THE THEORY AND PRACTICE OF MEDIATION: A REPLY TO PROFESSOR SUSSKIND

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INTRODUCTION

There is renewed interest in using mediation as an alternative to the judicial resolution of certain disputes.[1] During the past fifteen years, mediation has been used to resolve significant social conflicts and has been incorporated into systematic programs which supplement the traditional courtroom method of resolving disputes.[2]

Paradoxically, while the use of mediation has expanded, a common understanding as to what constitutes mediation has weakened. In some programs, the mediator has authority to render a binding decision; in other programs a resolution is established only upon agreement by the parties.[3] Participation in some mediation programs is voluntary while in others it is mandatory.[4] It is important for writers and practitioners to identify and clarify the principles and dynamics which together constitute mediation as a dispute settlement procedure. Topics to be addressed include the goals and purposes served by the mediation process, the values

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1. *See* P. Baldwin, Environmental Mediation: An Effective Alternative (RESOLVE, Center for Environmental Conflict Resolution, Apr. 1978); E. Johnson, J. Kantor & E. Schwartz, Outside the Courts: A Survey of Diversion Alternatives in Civil Cases (Nat'l Center for State Courts, Jan. 1977); New Approaches to Conflict Resolution (Ford Foundation, 1978); Report of Pound Conference Follow-Up Task Force (Am. Bar Ass'n, Aug. 1976); F. Sander & F. Snyder, Alternative Methods of Dispute Settlement: A Selected Bibliography (Am. Bar Ass'n, Dec. 1979); F. Sander, Report on the National Conference on Minor Disputes Resolution (Am. Bar Ass'n, May 1977).

2. *See* Stulberg, *A Civil Alternative to Criminal Prosecution*, 39 ALB. L. REV. 359 (1975); Citizen Dispute Settlement Manual (Dispute Resolution Alternatives Comm., Office of State Courts Administrator Fla. Sup. Ct., 1979); D. McGillis & J. Mullen, Neighborhood Justice Centers: An Analysis of Potential Models (U.S. Dep't of Justice, Oct. 1977); Mediating Social Conflict (Ford Foundation, 1978).

3. D. McGillis & J. Mullen, *supra* note 2, contrast the referral mechanisms and the decisionmaking authority of the hearing officer of the six programs analyzed in the book.

4. *Id.*

promoted by and embodied in mediation, the obligations of office undertaken by the various participants, the skills and resources necessary to implement the process, and the criteria for determining whether mediation efforts are successful.

Professor Susskind touches briefly upon a number of these concerns in his article.[5] His discussion and examples illustrate that mediation can be effectively used to resolve environmental disputes. Susskind's argument is novel in that he asserts that the mediator of environmental disputes, unlike his counterpart in labor-management, community, or international disputes, should not be neutral and should be held accountable for the mediated outcome.[6] Since most mediators believe that a commitment to impartiality and neutrality is the defining principle of their role, Susskind's argument carries significant consequences for mediation.

The basis of this article is that Susskind's demand for a non-neutral intervenor is conceptually and pragmatically incompatible with the goals and purposes of mediation. The intervenor posture that Susskind advocates is not anchored by any principles or obligations of office. The intervenor's conduct, strategies or contribution to the dispute settlement process is, therefore, neither predictable nor consistent. It is precisely a mediator's commitment to neutrality which ensures responsible actions on the part of the mediator and permits mediation to be an effective, principled dispute settlement procedure.

Susskind maintains, in four distinct ways, that a mediator of environmental disputes should not be neutral. Environmental mediators ought to be concerned about:

1. The impacts of negotiated agreements on under-represented or unrepresentable groups in the community.
2. The possibility that joint net gains have not been maximized.
3. The long-term or spillover effects of the settlements they help to reach.

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5. Susskind, *Environmental Mediation and the Accountability Problem*, 6 VT. L. REV. 1 (1981).

6. *Id.* at 3-4.

4. The precedents that they set and the precedents upon which agreements are based.[7]

At a substantive level, Susskind argues that the mediator must ensure that the negotiated agreements are fair.[8] The most dramatic example of the difference between the traditional neutral mediator and Susskind's environmental mediator is the person Susskind describes and endorses as a mediator with "clout."[9] For Susskind, the term "clout" applies to a mediator publicly committed to a particular substantive outcome with the power to move the contesting parties toward an agreement. In contrast, the traditional mediator would view that public commitment as the signal reason for disqualifying himself from service.[10]

It is more than a mere terminological quibble to analyze whether a mediator must be someone who is committed to a posture of neutrality. Such a commitment enables both the mediation process and the mediator to operate effectively. A commitment of neutrality provides the mediator with a principled rather than opportunistic basis for service. As a result, the parties will use his services in ways that would be foreclosed to the "mediator with clout." Susskind's analysis has practical implications for mediator selection, training, scope of service, and financing of services. Clarifying this matter is of no small moment for those interested in the continued experimentation and use of mediation.

One disclaimer is in order. Arguing that a mediator's role requires a commitment to impartiality and neutrality is not to claim that Susskind's "mediator with clout" could not be an effective intervenor. There are many types of "intervenors with clout," a police officer, parent, government regulatory agency, psychologist, marriage counselor, meeting facilitator, corporate executive, and school principal. For certain kinds of dispute settings, those per-

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7. *Id.* at 46.

8. *Id.* at 47.

9. *Id.* at 42.

10. *See generally* E. Robins, A Guide for Labor Mediators (Jan. 1976) (booklet published by the Industrial Relations Center, University of Hawaii); Newman, *Mediation and Fact-Finding* in PORTRAIT OF A PROCESS—COLLECTIVE NEGOTIATIONS IN PUBLIC EMPLOYMENT 196-206 (M. Gibbons, R. Helsby, J. Lefkowitz & B. Tener eds. 1979).

sons intervene with clout in much the same way that Susskind proposes for his environmental dispute mediator. Such a description does not make these persons mediators nor does it make their intervention ineffective or less effective than service rendered by a mediator. It simply constitutes a different kind of intervention posture from that of a mediator. One purpose served by conceptual analysis is to distinguish among different functions served by various types of intervenor postures, allowing those involved to become more sensitive to the types of intervention which are appropriate to different disputes.

The first part of this article offers a conceptualization of the mediation process to help define the positions and roles assigned to the various participants. The basic functions of a mediator are identified in the second part. The third section outlines some of the personal characteristics and skills required of a mediator. Section four describes two specific approaches used by mediators to develop settlements. Section five compares how the mediator's approach and contribution to dispute resolution differs importantly from Susskind's environmental mediator.

