

## **MEDIATION IN ENVIRONMENTAL DISPUTES**

**Sanda Kaufman**

*Levin College of Urban Affairs, Cleveland State University, Cleveland, OH 44115, USA*

**Keywords:** conflict, third party intervention, mediation, environmental disputes, framing, consensus building, evaluation

### **Contents**

1. Introduction
  2. Mediation as third party intervention
  3. Brief history and current practices
  4. Mediation of environmental disputes
  5. Some current issues
- Glossary  
Bibliography  
Biographical Sketch

### **Summary**

Mediation is a type of third party intervention in environmental and other kinds of disputes. Its characteristics – voluntary participation and agreement, confidentiality of exchanges among parties, the search for mutually satisfactory solutions – are well suited for the multi-party, complex context of environmental conflicts. Mediation is often used concurrently with other modes of conflict management. Some current challenging issues for environmental mediation include mediator training; the production and communication of technical data, especially concerning risks, to lay publics; evaluation of mediation and mediator; the handling of conflicts that are resistant to resolution; the timing of intervention; and whether agreement should be sought in all cases.

### **1. Introduction**

This article describes mediation and its uses in managing environmental conflicts. The second section characterizes the mediation process in the context of various forms of third party intervention. The third section briefly outlines its history in the United States, beginning with use in labor-management disputes and expanding to a variety of other contexts including environmental and public disputes. The fourth section focuses on the special characteristics on environmental conflicts and the ensuing challenges of mediating them. The fifth section explores some current issues and future directions of third party intervention in environmental conflicts.

### **2. Mediation as third party intervention**

Mediation is a form of third party intervention in disputes. Third parties are individuals or organizations called, appointed, or volunteering to assist conflicting parties in managing or settling differences. Although not necessarily recognized as such, a number of familiar roles amount to third party intervention. For example, village elders,

priests, parents, matchmakers, lawyers, arbitrators, mediators, policemen, consultants, managers, judges, the Better Business Bureau, the United Nations, the World Bank and the International Court at the Hague, all exercise some form of intervention in conflicts. In most cases, their key shared characteristic is that they are neither a contributing cause of the situation in which they intervene, nor a direct beneficiary of a specific outcome. They are mostly interested in seeing conflict managed constructively or resolved. Differences among third parties include mandate, trigger and timing of the intervention, payoffs, techniques, personal and process goals, and performance measures (Kaufman & Duncan, 1988). These differences matter when matching conflict situations with suitable intervention, thereby increasing the likelihood of success.

During mediation, a *neutral* third party -- the mediator -- assists two or more disputing parties in reaching a *negotiated settlement*. Participation is voluntary for all: any of the disputing parties and the mediator can opt out at any time. *Agreement is voluntary* too. The parties own the mediated agreement, and in most cases are solely responsible for implementation and compliance. Mediators derive their requisite neutrality from lack of a direct interest in the outcome of disputes, and lack of alignment or power relationship with any of the disputants. Mediators are expected to hold parties' communications in strict *confidentiality*.

Based on its characteristics, mediation is best suited to interests-based disputes, as opposed to rights- or power-based disputes (Ury, Brett & Goldberg, 1988). In such disputes, parties differ in their preference for tangible outcomes (for example, actions, payments, specific behaviors) and for intangible ones (for example, relationships or attitudes). They are not seeking to decide who is right or wrong according to laws or rules (rights-based dispute). They typically lack the ability -- whether rooted in formal mandate, position or resources -- to prevail by imposing a preferred outcome on others (power-based disputes), or to attain that outcome unilaterally. Interest-based situations often have a mixed-motive nature (Schelling, 1960), in that the parties have both joint and competitive interests and despite their differences they need each other for a mutually agreeable outcome to prevail. They need to negotiate this outcome, and they can benefit from the assistance of a mediator especially when there are communication difficulties, a history of fraught relationships, numerous interested and affected parties, lack of a defined process, or a high level of process or content complexity.

In theory, mediators accomplish their intervention tasks mainly by supplying information to parties and transferring information among them. They do not typically affect resources or their distribution, and cannot ensure compliance with agreements or offer any guarantees. Instead, mediators fosters agreements by altering the ways in which the parties perceive the dispute, each other, the outcomes, the process, the alternatives and their consequences (Kaufman & Duncan 1989). Therefore, mediation is necessarily *transformative*: in the absence of any tangible change in the situation itself, a voluntary agreement among disputants signals changes in their views of the conflict. Not surprisingly given the nature of such intervention, the mediator's tool bag contains a number of communication techniques -- fact finding, conflict assessment, skillful questioning of the disputants, active listening, information supply, transfer and interpretation, reframing of the parties' stated views, as well as process design and relationships management.

