

Court-Appointed Masters as Mediators

Lawrence E. Susskind

Judges often appoint special masters to help with complex cases. In many of the desegregation cases of the 1970s, for example, special masters were assigned to oversee the development and implementation of court-ordered busing plans. In bankruptcy proceedings, special masters serve as court-appointed executors to preside over the liquidation of holdings. Judges have also appointed special masters to serve as "receivers" of public agencies and to oversee implementation of consent decrees involving reforms at prisons and mental institutions.¹

And, during the past few years, federal and state judges have employed special masters in a new way—as mediators in complex public policy disputes. I recently served as a special master in a multi-party, multi-issue environmental dispute, and the experience proved to be both novel and instructive. Functioning primarily as a mediator, my assignment was to help the parties develop a strategy for allocating the costs of a long-delayed pollution cleanup effort.

More than forty municipal, regional, and state agencies have a direct interest in this case. One of the municipalities in the region brought suit against the regional sewage author-

ity, challenging the design of the proposed county-wide sewage system and the proposed allocation of costs for the cleanup. Other communities and interested parties also filed suit, and the regional authority asked the court to consider all the claimants together, in order to avoid a succession of separate suits.

Some of the smaller towns in the county believe that they should not be required to join an expensive regional sewage system. They assert that septic systems which naturally percolate waste through the soil or other small-scale, locally-managed waste disposal systems are adequate for their needs.

There is a great deal at stake. According to the sewage authority, it may cost as much as \$600 million to meet the federal clean water standards that go into effect in 1988. By one estimate that will require additional sewer fees of more than \$300 per household each year for at least 20 years.

The state Superior Court imposed a ban on all new sewer connections pending a resolution of the cleanup dispute, bringing the development community and a great many landowners into the conflict.

The U.S. Environmental Protec-

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tion Agency and the state environmental agency have sought through the courts to require the communities involved to clean up the rivers and streams in the county. For the fourteen years that the parties have moved in and out of court, only minimal investments have been made to keep the older local treatment systems in operating order. In the meantime, no cleanup has taken place, the regional authority has run up a large debt in preparing engineering studies, the cost of building any kind of system has inflated tremendously, and federal funds to subsidize the construction of sewage treatment facilities have dried up. To put the cost of the dispute in perspective, I was shocked to discover that the entire sewage system could have been built in 1972 for an amount equal to the current \$72 million debt the authority has accumulated in legal fees and borrowing (necessitated, in large part, by the unwillingness of the cities and towns to start paying sewer charges to the regional authority).

I cannot provide more details about this case because it has not yet been fully resolved. However, several key lessons regarding the use of court-appointed masters as mediators seem obvious to me even at this point, and I want to share them while my impressions are still fresh. I invite other court-appointed masters in complex public disputes to share their experiences and to react to my comments.

Why Use a Special Master As a Mediator?

There are at least three reasons why a judge might ask a special master to mediate. First, in highly complex cases, where a judge feels the judicial process is too constraining to work out the elaborate interplay of technical issues and competing economic

interests, he or she may use a master with specialized expertise to try to work out an accommodation among the parties. Along the same lines, a judge might ask a master to seek a mediated solution as a way of encouraging speedy resolution of a conflict in a situation in which continued appeals would only exacerbate the problem. One mediator I know was appointed as a special master in a complex dispute because any further delay in settling the hostilities might actually have cost additional lives.

A second reason for appointing a special master to mediate is to narrow the range of issues that the court must address, saving time and money. In complex disputes the process of discovery can go on for an extended period. Also, when technically sophisticated witnesses must be cross-examined, the judge and jury may be hopelessly beyond their abilities to follow the arguments presented.

In my case, I was fortunate to have a highly skilled team of assistants and expert consultants. With their help, and the help of my co-mediator (who provided a local point of contact for the parties since I am from out-of-state), we produced a computer model that the parties can use to test the cost implications of alternative settlement packages.

The complexity of some court proceedings can be reduced or avoided if a mediator can bring the parties to a stipulated agreement on some of the issues or, at least, get them to agree to a certain body of factual material through an informal process of joint fact-finding. Unconstrained by the formal rules of evidence and court procedure, a mediator may be able to assist the parties (and the court) in narrowing and illuminating the issues.