I. The Mediation Process: An Overview

The mediation process can be characterized as follows: it is (1) a non-compulsory procedure in which (2) an impartial, neutral party is invited or accepted by (3) parties to a dispute to help them (4) identify issues of mutual concern and (5) design solutions to these issues (6) which are acceptable to the parties. By analyzing a few of these components, one can begin to gain an appreciation of the strengths and limitations of mediation as a dispute settlement procedure.

First, the mediation process is non-compulsory. There is no legal liability attached to any party refusing to participate in a mediation process.[11] As a practical matter, therefore, a frequent obsta-

11. Although many statutes, both federal and state, provide for the use of mediation as an impasse procedure for employers and unions engaged in collective bargaining, a refusal to participate in mediation is not, in and of itself, unlawful. As a practical matter, parties could appear at a scheduled mediation conference and then simply display no movement to the

cle to initiating the mediation process is the refusal of one or more parties to participate, for an infinite number of reasons. Since a mediator has no authority unilaterally to impose a decision on the parties, he cannot threaten the recalcitrant party with a default judgment for non-appearance. Such a concept is simply not germane to the mediation process.

This feature of mediation is not surprising. Mediation is a procedure predicated upon the process of negotiation. Parties choose or agree to negotiate only when they perceive that they lack the power to obtain their goal unilaterally. They negotiate only with those persons or groups whose cooperation is essential to the attainment of their objective. The mediator's role, as classically conceived, is simply to assist these negotiating parties to agree upon mutually-acceptable terms. Hence, if the parties do not want to negotiate, the triggering mechanism for the entry of the mediator is absent.

Second, the mediator should be both neutral and acceptable to the parties. In traditional labor-management collective bargaining situations, one or more of the parties officially requests the assistance of a mediator.[12] This procedure stems from the institutional structure and an understanding of the mediator's role. There is no comparable institutional framework and practice in the area of en-

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mediator. Of course, continued resistance to bargaining in good faith would constitute a violation of another statutory provision. Refusing to participate at all in mediation might constitute an item of evidence to establish the lack of good faith. The two matters, however, are quite distinct. *See, e.g.*, N.Y. CIV. SERV. LAW §§ 200-14 (McKinney 1973 & Supp. 1980-81).

12. State statutes providing for this procedure in public employment relations are illustrative. *See, e.g.*, ALASKA STAT. § 23.40.190 (1972); CAL. GOV'T CODE §§ 3505.2, 3507.1 (West 1980) (municipal employees); CONN. GEN. STAT. ANN. § 7-473 (West 1972 & Supp. 1981); HAWAII REV. STAT. § 89-11 (1976 Replacement & Supp. 1980); IOWA CODE § 20.20 (1975); ME. REV. STAT. ANN. tit. 26, §§ 965, 979-D (1964 & Supp. 1980-81); MASS. ANN. LAWS ch. 150E, § 9 (Michie/Law. Co-op 1976); MICH. COMP. LAWS § 423.207 (1970); MONT. REV. CODES ANN. § 39-31-307 (1979); NEB. REV. STAT. § 48-838 (1978); NEV. REV. STAT. § 288.190 (1979); N.H. REV. STAT. ANN. § 273-A:12 (1977 Replacement & Supp. 1979); N.J. STAT. ANN. § 34:13A-1-13 (West 1965); N.Y. CIV. SERV. LAW §§ 205, 209 (McKinney 1973 & Supp. 1980-81); OR. REV. STAT. § 243.712 (1979); R.I. GEN. LAWS § 28-9.4-10 (1979 Reenactment); VT. STAT. ANN. tit. 3, § 925 (Supp. 1980); WASH. REV. CODE ANN. § 41.56.010-950 (1972 & Cum. Supp. 1976); WIS. STAT. ANN. § 111.87 (West 1974).

vironmental or community disputes. As a practical matter, the question becomes whether an invitation by all parties for the mediator's assistance is essential to initiate the process. The answer must be negative.

Although there is a growing awareness of the use of mediation as a dispute settlement procedure, it has not yet been ingrained on the public's consciousness. Most people in need will contact a lawyer, police officer, or someone with the authority to resolve the controversy. It is infrequent that one thinks to call a mediator. Public ignorance, however, does not prevent the mediation process from serving as an effective instrument for resolving problems. As Professor Susskind correctly notes, in non-institutional disputes a mediator frequently initiates the process.[13] He contacts the parties, explains the mediation process, and allows them to decide whether to accept the proffered services. Although this posture may suggest that such mediators chase ambulances, the concern is not urgent if the parties are free to reject the offer of services. The challenge for mediators so operating, however, is to ensure that the explanation of the potential benefits and limitations of mediation is consistent among practitioners.

Third, the mediator helps parties identify issues of mutual concern and develop mutually-acceptable solutions. These characteristics reaffirm both the parties to be involved in the process and the limits of the mediator's authority. If the mediator's efforts succeed, the parties will have an agreement and the mediator leaves. If his efforts fall short of an agreement, then he removes himself from the discussions and the parties must find another way to harmonize their differences.

This characterization of the mediation process results in the application of mediation to a wide range of disputes as well as a liberal approach in the timing of its use. For example, contrary to the accepted dogma, mediation need not begin only after the parties have initiated negotiations and have reached an impasse.[14] It

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13. Susskind, *supra* note 5, at 45.

14. "Mediation generally results from failure. It is invoked when there has been a failure of the employer and the union . . . to reach agreement on new contract terms or, on

can commence when any of the parties or the mediator believe mediation would be useful. There is no requirement that the parties meet personally, although that clearly is the common format. One could mediate successfully entirely by telephone or by successive meetings with individual parties. Any number of parties can participate in the process. Finally, the issues for mediation, as in negotiation, can be as extensive or as limited as the parties are willing to address. There is no requirement that parties be able to plead a cause of action. Parties negotiate and use mediation to secure a commitment from those whose cooperation is required. The domain of issues simply consists of those matters which must be addressed for the parties to achieve their respective objectives.

The functions of a mediator are determined by this basic mediation framework. He operates within the limitations of the process and attempts to maximize the benefits available from mediation.

II. The Functions of a Mediator

Lon Fuller, the distinguished professor and arbitrator, described the goal of the mediator in elegant fashion when he wrote: "[T]he central quality of mediation [is] its capacity to reorient the parties towards each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitude and dispositions toward one another."[15] What functions of office does the mediator have that enable him to fulfill that objective? A brief listing would include the following functions.[16]

A mediator is a catalyst. Succinctly stated, the mediator's presence affects how the parties interact. His presence should lend a constructive posture to the discussions rather than cause further

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occasion, to resolve problems which arise under the terms of an agreement." Robins, *supra* note 10, at 3.

