

Mediating Inequality:
Mediators' perspectives on power imbalances in public disputes

by

Alexis L. Gensberg

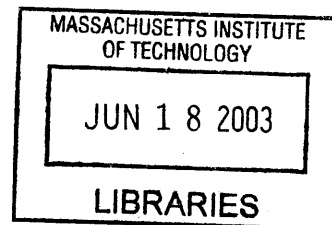
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Alexis L. Gensberg

Submitted to the Department of Urban Studies and Planning
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ABSTRACT

Mediators of public disputes respond to inequalities among parties in a variety of ways. In order to understand the range of interventions they employ and the reasoning behind these interventions, I interviewed 17 experienced public disputes mediators about their individual practice guidelines.

I found that mediators' interventions differed substantially when deciding what interests need to be at the table, in providing information to parties on finding technical assistance, and in analyzing emerging agreements. Most mediators interviewed agreed that they should disclose or make obvious to all parties the nature of their contact with an individual party, and that it is inappropriate for them to recommend a specific course of action to a party or a specific solution to the group. In addition, a number of interviewees said that they felt uncomfortable defining the guidelines other mediators should follow.

Given this range of responses, I suggest that to better inform parties in a dispute about how the mediator will handle inequalities, it is important that mediators disclose certain approaches before beginning a mediation. The responsibility to disclose can take the place of specific ethical guidelines for public dispute mediators in situations characterized by inequalities. If the mediator responses I found indicate the range of views that exists among public disputes mediators in general, then the field of public disputes mediation is currently too inchoate for a unified set of ethical or practice guidelines to be useful.

Thesis Supervisor: Lawrence Susskind

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Introduction

Chapter 1

What is the range of mediators' responses to inequalities among parties in public disputes? ¹ When mediators manage processes involving people with significantly fewer resources than other parties, what worries them and how do they proceed? What do they consider to be appropriate interventions? This study explores mediators' responses to inequalities among parties and the reasoning they employ to explain their interventions. The stories and explanations collected in this study expand our understanding of what activities mediators consider appropriate and the range of responses among mediators to problems stemming from inequalities among parties.

I have interviewed 17 experienced public disputes mediators to learn how they have handled these types of situations the past, how they would handle them in a hypothetical scenario, and how they would make the case for their approach to other parties or other mediators.²

Mediators described cases that fit into my definition of disputes characterized by inequalities,³ first in response to the general question of what has worried them or been problematic in past cases, and then in comparison to the hypothetical scenario. For this

¹ For the purpose of this study, I have defined disputes characterized by inequalities or power imbalances as those in which:

- One or more of the parties lacks the negotiation skills and/or technical background to represent their interests or understand the implications of a decision
- One or more of the parties does not have the financial resources to adequately represent themselves (including attending the meetings and taking time to prepare)
- One or more parties who will be affected by the proceedings (including future generations) is not included in the discussions
- One or more of the parties is not aware of legal processes and alternatives available to them
- One or more parties traditionally has less access to public decision making, perhaps because of language barriers, geographical barriers, or mistrust of government agencies

² Please see questions and hypothetical scenario used in interviews, Appendices A and B.

³ Please see footnote 1.

reason, although I determined the types of cases respondents talked about, they chose to focus on particular aspects of the definition that particularly concerned or interested them. I have grouped their responses around five general problems. These problems are similar to my definition of inequalities, but the types of problems mediators focused on within the definition helped me to organize them.

1. Certain interests are not represented
2. Some parties have difficulty participating
3. Parties do not have access to information they need
4. Some parties are not fully exploring their alternatives to mediation
5. Parties are not gaining as much through mediation as they could

I devote a chapter to each problem.

Mediators cope with these five challenges in a range of ways. In each chapter I explore how these responses vary; how different types of interventions may affect parties who are weaker in terms of negotiation skills, technical expertise, financial resources, representation and participation in the process, knowledge of alternatives, or familiarity with public decision making; and what the risks and benefits of encouraging mediators to move towards one end of the range or the other could be. The range produced from mediators' interview responses point to common as well as divergent practices in disputes characterized by inequalities.

Research method

Chapter 2

I interviewed 17 experienced public disputes mediators in order to answer the questions:

- When mediators find themselves hired for a process involving significant inequalities, (as defined in the Introduction), what worries them?
- What do they consider to be appropriate interventions?

I selected mediators to invite to participate by consulting with the following mediators and researchers: Joan Calcagno, Chris Carlson, Carrie Menkel-Meadow, and Larry Susskind.⁴ They suggested experienced public disputes mediators representing a variety of backgrounds who would likely have insight into disputes involving inequalities. Based on their suggestions, I chose mediators to invite with the following goals in mind:

- Interview an equal number of men and women
- Contact at least one of the mediators suggested by each person above. I also interviewed at least one mediator suggested by each of the people above
- Interview people representing a variety of backgrounds, including lawyers, policy analysts, advocates, and academics.
- Interview people who together represent most of the regions in the U.S. I did not fully accomplish this, although many of the mediators, as discussed below, have worked in a number of regions outside their own.
- Interview at least half of the mediators in person. This became impossible because of the large rate of reply I got from mediators outside the Boston area as opposed to those in the Boston area.

⁴ Joan Calcagno is the Roster Coordinator at the U.S. Institute for Environmental Conflict Resolution
Chris Carlson is Co-Executive Director of the Policy Consensus Initiative
Carrie Menkel-Meadow is Professor of Law and Director, Georgetown-Hewlett Program on Conflict Resolution and Legal Problem Solving, Georgetown University Law Center
Lawrence Susskind is Ford Professor of Urban and Environmental Planning, MIT, and Director, MIT-Harvard Public Disputes Program

These goals evolved once I started the interview process. I ended up contacting 31 people from a list of 124 mediators. I received 26 responses, which resulted in 17 interviews. I did not turn down any mediator who replied to my request unless they said they had not in fact mediated disputes with significant power or resource imbalances, or could not do the interview within my timeframe.

Twelve of the mediators who participated in this study are on the U.S. Institute for Environmental Conflict Resolution mediator's roster, and two others are eligible for inclusion.⁵ Two more mediators have equivalent hours of experience in multiparty mediation but have focused on non-environmental public disputes. While I do not know the number of hours the remaining mediator has served as principle on multiparty cases, this person does partner with a number of the other mediators listed or eligible for USIECR. The requirements for being listed on the USIECR roster include:

- Serving as the principal professional on two to ten environmental cases totaling 200 case hours in aggregate; and
- Accumulating a certain number of points in the following three categories:
 1. Complex Case and Additional Case Experience
 2. Interactive Process Training
 3. Substantive Education and Experience (including graduate degrees and years or employment in related fields) relating to case experience, training work, and substantive background.⁶

I interviewed nine men and eight women. One interviewee is a person of color. Five currently practice out of Massachusetts, four out of California, four out of Washington, DC, two out of Colorado, one out of New Mexico, and one out of Ohio. I did not interview mediators from the South or the Midwest (except for Ohio), and I did invite a disproportionate number of Boston-based mediators because I wanted to do as

⁵ Joan Calcagno, personal communication, April 25, 2003.

⁶ http://www.ecr.gov/r_entry.htm. Last downloaded May 1, 2003.

many in-person interviews as possible. I conducted five interviews in person; I spoke with the other interviewees over the phone. I also attempted to choose mediators who had practiced in a variety of places. Most mediators interviewed practice in other states, and at least two practice internationally as well as domestically. Four of the respondents are professors and at least two have been trained as lawyers. At least three interviewees worked for a State or Federal agency before becoming a mediator.

Although I attempted to interview mediators who would represent a variety of backgrounds, case types, and approaches, this study should not be considered representative of all public disputes mediators. My intent is to show how mediators can respond and their responses play out in the context of past experiences and a hypothetical example. In order to explore how some of the findings from this research might relate to the population of public disputes mediators as a whole, a researcher would need to design a more random sample. The sample should somehow take into account the fact that more experienced mediators may be less likely to respond to requests to participate in a study than less experienced mediators due to time constraints.

The aim of my interview questions was to get mediators to describe and analyze the principles they choose to employ in these types of disputes.⁷ I conducted semi-structured interviews⁸ that consisted of three parts: open questions that respondents answered based on their own experiences, hypothetical questions in response to a scenario, and questions designed to clarify the principles respondents' use to explain their

⁷ I have based this goal on the assumption that each respondent will have developed his or her own theories to explain their work and the roles they play. (Flick 1998) However, because the word "theory" may connote various meanings, I am describing what I am looking for as "guidelines" or "principles."

⁸ Flick, Uwe. An Introduction to Qualitative Research. Thousand Oaks, Calif.: Sage Publications, 1998.

interventions.⁹ I started with an open-ended question in order to understand what the respondent considers a dispute characterized by significant power imbalances. I used follow-up questions to the respondent's initial response to clarify the reasoning behind the particular actions that the respondents described, and to identify the conditions under which they would act differently. The scenario gave me the opportunity to compare mediators' responses. I analyzed the responses after the first eight cases in order to incorporate new insights and modify the types of responses for which I was searching.

Because interviewees' responses to my questions depended on how I asked them, how I follow up on them, and how I presented myself, there are a number of risks that the responses I got did not convey respondents actual practices and reasoning behind those practices. Denzin (1978) identifies a number of sources of invalidity common to the interview, including self-presentation, and presentation of the study. (Denzin 1978: 124)

I attempted to overcome some of these risks by describing my study in similar terms to each mediator, and by clearly stating that mediators' identities would not be revealed and they would have a chance to verify all the quotes I used. This gave mediators an opportunity to speak candidly, although I have no way of knowing whether they actually did. In order to reduce the chance that mediators thought I was looking for a particular answer, I avoided mentioning existing ethical standards and in most cases did not even use the word "ethical." When I pushed a mediator to clarify their response, I specified that I was not looking for a particular answer but rather a better sense of their real approach.

⁹ Please see interview questions and scenario in Appendices A and B. I asked respondents not to look at the scenario before answering the open-ended question about their own case because I wanted to understand what they found "problematic" or "worrisome" in such cases before providing my own interpretation.

It is possible that the mediators in this study described their current reasoning behind a particular action differently than how they actually felt when intervening. While I could not perfectly correct for this, I attempted to get mediators to talk about what they did at the time in specific cases and how they felt then. It is also possible that different interviewees understood the same question very differently. To compensate for this, I used follow up questions to pursue the same type of information across all interviews.

Research that informed this study

Chapter 3

Mediators and their potential clients should pay attention to the way mediators handle disputes characterized by inequalities because of mediation's potential to result in an agreement less favorable to parties who are weaker in terms of negotiation skills, technical expertise, financial resources, representation and participation in the process, knowledge of alternatives, or experience with public decision making. If a clear understanding does not exist of the approaches mediators consider within their role in disputes characterized by inequalities, parties risk agreeing to processes where their opportunity to contribute to and influence an agreement significantly depends on the choice of mediator.

A discussion of mediator's approaches to inequality should start with the ongoing debate in the public disputes mediation field on mediators' accountability to the process and outcome. Three main arguments characterize this debate:

1. Mediators are not responsible for taking into account "fairness" or other principles in the process or in the outcome, because to do so would be to compromise their neutrality. (Stulberg 1981: 86)
2. Mediators should advocate for a fair process, which includes providing parties with negotiation skills and securing the technical assistance they need to make informed decisions (Susskind, personal communication), and the mediator should be concerned with the impacts of any outcome on those who are underrepresented or can't be represented. (Susskind 1981: 46) Mediators are responsible for ensuring the outcome is acceptable to all parties and seen as legitimate to those who will implement it and be affected by it. (Susskind 1981: 18) However, the mediator does not openly judge the outcome or deliver his or her judgment of it.
3. Mediators should not only advocate for a fair process, but also, if the outcome produced is patently unfair or unconscionable in the view of the mediator, there are times when the mediator may or even should make this known by withdrawing from the agreement or by communicating this view to the parties. (Menkel-Meadow 2002, Menkel-Meadow personal communication November 2002)

Stulberg's (1981) argument identifies neutrality as the mediator's primary ethical responsibility. He argues that if the mediator designs a process based on principles not identified by the parties themselves, then that mediator is pursuing an agenda and cannot be considered neutral. Goldberg, Green and Sander (1985) elaborated this argument a few years later by arguing that the mediator is not authorized to make these types of judgments on behalf of the parties. (Goldberg et al. 1985: 264) In this line of reasoning, the mediator is not responsible for any of the content of the agreement reached, whether the impact be private or public. (Goldberg et al. 1985: 264) In this view, the goal of mediation may be seen as getting an agreement. "If the mediator has to spend time worrying about whether the agreement is going to be fair or unfair, all too often there won't be any agreement to worry about." (Goldberg et al. 1985: 265)

Susskind's concern for fairness in the mediation process (and, indirectly, the outcome) requires mediators to balance their commitment to neutrality with their commitment to equity among the parties. These considerations go beyond the process design itself, even, but also to the quality of the resulting agreement. Susskind contends that it is not enough to have a "fair and efficient process," but that the success of the mediation must also be judged by the "fairness and stability" of the agreement. (Susskind 1981: 14) Susskind considers an agreement to be fair to the community if it is "consistent with shared notions of equity and justice." (Susskind 1981: 17, citing Fisher 1979).

In Susskind's view, a mediator should recognize potential obstacles to a "mutually acceptable agreement" before participating in the process, and withdraw from the process if it is clear that one or more parties is pursuing a solution that would be

unjust to another party, whether or not that party is represented in the negotiation. (Susskind 1981: 14) Susskind also recommends that mediators not be part of an agreement in which it would be perceived that a more powerful group was able to achieve the outcome they wanted by just holding out until parties with weaker alternatives to the negotiation reluctantly gave in. (Susskind 1981: 15) This argument points to a sense of responsibility to a fair process that is closely linked with concern for the fairness of a final outcome. Goldberg, Green and Sander elaborate on this argument by adding that “The greater the power disparity among the parties, the more important it is that the mediator be held responsible for the fairness of the agreement.” (Goldberg et al. 1985: 266)

However, Susskind does not go so far as to recommend that a mediator judge the final agreement if the mediator believes that his or her obligation to a “fair” process has been fulfilled. Part of his reason for not recommending the evaluation of a specific agreement once the process has been carried out may be that the criteria for determining the “fairness” of an agreement would be so case-specific as to be non-transferable from one dispute to the next. For this reason, Susskind recommends judging the process, which can be evaluated, rather than the outcome. If the mediator created a “fair” process, then the outcome should be fair. (Susskind, presentation at the Advanced Course for Mediating Land Use Disputes, 4/2002)

Schoeny and Warfield (2000) challenge the assumption that a “fair” process will lead to a “fair” outcome. They contend that this link depends on the institutions overseeing the administration of the process. If we consider these institutions problematic, they observe, then the relationship among fair process and fair outcome falls

apart. (Schoeny and Warfield 2000: 262) Their argument fails to provide an alternative to arriving at a fair outcome through a fair process, however. The authors do not explicitly suggest that mediators should make a value judgment on the outcome, although this would be one way of addressing the problem.

Menkel-Meadow (2002) fills in this gap in her proposal of 15 principles for public dispute consensus building practitioners. These guidelines, which were developed through conversation with a group of experienced mediators, elaborate on the consensus building practitioners' responsibilities. The last guideline in the list, which Menkel-Meadow considers the most controversial, addresses mediator responsibility to the justice of the outcome (emphasis is mine):

A facilitator, mediator, intermediary or third party neutral should do everything within his/her control to ensure that any agreement reached or decision taken is not unconscionable, unfair, or unjust or causes unnecessary harm to the participants or to any third parties not present during the process. [...] Third party neutrals should not allow themselves to 'preside' over agreements that are obviously unfair, unjust, unconscionable or will cause harm to the participants or others outside of the process. (Menkel-Meadow 2002)

This guideline departs from the first two views above on mediator accountability identified in that it explicitly advises judging the outcome of the mediation. This implies a mediator would have more influence over the outcome of a mediation than if he or she were just to indirectly influence the outcome through the process.

