

MEDIATION IN ENVIRONMENTAL DISPUTES

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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.

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Biographical Sketch

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