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# Twenty-Five Years Ago and Twenty-Five Years from Now: The Future of Public Dispute Resolution

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*Over the past twenty-five years, public dispute resolution has emerged as an important area of practice — linked, in part, to ongoing efforts to promote deliberative democracy. As the field has evolved, however, the market for public dispute mediators has shifted. It is already possible to glimpse the further shifts and the new intellectual challenges likely to face the public dispute resolution field over the next twenty-five years.*

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## **In the Beginning**

I remember trying to convince my colleagues at the Program on Negotiation that we should start what ultimately became *Negotiation Journal*. Howard Raiffa, Roger Fisher, and I agreed to write articles for the first few issues, thinking that if we were willing to write something, it would be easier to convince others to do the same. Now, twenty-five years later, the journal is going strong. In many ways, it is a much more serious enterprise

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than it was then. At the outset, we just wanted to encourage people to pay attention to negotiation theory and practice. Our goal was to be provocative. Now, we have research results to report, theory-practice hypotheses to test, and theoretical challenges to rebut.

In 1985, when I wrote my first *Negotiation Journal* column on public dispute resolution, I was guessing about the growth of this field. I predicted that public dispute resolution (i.e., the use of skilled mediators to resolve disagreements over public policy, public resource allocation priorities, and the setting of health, safety, and other standards) would become both the norm and a stand-alone practice area. I also suggested that public dispute resolvers might need to be trained in ways more akin to public administrators and urban planners — to manage public involvement in government decision making — rather than in the way labor mediators or lawyers were trained to settle disputes.

I was not too far off the mark. Now, hundreds of full-time professionals in the United States and many more in other parts of the world practice public dispute resolution and meet regularly to compare notes and organize themselves as a practice community. We have laws in a number of states and at the federal level institutionalizing the use of mediation in the public policy-making realm. Now, most public policy, planning, and public management schools teach negotiation and dispute resolution as core skills. And public dispute resolution practice has spread internationally to Australia, Canada, Europe, and, more recently, parts of Asia and Latin America.

Back in the beginning, I also predicted that public dispute mediation would meet strong resistance from elected and appointed officials who might see it as an effort to undermine their authority. This also proved to be the case.

The theoretical literature on public dispute resolution has accumulated quickly. I recently published a four-volume collection on *Multiparty Negotiation* with Larry Crump (Susskind and Crump 2008) that includes a volume devoted entirely to public dispute resolution. In the book, we spell out how public dispute resolution differs from other kinds of multiparty negotiations and how multiparty negotiation differs in important ways from two-party negotiation.

In a recent *Negotiation Journal* article, Carri Hulet and I (Susskind and Hulet 2007) described the dollar value of the public dispute resolution field. It has become a business generating fifty million dollars or more a year in the United States. At one of the nine large firms we studied, the Consensus Building Institute (founded by my wife, Leslie Tuttle, and me in the early 1990s), public dispute mediators are as likely to be heading off to Nigeria to help with stakeholder involvement in the Niger Delta as they are to North Carolina to support U.S. Park Service efforts to manage public lands or to Washington, DC to assist the Department of Energy in its efforts to find sites for renewable energy facilities. These firms, along with some of the larger

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solo practitioners we studied, provide a wide range of dispute resolution services, including training, research, and capacity-building support for numerous public sector clients.

Will the market for these services continue to grow over the next twenty-five years? I do not see why not. We are likely to have more, not fewer, policy disagreements in the public realm. Will the field of public dispute resolution remain a distinct area of practice? I think so. The need for increasingly knowledgeable public dispute resolution specialists will not be satisfied by the proliferation of specialists in other branches of the conflict resolution field. What will be different twenty-five years from now in the way public dispute resolution is practiced? Which theoretical puzzles will occupy public dispute resolution theory builders over the next several decades? These are the questions I now consider in this article, ever mindful of the risks of gazing into crystal balls.

## **The Market**

Elected officials and public sector administrators have no choice but to engage stakeholders, experts, and various partisans when they formulate policy, design programs, or implement strategies. Unless they can generate reasonably widespread agreement, the forces of inertia will usually prevail and nothing will be accomplished. Multiparty negotiations are complex. They must be managed by someone who can be trusted by the partisans. In my view, this is a service best provided by a “professional neutral.” And this is true at every level of government — from neighborhood associations, to city councils, to state regulatory agencies, to federal departments, and even to global regimes. As more and more leaders take a facilitative (as opposed to a decide-announce-defend) approach to management, they will need consensus building help. Thus, the demand for public dispute resolution professionals is likely to increase. Moreover, this will probably be as true in other democracies as it is in the United States. Thus, I do not expect the market for public dispute resolution services to shrink. People do not want to waste time and money coping with contentiousness if they have a better choice.