However, the guideline itself does not contain practical criteria for making this judgment. Simple definitions do not exist for the terms "unconscionable," "unfair," and "unjust". The definition of unconscionable is especially elusive. Adler and Silverstein (2000) explain that the definition of the word, whose purpose is to protect parties with less power from more powerful negotiators, is deliberately unclear in order to adapt to diverse contexts (Alder and Silverstein 2000: 42) If a mediator were to attempt to follow

Menkel's guideline #15, how would he or she decide when an agreement fit those definitions and what action would be appropriate to take? To answer the question of how mediators view their accountability in disputes characterized by inequalities requires a more detailed of the approaches that mediators consider to be appropriate and inappropriate.

Picard reveals some of the differences in approach among mediators of two-party disputes in her study, "Common language, Different Meaning: What Mediators Mean When They Talk About Their Work." She finds that even when mediators use the same terms to describe their work, they may be describing in fact different actions or different reasons to inform or guide that action. She argues at the end of her study for the categorization of approaches and for mediators to understand where they fit and to communicate this orientation to students and clients. (Picard 2002:265)

In his study of mediators of interpersonal, community, divorce, or civil disputes, Bush found that respondents identified ethical dilemmas in their practice that could be grouped into nine types of dilemmas. In a number of cases, a dilemma arose because the mediator was trying to uphold two or more principles that contradicted the action the mediator should take. (Bush 1993: 17)

Bush found that mediators made value choices by favoring one ethical principle over another when two principles contradict each other. Mediators make these choices without the help of standard guidelines that would help them decide which of two mutually-exclusive principles they are to follow. (Bush 1993: 17) According to Bush's findings, when having to choose among competing values, mediators he interviewed were most concerned with preserving the self-determination of the parties (i.e., the

parties' ability to resolve their dispute based solely on their own values). (Yevsyukova 1997: 4) Mediators were therefore most concerned with not imposing their own values on the process, or the values of anyone besides the parties.

It is likely that these findings will be different for public disputes mediators, especially if they are confronted with cases characterized by large power imbalances. For one, in interpersonal disputes, the parties to the conflict are usually easy to identify, and these disputes usually involve only two sides. The disputes are not public, and therefore mediators often do not need to worry about the impact of the outcome on parties not at the table, including those that are affected by the agreement but not represented. There is also less of a need for the mediator to manage coalitions that may form and exacerbate existing power imbalances. The competing principles for mediators that would likely figure in multiparty disputes would include concerns for the legitimacy of the agreement, its stability, how the parties were selected, how to manage coalitions, and how to maintain impartiality. (Susskind 1981, Susskind, personal communication)

What tradeoffs are mediators making, and what values or principles are guiding those tradeoffs? What conditions outside of the mediator's control influence the tradeoffs he or she makes? These questions need to be answered in order to respond honestly to arguments made by critics of mediation that it does not improve access to justice, and may actually undermine social justice movements and encourage participants to compromise gains they might otherwise organize or litigate against.

It is also important to ask what value choices mediators make in disputes characterized by large power imbalances because the answers will inform parties who are weaker in terms of negotiation skills, technical expertise, financial resources,

representation and participation in the process, knowledge of alternatives, or experience with public decision making about what they stand to gain and lose through the mediation process. Some underrepresented groups are often reluctant to participate in mediation processes because they are worried that, since an agreement is to be worked out among parties and not in a court of law, protections of rights and equality may not apply. They may also fear that their group of people will look uncooperative if they refuse to go with a deal that they feel is inherently unjust. Finally, if a party to the dispute or dialogue is oriented towards direct-action organizing and increasing membership to confront certain structural injustices, the groups' leaders may fear that mediation could undermine their movement. (Shoeny and Warfield, 262)

Whether mediation increases or limits parties' ability to get the equitable treatment and access to opportunities that they deserve is still up for debate. Proponents of mediation cite its ability to achieve a more just solution. Some of the advantages Houseman cites for those with few financial resources include mediation's lower cost and the greater opportunity to design the resolution of the dispute. (Houseman 1993: 9) While this statement was made in regard to more traditional two-party disputes, it can apply to multi-stakeholder disputes, especially when a government agency or other convenor is paying for a public process.

One reason advocates for the poor, however, are reluctant to support mediation is that in interpersonal disputes, mediation is often mandated before a case can be heard before a judge. This is especially true in cases of "small claims," which can nonetheless represent important sums of money to the people involved. This has given advocates the

impression that poor litigants sent to mediation were being relegated to a second-best system, and has given them reason to resist it. (Houseman 1993: 9)

Additionally, the question of how well parties are represented, and who is ultimately responsible for ensuring that representation, remains unanswered. Nader argues that organizations are much better served through mediation than individuals. (Nader 1992: 13) In my own research on conflict assessments, I have found that parties have expressed concern that their interests were not well represented when they have been grouped in a category of diffuse stakeholders with diverse interests. Parties have felt that they are better represented when the stakeholders of a particular category have been able to organize around common interests.

Nader also criticizes mediation as a move towards harmonization intended to diffuse social movements. She argues that mediation and other alternative dispute resolution techniques gained prominence as a response to increased litigation on behalf of civil rights, women's rights, environmental protection, and other social movements. Instead of being a way for parties to work to improve their joint gains in a dispute (Susskind, 1981:16) Nader sees mediation as a form of social control; mediation is a way to counteract legal confrontation, when in fact legal confrontation may be the key to success for these groups' agendas. (Nader 1992: 13) Chesler echoes this statement, claiming that mediation and other alternative dispute resolution processes often confirm and reinforce the existing status quo. (Chesler 1991: 3, cited in Schoeny and Warfield 2000: 258)

Schoeny and Warfield explain the problem of harmonization through the concept of "systems maintenance." In this way, a tension exists among achieving the goals of

social justice and the goals of “systems maintenance” of existing (and perhaps unjust) systems. (Schoeny and Warfield 2000: 254, 255) Schoeny and Warfield address this concern by arguing that mediation itself came out of a social justice tradition – not as a counter to it. Systems maintenance, especially in public disputes, can involve a number of systems, including those that may promote social justice principles in conflicting ways. In this way, mediation’s ability to harmonize systems can actually further social justice goals by increasing the coordination among, and potentially the effectiveness of, systems that themselves are designed to promote greater equality and protection for minority groups. (Schoeny and Warfield 2000: 260)

Menkel-Meadow (1999) has also written on how alternative dispute resolution may favor those who have greater familiarity with the legal process. She focuses on how the process is designed, though this stems from a concern about the outcomes that the process produces. Although, again, her focus is on two-party conflicts, a similar inequality exists in public multiparty conflicts, with respect to unfamiliarity with government processes and legal options.

Nader and Menkel-Meadow point out that we need to question both the positive and negative impacts that mediation can have on the parties involved, and we need to question how mediators and the process they design contribute to those impacts. In the same way, an outcome reached in a public decision must be evaluated to determine its impact on the public and especially on those who are not easily represented or stand to lose over time.

Is the mediator in the best position to do this evaluation? Goldman, Green, and Sander’s article explores the argument that the mediator is best placed to make this

judgment because of his or her closeness to the situation and familiarity with the nuances of the case, but they also acknowledge the threats to the mediator's neutrality in this situation. They raise the alternative proposal of having an independent commission or administrator do it, with drawbacks being that the independent commission would be less familiar with the case and that the legal system currently does not have the institutional capacity to fulfill this role. In either case, the difficulty of evaluating the mediation would be in determining criteria appropriate for a wide range of cases.

How can the field of public disputes mediation clearly communicate mediators' approaches to inequalities among parties in the processes they manage? Existing ethical standards provide public disputes mediators with few practical guidelines to determine what interventions are appropriate in disputes characterized by inequalities. The Association for Conflict Resolution (ACR) requires its members to adhere to Joint Standards developed in 1994 by. However, these standards apply to all types of mediation fields, including private, two-party mediation.

The ACR standards committee has recently begun to update their ethical standards, an effort that may take a number of years.¹⁰ Afterwards, individual sections of the Association, including the Public Policy / Environmental disputes section, will be able to create additional standards that clarify appropriate interventions specific to the public, multiparty disputes. In the meantime, public disputes mediators do not possess a shared written understanding of the range of appropriate interventions. A clearer understanding is needed of what actions are within and outside the mediator's role in disputes characterized by inequalities among parties.

¹⁰ Sharon Press, personal communication, February 25, 2003

In the Ethical Standards of Professional Responsibility produced in 1986 by The Society of Professionals in Dispute Resolution Ethics Committee (SPIDR, now the Association for Conflict Resolution or ACR), the principle dealing most closely with these challenges focuses solely on the process (emphasis is mine):

The dispute resolution process belongs to the parties. The neutral has no vested interested [sic] in the terms of a settlement, but must be satisfied that agreements in which he or she has participated will not impugn the integrity of the process. The neutral has a responsibility to see that the parties consider the terms of a settlement. If the neutral is concerned about the possible consequences of a proposed agreement, and the needs of the parties dictate, the neutral must inform the parties of that concern. In adhering to this standard, the neutral may find it advisable to educate the parties, to refer one or more parties for specialized advice, or to withdraw from the case. In no case, however, shall the neutral violate section 3, Confidentiality, of these standards. (SPIDR 1986, 6th principle of the Ethical Standards)

The current review of these ethical standards being conducted by the Association for Conflict Resolution is to apply to all fields of mediation – from family and other interpersonal types of mediation to public, multiparty mediation.¹¹ Because of the fundamental differences among multiparty public disputes and two-party private disputes, the assumption that general profession-wide guidelines are appropriate should be challenged until we have other indicators that the issues faced across different types of mediation are in fact similar. By focusing on multiparty public disputes, my study will contribute to the understanding of the particular challenges facing multiparty public disputes mediators in situations characterized by inequalities among parties.

Picard argues against the use of one standardized set of ethical guidelines because her study produced a wide enough range of responses about mediator activity to indicate different philosophies behind their practice. As mentioned above, instead of advocating for one specific approach to communicate one view of ethical standards and priorities,

¹¹ Sharon Press, personal communication, February 25, 2003

she argues for a better understanding of each different approach. (Picard 2002, 264-265)

Regardless of whether one or multiple sets of ethical standards are developed, we must have a better idea of what the existing rationales are for the field of public disputes mediation.

Certain interests are not represented

Chapter 4

If a stakeholder groups' interests are not represented by at least one of the participants in a public mediation, individuals with that interest have little chance of opposing through dialogue outcomes that harm them, and have no hand in crafting a solution that benefits them in addition to the other represented interests. Conventional understanding of multiparty public disputes holds that groups that traditionally have less of an institutionalized voice in public decision making, like community groups, need to be "noisy" and be a source of political pressure in order for more institutionalized players, like developers and local government representatives, to need to negotiate with them.

What happens if representatives of a particular stakeholder interest are not noisy? Stakeholder groups with viable alternatives to the negotiation may not negotiate with them. This reality challenges the aspirations of public disputes mediation to result in an agreement that those affected by the decision consider legitimate. If certain parties are excluded from a public dialogue, is it appropriate for the mediator to move forward? Is it within the mediator's role to have a say in who participates?

Interviews with mediators revealed that the extent to which they take part in choosing what interests will be represented in the mediation, and who will actually represent those interests, varies greatly. While some mediators felt it was their obligation to ensure certain interests participated, particularly traditionally underrepresented ones, others felt that only the stakeholders in the conflict should decide who participates.

One mediator who stated clearly that exclusion of certain parties was a non-starter described a policy dialogue they¹² are mediating to develop a transportation and land-use plan. When they and a team were invited to develop a process for the plan, they made sure that types of people who are typically underrepresented in transportation planning be included in the process.

This mediator and their team identified the parties who should participate in the process through conducting an issues assessment as well as based on their own knowledge of the issue:

My policy background is in transportation and land-use. So the whole issue of social equity and land-use – if you are up on the literature, you know there is a rich critique around how land-use decisions can mess over people who are economically disadvantaged. [...] For transportation issues, it's clear that people who are disabled are going to be underserved. So it was clear to us we needed good representation from the Latino community, black community, Asian Pacific Islander community, disabled, seniors, youth. Those are the ones we were most concerned about.

This mediator emphasized that it was important for their other team members to have a strong familiarity with the political context of a dialogue and to have political and policy expertise, and stressed that, “You have to have (a political sense) in your blood or some background in order to be able to make these judgments, because we usually get very complicated political problems and you have to be able to run with that.”

This comment emphasizes looking out for disadvantaged interests. A potential client could therefore question whether it is beyond the mediator's role to determine the parties who should be included in a decision-making process. This mediator made the case for this approach to a potential client by explaining that identifying underrepresented

¹² Some of the mediators interviewed requested that their genders not be revealed, in order to make their comments as confidential as possible. I have changed all pronouns referring to these mediators to the third person plural (e.g. “they” or “their”).

parties was an important part of the team's work. They elaborate: "It wasn't that hard (...). We just said (...) if you're going to do transportation and land use, you have got to have (representation of underserved populations)." Their client did not disagree with this approach. The mediator interviewed feels this was because another planning process the team recently mediated had ended in success, and the client wanted to model their transportation planning effort after this successful effort.

Had the client disagreed, the mediator would have most likely declined the project, as their team has already done in situations where everyone they thought needed to be included was not included. "We take seriously the issues assessments and figuring out who could be advantaged or disadvantaged by this particular agreement, and making sure that everyone with a stake in the issue is at the table. [...] That's (...) a moral principle, that people who are affected by the outcome need to be there. We feel that really deeply." Their judgment of who should be included is based on an issues assessment conducted by the team and by "years and years and years of work in the field, knowing who's who."

Faced with a similar problem, another mediator acted differently. She expressed the same concern, however, of including all the major stakeholders and identifying low-income groups as missing. In describing this story, she explored some of the competing forces that caused her to proceed with a process in which all the parties she felt should be there were not in fact represented.

In this situation, a federal district court declared the state's method of financing health care for the uninsured unconstitutional and gave the state a year to come up with another form of financing. The State Hospital Association and Medical Society

convened representatives of health management organizations (HMOs), insurance providers, health care groups, trade unions who provide insurance, health professional and hospital associations, and small business, large business, and industry associations. They invited this mediator to facilitate a process among them and told her they could not involve additional stakeholders. “At that meeting I told them that my view of consensus building was that all of the stakeholders had to be at the table. [...] They declined to hire me (because) they thought they could do it themselves. They didn’t want to broaden the number of people in the room.”

After the process reached an impasse with only half a year to go, the group called the mediator back in to work with them. She recommended inclusion of a consumer advocate group, but the representatives of the trade unions who provide insurance and of the business and industry associations felt that their organizations represented consumers. The group discussed including additional consumer groups in the process once an initial set of proposals had been developed, and the mediator believed they likely would. At that point, the mediator agreed to manage the process. Some consumer groups were later included at the very end.

My regret is that I did not push harder, is one way to say it, or was unable to be persuasive, is another way to say it, of the people in the room to broaden, to bring enough consumers, in my view. And I to this day regret that - more as a matter of personal belief than of effectiveness of process. [...] I truly believe that decisions are better, practically they are better, they just work better, if major stakeholders are involved. In this case, (many of the stakeholders were involved). [...] But there were no organizations representing – like the League of Women Voters. In (the state) at that time there was a very – considered – radical group calling for health care for all (this was not it’s name). [...]

When I suggested that the table be broadened to include them, (the other participants) said no, that they were opposed (...). [...] (They) just plain refused to have that group at the table. (The health care for all group) didn’t understand why it was necessary to make (the revision of the statute) a smaller and more narrow piece of work. (The other stakeholders) didn’t want to have that voice at

the table in discussing how they would provide health care – that’s what the bottom line was.

