other people say; you identify with that; you're informed by argument and debate; and you could never predict at the beginning where you are going to come out on the issue of your community's responsibilities by the end.

All interests are not knowable at the beginning of a mediation, or even at the end. I mean, when confronted with a package or choice, when we have come as far as we have, when we don't have any more time or money, when we've explored and plumbed and probed, and when the mediator asks, "Do you want this package or the alternative, which is no agreement?" then parties

know what is in their best interest, relative to what the options are, better than anyone else can know them at that time.

That's what I mean when I talk about interests. I don't think of interests as completely known quantities from beginning to end. If I were to use the economists' multi-attribute decision analytic frame, I'd say that between the beginning and the end, we've added a large number of attributes, we've changed the rank ordering, and we've changed the rationale for the weightings and the rank orderings along the way. The list of what is known changes because of the conversation. The conversation *matters*.

There is a danger if a mediator walks in thinking, "You have your interests, you over here have your interests, you over there have your interests, and now we're going to talk." If you don't presume that people are going to learn anything from the conversation, you won't promote useful dialogue. If you don't presume that people will alter and adjust their calculus as they go, then you won't honor and value the learning that needs to go on: the clarity of communication, the usefulness of bringing new information. That's a big danger.

Arguments about bringing knowledge and expertise and being activist and so on all honor the fact that people don't know everything that they want and need and can't be explicit about it at the beginning of a dispute. Otherwise, we wouldn't go through all this inventing.

I don't assume some perfect rationality from everybody in the room. I assume, first, that emotion will overcome logic during the course of the process. Almost everybody will often do things that, if they thought about them beforehand and were asked, "Would you do that?" they'd say, "No." But they—we—will do it anyway, because emotion dominates logic.

I expect it to happen. I expect someone to blow up, even though blowing up at their ally is stupid, but they'll do it anyway. I expect it. Which means we have to give people room in the process, that we have to give them a chance to save face. The

mediator has to absorb a lot of that, and deflect it. The person will be glad you did it, because they'll be the first to tell you that emotion overwhelmed logic at the time. They won't say it that way, but that's what happens. They'll say, "The guy just ticked me off." I expect that.

Second, I expect people to say, "Option one is better than option two, option two is better than option three, but I don't believe one is better than three."

"Wait a minute!" I'll say. "One is better than two; two is better than three, but you don't think one's better than three?"

I expect that because certain things have symbolic meaning, we don't understand. So I try to remember, "There's something in option three that means something to you that I don't understand, which means that it's better for you than option one, even though one is better than two, you agree, and two is better than three, you agree—but if you had a choice between three and one, you would choose three."

I try to remember this. I expect people not to be able or willing to communicate lots of value overlays I don't understand. I expect "illogical" statements, but "illogical" for good reasons.

I try to respond not by convincing people that they're wrong but by taking what they've said at face value and trying to understand what it is about option three that makes it better than number one. I cross-examine people to make sure their priorities are clear.

Third, people let personal likes and dislikes outweigh their strategic advantage. I might say, "It'd be great if you had that guy as your ally."

"No way!" is the response I might get.

"But if the two of you were in agreement, it would clearly carry the day," I'll say.

"I don't like the guy. Period," they'll say. "I'm not having a private meeting with him; I don't like him." Or they'll say,

"You're right, it would probably help. But I'm not doing it." This is more of a personality thing than anything else.

I also expect people to have a bad day—they've had a fight with their spouse the night before; they didn't get enough sleep, they're cranky; they're worried about something. I expect as much.

Anyone who doesn't expect problems like this hasn't tried to mediate. So much of what is written about mediation is written by people who haven't tried to do it, who haven't looked at it closely. It drives me crazy!

Now, think for a minute about the definition of democracy that most people have. The definition that theorists have has to do with rights and freedoms and not responsibilities. But if you *really* look at democratic theory, at least in the way I think it ought to be looked at, it's about the balance between rights and obligations, or rights and responsibilities. You have a *right* to express your own views; you don't have a right to get everything you want. You have a *responsibility* to behave in ways that respect the needs of other people and doesn't infringe upon their rights.

And what are the mechanisms of democracy we use to balance rights and responsibilities? There aren't very many. Voting? Voting's a big thing. You vote. Are you balancing rights and responsibilities? Not really. Especially with referenda. You pick one side and take no responsibility for the downside. How should we work on this balancing? By participating in the processes of government? That doesn't look to me like many people sharing much responsibility. They are complaining, they're lobbying, they're going to a public meeting, they're saying what's good for them.