Could I be wrong? Is there any chance that political decision making will become *less* partisan in the years ahead? Is it likely that groups affected by public decisions will back off and defer to the officials who make these choices? It seems unlikely. Will some other technique for settling disagreements or bringing parties together when there is an urgent need for public action emerge? I do not see California-style referenda being used more widely. They short-circuit rather than encourage constructive deliberation; moreover, they do not settle issues. They just reduce every complicated public policy choice to a yes/no slogan that fits on a ballot and lends itself to simple-minded television commercials. Representatives of one side in a political dispute may “win” a referendum vote, only to find that they are still

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unable to act, while the opposition pursues its goal in other venues such as the courts. In the end, we need to find ways of “making talk work.” That is, we need to bring together *ad hoc* representatives of all relevant stakeholder groups to engage in joint problem solving. This is unlikely to happen without the assistance of a corps of skilled mediators.

## **A Separate Area of Practice**

I am certain that the help sought by public agencies and organizations will continue to require the assistance of public dispute resolution specialists — not just general process managers — with highly developed skills and knowledge. I do not suggest that lawyer-mediators who can handle court-annexed mediation can not do public dispute resolution, but I argue that they will always be somewhat less credible than experienced public sector planners or managers who have mediation track records. I would not be surprised, however, if it gets harder to distinguish public sector dispute resolvers from other public sector specialists because the process management skills that mediators must learn are increasingly recognized as important and are being taught to all kinds of public sector professionals. Finally, as urban densities increase and more people are affected by public resource allocation decisions, the demand for public sector mediators with deep knowledge of the socioecological and financial systems involved will undoubtedly increase.

## **The Changing Shape of the Field**

We have already seen three important trends take hold. The first is the push to bring potential adversaries together earlier, before a conflict ripens. Public dispute resolution practitioners increasingly emphasize that consensus building should take place before *impasse* has been reached.

A second important trend has been a focus on improving long-term organizational capacity to deal with conflict, that is, to design better conflict management systems. Instead of focusing on one-of-a-kind or one-at-a-time disputes, public dispute resolution professionals are being asked to build more comprehensive dispute handling systems that improve over time.

The third trend involves institutionalization of public dispute resolution. I expect we will see an increasing number of laws and regulations specifying that a mediation step must be added to all zoning, permitting, licensing, facility siting, budgeting, and even statute-writing processes. When such ground rules are spelled out in advance, it is much easier to implement dispute resolution efforts.

## **Theoretical Challenges Ahead**

We have already seen a shift in the intellectual agenda of the public dispute resolution field. For three decades, the focus was on clarifying the arguments for and against public dispute resolution, defining the ethical and

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moral obligations of public dispute resolvers (along with the skills they need to be effective), and explaining the most appropriate ways of connecting *ad hoc* processes of mediation to formal government decision making. Over the last ten years, detailed accounts (and statistical studies) of public dispute mediation have allowed us to move forward.

Now, the focus has shifted to:

- values-based and identity-based (as opposed to interest-based) disputes because so many public sector disagreements seem to revolve around ideological or philosophical considerations that are not resolvable through log-rolling or horsetrading;
- the obligations of government to truly respond to an increasingly diverse citizenry, beyond merely standing for election and meeting the transparency requirements of electoral finance laws; and
- ensuring that scientific complexity is factored appropriately into public agency decisions.

What should we expect from mediators in values-based and identity-based disputes? How do we think mediation in such instances ought to be handled when bundling issues or options that parties value differently is not a possibility? Presumably, the nature of the discourse must change, but how? We do not expect people to compromise when their fundamental beliefs or their identity is at stake, so how is resolution possible? While groups like the Public Conversations Project in Boston (<http://www.publicconversations.org>) have been wrestling with disputes of this kind (i.e., conflicts over legalized abortion, bringing together “right to life” proponents and proponents of a “woman’s right to choose” for extended interpersonal dialogues) for some time, the field has not yet codified best practices or spelled out the underlying logic of conflict management in such contexts.