15. Fuller, *Mediation—Its Forms and Functions*, 44 S. Cal. L. Rev. 305, 325 (1971).

16. Some, but not all, of these items are discussed by various writers. *See, e.g.*, G. Nicolau, Community Mediator Training Manual for the Neighborhood Justice Center of Kansas City, Missouri (1978) (Institute for Mediation and Conflict Resolution); American Arbitration Association, Why Is a Mediator Needed? (undated).

misunderstanding and polarization, although there are no guarantees that the latter condition will not result. It seems elementary, but many persons equate a mediator's neutrality with his being a non-entity at the negotiations. Nothing could be further from the truth. Susskind, borrowing from the writings of a distinguished mediator, notes that the mediator performs some procedural functions and, if necessary, assumes an active role.[17] Even the mediator's assumption of a procedural role, however, is an important action that, in itself, may be sufficient to reorient the parties towards an accomodation. Susskind implies that the procedural role is passive whereas an active role would include suggesting substantive resolutions to an issue.[18] The active/passive distinction, however, seriously misrepresents the impact of the mediator's presence on the parties. Much as the chemical term, catalyst connotes the mediator's presence alone creates a special reaction between the parties. Any mediator, therefore, takes on a unique responsibility for the continued integrity of the discussions.

A mediator is also an educator. He must know the desires, aspirations, working procedures, political limitations, and business constraints of the parties. He must immerse himself in the dynamics of the controversy to enable him to explain (although not necessarily justify) the reasons for a party's specific proposal or its refusal to yield in its demands. He may have to explain, for example, the meaning of certain statutory provisions that bear on the dispute, the technology of machinery that is the focus of discussion, or simply the principles by which the negotiation process goes forward.

Third, the mediator must be a translator. The mediator's role is to convey each party's proposals in a language that is both faithful to the desired objectives of the party and formulated to insure the highest degree of receptivity by the listener. The proposal of an angry neighbor that the "young hoodlum" not play his stereo from 11:00 p.m. to 7:00 a.m. every day becomes, through the inter-

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17. Susskind, *supra* note 5, at 6 n. 13 (citing W. SIMKIN, MEDIATION AND THE DYNAMICS OF COLLECTIVE BARGAINING (1971)).

18. Susskind, *supra* note 5, at 46-7.

vention and guidance of a mediator, a proposal to the youth that he be able to play his stereo on a daily basis from 7:00 a.m. to 11:00 p.m.

Fourth, the mediator may also expand the resources available to the parties. Persons are occasionally frustrated in their discussions because of a lack of information or support services. The mediator, by his personal presence and with the integrity of his office, can frequently gain access for the parties to needed personnel or data. This service can range from securing research or computer facilities to arranging meetings with the governor or President.

Fifth, the mediator often becomes the bearer of bad news. Concessions do not always come readily; parties frequently reject a proposal in whole or in part. The mediator can cushion the expected negative reaction to such a rejection by preparing the parties for it in private conversations. Negotiations are not sanitized. They can be extremely emotional. Persons can react honestly and indignantly, frequently launching personal attacks on those representatives refusing to display flexibility. Those who are the focus of such an attack will, quite understandably, react defensively. The mediator's function is to create a context in which such an emotional, cathartic response can occur without causing an escalation of hostilities or further polarization.

Sixth, the mediator is an agent of reality. Persons frequently become committed to advocating one and only one solution to a problem. There are a variety of explanations for this common phenomenon, ranging from pride of authorship in a proposal to the mistaken belief that compromising means acting without principles. The mediator is in the best position to inform a party, as directly and as candidly as possible, that its objective is simply not obtainable through those specific negotiations. He does not argue that the proposal is undesirable and therefore not obtainable. Rather, as an impartial participant in the discussions, he may suggest that the positions the party advances will not be realized, either because they are beyond the resource capacity of the other parties to fulfill or that, for reasons of administrative efficiency or matters of principle, the other parties will not concede. If the pro-

posing party persists in its belief that the other parties will relent, the question is reduced to a perception of power. The mediator's role at that time is to force the proposing party to reassess the degree of power that it perceives it possesses.

The last function of a mediator is to be a scapegoat. No one ever enters into an agreement without thinking he might have done better had he waited a little longer or demanded a little more. A party can conveniently suggest to its constituents when it presents the settlement terms that the decision was forced upon it. In the context of negotiation and mediation, that focus of blame—the scapegoat—can be the mediator.

Although a mediator discharges many other functions, this listing is sufficient to allow examination of 1) the type of person most able to discharge effectively those functions, and 2) the impact those functions have on shaping the language and strategies a mediator uses to move parties towards an accommodation.

III. Profile of a Mediator

One way to generate a list of the desirable qualities and abilities a mediator should possess is to adopt the posture of a potential party to a mediation session and analyze the type of person that it would want in the role. The following qualities and abilities would probably be included: capable of appreciating the dynamics of the environment in which the dispute is occurring, intelligent, effective listener, articulate, patient, non-judgmental, flexible, forceful and persuasive, imaginative, resourceful, a person of professional standing or reputation, reliable, capable of gaining access to necessary resources, non-defensive, person of integrity, humble, objective, and neutral with regard to the outcome. Three of these qualities merit further analysis.

It is very important that a mediator have the capacity to appreciate the dynamics of the environment in which the dispute is occurring. The objective of negotiation and mediation is to have parties agree to do something. Discussions are to result in action. The mediator must be able to appreciate the real world constraints, pressures, and frustrations under which the parties act.

Only then can he establish the tempo of discussions and range of settlement possibilities in a manner commensurate with the urgency of the dispute. Parties with vital interests at stake will not be persuaded to reorient their perspectives towards one another by the intervenor who simply admonishes them to love one another.

Second, the mediator must be intelligent. The question remains, however, whether the mediator must be knowledgeable about the substantive area in dispute. In an environmental dispute involving nuclear reactor plants, what should the mediator know about the science of nuclear energy? This question, touched upon by Susskind, has been framed in ways that are seriously misleading.[19] We do not know what constitutes technical knowledge nor in which subjects the mediator should have such knowledge. Should the mediator, for example, know about the science of nuclear energy, the science and economics of alternative energy resources, the legal regulatory process governing the licensing of nuclear plants, or the politics of energy development? Are all of those items of technical knowledge? If so, which type or types should the mediator possess?

That this question even surfaces reflects an insidious example of a straw man argument. Susskind correctly suggests that an environmental mediator needs to possess substantive knowledge about a dispute.[20] His conclusion intimates, when combined with his suggestions that mediators traditionally assume primarily a passive role and are concerned predominately with procedural matters, that the traditional mediator need *not* possess equivalent substantive knowledge. Nothing could be further from the truth. The mediator of a labor-management negotiation session who is not familiar with the intricacies of budgets, work schedules, personnel practices, legal guidelines stipulating mandatory bargaining subjects, arbitration awards which interpret particular phrases of contract language and the like, is ineffective and even becomes a stumbling block to an agreement. Susskind's argument hints of the distinction between communication skills and substantive knowl-

19. *Id.* at 46-7.
20. *Id.*

edge in a particular subject area.