In practice, in the numerous contexts in which third party intervention labeled "mediation" is used nowadays, some of the key characteristics of mediation described above are absent. In fact, the term is often used generically in reference to a broad set of nonadjudicative dispute resolution processes (Yarn, 1999). Even the goals of mediation vary along a rather wide range. While usually mediation seeks to help disputants reach an agreement, owing to the complexity and protracted nature of some long-term international and environmental conflicts, intervention goals get scaled down to constructive management of dispute episodes rather than conflict resolution (Burgess & Burgess 1996). The type of mediation called "transformative" (Busch & Folger 1994) has rather ambitious goals, that don't necessarily include dispute settlement. Instead, such intervention aims for mutual understanding and a deeper, longer lasting transformation of the parties' views than is required for parties to forge an agreement. Between these poles lie various other practical mediation goals, though the entire range is pervaded by concern for averting destructive violent outcomes and maintaining or improving relationships among the disputants to the extent possible.

Those acting as mediators, whether formally or informally, are not necessarily goal- or outcome-neutral. Some have a direct interest in the outcome, and the ability to affect the resource distribution by rewarding behavior consistent with their interests. For example, the United States is said to act as a mediator in international conflicts such as the Middle East or Northern Ireland, although it is not indifferent among the possible outcomes of these long-term conflicts. Some international agreements are contingent on financial or technical assistance from the intervenor. Even if the United States exercises no pressure, it is generally perceived by parties to have power and the ability to mete retribution at some future time, if dissatisfied with the parties' actions (Bercovitch 1992). Managers in organizations act as informal mediators in disputes (Lax & Sebenius 1986) in which they have some measure of power over the disputants. Disputing subordinates are aware of the managers' ability to impose a solution, but the managers may nevertheless be acceptable as mediators.

Although neutrality has long been held as one of the hallmarks of mediation, in practice mediators can rarely avoid forming some preference for a party or some specific outcome, while well able maintain procedural neutrality. However, there are examples of successful mediation in which some or all parties perceived the mediator to lack neutrality (Rifkin, Millen & Cobb 1991), as in the instance of Kissinger's shuttle diplomacy in the Middle East (Rubin 1983). It appears that parties can abide a mediator's up-front partiality as long as they continue to perceive the process as fair. City planners intervene in public and community disputes in mediator-like manner (Forester), although they are legitimately not neutral by their very mandate to uphold the public interest.

While the parties' ownership of the solution seems to be a prevalent value in most contexts, the actual practices differ in implementation. For example, in school and community disputes, mediators are trained to scrupulously avoid any input in the crafting of solutions. In divorce and labor-management disputes, the experienced mediator's input is welcome and even expected, as long as it remains perceived as neutral. In environmental, public and international disputes that are highly complex, mediator input in the design of solutions is not unusual, even when the mediator is

perceived, or known, not to be neutral. Across contexts, however, the usual mediator practice is to encourage parties to the extent possible to take charge of the process of crafting a joint agreement.

The confidentiality of communications with the mediator is quite essential to the process, especially in cases involving parties accountable to constituencies, or in cases that fail to settle and go before a court where the information volunteered by parties may be used against them. In the United States this issue is knotty, as the legal system has not recognized mediators' confidentiality privileges comparable to those of medical doctors, therapists or religious ministers.

The voluntary characteristic cuts across all contexts in which mediation is used, regardless of any other deviations from the theoretical definition. However, for a process to be genuinely voluntary, it requires power balance among the parties, else a disputant be coerced into an agreement by concern for future retribution, or by lack of means to seek alternatives to the mediated agreement. In practice, mediation is used in situations with varying degrees of power imbalance, such as some international, public and business disputes, and even in domestic violence cases. The latter is arguably at the limit of acceptability, with possibly dire consequences for the abused side participating in a process that requires some level of disclosure of past incidents to a third party.

Lastly, although not necessarily equipped by training, mediators are venturing into realms and techniques akin to therapy, as in victim-offender situations in which the intervention process seeks to mend the spirits of individuals involved, usually but not necessarily after the offenders have been found guilty and have been sentenced by the courts.

-  
-  
-

TO ACCESS ALL THE 17 PAGES OF THIS CHAPTER,  
Visit: <http://www.eolss.net/Eolss-sampleAllChapter.aspx>

### **Bibliography**

Bacow, L.S. & M. Wheeler. 1984. *Environmental dispute resolution*. New York: Plenum. [Collection of amply documented environmental dispute cases illustrating third party intervention.]

Baron J. & Ritov, I. 1994. Reference points and omission bias. *Organizational Behavior and Human Decision Processes* 59, pp. 475-98. [Cognitive psychology experiments identifying the effects of reference points and of the omission bias in individual choices.]

Bercovitch J. & Rubin J.Z. editors (1992). *Mediation in International Relations: Multiple Approaches to Conflict Management*. New York: St. Martin's Press. [Essays and cases illustrating intervention in international conflicts.]