The mediator had the idea to broaden the group to include those advocating for health care for all, “Because representatives of low-income populations likely to be either uninsured or underinsured are, from my perspective, the major stakeholders of healthcare. So they need to be in the room, I believe, when such decisions are being made. That’s personal belief.” She felt that a consumer advocate group would have been “a stronger, more articulate, more fully informed representative of consumer stakeholders.”

She did not “push harder” because she respected the commitment of the representatives already participating in the coalition to reform the method for financing healthcare.

I thought it was really important that there be a method for financing health care for the uninsured, and without successful consensus among these players, the most likely outcome was no such financial support. And finally, there are limits to how much I feel I should impose my own personal beliefs and values on those I work with. It seems important to me to raise the questions of participation, and to give my best thinking; then I have to respect them.

In both this and the transportation case, the mediators drew upon the knowledge of the issue to identify stakeholders that could be affected by decisions reached through the mediation. They both identified the importance of including overlooked members of underserved populations as a personal principle that all affected stakeholders needed to participate. Many mediators would agree that all affected stakeholders need to participate, but actively identifying missing parties seems to go beyond conventional wisdom. It may be significant that both of these mediators employed these principles in the context of public policy dialogues where making the solution legitimate to all those affected by it may be an explicit goal.

Stakeholders fearing exclusion from a process (possibly because of lack of leverage or not recommended by other parties) would likely have an increased chance of participating with a mediator who not only believes that affected groups should participate but actively looks out for who might be missing and asks or requires that the process include them. Some mediators said they look out for missing parties for practical reasons: even if the excluded party is weaker in terms of resources or political leverage, they could find a way to undermine the agreement later. The second mediator referred to this reasoning by saying, “practically they are better, they just work better, if major stakeholders are involved.” In the two cases presented above, however, the mediators did not say they identified missing parties because they thought that excluding those parties would make the agreement less sustainable. Their comments imply that they felt the parties needed to be there if they were in some way affected by the agreement, even if they did not necessarily pose a threat to the sustainability of the agreement.

In addition to their own judgment, mediators can use other means of selecting parties. One recommended method is to interview the parties affected by the dispute (often identified by the convenor of the process), then to interview those who were identified by this first group, and then to interview anyone who presents themselves, asking each group who needs to be at the table.¹³ If underrepresented parties are to be included using this method, it seems they need to be vocal or other parties have to have an incentive to mention them. One mediator talked about what happened when consulting interested parties did not surface a stakeholder.

¹³ Susskind, Lawrence. “A Short Guide to Consensus Building.” In *The Consensus Building Handbook*, Lawrence Susskind, Sarah McKernan, and Jennifer Thomas-Larmer, eds. Thousand Oaks, Calif.: Sage Publications, 1999. Pp. 36-38.

In one process this mediator managed, they identified stakeholder interests by asking numerous people who had been involved in the issue who would need to be represented in the process. The mediation process was convened and the table configured according to that report. Towards the end of the process, a person claiming to represent a neglected stakeholder interest protested their¹⁴ exclusion. This person argued that they had been excluded because they were “low power.”

In my convening interviews, I asked the questions that should have surfaced that stakeholder, and yet, the people I was interviewing, none of them thought of that stakeholder. None of them even identified this person’s constituency as a stakeholder. And they should have, interestingly enough, identified that constituency. They should have named this person as a player. This person probably would not have been the right person to be at the table, but the fact that the whole community seemed to have blinders on about this party and this player... So I feel (ethical) twinges about, is there something else I should have done, to surface that player?

Had this mediator had a sense of what types of stakeholder groups this particular issue would affect, they may have more easily noticed this group missing. However, disputes that do not involve obvious stakeholder categories like certain ethnic groups or specific types of service users, make this kind of vigilance more difficult.

If other stakeholders collectively work to play down or omit another stakeholder’s role, a mediator unfamiliar with the type of issue or with the specifics of that area may not be able to see that the process lacks a group.

There’s reasons that the rest of the community had blinders about that player, because this is a person (...) who used the cloak of power imbalance to negotiate in a very positional way, in a way that alienates (other) people. [...] (Outreach by the project’s steering committee) ultimately surfaced another person from that constituency that could be invited to the table and other people would accept that person in a constructive dialogue (...) situation. [...] We brought that second

¹⁴ Some of the mediators interviewed requested that the genders of the parties in the cases they describe not be revealed, in order to make their comments as confidential as possible. I have changed all pronouns referring to these parties to the third person plural (e.g. “they” or “their”).

person to the table, but the first person continued to carry lots of negativity about not initially being identified as a stakeholder.

This mediator felt an “ethical twinge” after realizing that this group, who should have been at the table, was not. They wondered later about what they could have done differently, which may mean that they felt somewhat responsible for not surfacing a stakeholder group affected by the mediation.

Two other mediators do not feel responsible for identifying stakeholders who might be missing from a public dispute. They rely on the parties’ own judgment of who should be there.

One of these mediators said that when he has been hired to mediate an agreement among a pre-selected group of parties, even if he has thought the dispute involved other parties, if the groups already assembled did not want to include that party, he had no trouble moving forward. In a dispute regarding the reconstruction of a bridge used by local fishermen to get access to the shore in the habitat of a threatened species, the mediator managed a process among the fishermen, environmentalists concerned about the species, and the town government. “But missing from the table was the landowner who controlled the land where they were now crossing (instead of using the bridge), and also missing was the Army Corps of Engineers – who (has control of) navigable streams.”

He explains how he came to mediate among the two parties at the table.

I had not even been aware that Corps of Engineers had a role to play. The town hadn’t raised (the issue), nobody had raised it. This came to the State Transportation Department, and even they hadn’t raised it. Anyway, the result of the deal held, but it took I think about two years longer to get the Corps of Engineers to sign on to it. So I think it would have been much better to get them to the table. But you know, parties sometimes say, ‘We need to keep this simple.’ So first of all you can have the three parties agreeing, and they could go to the Corps of Engineers and say, ‘This is what we’ve worked out, this is what we all want to do.’

When asked if it would have been appropriate for him to stop and possibly demand that the Corps of Engineers be involved, he replied, “In that case, no it wouldn’t have. They (...) had engaged me to mediate among the three of them. [...] The Secretary of Transportation convened it.” This response prioritizes the parties’ wishes to not expand the process to parties they do not want participating over practical considerations about the agreement’s acceptance and sustainability. In so doing, the mediator’s choice contrasts sharply with other respondents’ practical reasons for looking out for missing stakeholders: otherwise those left out could undermine the process.

Another mediator described how relying on the parties to define who should be at the table plays out after mediation starts. In describing a dispute involving a developer of a shopping center and movie theatre, the neighborhood near the proposed development and the city, this mediator talked about how he came to mediate a process that excluded the neighborhood.

The city had I think for years taken the position of putting itself in legal jeopardy to be responsive to the community. [...] In the end, the city worked to cut a deal with the builder that they knew the community association was going to oppose. But they felt that they were doing the right thing, they knew they were going to take the heat, they knew the association was going to be extremely unhappy, but they went through with it. I thought that they had considered all of the alternatives, they considered the risks, and they were making a prudent judgment. It wasn’t for me to decide whether it was prudent, but I couldn’t argue with the logic of what they were doing.

The mediator sees his responsibility here very differently than the first two mediators. He takes care to make sure the parties moving toward excluding another understand the consequences of their choice, but once they make that choice, he continues the mediation.

I mediated that agreement with them. And at that point, the association was not going to be – (the city) had decided, and I think for legitimate reasons, that they couldn’t get a deal with the association. Now you’re asking an interesting question, which is, ‘Aren’t I making a judgment as to the legitimacy of their position, or the illegitimacy of the community’s position? How does that happen?’

Aren't I exercising power in a way that the mediator needs to be careful (about)?' And I guess the answer is (...) that there is some judgment here. My goal is always to keep the parties in as much as possible, but if it becomes obvious that a deal can't be reached with all the parties, is it appropriate for me to help some of the parties reach a deal? I've always taken the position that it is.

The mediator here arguably views his role in achieving an agreement considered legitimate by those it affects differently than the first two mediators.

An obligation to see that all parties affected by the dispute participate does not guide him as it guided the first two mediators. His concern focuses on whether an agreement is possible given all the interests at the table. If it is not possible, he focuses on what may be possible with some of the parties, partly in hopes that this will motivate the excluded party to reevaluate their best alternative to staying in the process.

Mediation's a dynamic process. Where parties start out yesterday is no predictor necessarily of where they'll end up tomorrow. And so if the party's being unrealistic in what they're seeking to achieve, and maybe even being obstructionist, I'm not sure I as the mediator want to facilitate that obstruction. You know, these are loaded terms I guess I'm using, and they're judgmental terms. But what I've learned to, is that as parties negotiate, and factions form, other parties change their positions. So if you have a highly obstructionist – doesn't matter whether it's the plant or the community – and you start to cut deals that exclude them, they come around and want to participate and they may adjust their positions to be part of the process.

In this way, excluding a party is a form of moving the process forward and getting all the parties – including the excluded one – to think about their incentives for participating.

The range of responses to a related problem, that of whether people in a mediation are appropriately representing their interests, was not as pronounced. All the mediators who did discuss this issue, however, mentioned concerns. In this situation, the "missing parties" are members of a stakeholder group with representatives in the process who may not be fully acting on behalf of that stakeholder group.

A mediator interviewed discussed this problem and his inability, due to time constraints, to solve it. The Army Corps of Engineers hired him to facilitate a dialogue with residents of an island village in a U.S. territory, after PCB's from barrels blown into the village by a typhoon leached into the soil. The U.S. government declared the area a Superfund site, but the Army Corps and villagers could not agree on what portion of soil to remove and what portion the Army Corps would treat onsite. The fact that the village representatives refused to allow other villagers participate complicated the situation.

The most vocal antagonists to the Army Corps were a group that had other political agendas and they were very sophisticated in negotiation skills and had done a fair amount of technical investigation of the issue, and did in fact have access to scientists to take a look at this. But there were lots of other people in the village that did not have any negotiation skills and had no access to technical information and were relying on these community leaders to help decide which way they should be thinking about things. [...]

This mediator did identify differences in the representatives' interests and other villagers' interests.

From my point of view, one of the missing ingredients was a more widespread representation of the village. [...] A large number of villagers were relying on these community leaders who, frankly from my point of view in hindsight, really had other political agendas. It was in their interest not to resolve this case, to continue to use (the situation) as a way of mobilizing against (their own) government, against the Army Corps of Engineers, potentially to bring lawsuits, potentially to seek large damages.

He played a minimal role in selecting the parties. He met with the community leaders the day before and after the meeting he facilitated.

It was clear that the (...) group of community leaders did not want to have anybody else from the village involved. They viewed themselves as the representatives of the community, so they were in effect standing in the way of talking to other people. So not a lot that could be done to widen the conversation at that particular juncture.

This mediator accepted the village leaders as spokespeople for the villagers because he had very little time to research the situation and prepare for the meeting.

I would have needed to go in there earlier and have a lot of contact with people – much earlier on, in order to be able to come to that conclusion and to be able to do something about it. So it's sort of like you show up, you're going to be there for three or four days, you find this information out and you say, 'Gee, I wish I could have gotten here a week earlier. But I am where I am.' At that point, you can't peel it back and say, 'Let's stop the meeting, let's not do anything until we have time to broaden the discourse to everyone else in the village.'

If he had had time, he would have conducted a conflict assessment and done more to assure parties with different interests were at the table.

If I did know about this situation, I would have organized the process a little bit differently and gone in much earlier to try to do some groundwork before we had this meeting. That wasn't an option by the time that I got there. [...]

I think in an ideal – I think there's an ideal sort of archetype of how this process might work or should work, and in an ideal construction of this, I would have had an opportunity to do an analysis in the village of the different groups who had a stake and an interest in the outcome of how the soil was going to be remediated, and would have had an opportunity to help construct a negotiating group. So it wouldn't have been just one group who was able to seize (...) the proverbial microphone. It would have been ideally a better cross section and included people who were more reasonable, moderate, and wanted solutions. Or even if they weren't moderate, even if they weren't reasonable, that they would be able to also represent different interests than the group who had actually grabbed the podium.

His feeling that the process could have been better but that it still worked out may be due to the fact that he feels the outcome would have been the same had all the other parties participated in the decision making as well. The parties who were missing represented more moderate positions towards the soil cleanup than the group that had monopolized the community's voice.

I think they would have come to the same solution that they were moving towards. It would have happened maybe with less friction. [...] And they would have come to solutions a little sooner than they did. [...] I guess if I was to draw a principle out of this, the principle would be, in this particular case, if you would have gotten stronger, real cross-representation of the community, you probably would have gotten a better negotiation and more interests on the table represented and more interests met in the negotiations with the Army Corps.

Other mediators described ways of handling problems that arise when the people who actually represent an interest at stake cannot easily participate at the table. When a policy issue affects the homeless population, one mediator identifies a non-homeless representative, such as the head of a coalition for homeless interests.

Generally we find people who can represent those constituencies, and it may not be a direct member of that constituency per say. For instance, if you're talking in (her metropolitan region) about the homeless issue, you probably get (a local poverty law center or a branch of Legal Aid). We don't have a homeless person at the table.

Another described her concerns about inclusion of "future generations." She as the mediator takes responsibility for getting the other parties to think of future generations.

I think what your job is is to make sure that all the voices are heard. Even if they're not at the table. I think that's your job. And so – because otherwise you don't have sustainable agreements. And so I do a lot of that, I do a lot of asking people to understand and think about people who are not in the room. [...]

The hardest part is projecting anything past a very specific period of time. Your whole assumption's about what is good or what is bad – so much of that is contextual. [...] You talk about what's hard and what's hard about that is I don't know any better than anybody else does. The part that you're looking for always, though, and you're always keeping on the table is, 'Is this sustainable? Will this be able to live past this process, will this be in place?' In this particular case (...) one of the things we did was future scenarios as part of our mediation – what would happen.

These three quotes demonstrate concern by the mediator that a stakeholder representative is actually communicating his or her groups' interests and needs. In the absence of a designated representative, in the case of future generations, one mediator takes responsibility for raising with the rest of the group that stakeholder's potential needs.

Mediators interviewed responded very differently to the problem of including stakeholders in the process. At one extreme, some mediators felt obligated by a personal or moral belief that a mediation should include all affected interests. At the other end, mediators felt that the parties alone should decide who participates and who is not

excluded. The fact that the more interventionist mediators described their beliefs in the context of public policy mediation while the other two mediators described local land-use cases may help to explain this. The need for broad inclusion of stakeholders in a public policy mediation is arguably greater than in a land-use dispute involving fewer groups.

In terms of assuring that parties to a mediation represent their stakeholders appropriately, a range of responses did not become apparent. However, the mediator concerned with future generations described reminding parties of the interests of future generations, while the facilitator in the island PCB situation accepted the representation as it was, despite his qualms, because of a forced time constraint.

Given these different responses, groups or individuals who feel their opportunities for having their interest represented in a decision making exercise that affects them are weak would do well to understand how participating in a process managed by mediators with opposite approaches to party selection could affect their outcome. Where a mediator stands on this fundamentally changes the outcome, if we assume that the outcome differs with the combination of participating interests. There are positives and negatives to each approach.

The strengths of the more interventionist approach is that it searches for and attempts to include or insists on including parties who are hard to represent or commonly underrepresented – and that other parties may have an interest to exclude. Someone looking out for future generations is also in effect choosing additional parties to be at the table, and in the case of the mediator who talked about future generations, representing their interests herself in the sense that she reminds other parties of them. The drawback is that judgment and knowledge varies from mediator to mediator, which makes it hard

for parties to know how much of a mediator's judgment is entering into his or her choice of parties. Also, the mediator risks crossing the line into becoming a consultant for the convenor on who should be at the table, and potentially even an advocate for underserved parties.