From the perspective of the potential party to the mediation sessions the mediator should possess both process (communication) skills and content knowledge. The content knowledge a mediator should have depends on the specific type of dispute into which the mediator might intervene and what the parties believe will be the most useful to them. The parties at least want the mediator to be intelligent enough to become educated about the matters in dispute as the talks progress. The knowledgeable mediator can ask penetrating questions, be sensitive to when parties are erecting artificial constraints on their conduct, and avoid becoming an obstacle in the discussions of the more subtle nuances of the matters in dispute. The mediator does not possess such knowledge, however, for the purpose of serving as an expert who advises the parties as to the "right answers."

The third major characteristic is that a mediator must be neutral with regard to outcome. Parties negotiate because they lack the power to achieve their objectives unilaterally. They negotiate with those persons or representatives of groups whose cooperation they need to achieve their objective. If the mediator is neutral and remains so, then he and his office invite a bond of trust to develop between him and the parties. If the mediator's job is to assist the parties to reach a resolution, and his commitment to neutrality ensures confidentiality, then, in an important sense, the parties have nothing to lose and everything to gain by the mediator's intervention. In these two bases of assistance and neutrality there is no way the mediator could jeopardize or abridge the substantive interests of the respective parties.

How is this trust exemplified in practice? Suppose a party advocates certain proposals because of internal political divisions which might impede discussions. For tactical reasons, however, the party does not want to reveal these internal divisions to the other parties. A mediator to whom such information is entrusted can direct discussions so that such a dilemma can be overcome. The mediator's vigorous plea made in the presence of all parties to remove

the proposal from further discussions, for example, might provide a safe, face-saving way for that party to drop its demand.

There is a variety of information that parties will entrust to a neutral mediator, including a statement of their priorities, acceptable trade-offs, and their desired timing for demonstrating movement and flexibility. All of these postures are aimed to achieve a resolution without fear that such information will be carelessly shared or that it will surface in public forums in a manner calculated to embarass or exploit the parties into undesired movement. This type of trust is secured and reinforced only if the mediator is neutral, has no power to insist upon a particular outcome, and honors the confidences placed in him. If any of these characteristics is absent, then the parties must calculate what information they will share with the mediator, just as they do in communicating with any of the parties to the controversy.

The other character traits and desired skills noted above are self-explanatory and will not be discussed further. The skills of a mediator directly affect his approach, actions, and relationship to the parties in a mediation effort so that he is able to make a positive contribution to the resolution of the dispute.

IV. Mediator Strategies for Building a Settlement

The combination of the mediator's functions, skills, and personal characteristics creates a working mediation structure. The combination also establishes the framework for evaluating his conduct (whether principled or opportunistic) and prescribes the language and demeanor appropriate to the office.

The mediator's role is a vital, challenging one. To suggest that some functions are procedural and others more affirmative is not identical to the passive/active distinction that Susskind ascribes to the traditional mediator's role. To take a simple illustration, suppose that the mediator decides that the meetings will be held at a hotel conference room conveniently situated for all parties. Automatically that choice suggests that the mediator decided to conduct discussions on neutral turf. At first glance, this choice might not appear to be significant. If, however, previous discussions had

been conducted only in the offices of one of the parties to the dispute, as demonstrators picketed outside, then the choice of site is hardly a passive move. That action alone could serve to diffuse a volatile environment, establish an equality of respect among the participants, and enable the mediator to establish a degree of control over the meetings. By making such a decision, the mediator might assist in converting the discussions from the semblance of a public rally into the posture of directed discussions leading to specific actions.

The mediator's job is to structure effective communication among the parties. He establishes a frame of reference for discussions. He requires the parties to state their concerns and proposed solutions, thereby establishing the criteria against which he can evaluate and quash any attempts to escalate demands. The mediator's notes serve to monitor the movement and flexibility, if any, that a party exhibits. By forcing the parties to speak through selected spokespersons, the mediator restricts potential grandstanding, reduces interruptions, and minimizes disjointed discussions. In pressing for agreement on such procedural items as how frequently the parties will meet and for what duration, the mediator imposes a sense of purpose, direction and momentum on the discussions. Finally, by requiring an understanding of how the parties will report their activities to the news media, the mediator minimizes the acrimony that can otherwise be generated by waging war through the media. These opening moves involve a variety of subtle considerations for the mediator and a series of significant decisions which only he can make. The impact of his choices on the manner in which the discussions will proceed is noticeable.

As the mediator moves the parties from a statement of their initial position to a discussion of possible accommodations, he is confronted with a range of strategic and tactical possibilities. Examined below are two aspects of the mediator's role which comprise an integral part of his effort in trying to move the parties toward a resolution. What the mediator actually does and how he does it will be noted, thereby clarifying the manner in which the mediator's official functions and characteristics create the guidelines for a mediator executing his task. Once these approaches

have been discussed, one can assess directly how the mediator's role, so conceived and executed, differs from Susskind's proposed role for the intervenor in environmental disputes.

A. Structuring the Agenda for Discussion

An important consideration for the mediator when trying to structure effective communication is the order in which the parties will discuss the issues. To those unfamiliar with the negotiation-mediation process, this matter might appear to be a trivial housekeeping point. Frequently, however, stalemates and impasses occur not because parties disagree on all matters but because they have failed to structure discussions so that they can distinguish those matters on which they agree from those on which they do not.

Consider the following example drawn from the labor-management arena.[21] The Union and the Employer exchange the following proposals:

Union

1. Salary increase of fifteen percent for each year of a proposed two-year contract,
2. Dental insurance program to be paid for entirely by Employer,
3. Increase of five vacation days for each category of employee,
4. Elimination of the day following Thanksgiving as a regular work day, with that time to be made up during the year,
5. Two days of paid leave for Union's local president to attend state-wide Union conferences,
6. Requirement that Employer notify the employee in writing of all entries made in the employee's personnel file.

Employer

1. Change in seventeen contractual clauses of the name of Employer to reflect the change in its corporate status,
2. Increase the number of hours worked per week by Union

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21. This hypothetical is based upon the author's experience in mediating collective bargaining negotiations in the public sector.

members by ten hours per week,

3. Reduce the number of vacation days earned per year from three weeks to two weeks for all employees hired following the signing of the collective bargaining agreement.
4. Require all employees who take a day off in order to take a Civil Service exam to provide Employer with a minimum of seven day's notice with regard to his/her expected absence.
5. Require all employees to advise Employer by March 15 of each year as to their desired vacation schedule.

The initial problem for the mediator is deciding which item the parties should discuss first. There are two obvious methods for proceeding. The mediator could start with the first union proposal and simply proceed down its list seriatum, and then proceed in like manner for the employer's proposals. Alternatively, the mediator could examine the existing contract and, proceeding article by article, discuss the parties' respective proposals which modify or alter a particular provision.