Bingham, G. 1986. *Resolving Environmental Disputes: A decade of experience*. The Conservation Foundation. Washington, D.C. [An evaluative examination of the record of intervention in environmental disputes, written by a dispute resolution professional and pioneer in her field.]

Birkhoff, J. & G. Bingham. 1997. *Defining Success—What is a success in mediation and what does the field want to know about success?* Paper prepared for *Building Bridges between Research and Practice: What is success in Public Policy Dispute Resolution?* Sponsored by RESOLVE and NIDR, June. [An examination of the challenges of assessing mediation success and some ways in which success can be framed.]

Burgess H. & Burgess G (1996). *Constructive Confrontation: A Transformative Approach to Intractable Conflicts*. *Mediation Quarterly*, Volume 13 #4 pp. 305-322. [Proposed steps for managing constructively negative aspects of conflicts that do not appear to be amenable to resolution in the short run.]

Bush R.A.B. & Folger J.P.(1994). *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition*. San Francisco: Jossey-Bass Publications. [Outlines transformative mediation.]

Carnevale P.J.D. (1986). *Strategic Choice in Mediation*. *Negotiation Journal* 2(1) pp. 41-56. [Study of how mediators select strategies during mediation.]

Carpenter S.L. and Kennedy W.J.D. (1988). *Managing Public Disputes: A Practical Guide to Handling Conflict and Reaching Agreement*. San Francisco: Jossey-Bass Publications. [A study of the categories of actions can mediators take and of the ways in which they select their actions in the midst of negotiations.]

Crowfoot, J.E. & J.M. Wondolleck. 1990. *Environmental disputes: community involvement in conflict resolution*. Washington, D.C.: Island Press.

D'Estree, T.P., C. Beck & B. Colby, 1999. [Criteria for evaluating successful environmental dispute resolution. Unpublished.]

Deutsch M & Coleman P.T. editors (2000). *The Handbook of Conflict Resolution: Theory and Practice*. San Francisco: Jossey-Bass Publications. [A collection of articles covering a broad array of factors affecting the unfolding of conflicts and ways in which they can be addressed productively.]

Duffy K.G., Grosch J.W. & Olczak P.V. editors (1991). *Community Mediation: A Handbook for Practitioners and Researchers*. New York: The Guilford Press. [Theory-grounded practical advice for interveners in community conflicts.]

Elliott, M.L.P. 1999. *The role of facilitators, mediators, and other consensus building practitioners*. Pp. 199-239. [A comparative examination of a range of interveners in public disputes.]

Gray, B. 1997. *Framing and reframing of intractable environmental disputes*. In R. Lewicki, R. Bies, & B. Sheppard (Eds.), *Research on Negotiation in Organizations*, 6. Greenwich, CT: JAI Press, 163-188. [An examination of how stakeholders frame environmental disputes and how reframing can help resolve them.]

Innes, J.E., Gruber, J., Neuman, M. & Thompson, R. 1994. *Coordinating growth and environmental management through consensus building*. CPS Report: A policy research report. Berkeley: California Policy Seminar, University of California, Berkeley. [Report on real large-scale project in which decisions were made by consensus.]

Kaufman, S. & Duncan G.T. (1989). *Third Party Intervention: A Theoretical Framework*. In *Managing Conflict: An Interdisciplinary Approach* (A. Rahim, Ed.), New York: Praeger, '89. [Proposes a transformational mechanism by means of which mediators accomplish results, by helping alter only the way in which parties see their disputes.]

Kressel K., Pruitt D.G. & Associates (1989). *Mediation Research: The Process and Effectiveness of Third Party Intervention*. San Francisco: Jossey-Bass Publications. [Series of articles on the state-of-the-art of research on various aspects of mediation.]

Kolb D.M. & Associates (1994). *When Talk Works: Profiles of Mediators*. San Francisco: Jossey-Bass Publications. [Series of probing interviews with mediators who describe their approaches to the profession.]

Lax D.A. & Sebenius J.K. (1986) *The Manager as Negotiator: Bargaining for Cooperation and Competitive Gain*. New York: Free Press. [Proposes that managers in organizations can and do play an informal intervention role that can enhance the ways in which organizations deal with conflict.]

Lewicki, R.J., Saunders D.M., & Minton, J.W. 1999. *Negotiation*. Irwin, McGraw-Hill. [Seminal textbook on negotiation and the research behind a large number of prescriptions for negotiators.]

Lewicki, R., Gray B. & Elliott, M. editors, 2001. *Making sense of environmental disputes*. Washington DC: Island Press. [A theoretical framework for framing in environmental disputes, illustrated with eight cases.]

Marshall, Gary and Connie P. Ozawa, "Mediation at the Local Level: Implications for Democratic Governance," in Peter Bogason, ed., *Tampering with Tradition: The Unrealized Authority of Democratic Agency* (forthcoming). [A solid discussion of the need to build civic capacity to enable participation in public decisions.]