The benefit of letting the parties decide is that the mediator has a very low risk of having his or her neutrality challenged. The parties thus pre-determine the problem and extent of the dispute. The mediator with the case of the excluded party demonstrated that one of the pitfalls of that approach is that a party later protested their exclusion. Another pitfall, as the mediator of the dispute involving the threatened species and fishermen highlighted, is the additional time excluded parties may take to accept the agreement.

More fundamentally, though, if parties can be excluded from a process, as was the case in the shopping center developer-neighborhood-city case, how can the resulting decision be considered legitimate to those it affects? The calculation that the city made in excluding the party was based on the political viability of their move. If stakeholders are excluded or otherwise underrepresented because they have little ability to "make noise," it may make sense for other parties to not listen to them. However, their exclusion seems to compromise the notion that the process is legitimate.

Although some would argue that the mediator is not responsible for an agreement's legitimacy in the eyes of those it affects, the hope that it will be seems in part to fuel enthusiasm for public policy dialogues. A mediator who feels some responsibility to ensuring that those with a stake in the agreement consider it legitimate would likely manage a process that produces an outcome much different than one who does not. If the process is going to claim to be legitimate, there need to be guidelines for

including parties that go beyond relying on people with an interest in the dispute to select the stakeholders, because of the potential for the stakeholders to intentionally or accidentally exclude certain parties.

Some parties have difficulty fully participating

Chapter 5

Getting a party to represent an interest in a public dispute does not ensure that the party will represent that interest well. Parties who are weaker in terms of negotiating skills or who lack the resources needed to attend negotiations are likely to not represent the interests of their stakeholders as well as those who do not face these obstacles. The degree to which a mediator intervenes to compensate for these deficiencies affects the degree to which the party can represent his or her constituents, which in turn affects what the party can gain through mediation.

Mediators interviewed spoke about a number of obstacles to parties' "full participation," including difficulty in attending meetings, financial constraints to fully participating, language barriers, and lack of appropriate negotiation skills. They also described the problem of parties who do not have the information they need or who are not able to fully understand information presented to them. I treat these two obstacles in Chapter 6.

Difficulty in attending meetings and financial constraints both represent logistical obstacles. The mediators who mentioned them did not struggle with how to respond; they considered finding a way to improve the ability of a party to participate as a normal thing for a mediator to do, and justified it as part of ensuring a good process for all parties.

One mediator interviewed explained in practical terms their intervention in response to a party's complaint. In a process involving paid and unpaid stakeholders, many of the paid stakeholders wanted to meet in the same downtown area while a volunteer stakeholder had difficulty with the parking expenses associated with coming to

the city. This mediator asked the group to compromise on where meetings would be held and to search for some funding for this participant for parking and other “out of pocket” expenses related to participating.

They were a key stakeholder, they needed to be at the table, they brought a value and they were basically saying that it would enable them to participate fully, as fully as possible, to have access to such resources. To me, it was in the best interest of the overall process that we could find a way to meet those needs.

The mediator asked the convening agency to establish a system for reimbursing volunteer participants. They then used that system to reimburse the party for process-related expenses.

This mediator did not have second thoughts or struggle with this intervention. “I wouldn’t characterize it as challenging in that example, just something that needed to be attended to.” When asked if it would be inappropriate for a mediator not to search out financial help for that stakeholder, they continued:

I’m kind of uncomfortable telling other mediators what they should do, because things are so circumstantial, but it seems to me most mediators would want to do that if they could, because for the reasons that I mentioned – they were a key player – and in order for the agreement to be as effective as possible, as durable, as well informed, as responsive to the stakeholders’ needs as possible, it appeared to me that that was an important connection to make, it seems to me that I don’t think I know of any (...) public policy mediators who would not want to do that if they could, if they could identify such a pot of funds.

Another mediator summarized the reasoning that the above mediator seemed to be employing in this intervention: “Once the legitimate stakeholders are identified, we have to find a way to include them.”

This principle justifies different types of interventions, some more interventionist than others. Another mediator went farther in one case by identifying the obstacle herself, and not responding to a party’s complaint. She discussed problems related to involving parties who are not paid to participate when most others are.

Often community members are not compensated for participating. So what we have to do when we work with them is to help them figure out how they can spread their resources around a little bit. That might include getting one person who is more flexible to represent them in more situations, having them share the work among themselves. I will sometimes load a table to give them more voices because they can't be there as often.

In a policy dialogue she has mediated on the design of a large urban recreation space, this mediator has dealt with this problem by adding more people from community groups.

In this case, a number of people representing agencies and institutions are paid to participate, but about twenty community members – representing everything from school to neighborhood to business interests – participate unpaid. “They really need extra seats. Otherwise they won't be represented. They can't call me like (the paid stakeholders do). (They need extra seats) to cover for each other, to split the time, to share the work.” When asked whether the parties lose anything by having different people represent different interests at different times during the negotiation, she replied, “I think (a loss of information when different representatives show up) is possible, but I would also tell you that the converse is true, that you have the opportunity to get more in the room.”

This mediator's interpretation of the principle “have to find a way to include stakeholders” legitimates increasing the number of representatives of certain stakeholder groups and compensating as best she can for representation problems she, not the parties, perceives. This contrasts with the party in the first example, who raised the issue himself. A party who has difficulty participating would be able to more fully participate if these obstacles are reduced. No mediator interviewed said they would not seek a way to overcome these obstacles, but many did not mention addressing the obstacles before a party raised them.

Mediators did not make it clear what minimum obligation they felt to ensuring that parties fully participated, but one did describe what would cause her not to take on a process. She explained why she would opt out of a process that did not from the outset commit funding to make the process accessible to parties she felt needed to be included. She described a recent invitation to design a public consultation process for the construction of a project that includes three developing countries. The project worries her because she does not know whether the convening agency will commit to funding needed to hold meetings in enough places to allow all the interests impacted by the project to be voiced.

There are parties in these countries – (...) a large percentage of the population does not live in the capital cities nor do they probably have funds to get transportation to the capital city. So one of your questions is what about people that don't have the resources? Well these people would not have the resources to get to the meetings. So we have to be able to either pay for some of the people to come to the meetings – people from afar – or move some of the meetings, or both. And we're proposing that we do both.

When asked what would cause her not to take on this project, she responded:

If there was not sufficient commitment of both time and resources to allow us to do the best job we could do. [...] Part of it is some logistics, like how many meetings and where are they? [...] And we don't know if the people that are running the contract here are going to honor that, and so that would be one thing that would actually be a non-starter for us, if we were not able to do that, if they were not willing to (...) go along with our best judgment about what to do here, then we might not be able to participate.

This mediator's concern is therefore focused on the ability of parties with few resources to participate in the consultation process.

A party with sufficient resources to attend a meeting on his or her own could argue that if the facilitators of the dialogue insist on funding for poorer people to come to meetings or specifically holding meetings close to them, then the consultative process is obviously favored towards the poor and the convenors are paying to get only certain

types of responses. The mediator would explain her process to such a party in the following way:

I would say that it is my understanding that we're looking at local stakeholders, and there are some local stakeholders who have the funds to attend, and others who do not. And if we, if you really want to hear the concerns of local stakeholders across the board, there are some of them whom you are going to have to either go to them, or have them to come to you if you want to hear them. Since this is a (multinational project), (...) the affected parties are throughout a lot of miles, so that's a big problem.

The mediator's perception of her role as a facilitator of a public dialogue process guided her intervention: "In this situation, there's a project, and there are people who want to give input, and our job is to see that their input is given and heard." The principle guiding her actions, then, is that the mediator is obligated to ensure that people who are supposed to have input into the process are provided with the means, including financial, to do so.

Mediation processes that involve speakers of different languages pose challenges related to the challenge of making a contribution to the conversation. In these cases increasing understanding among parties is not a matter of training or creating a less intimidating atmosphere, but rather finding ways for parties to communicate the underlying meaning behind their comments.

One mediator described the obstacles language differences raised in a mediation involving the potential siting of a power plant on a Native American reservation.

There are a number of huge problems (in mediating with members of a Native American tribe) (...). One is the language barrier – not only requiring translation of a lot of complicated technical materials, but also a reconceptualization of them. Because (the language of the tribe he worked with) does not have, as a language, a lot of the technical terminology, especially relating to something like a power plant, nor does it have very good terms for what we call, 'negotiation.'

This obstacle prompted the mediator to get involved in the creation of appropriately translated materials.

So it involved a very thorough deconstruction of everything relating to this situation to put it into terms that would really be comprehensible. As it was, I still had misgivings. [...] What we were doing was important and thorough as it could be, but still I wouldn't have felt that those folks would be completely protected in negotiation circumstances – that they might very easily feel that they were in a situation where they couldn't really say, 'No'.

Another mediator described providing translators for a process involving multiple languages. The problem that the first mediator raises is that translation of the proceedings may not be enough if the concepts being discussed are not also translated in a way that is relevant in the other language. Parties working in another language are likely to more fully participate if the concepts, in addition to the words, are translated. This mediator considered this more involved form of translation to be within his role, but it is not clear whether he feels other mediators should be obligated to do this.

Mediators can anticipate financial and geographical obstacles early in a mediation process. Problems that can arise once the process has begun include some parties being unable to contribute to the discussion or to negotiate skillfully. Two mediators describe two versions of this problem.

There are situations where someone's not fully participating at the table. And that may be because of a self-perception of a lack of power. Now that's problematic for me (...) because I need everybody to fully participate in order to get the best outcome. (There) was a case (...) where I started to observe that the Hispanic representatives were really quiet in the meetings. They just weren't participating at the meetings. And that worried me. So I called each of them separately and said, 'Can we go out for a cup of coffee?' and just sat with them, talked to them, 'How's the process going for you? What are your really important issues?' And so I just encouraged them, and then at the next meeting they much more fully participated. I suppose it was a little intimidating to them. I felt like making that kind of personal contact would help them feel less intimidated. And it seemed to help.

In describing why their lack of participation worried her, she explained that it was in the interest of making the process work:

The bias is a really an interesting thing, because this is what happens in my mind: 'That person is quiet, the issues they're going to raise are going to be difficult issues, and it would be easier to have them not talk because it's work for me.' That's where it starts, and then the next thought is, 'And if they don't speak now, they're not going to agree to the package later, so even though it looks easier to not do anything, it's not.' So that's sort of the thought pattern. If they don't talk through the whole thing, when you ask for the final consensus, they're probably just going to say, 'No,' and then that was my fault for not engaging them and being sure their issues were woven into the product.

In addition to the very practical considerations of what interventions will contribute to successful process, do her beliefs about what is a "right" process enter into her decision to encourage quiet parties to participate more?

In other words, do my values come into it in the sense that these people are here and therefore...? I mean (...), I'm a mediator because I think everybody's voice is important. But I think that as a mediator, I'm very pragmatic. You're trying to do something really complicated and really hard. To try to march 30 people in one direction, who all represent hundreds or thousands of other people, it's very complicated, it takes an enormous amount of energy to do that. [...]

I'm in this work because of my own values, and because I really believe (...) if you get all the voices woven in, you have a better product that more accurately reflects the unique circumstances of the problem. When I'm in it, I'm trying to make it work, which includes getting all of the voices in.

Another mediator elaborated on the problem of parties feeling intimidated or uncomfortable in the process by describing the importance of communicating in the vocabulary – and emotion – with which they feel most comfortable.

I think (another) dimension of participation is that people get to speak in their own way- and by that I mean in language and in a format that they're comfortable with. So that if one's party's represented by lawyers in a conversation and (...) other groups are not (...), to have somebody 'present' a targeted presentation in a twenty minute opening statement, that (would be) garbage. You need to be able to structure the format of presenting information so that people could say whatever they wanted to say, in language they wanted to say it, with whatever heat they wanted to say it with, and I think that if that is stifled in any... in some

kind of authoritative way, that one is doing a disservice, that it is improper for a mediator to do it. [...]

So if people are using slang, if they're calling people 'motherf-ing racist,' I think it's the mediator's job to prepare the participants to hear that, to the degree one can anticipate that. That actually becomes I think quite important in a particular context. I think there's a middle-class tendency to want people to be polite and work in a constructive, collaborative way – I don't think that's the mediator's job to make that a condition of participation. I think that in effect disenfranchises some people.

A party uncomfortable in speaking up in a process or in speaking in the same tone as other parties could more likely overcome these obstacles with these two mediators' approaches than they could otherwise. The second mediator implies that some parties who have a non- middle class way of speaking will get to express themselves more freely in a process managed by a mediator comfortable with heated, non-“polite” discussion. No mediator interviewed mentioned being opposed to doing this, and these mediators did not say it was their obligation to intervene in this way. However, the fact that there might be variation in the extent a mediator encourages parties to communicate in the way most comfortable to them means there might be variation in how fully parties with non-mainstream communication styles can participate.

Parties' own weaknesses in negotiation skills present another challenge that may not become obvious until the mediation process has begun. Like the problem of parties feeling intimidated by the process or limited in how they may express themselves, weak negotiation skills can result from a party having less experience with public decision-making.

Weak negotiating skills can cause a parties to focus on their original demands or position to the point of reducing their chances of gaining in the mediation. One mediator

described this behavior as directly resulting from a party feeling they were less powerful than other parties.

(One) case involved somebody who was (...) representing a small tribal community and didn't have experience negotiating in a public policy arena. [...] They had a learning curve to travel in order to figure out how to make best use of a public policy negotiation, and how to get their stakeholder group's interests met through negotiations. I (...) did a little extra outreach to this person to check in and make sure they were feeling comfortable, that they felt welcome and comfortable in the discussions.

At one point, the tribal representative used the occasion of a presentation by a visiting agency expert to press the presenter about an interaction between that agency and the tribal representative's community, which had gone badly, but which was irrelevant to the negotiation. The tribal representative pursued the topic until the rest of the group became restless. The mediator felt the party was "violating an unspoken group norm in the group" about how to negotiate in a public policy dialogue, such as the group should focus on the topic they agreed on, or personal issues with other parties should be discussed during a break.

And I think it reflected this person still learning what was the appropriate way to pursue negotiations in a public policy venue. Instead of shutting them down completely, my intervention [...] was to try to help them make a bridge from what they were talking about to what the rest of the group was supposed to be talking about and interested in. So my intent was to make a gentle intervention that helped this person connect with the rest of the group, without embarrassing them.

This mediator did not raise the possibility of providing negotiation training specifically to the party who they felt needed help, in part because offering negotiation training for this party would have been more help than the party needed, and perhaps offensive to them. The principle that guided this mediator's choice may have been that the mediator has an obligation to facilitate communication.

Another mediator interviewed provided training specifically to one party in response to the negative impact of their communication style on the process.

I did have a situation in the last year where I had some representatives of rural interests that – I was constantly having to work with them to get them to understand about what it was that they needed to be doing at the table. What would happen was they would kind of (...) lose their temper and not work through things, and it was really around their sophistication.

Other parties' reactions to these representatives prompted the mediator to intervene.

For the environmental caucus, it really was starting to piss them off, because they'd be like, 'We work with these people (...), and they just don't come along.' So we just spent a lot of time working with that and resolving that. At one point I actually drove in to their – I usually do multi-community stuff – so I did a field trip into this community, and conducted meetings physically in their physical space and really did a lot of things to kind of shore that up. That's a very real experience that I have that people don't come to the table with equal skills.

These examples also raise the issue that a party with poor negotiation skills can make it harder for other parties to gain as much as they could from mediation. The question may be asked, then, whether a mediator's duty to all parties may actually include a duty to provide negotiation training to individual parties who the mediator thinks need it?

Had the other parties expressed interest, she would have provided negotiation training to them as well. But, she added, every time another party has raised the question of why a certain party has been trained, they have not taken her up on her subsequent offer to provide them with training as well. The mediator explained her reasoning for working to improve one party's negotiating skills:

When we have parties that aren't able to adequately represent themselves, for whatever reason, negotiation skills or technical background or whatever, (...) I, and the people I work with, typically will go to extraordinary lengths to shore them up. We'll provide surrogate expertise, we'll pair them with other people – we really go out of our way to bring people along. [...] It's such a kind of sacred – the fact that people need to be at the table in a genuine, authentic way, and fairly represented, that's (...) such a foundational issue for me, that (...) would be a deal killer for me, where I would say, 'We can't proceed,' if people can't be at the table with authenticity and really legitimately able to represent themselves.