A mediator, meeting privately with

each of the parties, may also be able to pinpoint the most serious concerns of each party as well as their true "walk away positions" on key issues. Armed with this information, especially in cases that do not involve questions of fundamental rights, the court may be better able to develop an order that all sides will accept; such an order, in turn, would head off lengthy and costly appeals.

A third reason a court might ask a special master to mediate is to help generate new ideas for the parties to consider, thereby encouraging out-of-court settlement. Judges are rarely expert enough on the issues before them to propose entirely new options for the parties to consider. A special master (with access to independent technical assistance) may be able to come up with good ideas that none of the parties had considered. A technically-skilled, nonpartisan intervenor is often in an ideal position to invent ways of reconciling the interests of the parties that all sides will find satisfactory.

Many special masters function solely as fact-finders or arbitrators (in the sense that they make recommendations to the court suggesting ways of handling the differences among the parties). Special masters functioning as mediators, as I did, seek to assist the parties in reaching an out-of-court settlement, or at least an accord that the court will accept. Unlike other informal mediation situations, however, the special master has certain powers that most mediators do not have. I found these a bit overwhelming at first, and, in the end, I discovered that they also have their drawbacks.

The Powers of the Special Master

The court can require the parties to appear before a special master. This is

certainly something that mediators are not used to. Usually a mediator has to spend a great deal of time establishing his or her credibility and convincing all the parties to come to the negotiating table. When mediating as a special master, it is not necessary to "sell" the parties on the advantages of using an outside helper. In general, there are few problems of entry (e.g., being asked to mediate by one side and then having to convince the others of the mediator's non-partisanship).

Because the court can issue an order embodying the results of an informal negotiation, the parties to a dispute are not as likely to be skeptical about the value of the informal process. Indeed, the prospect of court enforcement of a negotiated agreement frees the parties from having to invent ways of holding each other to their commitments.

A special master can use the threat of the formal discovery process to encourage the parties to be forthcoming with technical information. In addition, if the special master has access to his or her own technical advisers (which was the case for me), he or she may well be able to head off conflicts over facts and forecasts. This should help focus the parties on ways of dealing with their differing interests.

While I would not necessarily advise it, the master can ask the judge to require the parties to provide a written indication that they have considered certain options put forward by the other side or by the mediator. Most mediators have no way of forcing the parties to give serious consideration to such alternatives, or to force a party to spell out why a certain proposal is unacceptable.

The court can monitor implementation of an agreement and guarantee the parties that, if circumstances

change, an agreement can be reopened. This promise may encourage the parties to explore contingent commitments that would otherwise seem unrealistic. The possibility of contingent agreements, in my view, increases the likelihood of settlement.

As a mediator, it was a heady feeling to be able to tell the parties where and when I wanted to meet. By the way, this made it possible for me to accomplish a great deal more in a shorter time, since I didn't have to do as much travelling. All in all, the pre-negotiation stages of the mediation process were much easier than usual. I should point out, though, that we still had enormous difficulty reaching an accord.

The Drawbacks

There is a downside to each of the points I've mentioned. For example, when the parties don't feel that their participation in the mediation process is really voluntary, they spend a great deal more time behaving like adversaries. They treated me as if I were a judge, making it difficult for us to move into a problem-solving mode.

The parties felt they needed to have their lawyers present when they met with me. As every mediator knows, that is not necessarily the best context in which to work on the invention of ways to maximize joint gains.

Also, since the parties were not consulted explicitly by the judge about my selection, they did not necessarily feel that I was going to be responsive to their concerns. I should note that the judge did give the parties a chance to comment on his intention to appoint a mediator. He also chose an organization within the state as the institutional setting through which I could work; that organization had suggested my name to

the judge.

When the mediation process takes place within "the shadow of the robe," constraints emerge that generally do not affect mediators who operate informally. One such issue was the question of due process. Should all parties be given a chance to cross-examine those presenting information to the mediator? Should the mediator be bound by *ex parte* rules? Should all mediation sessions be conducted in public?