Public engagement or public participation assumes that high-quality deliberation is an end in itself, and that elected and appointed officials will be appropriately influenced by deliberative polling, policy juries, charettes, or other expressions of public concern. Unfortunately, no rules or norms oblige elected or appointed officials to take such sentiments to heart. Moreover, increased participation usually yields an even wider array of contrasting views, making it easier for officials to ignore what everyone is saying and to do whatever they want. Public dispute resolution, however, assumes that appropriately representative groups, assisted by a mediation team that knows how to manage joint fact-finding and collaborative decision making, should be able to generate a set of recommendations that elected and appointed officials cannot ignore — especially if it represents an informed consensus reached in a very public way. But, exactly how are *ad hoc* consensus-building processes supposed to influence (or bind)

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elected and appointed decision makers who have statutory powers and responsibilities? The next stage in the development of our evolving democracy must make this explicit.

It made little sense in the 1980s, when *Negotiation Journal* was founded, to “let the experts decide” in those cases when governments sought to manage endangered habitats, rivers, oceans, atmospheres, or other complex socio-ecological systems in which so many different people had a stake. It makes even less sense now. A great many groups have their own experts to call on when they want a professional to produce certain predictable results. Ironically, just as we have come to appreciate the enormous complexity and unpredictability of the systems we must manage, we have politicized almost all scientific inquiry. Public dispute resolution in science-intensive policy making must find ways of ensuring that science and politics are appropriately balanced. It may be that public dispute resolution will have to shift to more of an adaptive management format — spelling out provisional policy ideas, ensuring careful and jointly designed monitoring schemes, and mediating ongoing adjustments in light of what is learned. Instead of negotiating agreements that presume away uncertainty, we may see a move to implement more elaborate contingent agreements that require jointly managed experiments and ongoing public learning. This may be the only way to move forward in the face of increasing complexity and uncertainty.

Finally, on the legal side of things, the public dispute resolution field is going to have to figure out how to deal with the growing tension between the elegance of tailored solutions (which is what mediation is supposed to offer) and the need to ensure fairness by guaranteeing consistency in comparable situations. Keeping track of previous mediated decisions, and figuring out when, why, and how to apply them, is likely to be a major challenge in the years ahead.

### ***Negotiation Journal* in 2034**

Whatever form *Negotiation Journal* takes in 2034, it will surely be different from what it is now. It already straddles the print and online divide. Within a few years, it may well be entirely digital. It may even include a video-focused element with authors — and their antagonists — presenting their ideas or findings in a spoken and interactive format. Would it not be exciting if journals were locations in which a dialogue within a community of practice could be extended and deepened? When somebody wanted to make a point with reference to practice, the reader/viewer could click on real-time footage of that activity and review it for himself or herself. All relevant arguments could be footnoted and embedded in each new article, making it easy for any reader to follow the evolution of important ideas. Readers/viewers could indicate their support or rejection of each argument online, leading to a wiki-style product and, ultimately, a collective judgment by the field.

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I guess that it will be just as difficult in the future to bridge theory and practice as it is today, with academics attempting to theorize without sufficient direct involvement in practice, and practitioners resisting efforts to generalize because they worry that their unique contributions to practice will be minimized. Perhaps by 2034, we will have abandoned what Ian Shapiro (2007) calls “the flight from reality in the human sciences” and found a way to reengage scholarship with close studies of what goes on in the field. Or maybe reflective practice or action research will have toppled more traditional forms of scholarly detachment, closing the theory–practice divide in still another way.

My strong recommendation to the next generation of editors at *Negotiation Journal* is that they always invite a wide range of commentaries (from numerous perspectives) on actual dispute resolution efforts. Do not be afraid to ask practitioners to reflect on the theoretical implications of their work, and do not hesitate to challenge social theorists to show the connections between what they have to say and well-documented in-depth accounts of practice. Press both “sides” to be explicit about the metrics they are using. How should best practice be measured and why? How do public dispute resolution practitioners measure their success in the short term and in the long term, and why? Do theory builders espouse different measures of success than practitioners, and if so, why?

I am sure that our thinking about what are the most important contours of public dispute resolution will change over the next twenty-five years. I assume that our approach to measuring the success of theory building and practice — and how we talk about such things with each other — will change as well.

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