What is interesting about this principle is that she would withdraw from a process if a party did not have adequate negotiation skills to participate.

The two previous mediators talk about instructing parties in better negotiation skills, one through a gentle comment during the process, the other through a more formal training session. Some could argue that by coaching parties in negotiation skills, a mediator is improving that party's leverage over another party. Two other mediators explained how they would make the case for what types of coaching should be considered appropriate.

One mediator explained that most of their "coaching" in interest-based negotiation does not take place in a formal training but rather in comments made to parties during the process – often in caucus or over the phone.

I find oftentimes that a project budget doesn't have the funds to build in an extra specific half-day training, or the participants don't think they need it, or what have you. And so it often turns out to be the way people are most receptive to it is in these (moments) when they can see why – it's not just an abstract training session, it's in the context of a particular negotiation, and here's how that concept applies to what you're facing right now.

A party in such a process could eventually argue that since this advice is given to parties as they need it, often in private, then different parties may be getting different advice.

Does this mediator worry about that becoming a problem?

I am not too concerned about the possibility that, by coaching a stakeholder on "process," I might raise questions about my neutrality, I have to tell you the truth. I think that it depends on how you do it. [...] I would do that for any of the parties, if I perceived that any of the parties were not – didn't have a grasp on the distinction among positions and interests, I would be equally likely to seek them out and help them understand that. [...]

Advising parties on strategies for gaining more in the negotiation would cross the line into advocacy.

If I coached them on what might work – what other people might be receptive to, what I thought was going on in the minds of other parties, those kinds of things would probably be pushing the line or stepping over the line as far as propriety. (I could be giving a party an unfair advantage) if it was like, ‘I think that the other parties at the table would be receptive if you changed your proposal in this way, substantively, to take out clause ‘a’ and put in clause ‘b’. Take out concept ‘a’ and put in concept ‘b’.’ That doesn’t seem to me like it would be appropriate. But I think that reasonable people can disagree because I think some other mediators might do that. Certainly, floating a straw man proposal is not over the line.

This mediator’s way of determining what is appropriate is to do what they think the parties would accept.

[...] I think that the way I check myself on that question, about whether that’s a fair thing to do, is putting myself in the mind of one of the other stakeholders. If I brought to their attention, or if somebody brought to their attention, if this party that I was coaching happened to mention that I was really helpful to them in understanding the distinction among an interest and a position, I think the other people at the table would go, ‘Hallelujah!’ I don’t think they would feel threatened by it. So that’s how I am checking myself.

Another mediator summed up his understanding of the difference between appropriate and inappropriate coaching. “The goal of coaching is to enable them to be a full participant,” not, “to give them strategies to make them ‘win.’” He has never felt like he stepped over this line.

Mediators identified a number of obstacles to a party’s “full” participation, including lack of resources and time to attend meetings, language barriers, feeling intimidated at the table, and lack of negotiation skills. Their responses do not demonstrate a wide range in terms of heavily to lightly interventionist, but their responses did differ in terms of whether the party lacking the resources or the mediator was responsible for identifying this lack. In addition, mediators explained many of their interventions in practical terms, as what was necessary to move the process forward or

move towards a solution. For example, mediators did not hesitate in their responses to a party's lack of funding resources to participate.

In terms of less concrete obstacles, mediators responded to lack of negotiating skill by coaching parties in interest-based negotiation. This intervention seems to benefit all the parties, especially since, in cases described here, the mediator was responding to other parties' complaints of the difficulty of negotiating with less skillful party. There was no obvious disagreement among mediators about the appropriateness of coaching. Two mediators made the distinction between helping parties participate versus helping parties come up with strategies to gain more.

What is interesting about meeting with parties separately or allowing for a variety of forms of expression is these actions encourage participation by parties who might be intimidated by the process due to unfamiliarity or discomfort in communicating. A party who is less familiar with public dialogues will likely more fully participate if a mediator does this kind of intervention. The mediator who talked about the middle class bias of polite language also implied a reverse problem, that in broadening the nature of the discussion he may risk making other parties uncomfortable.

Mediators justified in practical terms providing coaching and searching for funding or other resources to overcome barriers parties might have in getting to the table. Some mediators explained that if the parties at the table want to hear the voices of parties facing obstacles to full participations, they need to accept and in some cases fund measures to overcome these obstacles. Since this is a practical consideration, it could be argued that when the need presents itself the other parties will find it in their best interest to support this. Guidelines that would require a more consistent approach to identifying

needs ahead of time (a number of mediators mentioned using conflict assessments for this) could guide mediator interventions even when one the group as a whole does not perceive an incentive to help one party more fully participate. This could take the form of guidelines requiring mediators to identify as early as possible a party's resource needs such as difficulty coming to the meetings and lack of a long time commitment.

The tendency for some parties to be intimidated at the table raises some interesting questions. Only a few mediators brought it up, but the ones that did mentioned ways in which they took action to make the specific parties feel more welcome. This addresses one of the problems associated with representatives who traditionally have less access to public decision making, perhaps because of language barriers, geographical barriers, or mistrust of government agencies. Would a mediator not be fulfilling their role if they did not do this? They certainly would be fostering a situation in which those who traditionally feel comfortable participating and speaking in a conventional manner have an easier time participating than those who do not.

If mediators were expected to work to make sure the process did not intimidate parties, there may be problems in allowing or designing a process that includes forms of communication potentially uncomfortable to other parties and the mediator. This question could remain simply an issue of style, but leaving it up to the mediator's discretion plays down the role intimidation can have on a party's participation and therefore their potential gains in the agreement.

Parties do not have access to information they need

Chapter 6

How information is shared during a negotiation, with whom, and in what format influences the gains parties can make in a negotiation. A number of mediators characterized this influence as “Information is power.” Parties who have less access to information or who are less able to understand the technical aspects of a given dispute risk not being able to justify their interests as well as other parties. They also risk not understanding the elements of a potential agreement. Given that mediators can help manage the collection and use of information, their interventions also influence the gains parties can make and the outcome the process might produce. What role then, is appropriate for mediators in providing, managing, and facilitating the understanding of information?

Respondents discussed a number of problems, including parties’ inability to understand information presented, parties’ lack of technical expertise, and parties’ lack of information the mediator thinks they need. Parties being ill-equipped or needing help to understand or process information presented another challenge for mediators concerned about information. One respondent talked about misgivings he had following the mediation of a state’s electric power rates.

Ratemaking is an extraordinarily complex process. There were twenty participants – each had an attorney and an economist who came to the table with them – huge number of people. There were citizens on the task force who represented themselves and other ratepayers. [...] The way we solved that imbalance, the way we addressed the technical issue, was to create a technical resources subcommittee. Because none of (the parties) trusted the other to do the analysis, (...) they debated and then came up with an external consultant whom they’d all done some work with, who then worked with the committee.

(The committee) came up with different scenarios and different rate plans, and I believe towards the end of the process, (a citizen representative) actually submitted a rate plan himself – or a suggestion. What concerned me in retrospect

in thinking about the case (...) was the degree to which there was a real understanding among the representatives at the table, about what was being proposed. And I didn't have a basis for understanding whether or not the field was 'level' or not.

This mediator feels it would have been inappropriate for he and his team not to create the technical subcommittee.

Because one of the keys to solving the problem had to do with a visible and audible disagreement over what the facts where. [...] This was an in-your-face issue for which it was obvious to me. I think it would be hard (...) to not say something to the committee like, 'Well how do we deal with this?' I and the mediation team outright suggested that a) we would form a technical subcommittee, and b) that it would have to have access to some resources. And that was the other equity issue in achieving some balance of power and access in this case.

The mediator's goal was to achieve some balance of power in this case, "if power means we will all participate in, understand, and have access to the technical information."

This mediator pursues this goal for both practical and philosophical reasons. In practical terms, he felt it would be impossible to get an agreement without parties understanding the technical information better. "If we didn't figure out a way to solve the technical information problem, (...) there would not be a solution."

However, even if a successful agreement did not depend in this case on a full understanding of the technical information, this mediator would still feel an obligation to balancing out information imbalances. "In my own work, the issue of (...) people's understanding of and access to the information involved in the case, whatever it is, is an absolutely crucial step."

Another mediator described their approach to the problem of stakeholders not being able to follow the proceedings.

For instance in a policy dialogue, we have this "underserved" group, and we have another group of "neighborhoods". [...] And so we do have representatives from very poor neighborhoods and they are in the neighborhood structure and they are

leaders in their neighborhood. And some of them from some of the poorest and ethnic neighborhoods that are still leaders, people look at them as leaders, they have a really hard time keeping up with the (group). Because it's not in their educational... you know, it's overwhelming.

First of all, there's this one (person) who (has a lot of family obligations) in one of the poorest areas. They are kind and smart, but haven't had much formal education. So that has raised issues along the way. First of all, we pay for their babysitting, so they can be there (...), but even so it's really hard for them to get to the meetings. And when they're there, they're lost half the time. [...] There are other situations where we don't have that, for whatever reason. [...] These (dialogue processes) are very intellectual processes – you're talking about all these policies, complicated projects, etc.

I just felt like this one person I've... it's given me pause to think about that, because the truth is they are sort of the local hero in their neighborhood,(...) and when they're there, I don't feel like their neighborhood's being represented. Because they are (...) not tracking with the conversation.

This mediator feels responsible for doing something about the situation.

I think actually they are getting to the point where it's too hard for them to do it, so we will find other people from that neighborhood that have the same profile, but people who don't have the burdens this person has (...). It's not like we're not going to have that neighborhood at the table, but we will choose someone who may be able to afford the time. So that's how we deal with it.

Although this mediator think it is appropriate to suggest some sort of training for parties who might need it, they raise the point that when a party is low both negotiation skills and time, training may not be a helpful solution.

We do (...) provide training. But this person doesn't have time for training. [...] It's just almost disrespectful to ask them to go to training. So I think what we're doing more is we're probably going to bring in alternates for (this person), and then offer (this person) the opportunity to maybe consult with the alternates, and be a liaison with them on (this person's) terms. So they are not out of it and they're welcome to come to all the meetings and be as included as they want, but (...) help them define their role if there are other people from their community who can be at the table, then (...) those other people can tell this person, 'I'll come to your house and we'll talk about (the process).'

Finally, another mediator worried whether, in certain situations, there was a limit to the extent a party could be informed about the consequences of the proposed project.

The kind of power plant they were talking about building was a huge facility – it would just have enormous impact in all kinds of ways. So it became harder and harder for me to really conceive how well (local residents) could grasp the totality of change that might occur if the project were done in a certain way.

One way of handling these concerns is to help a party get access to technical consultants who can help them analyze information being discussed. The first scenario in the “Baxter” story¹⁵ prompted a number of mediators to discuss what they would consider appropriate interventions to respond to a party’s lack of technical information or expertise.

One mediator explained he would address this problem with the help of the group as a whole.

I would push it back to the whole group and ask, ‘Who here can help people?’ I don’t think it’s my job to find them resources. Unless people turn to me and say, ‘Do you know anybody? We have \$25,000 to deal with this (...) issue.’ I might give three recommendations of technical professionals who might be able to help. But more likely I’d turn it back to people around the table, or their agencies. ‘Can you go back to your agency and find out who might help out on this air quality issue?’ To me that has the added huge benefit – you’re going to push the whole group to realize that there can be some objective data produced.

In this instance, the respondent would limit his intervention to raising the Community representatives’ technical assistance need with other parties to the dispute.

Another mediator would also respond to the situation in Scenario 1 by raising the Community’s technical information needs with the whole group. She would couch resolving the community’s information need as being in the best interest of the other parties. “I would say, ‘Look, some very important people here that might cause

¹⁵ Please see the “Baxter” hypothetical story, Appendix B. The first scenario after the general story background reads:

Immediately after the first meeting of the advisory committee, some residents who have called this decision a question of Environmental Justice say privately to the mediator that they don't feel it is worth coming back because even though they are all educated, they clearly don't have the technical background or the money to buy the scientific help that the industry and some of the other stakeholders do. What do you do?

disruption to this whole process are going to leave unless they feel it is fair to them, so these are some things we might do to make it work, and this is what I've suggested for them to do.” In this way, she would make disclose to rest of the group what she was doing. Her argument also validates the Community's need for information in that she refers to them as “important.”

This mediator would go farther than the first by talking to the Community representatives more explicitly about fundraising. If the community members needed money to hire a technical consultant or other aide, she would suggest names of foundations to contact. This is information she would offer to any party looking for funding for technical information.

The issue is what do you do if you think you need more information in order to participate in this thing, what can you do to get money? [...] I immediately think, 'What are some local foundations that might care about this?' and (...) I might tell them, 'You might want to see someone who will help you find an expert, or there might be scientists at various universities that could help you.' If I did that I would tell all the parties that I was doing that.

The farthest she would go in offering information on potential funding sources would be to provide a reference to the funder on behalf of the party or parties seeking funds.

Suppose I said to this group, 'I think that the xyz foundation might give you a little bit money of money to hire an expert.' And they say, 'Fine,' and they quickly called the foundation, and the foundation says to them, 'Can we call this neutral, and see whether you're reputable and what this process is all about?' I would certainly respond to a request from a Foundation to be a reference. If you're trying to draw lines here, it's very hard. [...] I wouldn't write the proposal for them, but I would give them a reference. I regard giving them a reference as still being related to the process I've been asked to facilitate. It's an aid of making the process go forward.

This mediator is justifying this intervention by distinguishing help in removing procedural barriers to participation (such as identifying potential funders and verifying

that the party's request is legitimate) from helping a party make the case for their need for funds.

This mediator clarifies the difference she sees among providing information and providing assistance:

Information and assistance (are) different. Telling everybody you might need to raise some funds in order to participate, here's a place to raise some funds from, that's just information, that's not my personal assistance – I'm not writing proposals for them. [...] Assistance would be my getting on the phone and helping them get money. I don't think I've ever done that. The closest I've come is saying, 'Here are some places that might fund you, given some specific information.' Similarly, in a legal context, 'Here are some cases you might want to look at to try to decide what to do.'

When asked why she had not in fact gone the extra step and assisted with making phone calls, she explained: "Because that does remove you from the neutrality role – (according to) my sense of neutrality. [...] I'm a lawyer, I can't be an advocate in this setting. Here I'm a facilitator of the process, I'm not an advocate for the parties." The line for this mediator among neutrality and advocacy, then, lies among providing information that could also be provided to other groups in the dispute, and actually acting on their behalf, even if she could act on behalf of other groups to the dispute as well.

This mediator's conception of what is appropriate and inappropriate can vary at various stages of the process.

Since this is at the beginning – the standard for me is can we do everything we possibly can at this point to see if there's any future in this process? It's much too early to say, 'I appreciate you can't participate without an expert so let's just call the whole thing off.' So for me it's also when it happens – we're here at the beginning and I'm just doing everything I can to see if this thing can work. I've been hired to facilitate a process, and I'm trying to do everything I can to make it work at this point. My line drawing might change later in the dispute.

Another mediator would also help parties search for funding, although they would not write a grant proposal either.

I would at a minimum, raise it with convening agencies and let them know that that was a critical issue as far as having meaningful dialogue. Probably, if they had suggestions, I would hope that they would go and find a (...) grant, that I could delegate the legwork on finding that to the convening agencies. If they didn't have any ideas, or had some ideas but I needed to pursue them, or ask the women to pursue them, then how much I could do on that would depend on the budget for the project. If it meant writing an (EPA technical assistance grant) application, or doing a significant amount of research to find somebody, most often the budget won't provide the amount of support for the mediators to do that kind of thing."