The drawback to each of these approaches is that neither necessarily bears any relationship to the mediator's primary concern of persuading the parties to accept, modify, or withdraw some of their proposals with the goal of reaching a settlement. The order in which the union lists its proposals may bear no relationship to the priority it attaches to any issue. Similarly, proceeding according to the outline of the current contract is haphazard with regard to what is or is not important to the parties. The mediator must employ a far more deliberate strategy in structuring the discussions.

A mediator could adopt one of several approaches in structuring the discussion of issues. He could start by discussing the easy issues first. Everyone can assess matters in terms of degree of importance. If the mediator focuses discussions on those less important matters (i.e. the matters perceived as enhancing the parties' relationship without in any way jeopardizing their substantive interests), then he can help the parties begin to forge some agreements.

Using this approach serves two purposes. First, it begins to develop a pattern of agreement and momentum of progress between

the parties. Confidence in the talks grows as agreement is reached on some items, and the parties obtain a limited basis for believing it possible to resolve the more difficult issues. Second, by building a series of small agreements, the mediator has laid a settlement foundation. As the parties reach more difficult issues, the cost of not settling increases since that cost would include relinquishing all agreements which had been reached. That fact alone might give the parties a strong incentive to reconsider any resistance to the remaining matters.

Another approach would involve dividing issues and proposals according to their common subject-matter. The mediator could categorize the proposals into such subjects as vacation, wages, hours of work, and the like and then discuss each party's proposal(s) that falls within that category. The starting point of the discussion would be the category of issues that seems most susceptible to prompt resolution. If the mediator used this approach in the example outlined above, he would have the parties consider in tandem both the Union and Employer's proposal #3 regarding vacation. The advantage of proceeding in this way is also two-fold. First, it serves to stake out very clearly how the parties differ on the particular subject matter under discussion. Second, it serves to undercut the natural temptation of parties to count how many issues they have won or lost. If negotiations proceed sequentially, a party may review his proposals and state: "We have given in on two of our proposals—now it's your turn to make two concessions." Such statements greatly increase the chances of reaching an impasse. A demand to make concessions for purposes of numerical equality is not necessarily related to the degree of importance which the parties attach to the respective proposals. The objective of negotiating is not to count the concessions each party has made but to assure that each team secures what it needs.[22] By structuring the order of discussion in the manner suggested, the mediator can quietly push the parties toward evaluating, rather than counting, proposals, thereby inducing the parties to follow sound princi-

22. Fuller, *supra* note 15, at 316 (quoting C. BARNARD, THE FUNCTIONS OF THE EXECUTIVE 254-55 (1953)).

ples of negotiation.

Third, the mediator could divide the issues and proposals into a variety of substantive categories and discuss the easy categories first. By proceeding in this fashion, the mediator could divide the proposals into such categories as economic issues, non-economic matters, matters requiring legislative change, matters involving administrative policy, matters involving language changes, matters requiring notice, as well as the more topical vacation, hours of work, and the like. The mediator gains significant flexibility under this approach. In our example, the mediator could suggest to the union that non-substantive matters involving simply a language change be tackled first. If the union assented, seventeen items (Employer proposal #1) could be quickly resolved and set aside. In so doing, the mediator has foreclosed either party from pursuing the not uncommon tactic of being obstinate on details just to be obstreperous or to show disapproval of the other party's unwillingness to make concessions on other matters. It insures that parties know precisely on which items they disagree and protects the parties from needless exasperation. The mediator might then suggest that the parties address all proposals which simply involve providing notice that a certain action will occur. He can suggest that such proposals neither add to nor subtract from the rights and privileges which the parties currently enjoy but simply involve a question of one party informing the other of when it chooses to exercise those rights and privileges. If this approach were successfully implemented, it would lead to the resolution of Union proposal #6 and Employer proposals #4 and #5. These agreements, added to the resolution of the seventeen language changes, illustrate how the mediator can alter the perceptions of the parties and build a momentum for resolution.

Fourth, the mediator could approach the discussion of the issues and proposals according to existing time constraints. The mediator could suggest that the parties first address those matters requiring prompt attention and defer discussion on the other matters until they could be addressed at a more leisurely pace.

There are other approaches, and combinations, that a media-

tor could adopt. There is no suggestion made here that one of these approaches is always better than another or that they are mutually exclusive within the context of one set of negotiations. The most effective approach depends on the context of the discussions and the individual parties. What must be underscored is that the approach to the discussion of issues can be deliberate rather than haphazard; it is the mediator's job to ensure that the discussions are intelligently ordered. By so directing the discussion, however, the mediator does not impose a particular outcome on the parties. Rather, he decides which matters and proposals he believes the parties will find acceptable and then tries to develop a deliberate strategy for bringing about the desired results.

Of course, simply structuring the order in which the matters will be discussed does not guarantee that the parties will achieve agreement on particular issues. The mediator will use a number of approaches to persuade the parties to soften their positions. One tactic frequently adopted by mediators is to meet with parties separately to discuss positions and review possible accommodations.

B. *Moving the Parties Toward an Agreement*

There are a variety of principles that guide a mediator in deciding when, with whom, and for what purpose he should call for a caucus.[23] Meeting separately with the parties enables the mediator to force a party to consider the merits of its proposals or alternative settlements without the party displaying any weakness or group dissension to the other parties. In addition, the mediator can, in caucus, sharply question a party with regard to its continued recalcitrance without the other parties believing that the mediator has suddenly become their ally. The use and value of the caucus can be exemplified by considering what the mediator might do when conducting a caucus in the example cited above.

Presume that the employer has indicated to the union (and has reaffirmed to the mediator in caucus) that its most important concern is to increase the number of hours worked during the

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23. *See generally* Robins, *supra* note 10.

week. In caucuses the mediator might then try to have the parties consider all matters relating to time. The mediator might meet first with the union and review its rationale for increasing vacation time and for not working the day following Thanksgiving. After making some quick calculations, the mediator might force the union to reconsider its vacation proposal in the following manner:

> "Under the present contract, twenty-one of thirty-three members in your unit, when combining vacation days and paid holidays, already enjoy thirty-three days off per year out of a work year of 240 days. You are now proposing a five-day increase for everyone, enabling more than one-half of the unit to have almost 1 ½ months of paid time off per year. You may want that, but the entire thrust of the employer's position is to get time back from you, not to give you more. There will be very little movement from the employer on the vacation proposal. I suggest that you think carefully about how important that matter is to you. Focus, perhaps, on a trade-off with your proposal for taking the day following Thanksgiving as a leave day, with the time given back when the immediate supervisor believes it most useful. Such a suggestion is far more likely to be compatible with the employer's posture than the vacation proposal."