Mnookin R.H. & Kornhauser L. (1979). *Bargaining in the Shadow of the Law: The Case of Divorce*. *Yale Law Journal* 88 pp. 950-997. [An analysis of the effect on negotiations of the existence of the court option for resolving the conflict.]

Moore, C.W. (1996). *The Mediation Process: Practical Strategies for Resolving Conflict*. San Francisco: Jossey-Bass Publications. [Mediation textbook that serves as basis for mediator training programs.]

Rifkin J., Millen J. & Cobb S. (1991). *Toward a New Discourse for Mediation: A Critique of Neutrality*. *Mediation Quarterly* 9(2) pp. 151-163. [Problematising of the importance of, and necessity for, neutrality in mediation.]

Rubin J. editor (1983). *Dynamics of Third Party Intervention: Kissinger in the Middle East*. Praeger Publishers. [Collection of articles applying various perspectives to Henry Kissinger's intervention in the Middle East conflict.]

Schelling T.C. (1960). *The Strategy of Conflict*. Cambridge: Harvard University Press. [Seminal framework that is a source of, and influence on, most subsequent conflict management scholarship.]

Sebenius, J.K. 1984. *Negotiating the Law of the Sea*. Cambridge: Harvard University Press. [In-depth case study documenting the crafting of an international agreement regarding the use of a major natural resource shared by many countries.]

Simkin W.E. (1971). *Mediation and the Dynamics of Collective Bargaining*. Washington DC: Bureau of National Affairs. [One of the earliest descriptions, by a professional mediator, of the mediated collective bargaining process.]

Shmueli D.F. ( ). *Approaches to Water Dispute Resolution: Applications to Arab-Israeli Negotiations*. *International Negotiation Journal*. [Comprehensive analysis, illustrated with case studies, of the issues involved in resolving disputes over water resources in arid contexts.]

Susskind, L. & D. Madigan. 1984. *New Approaches to Resolving Disputes in the Public Sector*. *The Justice System Journal*, 9 (2), 179-203. [Description of ways in which ADR is applied to large scale public disputes.]

Susskind L. & C. Ozawa. 1983. Mediated Negotiations in the Public Sector. *American Behavioral Scientist* 27 #2: 255-279. [One of the earliest and seminal articles proposing the application of ADR to public disputes.]

Ury W.L., Brett J.M. & Goldberg S.B. (1988). *Getting Disputes Resolved: Designing systems to cut the cost of conflict*. San Francisco: Jossey-Bass Publications. [This volume proposed the design of dispute resolution systems as an on-going way of attending to disputes in organizations by designing in a participatory way a process for resolving differences that parties would accept later should they be involved in work disputes.]

Ury W. (2000). *The Third Side: Why We Fight and How We Can Stop*. Penguin Books. [Proposal, illustrated with examples, to involve any and all individuals in reducing strife in all contexts.]

Wondolleck, J. & Yaffe, S. 2000. *Making Collaboration Work*, Washington, D.C.: Island Press. [Proposal, illustrated with examples, to involve any and all individuals in reducing strife in all contexts.]

Yarn D. Y. editor (1999). *Dictionary of Conflict Resolution*. San Francisco: Jossey-Bass Publications.

### **Biographical Sketch**

**Sanda Kaufman** is Professor of Planning and Public Administration at Cleveland State University's (CSU) Levin College of Urban Affairs. She teaches quantitative reasoning, conflict management and strategic planning. She received CSU's Distinguished Teacher Award in 1999. She holds degrees in architecture and planning (Technion, Israel Institute of Technology) and public policy analysis (Carnegie Mellon's Heinz School of Public Policy and Management). Her expertise is in negotiations and intervention in public, organizational, and environmental conflicts. She has planned and facilitated public meetings for a consensus-building process ranking Northeast Ohio's environmental risks. She has trained Cleveland Housing Court mediators and has facilitated community meetings. Currently, she is co-facilitating with the Consensus Building Institute an EPA pilot project to reduce the risks from air toxics in two Cleveland neighborhoods. For the past two years she has been part of a multi-university research consortium exploring the role of framing in intractable environmental disputes. Her articles have been published in the *Journal of Planning Education and Research (JPER)*, the *Journal of Architecture Planning and Research*, the *Journal of Conflict Resolution*, the *Negotiation Journal*, *Fractals*, and the *International Journal for Conflict Management (IJCM)*. Sanda Kaufman is a member of the Association of Collegiate Schools of Planning (on whose board she serves), the Urban Affairs Association, the International Association for People-Environment Studies, and the International Association for Conflict Management (on whose board she served). She is member of the editorial boards of *JPER*, the *Conflict Resolution Quarterly*, and *IJCM*, for which she is book reviews editor.