All of these questions were raised, and I know none of the answers. I do know that, beyond a certain point, the imposition of too many due process requirements will undermine the value of mediation. On the other hand, if the judge issues an order based on a mediator's report (regarding the progress the parties have made in trying to reach agreement) and the parties are not entirely happy with what the mediator has to say, they may have a legitimate due process complaint.

The judge in my case responded to these concerns in what seemed to me to be a very intelligent manner. First, he asked for a written report that he could distribute to all the parties. He gave them a chance to comment on both the substance of the report (i.e., primarily a statement of principles for handling the cost allocation problem) as well as the mediation process by which the principles were developed. He did this before he made any comment or took any action. Second, he offered to hold plenary hearings on particular issues that any party felt had not been adequately addressed.

The judge encouraged me to meet privately with each of the parties. I promised them confidentiality to the extent the law permitted me to do so. Based on the ideas generated in these private meetings, we circulated drafts

of proposed agreements that I wrote (with the help of my co-mediator and a very able staff from within the state). Then, we organized a public session to review reactions to a draft of the proposed agreement. Still other drafts were developed, following further private communications with concerned parties.

While my goal was to help the parties achieve an agreement, it seemed from the outset that the most likely outcome was a court order embodying as much of the negotiated agreement as possible. Some of the parties clearly felt that only a court order would ensure compliance by the others; in addition, it would allow many of the public officials involved to explain to their constituents that the agreement was something they had been ordered to accept.

A mediator operating as a special master may find, as other mediators often do, that for some parties delay is their best option. Under normal mediating circumstances, a mediator explains to the parties that there is no point continuing if a key player decides to "sit out" the negotiations or remains doggedly uncooperative. A special master, however, must keep going as long as the judge says to keep going. Since the master is working primarily for the judge rather than the parties, he or she must continue with the process. I was extremely uneasy about the conflict this situation created between my obligation to the parties and my responsibility to live within the time and legal constraints imposed by the judge.

Some Guidelines

Based on my experience and weighing the advantages and disadvantages of mediating as a special master, I would urge judges to consider using masters as mediators in certain com-

plex cases, particularly those involving a great deal of scientific or technical uncertainty.

Judges, however, should be aware of the conflicts that mediating as a special master can create for the mediator and the confusion that this form of mediation can cause the parties.

Also, mediation takes time. If the court is only interested in saving time (and not necessarily in working toward an out-of-court settlement), mediation might not be appropriate. While I believe that mediation can save time in the long run (by avoiding a lengthy appeals process), it may initially take extra time.

The court should try to clarify at the outset what its due process expectations are, and these should be explained ahead of time to everyone involved. The extent to which the mediator can promise confidentiality should also be clarified at the outset. In disputes involving the allocation of public resources, I would urge masters/mediators to include as many public sessions as possible.

In addition, I would encourage masters to maintain close contact with the news media and to serve as the point of contact for reporters interested in keeping track of developments. An unwillingness to talk with the press is likely to lead to pressure on the parties to negotiate through the press. This guideline, of course, should be discussed ahead of time with the judge.

I believe that the parties to a dispute should be given a chance to help design the process of mediation that the master/mediator will use. They should also, in my view, have veto power over the selection of a particular special master. The more involved the parties are in the design of the mediation process, the less troublesome the mandatory nature

of court-supervised mediation will be.

In my view, judges should try to select mediators with expert knowledge of the substantive issues at stake, or at least be prepared to provide sufficient financial resources for the mediator to build a technical staff. This, I think, is key to encouraging joint fact-finding.

Finally, when judges circulate copies of the master/mediator's final report (especially if it is a negotiated agreement), I would urge they not

ask the parties if they are entirely happy with the product. This will merely encourage the parties to retreat to their original positions if they have not gotten everything they wanted. Instead, judges should use a single text negotiating procedure—inviting all the parties to improve the mediator's proposed agreements when they are in *draft* form.

Obviously, one case is insufficient as a basis for drawing firm conclusions. I look forward to hearing from other special masters.

NOTE

1. For more information, see Henry R. Perritt, Jr., "'And the Whole Earth Was of One Language'—A Broad View of Dispute Resolution," *Villanova Law Review* 29, no. 6 (November 1984):1297-1304. Also, see "Implementation Problems in Institutional Reform Litigation," *Harvard Law Review* 91 (1977):428-463.