The mediator's presentation to the employer in caucus would be along the following lines:

> "I understand that, given your position with regard to increasing the number of hours worked per week, you oppose the union's proposal for increased vacation time. You are also resisting its proposal with regard to taking off the day following Thanksgiving as a leave day, with that time to be made up at some other time as determined by your supervisor. Under that proposal, you lose no time from your employees. Indeed, the seven hours of work that you would obtain from them at another time might be far more productive hours than those worked after the national holiday. Why do you continue to resist them on this matter?"

What has the mediator done? He has not said that the employer or union was right or wrong on any issue. He has simply suggested, after probing the flexibility of both sides, where the likely area of

resolution will fall.

The mediator, in caucus, can attempt other lines of argument in trying to persuade parties to modify their positions. He can force a party to determine if the proposals reflect the needs of its constituents or simply the preferences of one or two members of the bargaining team.[24] If it is the latter, he can frequently embarrass the team into modifying its position. Conversely, if the proposal addresses an important constituent need, he can press the parties to be sensitive to what the other party must secure to convince its constituents to ratify the agreement.[25]

As mediation approaches either an agreement or a breakdown, the mediator forcefully identifies for the respective parties the cost each will pay for not reaching a settlement: disintegrating employee morale, a hardening of positions, and relinquishing the benefits already tentatively secured during mediation. From the perspective of the party who is subjected to these persuasive tactics, it may appear that the mediator has joined forces with the other party and has become its advocate in trying to extract concessions from him. The sophisticated negotiator knows it to be otherwise, however. The mediator's language must remain impartial. He should not characterize one party's proposal as reasonable or fair, nor should he admonish one party to refrain from negotiating in bad faith. His job, rather, is to state proposals and arguments so that each party will appreciate how its position can be perceived from a different point of view, and to press the party to reconsider

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24. It might be the case that one member of the bargaining team, for example, was offended that a new employee with comparable skills had been hired at a starting salary that exceeded his current salary. That concern might convert into a demand for a "step and scale" salary structure, even if only one person in the unit was pressing for it. Or, a proposed increase in vacation benefits might affect only the most senior members, all of whom happen to be members of the bargaining team. In such a situation, the mediator can press the parties to consider the support they would receive from their constituents if the party forced the discussions to impasse and a threatened strike over an issue that would benefit only a select few.

25. An employer, for example, who refuses to concede on all proposals advanced by the union that would secure economic benefits for the union members must be reminded that in order to gain ratification of any tentative agreement, the union negotiating committee must be able to demonstrate to its members that it achieved something during the negotiations. To use the jargon, each side "needs to take something home to its group."

its needs in light of that new understanding. The parties can always resist the mediator's efforts. They may charge him with not understanding their needs or overestimating the power of the other side. The mediator would fail in his job of assisting the parties to reach a resolution, however, if he did not diligently and persistently challenge each party's own pretensions.

Most of all, the mediator should be guided in pressing the parties by his sense of what is attainable. He should painstakingly listen and search for where the parties have indicated the realm of agreement lies at a given point in time with the facts as then available. He may then shape the discussions and concessions to coincide with these contours that the parties have suggested. The discussions might be very intense and telescoped ino a very short time frame. Conversely, they may occur over a considerable period of time. When to press diligently and when to explore in a more conciliatory manner cannot be prescribed in a vacuum. Each dispute has its own dynamics and ebbs and flows; and individual personalities have a dramatic impact on the mediator's decision as to when to exert the leverage that his office provides.

The mediator should constantly remind the parties of their responsibility and commitment to move toward an agreement. He must assist them in framing proposals to insure the highest possible degree of receptivity, force them to reduce rhetoric to proposals justified by facts and supported by principles, and press them to consider alternative arrangements. In this way, he increases the likelihood that the discussions will produce tangible results which are both durable and acceptable. By performing these actions in a caucus environment, he allows each party to consider options and move so that it neither displays weakness to the other parties nor undercuts the negotiating team's credibility with its own constituency.

V. Environmental Dispute Mediation

The above description is an account of how a mediator should operate: his functions, his constraints and the ways in which the parties to a dispute can use a mediator to secure their needs. Susskind argues, however, that this role as sketched is not sufficient for

effective environmental dispute mediation.[26] Each modification he proposes to the mediator's role undercuts the posture of the mediator's neutrality.

Specifically, Susskind advances two separate types of arguments. First, he maintains that the nature of the dispute in the environmental field is such that the mediator must be an "activist" in a very particularly defined way:

> Environmental mediators ought to be concerned about 1) the impacts of negotiated agreements on underrepresented or unrepresentable groups in the community; 2) the possibility that joint net gains have not been maximized; 3) the long-term or spillover effects of the settlements they help to reach; and 4) the precedents that they set and the precedents upon which agreements are based.[27]

He concludes that an environmental mediator should be committed not merely to a procedurally just process but to an outcome that is both just and stable.[28] His second line of argument surfaces in the form of a tentative conclusion he endorses from one case example to the effect that a "mediator with clout" may be a key element in those disputes in which political pressure is necessary to force concessions from parties who had insisted on "winning it all."[29] What is one to make of these claims?

A. *The Mediator "With Clout"*

Susskind explicitly states that the Congressman who served as the mediator in the Foothills Water Treatment Project discussions was publicly committed to a particular position advanced by one of the parties prior to his entry as a mediator.[30] How did his role differ from the one sketched in the previous sections? How did his "clout" differ from that which a mediator otherwise possesses?

Susskind is very candid on this point: "Wirth's political posi-

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26. Susskind, *supra* note 5, at 46.
27. *Id.*
28. *Id.* at 46-7.
29. *Id.* at 42.
30. *Id.* at 33.

tion gave him clout, even when he chose not to use it. This clout was apparently respected by all the participants."[31] The message is obvious: if the parties do not cooperate, the Congressman could hurt them in Washington on this or some other matter. That is, the Congressman who intervened had the power by virtue of his position to prevent any party from obtaining its goals. Hence, they agreed to negotiate with him in order to secure a desired objective. Certainly, there is nothing wrong with proceeding in such a manner, and the account of the resolution suggests that his intervention was successful. One must question, however, how the parties thought that Wirth's intervention was most helpful. They might have been uncomfortable sharing confidential information with him regarding the lack of group consensus on a particular proposal. A party may not have informed him of all possibly acceptable alternatives, knowing that its legal or political posture might be compromised. The need for the parties to talk and work together would be substantially reduced if the simple persuasion of the other parties by the mediator to (his) one viewpoint would be sufficient to gain resolution. If the Congressman's political power is an ingredient necessary to the implementation of the agreement, then the agreement is only as stable as the Congressman's continued political success. The parties can legitimately wonder how the Congressman's political needs affect his efforts to prod the parties into an agreement. And the parties surely cannot be criticized if they view the Congressman's intervention as an opportunity to secure a variety of political objectives, thereby making trade-offs on the environmental matters in dispute in order to gain benefits on other matters of personal interest.