However, even if the budget provided for these kinds of activities, this mediator would not consider it within their role to do some of them:

I'm not sure I would feel comfortable writing the grant application, but I would feel comfortable making the connection for the stakeholders to the technical expert, and helping them to understand the procedures they'd have to go through in order to access that technical expert. With the (EPA) "TAG" grant program, (I think) EPA staff are able to help stakeholders write the TAG grant applications and give them coaching and stuff. I would have no hesitation in making the connections among stakeholders and the people who could help them do the grant application.

This mediator would not feel comfortable writing a grant application if it required them to make a case for the parties' technical need, but they would consider writing an application for a grant to specifically support the process.

I think that (...) the TAG grant application calls for making a case, from the stakeholders point of view about why they needed it, and what were their problems with the site, and so on and so forth. So in a sense it feels to me that it's part of an advocacy strategy to apply for a TAG grant. [...]

I also (think) that the USEICR has a new program (...) where they have a pot of funds available for stakeholders who need it in order to participate in processes – I think it may be linked to power imbalances. It's administered by an entity that is more or less a neutral player, and it's specifically to support good process. [...] If it was just a matter of a mediator putting in a request that a party at my table needs access to x funds in order to effectively participate, that to me – I can imagine a scenario in which it would feel appropriate for a mediator to request the funds.

The distinction these two previous mediators make is interesting because it shows how different mediators conceptualize the arguably gray line between advocacy and process

management. Because appropriate behavior in these explanations depend on the definition of “process-oriented,” a more explicit understanding of what interventions are in fact process-oriented would clarify what actions are appropriate for mediators to undertake.

In discussing information, mediators repeatedly mentioned situations in which they had information (technical or otherwise) that the parties did not ask for but that they felt parties should know. Respondents discussed a number of ways of handling this problem. One mediator said that even in cases where parties did not explicitly ask her to evaluate and comment on information being discussed, she would do this under certain conditions.

For me one of the crucial issues would be if the parties were unrepresented. If the parties have representatives, either other experts or lawyers, I'd be less inclined to do anything. But I've been in settings where haven't had lawyers, and I would share information, give my view of information. And the way to protect against that, any complaints about unfairness is to tell all the parties that that's what I'm going to do. I wouldn't hide anything that I was doing. I would let all the parties know what I was doing.

Another mediator provides information during policy dialogues if they think it will be helpful to the parties. They make sure the parties know if they're not completely sure of the accuracy of the information.

If they're not aware of (the legal process) and alternatives, we tend to make them aware of it (...). And we talk about how we do that. Everyone needs information, and so you bring it up, you bring things up like that. You do it with everybody, it's not like you take favorites. And people know that if we have information or technical information that we feel that it's appropriate to... people need the information and then they can make the decisions.

This mediator tells parties that they should gather information about their alternatives and potential solutions, but that the mediator will also provide information that parties did not ask for if they feel it would be very useful or important for the parties to know.

First of all, I let everyone know that I do it. I say, 'If I have information that would help anybody evaluate their situation, and maybe my information's not completely right on, so I'll tell you, look this is what I think I understand.' [...] I feel like information should not be sequestered. On the other hand, if someone tells me something, and says it's confidential, then I won't. If someone has a piece of information that would advantage them and disadvantage someone else at the table, and says to me, 'This is confidential information,' then that overrides.

Because the information mediators offer influences what parties' discuss, different mediators will influence the discussion in different ways. In discussing how he comes to decide what information to get parties to consider, and under what circumstances, one mediator described how mediators' past experiences can influence the direction of the negotiation.

(I base my judgments on) past experiences, (...) training. One has to acknowledge that it's limited. Different interveners might clearly see different things here. And I'm not suggesting that the instant you see it, you immediately raise it. If the person in the first (scenario) didn't articulate that they are uncomfortable because they don't have a technical background, I'm not sure I would have raised it. [...]

But I do think it is – those kinds of perspectives or ways of looking at the situation – I was going to use the word insight – and I think to some degree that's what one gets in particular interveners, and different people come with different capacities and insights and sort of see in that sense see different things, and your questions was (...) what are the sources of those ideas, and I think that's where they are, that's where they come from.

Because different interveners bring different information to the table, and because different information affects how people understand the issue at hand and potential agreements, this mediator feels that the choice of intervener affects the eventual outcome that is reached among the parties. When asked what responsibility, then, the mediator has to communicate the potential impact of their experiences on the outcome to the parties, he replied:

At one level, the "responsibility" can be discharged at a very general level, in terms of saying, 'This is the kind of person I am, this is my background, these are my experiences, and how people interact with other individuals clearly varies.'

[...] (Maybe not) to the degree you need to say, 'You know if you choose (me) it's going to work out to solution x and if you choose (another mediator) it will work out to solution y. I believe that in point of fact happens, but since nobody knows what x and y are, it strikes me that the more general comment that says, 'Who you pick and how you interact with that individual is going to vary from person to person,' and that's what mediating is about. [...]

If I interact with somebody and they feel comfortable with me and share certain information with me, then conversations may go one way, if that person's not comfortable with me and therefore they never disclose it, the conversations are going to go quite differently. I think it's just important for people to (...) have the choice of who their intervener is and then have a general understanding that different styles of intervention, different personalities, different resources, (...), the way in which participants relate to one another means that conversation x with mediator x is going to be a different kind of conversation than with a different mediator.

What is interesting here is that this mediator explains the variation in outcomes based on how parties relate to the mediator, and much less based on the personal technical expertise that the mediator brings. However, his earlier comment about information reveals that mediators' experiences and training do in part influence what information gets discussed in mediation.

In addition to providing information, it is also possible to steer the group towards a discussion of certain types of information. One mediator argued that it was his responsibility to identify types of information parties would need to know to increase their chance of an agreement. Speaking about the first scenario in the "Baxter" story, he explained:

I would then speak to the other participants to raise that in point of fact, (the Community representatives' need for assistance) is a concern for everybody in terms of understanding issues and related concerns. (I would also speak) to the degree that it's important for people to understand how Latino and Asian immigrants, what their lives are like, lifestyles – how this might impact them, how important employment opportunities are, health practices. [...]

Technical information regarding carcinogens may be one bit of information that needs to be surfaced, but there might need to be other kinds of information as well

that's important for people to understand and just not assume that the mayor and Allied Plating's representatives sort of understand other people in the room."

He would raise any non-technical information he thought parties ought to consider, as long as he thought it was accurate.

How should a mediator determine what types of additional information to suggest that parties consider?

I think it's under the general principle of, what kinds of things does one need to know in order to improve the probability of striking a deal or an understanding with other people in the room, and if part of the roadblocks to understanding, or ways (...) to enhance the probability is to get a better understanding of the kind of people and their backgrounds that you are interacting with in that room, then (...) I think it's appropriate to identify that and then try to brainstorm ways to capture that information.

If in dealing with a group of Native Americans over ownership of certain pieces of property, if representatives are just banging their heads and saying, 'These are the most stubborn individuals in the world, I don't understand why they're not living in the 21st century,' there's some information, I don't know if one would call it 'technical' but there's relevant information that one (...) needs to access that might at least explain or enrich the understanding of the environment in which people are operating. I think it's appropriate for a mediator to identify those kinds of things that tend to be triggered from the agenda and nature of the conversation that the intervener's experiencing on the spot.

Here the mediator's goal is to provide information that will change parties' misconceptions of other stakeholders in the dispute, particularly those with whom other parties around the table are not used to negotiating.

Respondents did not disagree that mediators should be concerned that parties are lost or unable to process the information at the table. There was no apparent disagreement, either, that mediators could provide unsolicited information to parties. Mediators who felt comfortable doing this felt it was their responsibility to get them to think about certain types of information, and even certain pieces of information, they may not have otherwise considered. However, their responses to the Community's need for

technical assistance in “Baxter” scenario #1 showed that they do disagree on the extent to which they should work with parties to get technical assistance.

Mediators who felt that providing information about sources of technical assistance fell under their role made a careful distinction between providing this information as a way to ensure a good process versus as a way to better the parties’ outcome. Bettering a party’s outcome would be advocacy and not within their role, according to these mediators. A number of mediators, in their response to “Baxter” Scenario #1, said they would ask other parties in a plenary session or in private caucuses for help in finding the Community representatives the technical assistance they needed, but not taking action beyond what the group decided. A few would go a bit farther in potentially recommending a few names.

The range of responses in terms of how far mediators would go in helping parties in need of technical information suggests that parties with a weaker understanding of the technical details under discussion may gain greater access to technical information with a mediator who feels comfortable suggesting to that party where to find technical assistance and funding to pay for the assistance. A party with limited resources for a technical advisor would likely get more access to technical assistance with a mediator comfortable with working with the party to get the information and potentially the funding they need. The risk of encouraging other mediators to take this approach is that the line between providing information and assistance may vary depending on the goal of the grant being applied for (as the mediator who mentioned the TAG and USIECR grants highlighted). The benefit is that this funding would be available to other parties as well,

and would result in potentially better informed parties who can take a more active role in crafting an agreement.

The risks of turning the problem of a party's lack of technical expertise over to the entire negotiating group is that, even if the mediator couches intervening as in all the parties' interests, some parties would likely feel they had little to gain from providing funding or information to another party. If the assistance from other parties were in the form of information or actual technical advisors, the question would have to be raised whether the party needing technical assistance would find the information or the advisors to be legitimate. The benefit, which a number of mediators mentioned, is that in owning the problem, the group may move towards collaborating on data collection and analysis and moving away from the adversarial use of information.

The range of responses on whether it is appropriate for the mediator to provide information highlights the fact that different mediators with different knowledge have different things to contribute. How do the mediators who do feel comfortable providing information deal with this problem? A number mentioned the importance of making it clear that they were going to share this information and that they were not sure of its authenticity. This disclosure would make it easier for parties to decide how best to use the information provided by the mediator.

Some parties are not fully exploring their alternatives to mediation

Chapter 7

In interest-based negotiation, the better a party can do away from the table, the more leverage they have at the table. In general, an advocate, not a mediator, works to improve a particular party's alternatives to a negotiation, or "BATNA".¹⁶ These alternatives reflect the balance of power among the parties away from the table. However, a mediator can work with parties to help them think through the options available to them in a mediated solution and their alternatives to the process.

Parties who are not fully aware of their alternatives to a mediated agreement risk accepting an agreement where they gain less than they could by not accepting it and pursuing their next best option. Mediators in general encourage parties to think through their alternatives before coming to the table, as well as during the process. However, given that increased knowledge of one's alternatives increases one's leverage in a negotiation, how far do mediators feel comfortable in exploring parties' alternatives with them?

Mediators interviewed describe their responses to situations in which parties had not fully considered their alternatives or parties felt they had stronger or weaker alternatives than the mediator felt was realistic. Their interventions in response to these problems ranged from exploring through questioning, to casting doubt on a party's assessment of their outcomes, to questioning parties to get them to reevaluate their alternatives. Their responses reveal that some mediators' interventions have a greater potential impact on the party's alternatives away from the table than others'.

¹⁶ "BATNA" is an acronym for "Best alternative to a negotiated agreement."

One mediator described how he encourages parties to think through their alternatives. He feels obligated to do this, and if he is sure they have thought it out, he is comfortable with a party's decision, even he does not consider it to be a "good" decision.

If it is totally clear to me that it's a bad decision, I will try to help them think about it, but in the end, it's their decision, not mine. (I get them to think about it) by asking tough questions, pushing them a bit (...) or if it's totally clear that they've been outgunned in whatever's happened thus far, I use the experience of the past to ask questions about the future. All of that is designed to help them make an informed decision, to get them to the point where they can say, 'Alright, damn the torpedoes, we're going forward with this,' or 'Hmm, you do raise a point here, and maybe we can't afford to be crazy.'

I do not tell people what to do. I'm prepared to ask very tough questions if they appear to me to be ignoring what appears to me to be the reality of the situation. [...] I do think it's my responsibility not to let them go off half-cocked without trying to raise questions and have them think about what the answers are.

This explanation draws from the principle that parties must be fully informed of their alternatives to an agreement, and that mediators cannot tell the parties what to do. While no mediator interviewed believed that a mediator should tell them what to do, others went farther to provide parties with a sense of what their alternatives could be, as I will show later in this chapter. What this mediator finds problematic is helping people make informed choices about their alternatives when the alternatives themselves are not very desirable or uncertain.

The problem for mediator is how do you help people sort through all of that and come to grips with – if it's simply a matter of scarce resources, what they may have to come to grips with is the fact that their resources are not likely to increase, and so they may end up taking less than a full loaf because they come to understand that if they don't, they might end up with no loaf at all. And that it seems to me is sometimes a very difficult message for mediators but one that they absolutely have an obligation to convey to people. [...], to help them think about the fact that, oops, maybe they can't continue to simply say, 'We're going to sit down and stop this project.' If they don't have the power to stop the project, then they may need to do deal with the art of the possible: what can they do?

This mediator feels obligated to ensure that the parties are informed and to get parties to think through the implications of their choices.

While this mediator feels he must explore options and ask questions with the goal of getting parties to thoroughly understand and weigh options and consider new alternatives, he implied that his interventions are made from the perspective that parties are often overly optimistic about what is possible.

The whole thrust (of my questioning about alternatives) is to cast doubt on their own predicted outcome if I think that they have a Pollyannaish view of the world and the outcome is not likely to be the one that they predict. So that they deal with the uncertainty, and at least consider whether the certainty that they can achieve at the table is worth more than the uncertain outcome that they would face not at the table.

Another mediator goes a bit farther in challenging parties' assumptions that they can do better in another forum. She explains her reasoning: Although she feels parties should choose the forum in which they can do best, she feels she should cast doubt on this possibility.

When someone hires me I think they want me to get some kind of an agreement. They're not hiring me for a good conversation, they want to resolve the issue, so therefore all of the interventions and activities that I do are to lead people to closure. So the time when I raise that (the question of what a party's alternatives are) is more when I'm thinking it's going to get someone to realize that they can't get more in an alternative forum. It's (a way to get) closure. I'm not saying that because after nine months of negotiations I want them to say, 'You know what, I'm going to do a letter-writing campaign instead of this.' It's because I'm... it's almost a rhetorical question. What's it going to cost you to get a marginal increase?

(If a party thinks they can get the marginal increase), then I would say that it's a rational decision for them to make that decision. [...] Much as I want to get closure and agreement, because I think that's my responsibility, I also understand when people make decisions... I want to understand why someone's making that decision, out of my own curiosity, because then I can let go.

Although the intervention she describes is very similar to the interventions described by the first mediator, it is based on a slightly different rationale: the mediator has an

obligation to get parties to explore why staying with mediation could be their best alternative. The fact that she mostly mediates public policy dialogues may explain in part her agreement-oriented approach.

The above two mediators stayed in the realm of questioning parties, even though some of the questions were more challenging than others. Another mediator challenged parties based on a different principle: the mediator has an obligation to clarify the power balance among the parties. Although clarifying ways in which each party has power over the other could serve the same purpose of casting doubt on parties' view of their alternatives, this mediator pursues a line of questioning intended to get parties to think of how their alternatives may be better than they assumed.

This mediator described a situation in which a coal mining company in a rural county had violated a requirement to cover coal trucks traveling from the mine to a railroad spur about a mile away. Nearby residents complained about coal dust being blown off the trucks and a group of citizens had invited her and another mediator to assess the situation, in hopes that they could mediate between the county and the company to get the trucks covered. In their initial assessment, the mediators found that the community members argued that they did not have any power to change the company's practices. "(They) just kept saying, 'You know we're just so powerless, we can't do anything,' throwing up their hands and rolling over exposing their belly like a dead dog." The mediator did not agree that they were powerless to change the situation, and started a line of questioning to get them to perceive their own power differently.

I'm a fan of Saul Alinsky, and the work he did to empower low-income communities in Chicago and elsewhere. He talked about how important it is for communities to understand and use their own power to effect change. When they would say, 'We have no power.' I remember saying, 'What (does the mining

company) need in order to conduct their business? (...) What do you have that they need?’