The mediation of public disputes is the *only* mechanism I can see which allows, indeed encourages, people to balance their rights and responsibilities as citizens.

And why? Because there's no agreement unless you listen, hear, and respond to the concerns of others. There's no action

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unless we all accept the responsibility for accommodating the needs and interests of everybody else.

Where's there another forum, another mechanism of democracy that does that? I don't see one. Maybe that's too extreme, but I don't see one. You go to court—are you balancing anything?

The need of parties to respond to each other brings out a sense of responsibility. It recalibrates what I think was the initial notion, the Jeffersonian notion, of democracy. People come in with, "I want this, I want that," and leave with, "We need to do this," in every case I've worked on.

When you see someone, starting with the mediator, attempting to accommodate your concerns, it behooves you to seek to accommodate other people's concerns, if only to get what you want. It is too hard, face-to-face, to say, "Well, now that you're doing what I want, that's great; I don't have to do anything for you." It comes down to that. It's too hard. I don't care how tough-minded you are. You can't encounter another person face-to-face, have them demonstrate that they want to help you get what you want, and then not accept responsibility for helping them get what they want. People can't do it. But you don't have to do that in a public hearing; you don't have to do that when you vote; you don't have to do that in court.

As a mediator, I create a context in which that is what happens, a setting which is protected enough, and where there are rules and rewards and encouragement for behaving in that way, and the usual impediments are taken away, and the burdens are made clear. Is there any other setting in which responsibilities are balanced with rights in this way?

The mediation process is the epitome of what I think democracy is really supposed to be like. It's not that people are no longer concerned about what they need. It's that they now realize that the only way to meet their needs is to respond to what others need as well, and therefore to come up with something they can do together that meets their needs. And this doesn't happen

for altruistic reasons. The "we" here is special. This "we" can help each of us get what each of us wants and needs. There's no loss of "I," but there is recognition of others, of differences.

Participating in politics usually involves three things: lobby, vote, or stand for office. What else is there? Those don't promote the kind of balancing of obligation and responsibility that face-to-face, joint problem solving creates.

I wouldn't argue that my model of direct democracy is best and we should abandon all the conventional mechanisms. I'm in favor of representative democracy. But I do think we can supplement it on occasion in the ways that I've described, and I think that it does produce "we" decisions in an informed way. What's interesting to me is, What is our option?

Finally, of course, there are public disputes that shouldn't be mediated at all. I don't think disputes concerning rights—constitutional rights, human rights, basic rights—should be mediated, even if you could meet the interests of all sides. We have certain basic constitutional, human rights that are decided and legislated in a different way. I don't think that those ought to be compromised in any way by negotiations.

While I wouldn't mediate conflicts over rights, I think there are skills and tools of dispute resolution that can help us have much better public, or even private, debate and discussion, so that we can learn to live with our differences. I don't think we are going to resolve differences through mediation when rights—fundamental rights, constitutional rights—are at stake. So if someone came to me and said, "We would like you to mediate the state policy on abortion," I'd say that there's no point in reaching a negotiated policy agreement on abortion. It's a constitutional matter.

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Susskind's views are likely to be welcomed by some, but greeted skeptically by others. For some practitioners, for example, Susskind is a gadfly, a stinging and disturbing political reminder of issues that seem intractable; he risks asking far too much of mediators of public disputes. For some more academic observers, though, Susskind does not challenge public dispute mediation fundamentally enough; his concerns with case-specific practice and even with the institutional delivery of public dispute resolution services threaten to distract attention from broader, underlying conditions of power and powerlessness, affluence and vulnerability. Thus where Susskind finds possibilities and opportunities, others may share his aspirations but nevertheless be less sanguine about their realization in everyday practice.

Larry Susskind nevertheless champions an alert pragmatism concerned with issues of power and exclusion, learning and deliberation, rights and responsibilities. His recommendation of an activist mediation style deserves widespread debate and criticism, for it cogently challenges the illusions of neutrality held not only by many mediators but also by many public-serving professionals who work in the face of conflict every day. And those who find activist mediation troublesome, Susskind reminds us, have a persistent practical question to answer: compared to what?

John Forester