Clearly, this type of intervention is quite different from that of a mediator who derives his power from his very commitment to neutrality. This difference is more than a terminological quibble about what constitutes "mediating." At issue is an understanding of, and respect for, what the parties to the mediation session are entitled to expect from the intervenor. Will confidences be honored? Who sets the agenda in terms of issues to be discussed?

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31. *Id.* at 35.

Will the order in which the issues are discussed be skewed so as to insure the mediator's desired outcome? Will meeting times be scheduled for the convenience of the parties or might they be arranged by the intervenor in order to make it difficult for some (i.e. "obstreperous") parties to attend and voice objections to the intervenor's preferred position? Will the mediator refuse to schedule meetings if the one party whose position the mediator supports demands that future meetings be conditional upon the other parties having made particular concessions?

One can certainly offer answers to these various problems, but Susskind's burden is more substantial. First, he should demonstrate how a mediator committed to neutrality cannot render effective service in an environmental dispute. Second, he should explain the obligations of office that the "mediator with clout" assumes when he renders his services. Is it appropriate, for example, for the "mediator with clout" to threaten a recalcitrant party with political retaliation? If not, why not? Third, Susskind should illustrate the value derived, if any, by labeling such intervention "mediation," since it differs in so many striking ways from mediation in labor-management collective bargaining, community dispute negotiations, court-diversion programs, and countless other private dispute settlement systems.[32] Clarification is necessary to insure a degree of consistency in program posture and purpose among those encouraged to experiment with "mediation" programs as an alternative dispute settlement procedure.

Susskind's "mediator with clout" is simply a special case of the activist mediator whom Susskind claims is necessary for rendering effective service in resolving environmental disputes. In order to appreciate the challenge Susskind must meet in delineating the principles and practices of the environmental mediator he advocates, one must consider the obligations which Susskind believes are necessary for such a mediator.

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32. *See, e.g.*, AMERICAN ARBITRATION ASSOCIATION, FAMILY DISPUTE SERVICES, MEDIATION & ARBITRATION (Sept. 1, 1979); AMERICAN ARBITRATION ASSOCIATION, ROOFING INDUSTRY MEDIATION (Feb. 1, 1980).

B. *Susskind's "Environmental Mediator"*

As stated earlier, it is seriously misleading to suggest that a traditional mediator is not active in a non-environmental dispute. Susskind argues, however, that the environmental mediator should be active in the four particular ways that are noted above. By analyzing three of Susskind's proposed obligations of office, one can bring the unanswered questions regarding the environmental mediator's role into sharp relief.

First, Susskind states that the environmental mediator "ought to be concerned about the impacts of negotiated agreements on underrepresented or unrepresentable groups in the community."[33] It is difficult to know precisely what this statement means. It seems to suggest, for example, that the mediators in the Snoqualmie-Snohomish Dam dispute[34] should have been concerned with whether the public that would now see a new dam at one particular site rather than another was adequately represented. It is unclear what this means to the mediator's function. Is Susskind suggesting that the mediator display the terms of the potential agreement to the public and direct a referendum on it? Or should the mediator outline to the public what the alternative considerations are and let the public react in whatever fashion it desires? In a traditional mediation role, the mediator tries to ensure that the parties have reached an agreement that is workable. In so doing, the mediator presses the parties to consider the potential interest and reaction of those who, for some reason, were not parties to the discussions but who possess the leverage to block the implementation of the agreement.

Why and how else, then, should the mediator pay special attention to those not represented, as Susskind is proposing? Presumably, the response would be along the following line. In environmental disputes, decisions are being made that will irrevocably affect the future development and life-style that can occur. The widest possible consensus among those who will be affected by the development is therefore necessary, whether or not they possess

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33. Susskind, *supra* note 5, at 46.

34. *Id.* at 21-24.

the power as individuals or groups to block implementation of the agreed-upon plan. Susskind appears to suggest that it is the mediator's job to assure that all those interests are represented in the decisionmaking process.

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

What Susskind might be indicating in making his recommendation is that using mediation to resolve environmental disputes of this dimension is not the most intelligent way of proceeding. There may be more effective ways than mediation to gather facts, consider alternative developments and proceed economically. This is, of course, the threshold issue that should be resolved before using any dispute settlement procedure to resolve a particular problem; it is not simply a matter of trying to patch up the mediation process.

Any dispute resolution procedure—whether litigation, legislation, referendum, mediation or any other—assumes answers to important and controversial questions regarding its compatibility with the principles and aspirations underlying a democratic society. Before agreeing upon which dispute resolution procedure to use, one ought to clarify such concepts as "the public interest" and the "rights of future generations." One should also analyze the related moral and political concepts of representation, liberty, property, participation, and a host of others. Such an enormous assignment, as a practical matter, is rarely undertaken. These questions,

however, are appropriately raised before mediation begins, and the answers might suggest that mediation is the wrong way to approach the resolution of environmental disputes. For example, if mediation as a dispute settlement procedure is defective in insuring that "the public interest" is secured, then the appropriate response is to employ a different dispute settlement procedure which more closely insures it. To suggest that an environmental mediator assume the responsibility of protecting the public's interest within the mediation context is comparable to suggesting that the way to avoid impasses in mediation is to authorize the mediator to impose dispositive, enforceable decisions on the parties.

Such a proposal is not simply adding a different twist to the mediation process; it is converting it from mediation to arbitration in the interest of promoting finality.[35] Susskind has yet to meet the burden of justifying how the environmental mediator can assume this particular responsibility to the "public" without simultaneously converting the dispute settlement procedure into something other than mediation.

Second, Susskind suggests that "[e]nvironmental mediators ought to be concerned . . . about . . . the possibility that joint net gains have not been maximized [and about] . . . the long-term or spillover effects of the settlements they help to reach."[36] Susskind proposes that it is the mediator's responsibility as an objective observer to insure that the final solution secures the greatest overall net benefits for each party, without leaving any party worse off than it was in its original configuration (the Pareto-optimal principle). He further suggests that the solution agreed upon should have the least possible adverse impact on other aspects of present or future community life. Simply stating the proposed responsibility for the mediator in this way reveals how awesome the task is that Susskind is proposing for the environmental mediator. To in-

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35. Arbitration is a procedure in which the neutral party is given the authority by the parties to render a final and binding decision on the matters in dispute. Some alternative court programs authorize the neutral intervenor to serve first as a mediator and, lacking a resolution, then become the arbitrator. *See* D. McGillis & J. Mullen, *supra* note 2, at 65-69, and Stulberg, *supra* note 2, at 363-68, for a discussion of this approach.