The mediator is still within the realm of parties open-ended questions about the nature of their power.

They (said), ‘They have to travel on our roads.’ ‘Okay, what power do you have over traveling on the roads?’ ‘I don’t know.’ I kept probing, and I remember them – somebody was saying, ‘Wait a minute, they have to travel over our bridge.’ And then I said, ‘What’s the tonnage on the bridge?’

It could be argued that with this question the mediator suggested one way in which the community could exercise control over the mine’s activities.

‘Oh, it’s so many thousand,’ (they said.) ‘Well how much do the coal trucks weigh?’ ‘Oh they weigh a certain amount of tons.’ And then I remember them going, ‘We could lower the tonnage requirement for the bridges!’ And all of a sudden they got it, they said, ‘Oh, we have power.’

Having observed that the community members weren’t asking questions about their power in relation to the mining company, the mediator got them to think through these questions without telling them what to do.

The mediator explained her reasoning behind the questioning, and how it fit with her role as a mediator.

It was behind the scenes coaching. I was getting them to think about what power they had without naming it myself. It was questioning related to exploring their BATNAs and what additional actions they could take. I was helping them think through, using Socratic questioning, what power they had.

The mediator’s past experience mediating mining conflicts in another state and seeing what organized communities had been able to get out of negotiating with mining companies informed this intervention.

At first it was just probing out of curiosity to see where the county was coming from. When we saw how powerless they felt, it was more, ‘Can we bring these people along?’ And because you saw somebody who had an image of themselves of being unable to move forward, and yet you realized – having worked on other cases – that just wasn’t true. I just realized they weren’t thinking about power.

Shortly after the meeting, local residents proposed the county government that the bridge tonnage be lowered, which would have shut down the mine by making it impossible for the trucks to reach the railroad. A few days later, representatives from the mining company's headquarters in the East Coast flew to the site and required their employees to cover the trucks. This action resolved the dispute. "So we never ended up mediating it, we were just able to coach them to a place where they appeared to have power in sufficient quantities to get the attention of headquarters, which then instructed the local mine officials to conform to the law."

It could be argued that in questioning the community members about their power until they saw how to improve their alternatives to a negotiated outcome, the mediator actually changed the balance of power among them. She sees the change not in the actual power among the parties but in how they perceived that actual power.

It was an opportunity to help them realize that they had power. And I think that created an ambiance or a climate where they could have more constructive discussions. I remember at the time thinking, 'Am I mediating? Am I being neutral?' And I felt that a mediator is neutral on the substance and the outcome, but needs to help the parties gain a more realistic understanding of their situation before they come to the table.

Mediators discuss BATNAs with parties, behind the scenes. They ask, 'What is your alternative here?' as a vehicle for getting people to think through whether they want to participate in a process. And that involves guided questioning to get people to think about what options they have to mediation. They may say, 'We'll take them to court.' And then you take them a step further, 'Well, what do you think would be likely to happen in court?' 'Oh, I think we should win.' 'Well have you checked recently to see how similar cases have turned out and how much is it going to cost you to go to court?'

You get them to think pragmatically. That is what I was doing here on power – helping them think through the power issues. I think it's within the realm of a mediator to help people to be more realistic about what the conditions really are. I don't think I was changing conditions, I was just helping them be more clear about that. I think that's something a mediator can do.

This mediator's definition of "realistic" differs from the definition of the first two mediators, who considered "realistic" to be aligned with casting doubt on alternatives to mediation. For this mediator, "realistic" includes conditions that she identifies that the parties themselves may not have perceived. The mediator's questioning the parties about sources of power seems to have played a significant role in changing the power balance among the two groups. She clarifies this:

Not the inherent power balance, but the perception of power, shifted dramatically. That's the difference. We didn't change power. The County had the power all the time. It was a County road. They could change the tonnage any time they wanted to, whether there was a mine there or not. I was having them think through what power they had.

In this sense, her responsibility is to get the parties to understand the actual power that exists among them.

This recalls the first two mediators' feeling of responsibility to getting parties to think about their realistic alternatives to mediation. However, while they ask questions focusing on the consequences of a party's alternative, the mediator in the mining dispute questioned one party on what better alternatives to mediation they might not have considered, with the idea that the party had better alternatives than they had thought. A party who had not thought through their alternatives to a negotiation arguably could have a better sense of what other options they could act on if a mediator questioned them as the latter mediator did.

Finally, another mediator explained where he felt he went too far in questioning a party about their alternatives. Interestingly enough, because this mediator feels comfortable with making selective suggestions, his unease with the questions was not because he thought they were too suggestive of a possible course of action, but rather because they presented the risk of being seen as advocating for another party.

This mediator is currently co-mediating a dialogue process with environmental, ranching, and government interests on a management plan for the habitat of a threatened species. At the beginning of the process, the environmental interests announced that they had filed a regulatory action asking the Bureau of Land Management to assess the species' habitat as an "environmentally sensitive area," which would force the agency to examine management practices there. At the first meeting, representatives of ranching interests claimed this showed that the environmental groups were not negotiating in good faith, and questioned how they could trust the process to go forward. The ranchers asked the environmental groups to withdraw their regulatory action while the mediation process continued, allowing them to still file it later if necessary. The environmental groups refused. The mediator broke the meeting for a caucus and suggested that the environmental groups talk seriously about their request to designate the area. As the mediator worked with them, the environmental groups began to draft a proposal.

I wasn't sure it was a very strong proposal, actually. One of the things I did was, I began to behave like a rancher, and asked that person, 'What do you think Joe is going to say when you propose this? Don't you think Joe is going to say...' Because what they had proposed is, 'Well, we'll slow it down a little bit, but we won't withdraw it. We'll let phase one (where the agency assesses the habitat's condition) go forward.' [...] So I said, 'How do you think that's going to be heard? [...] And I just sort of became pretty (pushy).

This intervention drew on an obligation the mediator felt to get the environmentalists to think about what was really going to happen if they refused to withdraw their request.

Because I didn't believe (the proposal) was sufficient. [...] I hoped that they would in good faith withdraw the action, and just wait. And quite frankly, they were not interested in that. They felt that would be caving in. Their response was, 'So why should we be the ones to give everything up? I don't see them stopping their grazing that they've done for fifty years and ruined the land. [...] What we will do is we will proceed with phase one, and allow the BLM to collect technical information, but not make a regulatory determination.'

This worried the mediator because it did not seem to be enough to convince the ranchers that the environmentalists would be negotiating in good faith.

And so I pressed them, hard. And then they said, 'That's the best we can do,' and I said 'Then the only thing you can do is make the suggestion. I really can't tell you what you'll (get).' [...] They made the suggestion and the ranchers said, 'I think that will work. I think that shows an act of good faith.'"

The ranchers' response surprised the mediator. The mediator later became concerned that by taking on the rancher's position, he had risked pressing the environmentalists more than the ranching interests would have. "I felt that at a certain point, I was risking convincing the enviros not even to make the proposal. [...] To say, 'There's nothing we can do.' Because they would not withdraw the request." If the environmental interests had subsequently complained that they had felt he had a specific goal in mind in challenging them, he would apologize for pushing too hard, and would explain that he "wanted to be certain that you were as clear as you can be, and had thought through as far as you could think through how your proposal would be heard." He would clarify that he was not advocating on behalf of the ranchers, but his intervention "was about being real clear and knowing that you have gone as far as you could go."

Later, he described what actually going beyond his role as a mediator would have looked like.

It would look like sitting down with the enviros and saying, 'In order to get an agreement out of the ranchers, you have to understand that ranching is the lifeblood of this part of the state, that the state economy will collapse and it doesn't matter what you do with the (species) habitat, you have to figure out a solution that respects the history of farming and ranching and ways of life of the eastern part of (the state).' Rather than querying what it is that can and ought to be done, I'm (saying what should be done). Maybe that's the point (...) at which I become a voice for what really should be done. And if that's clear to me and everybody else, I think I ought to step aside.

The mediator seems to feel that he must get parties to think about the likelihood of alternatives that seem unlikely to him, without going so far as to advocate that those alternatives are in fact unlikely or impossible. As with the first mediators who cast doubt on parties' alternatives, parties who had not thought through their alternatives could risk, like the environmentalists, giving more than they really had to.

This mediator's comment raises the question of what types of interventions are appropriate, given the general principle that a mediator must intervene to explore possible alternatives with parties without telling them what to do? The first mediator quoted in this chapter argued that asking almost any question was within the mediator's role,

As long as I'm asking questions, I think, just as a philosophical matter, it's hard to go too far. My answer would be different if I (told them what to do). That seems to me to have within it the possibility of going to far very quickly. But if I'm asking questions, it's difficult to go too far. [...]

Because asking questions, when done well, forces people to think about what it is that they're saying and attempts to force them to look at what they're saying and compare it to something else that I'm trying to get them to at least think about. And I'm not trying to get them to a right or wrong answer, I'm just trying to get them to think through what it is they are saying – whatever their position is now, and compare it to what might be possible in a settlement.

For this mediator, then, as long as the goal is to assist parties in thinking through a situation, it is difficult to push too far.

Another mediator would agree that questions are better than recommendations, but added that:

It's not so much what the question is, it's your attitude. [...] If your belief and your attitude are that the parties are the ones that have the information and (...) that you really trust their judgment, you're going to be asking genuine questions. If you are trying to manipulate them into doing what you think is best, your questions are going to come out manipulative. So if you genuinely believe that (...) that their ideas are the best, then you'll come across that way.

Still another mediator added to this idea explaining that she hoped that her questions were “trying to ‘surface the wisdom from within’ the parties.” She continued, “What I think I’m doing is asking questions that help people surface what they already know but haven’t yet recognized. As opposed to manipulating the outcome through questions.”

Going farther, another mediator felt comfortable suggesting alternatives in helping parties think through what their alternatives to a negotiated agreement might be. Suggesting alternatives “is not going so far as to say what should be done. [...] If I move from there, and become prescriptive about what it is this particular settlement ought to be, I think I’ve gone beyond the line.” For him then, the limit is not in the form the comment takes but in what it communicates.

What can we make of this range? First of all, questioning parties to get them to think through their alternatives represents the least directive intervention described in the interviews. However, although some interviewees felt that asking questions did not go beyond the mediator’s role, others raised the possibility of manipulative questions. They stressed the importance of asking questions with the attitude that the party knew the best answer for themselves.

Questioning from the point of view of another party introduces a greater degree of direction by the mediator. This strategy presents the challenge of knowing when to stop. Although the goal is to get parties to think as clearly as possible about their options, the mediator of the threatened species dispute showed how he could have potentially influenced the parties to reconsider their alternatives based solely on his intervention and not information provided by other parties.

Questioning parties to get them to explore their real power in a dispute challenges parties to think of alternatives to mediation and to the status quo that they had not considered. This involves the mediator in the creation of new strategies for parties in a way that questioning parties about the alternatives they have already identified does not. While in both approaches, mediators felt obligated to explore what is realistic, the difference in how they acted on this obligation could affect the outcome very differently, and even affect whether the parties reach an agreement at all.

The potential risk associated with casting doubt on a party's alternatives is that doing so could cause a party who really does have a better alternative to agree to a solution that is less than optimal than what they could get through a better alternative, such as going to court. A party who has a harder time thinking through their alternatives (possibly because of lack of information about them) may be then disadvantaged through the process. Both mediators who talked about casting doubt said that they would encourage a party who has a better alternative to act on it, but that is different than helping them to think through what more positive alternatives to mediation may be. The mediator who cast doubt on the environmentalists' position demonstrated this danger and later feared that, had he succeeded in getting the environmentalists to withdraw their regulatory action, he would have pushed them to propose something less than what they actually got.

One benefit of casting doubt on parties' alternatives, as the second mediator in this chapter mentioned, is that it can get the group closer to agreement. It also encourages parties to more carefully weigh the tradeoffs they may end up having to make than they would if they were only to think of positive alternatives to mediation.

The risk of questioning parties to think through what their alternatives really are is that the mediator could get close to telling the parties what to do. The mediator also gets close to the possibility of changing the power balance of a situation, which a number of mediators said was outside their role. The coal mining case mediator saw her role as changing parties' perceptions of their power, because she saw they had some power while they argued they did not have any. At what point, however, does changing the perception of power become changing the actual balance of power?

When a mediator suggests alternatives to a party, they can risk causing a party to believe that the mediator is promoting that alternative. That alternative may portray one party as stronger or less compromising than they really are. The mediator in the threatened species dispute experienced the risk of being seen as advocating for the ranchers. The coal mining mediator got close to suggesting a course of action when she focused specifically on the tonnage of the bridge.

In thinking about what aspects of these interventions could or should be codified, if mediators were encouraged to take the risks that the more interventionist mediators did, it may be easier for mediators to actually cross the line and be seen more frequently as advocating for a party or consulting with a party on a way to improve their alternatives. At that point, potential parties may not trust mediators to act impartially and may have less of an incentive to participate in a mediation.

On the other hand, if mediators are encouraged to cast doubt on a party's alternatives, they run the risk of facilitating agreements in which parties actually do less well than they could have outside of mediation. If the goal of mediation becomes to get an agreement (although that is not necessarily the only goal of mediators quoted here),

then parties who are weak in terms of their awareness of their other alternatives potentially have a lot more to stand to lose than those who can think through their alternatives or pay to consult with advisors about them.

Parties are not gaining as much through mediation as they could

Chapter 8

Exploring alternatives to a negotiated agreement gives a party a sense of the minimum they need to gain from mediation in order for it to be worth their while. In order to gain more than just slightly better than that alternative, a party needs to work with other parties to create potential agreements in which it could gain while satisfying other parties' key interests.

Parties evaluate a potential agreement not only based on whether or not it is better than their alternatives but also based on whether they can get more from the agreement. If a mediator sees a party heading for an agreement that they think disadvantages the party or otherwise isn't in their interest, what responsibility, if any, does the mediator feel to intervene in the form of questions, changes in the process design, or even evaluatory comments?

To understand the range of these interventions, we need to understand the range of responsibility to generating a wide range of options and maximizing joint gains. What responsibility does the mediator have towards maximizing joint gains? One mediator interviewed felt it was not the mediator's responsibility to try to maximize joint gains.

To me, the notion is that the mediator's job is to listen as carefully as you can to what parties are saying, interests and concerns they identify, they might not identify it in language that the other side hears so you've got to target that. If based on what people said there seemed to be related concerns that they haven't identified, that given what they've talked about, from your own experience, it might make sense for them to raise for them to address. I tend to approach it that way. Whether or not it's "pareto optimality" frankly, I'm not sure how to even assess that.

To elaborate on why he does not consider the idea of "pareto optimality" to be useful, this mediator described a dispute involving the takeover of part of a State Park by a

Native American tribe due to a treaty land claim. Before the mediators got involved, the primary question was whether or not the state police would evict the Native Americans newly reoccupying the land. The situation had escalated to the point that a couple of violent encounters had taken place.

People in some sense just wanted to talk. [...] What we thought might be helpful for people in that scenario was to talk about creating some sort of communication vehicle – we labeled it a ‘rumor control’ mechanism – that would address some of the tensions people were feeling in the area, because somebody would say, ‘I saw four Indians in (a nearby city), they were all headed towards the East and they were all carrying guns, let’s brace ourselves, they’re clearly coming here.’ That would have a significant impact on how people talked at the local tavern, the way they passed this particular site. [...]

If (suggesting ways to improve communication) means the mediator is concerned about pareto optimality, then fine, I endorse that. That was the furthest thought from our minds, whether it was optimal or not. The question was, ‘How can people, in some sense, tap their creativity to explore different ways of doing things?’

The mediator sees his role, then, as making communication and the creation of solutions possible, but not as determining whether those solutions maximize the potential gains parties could achieve through negotiation.