36. Susskind, *supra* note 5, at 46.

sure that the Pareto principle is met, the environmental mediator must be able to generate, or at least guarantee, consideration of every possible technical solution to the environmental problem. He must secure demographic information on all persons affected by the dispute and factor their interests, desires, aspirations, preferences and values into the solution. He must project alternative development plans for jobs, tax bases, population trends, aesthetic values, school development and recreational needs for each possible solution. He must calculate the advantages and disadvantages of each solution against retaining the status quo, including the costs involved in using alternative dispute settlement procedures. And the list goes on.

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

A more troublesome question arises, however, regarding the justification for a mediator to block an agreement that fails to meet the requirements of the Pareto principle. Who authorized the mediator to design or insure the attainment of the "optimal" outcome as so conceived? Clearly, it is preferable for persons to act as rational agents and do the "right" thing. Even conceding, however, the dubious proposition that the mediator could identify the "right" course of action as defined by the Pareto principle, on what basis does the mediator assume as an obligation of office that he help parties do only what is "right" and not necessarily that which is possible?

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

position, however, simply reveals Susskind's bias in the environmental versus pro-development dispute and his attempt to incorporate it as a principle of the mediation process;[37] it is not an independent justification for conferring such authority to a mediator.

It is not unique to environmental disputes that decisions made today foreclose certain options for tomorrow. Life is replete with such instances. In the labor-management sector, for example, agreement on a particular wage settlement might retard the development of mass transportation and thereby irrevocably increase the level of air pollution resulting from the use of automobiles. Why should that fact, however, allow the labor mediator the authority in collective bargaining negotiations to insist upon, and indeed impose, Pareto-optimal outcomes in collective bargaining negotiations? Susskind's argument confuses a desired state of affairs with the justification for conduct within an institutional role.

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

One possible rejoinder to these criticisms, suggested by a third argument of Susskind's is grounded in the requirement that the environmental mediator clearly define his role to the parties at the beginning of his service.[38] That is, as long as the environmental mediator puts the parties on notice as to what his role will be and they elect to proceed, then they are responsible for the consequences of their action. For example, the environmental mediator advises the parties that he will help them resolve their controversy only as long as their efforts comply with the constraints of the Pareto principle or the minimization of spillover effects as deter-

37. See *id.* at 8-13, for a discussion of this distinction.
38. *Id.* at 45-46.

mined by the mediator. If they fail, he will withdraw from service and feel at liberty to discuss and criticize in public forums the proposed actions of the parties. As long as this role was clearly delineated at the beginning, Susskind might argue, there is nothing wrong with the environmental mediator proceeding in that fashion.

This scenario is, of course, true. A question remains as to the nature of the service offered to the parties and how it will be discharged. Does this type of service authorize the intervenor to conduct independent research on the matters in controversy? Does it require discussion of certain agenda items which the parties have never considered or resist considering? Can the intervenor unilaterally invite other persons with a personal or professional interest to participate? Can the intervenor report the content of the continuing discussions to his colleagues in a public meeting for purposes of eliciting feed-back and advice?

The affirmative answers to such questions may constitute precisely the type of service and assistance that the parties want. The nature of that service, however, is more akin to our notion of tapping an expert resource to solve a problem than turning to a mediator for assistance in resolving a dispute. Whatever label one ultimately attaches to either mode of service, there is a need for the service and obligations of office, if any, to be stated clearly and thoroughly. The potential range of services for Susskind's environmental mediator, versus that of a traditional mediator committed to a posture of neutrality, is so importantly different that it is seriously misleading to use the same label to describe these respective intervention postures.

A final note is in order regarding the propriety of a mediator having a substantive commitment to a particular outcome or range of outcomes for a given dispute. It appears that the impetus for Susskind's prescription, that an environmental mediator not be neutral, emanates from the understandable reluctance to accord conclusive weight to the preferences of the parties in every conceivable situation. For example, if parties to a collective bargaining session agree to adopt a racially-discriminatory hiring policy, the mediator, Susskind would argue, should object. Although the

stated principle is correct, the mediator's role is not thereby converted into that of an advocate, even if the parties find acceptable an arrangement that is contrary to important principles of public policy or morality.

How should the mediator respond to such a situation? The answer seems relatively straightforward. The mediator should press the parties to examine whether or not they believe that (1) they would be acting in compliance with the law or with principles they would be willing, as rational agents, to universalize; (2) their activities will be acceptable to their respective constituencies and not overturned by public authorities; and (3) in the short and long run, their proposed actions are not contrary to their own self-interest. If the parties listen to these arguments and still find the proposed course of action acceptable, then the mediator can simply decide as an individual that he does not want to lend his personal presence and reputation, or the prestige of the mediation process, to that agreement and he can withdraw. That judgment is one for the mediator *qua* moral agent, not mediator, to make. It is comparable to the dilemma faced by a soldier who is given an order to commit a morally heinous act.

It is certainly the case that each of us is not neutral with regard to everything. Each of us has preferences, interests, commitments to certain moral principles and to an evolving philosophy of life which, when challenged or transgressed, will prompt us into advocating and acting in a manner that is faithful to these dictates. There is clearly no reason to be apologetic or hesitant about defending or advocating such considered judgments. It is also true, however, that mediation as a dispute settlement procedure can be used in a variety of contexts, not all of which would meet approval with everyone's considered judgments. What is important is that one keep distinct his personal posture of judgment from the rule-defined practice of the mediator and act accordingly.

Conclusion

Mediation is a tool for resolving disputes. It can be useful in some arenas to accomplish certain objectives; it is not helpful in others. Susskind notes several examples in the area of environmen-

tal disputes in which the use of traditional mediation has served the parties well. There are a variety of other examples that one could point to in order to underscore the value of using this dispute settlement procedure in a broad spectrum of activities in our national life. The way to insure the continued integrity and usefulness of mediation as a dispute settlement procedure, however, is to be certain that we do not demand that it perform functions beyond the scope of its institutional and conceptual capacity.

The context in which a mediator works, the purposes he serves, and the obligations that attach to his office have been sketched. Contrary to Susskind's suggestion, the mediator actually gains his strength—his "clout"—precisely because of his basic commitment to a posture of neutrality. Susskind's environmental mediator or "mediator with clout" is assuming an intervention posture that differs importantly from that of the traditional mediator. Both roles are important and, in their own ways, useful. They must, however, be distinguished. The collective responsibility of persons engaged in dispute settlement services is to explicate both the strengths and weaknesses of varying dispute settlement procedures and the practices which define the role of the respective participants in those procedures. In that way, one can identify the benchmarks against which we can hold persons accountable for principled rather than arbitrary or opportunistic conduct. Requiring this type of accountability is an essential ingredient for sustaining a life of ordered liberty.