Another mediator offered a way of moving towards better gains for all parties without speaking specifically of “maximizing joint gains.”

I do think that mediators have an obligation at the option stage to making sure there’s a rich a body of options possible. I say at that stage so that at the time the possible ingredients of an agreement are being put on a table, I can usually tell, I ought to be able to tell, from an understanding of peoples’ interests, what they would like to see in the final agreement. Unless you get a good range of possible components of an agreement, before you put it together, they’ve got to be out there so people can think about them.

If you don’t have that range early on, you (don’t) know what are the possible things we can do here – at the options stage, the mediator needs to be... not driving it in the sense of making all the options, but asking questions and suggesting places that people can look for information, that can kind of thing, and make sure that they’re there.

In disputes characterized by power imbalances, her responsibility to options generation is slightly different.

I guess I think it is a little different. The distinction that I make – I don't think a mediator ought to get his or herself into this position of trying to tell any of the parties what to do or to say, 'You don't have the power here, let me help you,' taking sides of that sort. And I think the place they need to be particularly careful to stay out of is at the final decision-making. [...]

Another mediator, who does think in terms of joint gains, focuses on joint gains only under certain conditions.

If (a party is) willing to accept 'something' – that's their right to accept it. [...] We can sometimes see some joint gains unclaimed. If we do, we might float it if benefits both parties or at least benefits one without hurting another. But we don't do this because we don't like the power imbalance.

This mediator responds in part to the first mediator's criticism that an effort to maximize joint gains puts the mediator in the role of evaluating the outcome. "If they're willing to accept 'something' – that's their right to accept it."

Mediators expressed a wide range of responses to the problem of a party considering accepting an unsatisfactory deal because it would be better than nothing. The problem that I presented to mediators in the third question of the "Baxter" scenario involved community members who, at the next-to-last meeting, expressed their reluctance to accept what they saw as a weak gain compared to what communities in other cities had received.¹⁷ Mediators interviewed responded very differently, from,

¹⁷ Please see the "Baxter" hypothetical story, Appendix B. The third scenario after the general story background reads:

At the second to last advisory committee meeting, before the final meeting in which recommendations will be presented to the State E, the mediator begins to address what appears to be an emerging consensus on a proposal to the State. At one point, a community resident who has contended all along that the community is owed compensation for the health risk burden that they bear disproportionately, takes the mediator aside and says that they are inclined to go along even though they know that they are not getting a very good deal.

“That’s an agreement,” to “I’d tell them not to make an agreement because I see gains to be made.”

The mediators who considered this situation to be achieving an agreement explained their reasoning. One described that her reasoning comes from the fact that the State EPA does not seem to be supporting the community’s proposals and that the community doesn’t seem to have another venue for getting these kinds of concessions.

It’s an agreement. The calculation is this is the second-to-last meeting, so this has been developing all the way through, and the State, who’s the convenor, the sponsor, has not been siding with the community residents to doing these kinds of monitoring things. So, apparently, they’re going to be willing to act without them, whether there’s an agreement or not. They’re not promoting (the concessions the community wants). [...] I’m not going to stop things now and say, ‘Let’s check in with EPA and see if they are going to ask or require that the company do these things,’ because we talked about all of that. So ostensibly I should know why EPA’s not going to require that.

What is interesting here is that the mediator’s perception is that, having presumably worked through alternatives with the parties, this is their best alternative. Because the options have already been discussed, this seems like a realistic conclusion to her.

Here’s what I read into this: We’ve been negotiating for months, and these proposals have come up. [...] The state is the one who has the authority to make this happen or not. They become the most powerful player at the table. So if they decide that they don’t need to require these things, it’s not that the community residents are going to get it anywhere else. [...]

Another mediator also considered this situation to be the lowest rung of consensus, if the parties say:

She knows through the grapevine that other Environmental Justice groups have not only gotten promises of more money to make neighborhood improvements of various kinds, but that other groups have been able to get agreements to sit on formal monitoring panels, and scholarships to send community people to get appropriate monitoring skills and credentials. She has proposed these kinds of compensation measures, but Allied Plating has refused to consider them because of the cost, and the representatives from the State and City have been reluctant to create a standing community post on a monitoring board. The community resident thinks the company, State, and City’s reactions are not fair and show they are not making a good faith effort. However, she and other community residents have started to think they should settle for something rather than nothing. What would you do?

‘Well this is okay in the sense that I’m not going to be put out of business, but I’m not crazy about it. I’ll let it go, I don’t want to sign it, though.’ That’s the lowest rung of a consensus ladder: ‘I can live with that, but don’t expect me to raise a finger to support it or publicly say that I like it. But I can let it go.’

There’s an obligation to let the group know where you stand, and not to apparently go along, because even if you apparently go along, sooner or later you’ll get out of it and repudiate the agreement. So it depends on the degree to which they feel this is not a very good deal.

Before feeling comfortable with the party’s response, however, this second mediator would make sure they had thought through their decision.

I wouldn’t just let that pass in order to get the agreement out the door. To begin with, I’d probe that party a whole lot, and try to get an understanding of... is this a question of not getting a very good deal, is this a question of actually being harmed, or is it a question of not getting certain advantages that they thought they might be able to get?

The mediator would need to know the party’s answer before moving forward.

If their interests are fully protected, and I’m satisfied that they understand what their interests are and how this agreement will affect them in the short run, the long run, all that, and if I think that the extras they want beyond the proposed agreement would move it into a positive territory rather than just a neutral agreement in their view – but would upset the rest of the apple cart there, I’d talk with them very carefully about how they might obtain those things in other ways.

This mediator would also want the community’s dissatisfaction raised at that table.

I would put it to them, you know, people want to hear from you one way or the other, and you have to be honest with them. So, if you think this is a bad deal, and you’re going to be hurt, we’ve got to hear that in open session and deal with it, because that’s what we’re here to do, we’re here to respond to the concerns of everybody around this table.”

Another mediator would take this intervention one step further, by not only questioning the community, but also Allied Plating and the City.

(I would) meet separately with the community immediately to talk through this issue of whether in the end they want to settle for something rather than nothing, and then meet with the City and the Allied Plating (...) and the State to raise those concerns again and see if we can get any movement on them. [...]

I wouldn't say to Allied and the City and the State that the community is going more likely than not to go along with the deal. I'd say to them, 'There are some serious concerns, and here's what they are. And the question is, before the last meeting, whether you can think of any ways of meeting any of these concerns, or not. Because if you don't, there's always the risk that the community is going to bolt at the last moment and you're so close.' Sometimes that's enough to prompt some movement.

In working with other parties in caucus about this issue, this mediator goes one step beyond the previous mediator, who would urge the Community to express their interests and reservations. This mediator would encourage Allied Plating, the City and the State EPA to consider providing more concessions to the community by casting doubt on how the Community will react to the final terms of the agreement. In this way, he would do what the first mediator would not and reopen the issue with the EPA, Allied Plating, and the City. He would raise the concerns on behalf of the Community, thereby legitimating those concerns, and question the other parties in hopes of getting them to move towards the Community's requests. His reasoning that otherwise the Community could bolt shows that he would raise concerns with the other parties in order to get a solution for the group as a whole, and not to specifically help the Community to gain more.

However, if the Community is willing to accept the agreement even if they don't like it and even if he thinks they can get better concessions, his responsibility is not to suggest they have better options but to make sure they know the consequences of this choice.

That's an easy one for me. It's not my decision. If the community's going to roll over and play dead, I would hope that before we got to this point, I've helped them (...) get a technical expert, maybe we've even talked about having a lawyer advise them on things, and maybe they've got someone who's talked to them a couple of times – maybe not, maybe they're just flying by themselves.

But in the end, if they come to me and say, 'Screw it. We're not getting even 10% of what we said we wanted, but we're getting something, and that's better than nothing,' that's their choice. Assuming I've done a good job of having them

be as informed as they can be in this process. It's not my job to say, 'There's going to be a sale tomorrow, just hold on, don't buy that now.' That's not my job. My job is to ask a couple questions: 'Are you sure?' 'Have you thought about whether there's a way to get any of these things other than here?' And if they say, 'No,' then they get the deal that they've negotiated for."

This mediator makes it clear here that he does not view his role as mentioning better options to the parties even if he is aware of them.

Another mediator with a similar approach raised the question of whether the length of the process was contributing to the Community representatives' readiness to get a deal with which they are unsatisfied. If parties were willing to agree to a solution they did not feel good about simply because they were tired or sick of participating, this mediator would suggest that the process be delayed.

If people are just exhausted and have process fatigue, I wouldn't suggest them to give in, I'd say, 'Okay, if you're feeling exhausted, let's take a two month break.' [...] If someone were to come and go, (...) 'I just don't want to come to any more meetings – I can't stand this.' Then I'd go, 'Okay well separate that out from your analysis about whether you could get a better alternative some other way.' [...] If they're just process fatigued-out. I'd probably negotiate a hiatus.

This suggestion of a break in the process would include exploring how the delay might affect other parties' decisions.

If (other parties) that want a quick resolution have more alternatives and they're going to go anyway, then that's something that the process fatigue people need to consider as part of the BATNA, that you have to strike while the iron's hot or the opportunity goes away because maybe there's a legislative deadline. [...] If (...) one of the parties' (interests) is timeliness, like a developer has holding costs and they just have to move forward, and having a hiatus really costs them a lot of money or whatever, then it's a whole different scene.

Then what you do is you bring the business guys together with the neighborhoods and you say, 'Okay (...) here's what's going on: You have holding costs, these people are fatigued and their kids need some attention and these are people who aren't getting paid (...). What are we going to do here? Talk to each other.' I bring them into a room and let them own the problem.

Another mediator also would encourage the community to think through their options and present them to the other side, but she would go farther in getting the community to think about the implications of those options. She would not go so far as to say that they should not take an agreement, but she would analyze and evaluate the tradeoffs with them.

I would ask the community people to express their views about all this stuff very strongly in the final meeting. And I would tell them not to go along with something if they thought it was really unfair and they thought they were not going to be happy with it – reality testing stuff. [...] And I would really strongly urge them to share that and to think and not to go along with it if they feel that they have a right to a monitoring committee and some compensation and all those things.

This mediator would draw upon her own familiarity with these types of situations in analyzing with parties the concessions they are asking for.

They are very standard in settings like this. That's the kind of thing I would tell them. I would say, 'Not everyone gets them, but they are standard enough that if you come in and show (...) (or) find illustrations where this has happened before...

Here's a non-neutral intervention: I would give them time – I'd say, 'Let's postpone the next meeting, for you to get some more hard data on this kind of stuff.'

It is interesting that this mediator considers delaying the process to be a non-neutral intervention, as contrasted with the previous mediator's suggestion to delay the process. The previous mediator may have seen this as still a neutral intervention because she felt the other parties in the negotiation could act on their alternatives if they opposed a delay, and that the parties wanting to delay would have to take this into account in deciding whether to postpone. The latter mediator would couch the delay in terms of being in the other parties' best interests.

I would tell the other side, 'We're very close, but there are elements of this that the community people feel are not fair and they are having doubts about whether to go along with it. So if you do want to work something out with the community we're going to have to take a time out, we're going to have to work on some other issues.'

And then, (...) I don't think I would 'call off' the settlement. If they are inclined to do something rather than nothing I would work through with them – decision trees, all kinds of things – what the likelihood is of what they would get if they did go along with the settlement. And of course the truth is they might not get some of this stuff in a formal EPA hearing. They might not, and so there would be tradeoffs.

Just on the facts that you've given (...), I would say to them, 'fifteen new jobs, and the promise of potentially more anti-pollution technology is not enough to justify a lot more harm to the community.' [...] I would say something like, 'We're not dealing with 300 new jobs, which is the kind of thing that would probably make the economic development stuff cause some people to, you know.' So this is decision tree – I would help them analyze the tradeoffs and all of that.

This mediator sees her suggestion that the jobs the Community would gain would not be worth the pollution they would face as falling within the realm of analysis and not consulting.

I wouldn't say, 'It's not a good tradeoff for you.' I would say, 'What you think that you could get is not unusual. There have been settings like yours in which people have gotten places on monitoring committees and some compensation.' Their problem from what you've told me here is there's been no epidemiological proof of injury yet, so we're mostly dealing with monitoring. [...]

In discussing the tradeoffs that the Community representatives might want to make, this mediator would be careful not to advise the parties what to do.

Although her interventions described above (particularly that what the company is offering “‘is not enough to justify a lot more harm to the community’”) go farther than other respondents' interventions, they remain for her within an effort to get the parties to think through what tradeoffs they will choose to make. She clarifies how she would couch this statement:

I would say, 'If (these concessions are) something that's very important to you, I will help you keep the process going to try to get that. But ultimately, in the end, you're going to have to decide on your own as a group whether to go along with it or not.' As a lawyer... I might (...) tell them to think about going along with a settlement that's not an absolutely binding settlement, that still leaves them some opportunity for challenges, contingent agreements – 'if x then y'. So if it turns out that the expansion causes something, then everything's off.

I would go so far as to propose some language in the agreement that might make an agreement, if thought they were not totally happy with, terminable under certain conditions. That's how I use my legal expertise. When I (hear) people (say), 'Well, I think we should go along because I'm not sure we could do any better, but we might.' Let's take a look at the conditions under which we could make this agreement terminable.

This mediator's comments raise the question of whether parties who are unsure how they will fare in an agreement over time would do better to have a mediator with sufficient legal familiarity to propose these kinds of options. For example, members of a community in a similar situation would most likely want a mediator like her to manage the process if they knew that eventually she would help them evaluate the tradeoffs between the plant expansion and economic development gains.

The mediator who said that he would tell the Community representatives in the third scenario to not to take the agreement goes farther in suggesting possible courses of action than the previous mediator.

I'd tell them I don't think they should take an agreement. [...] They're starting to think they should settle for something rather than nothing. I would say that I didn't think that they should take this. I could see that there were better gains to be made.

He would make this comment because he believes he would not be fulfilling his role as a mediator if he did not share information he knew.

I think it would be inappropriate for the mediator if (he or she) knew what the other precedents were, and felt that the State and the EPA and the City could come up with more, or that the group could sue successfully, and get more. If you knew those things, and then sat down, and looked the group in the eye and said, 'Well, you know, you've been at the table all this time, you're doing the best you

can do, okay (we have an agreement).’ I think that’s wrong. I don’t think that a mediator should do that.

I don’t have a lot of respect for the mediator who says, ‘It’s my business not to know any of this stuff, and I stay out of all that substance. What they were telling me was that they participated in good faith and this is what they feel they’re comfortable with, and the State said that and the City said that. I’ve lived up to my responsibility.’

This mediator would not respect that approach because he feels it would be shirking “the responsibility to be involved substantively in the issue as it grows. The responsibility to learn, and the responsibility to help create options, to (...) go beyond that role (...) that says, ‘My terrain is the process and it stops there.’”

A mediator who chooses to get less involved in the substance of an agreement could reply that by advising the community to not take this agreement, this respondent is in fact making a statement based on an evaluation of the outcome, and that this is outside of the role of the mediator. This mediator would make the case that this intervention is in fact within his role by saying, “The art of developing a good agreement – that it is fair, wise, efficient and stable, lies in getting involved and knowing about messy details, and knowing about substance. Mediators have a responsibility to learn about the terrain.”

One aspect of learning the terrain may be to understand the history of past decisions and who has historically not gained from them. Another mediator interviewed responded to the third scenario with a concern about “situations when people decide to go along with it, even when they don’t feel they’re getting a good deal.”

This statement would concern me. I would wonder what the reasons were. Is it like spousal abuse where the victim accepts the abuse because she or he is afraid of the consequences of doing something else or is it a case of the ignorance of not knowing what else to do? There’s something wrong about the poor community being oppressed yet again, or taken advantage of again. I would wonder if this is an Environmental Justice issue, and (would) question, ‘What is the fallback for the community? What would happen if they didn’t have any deal at all? Would it

be worse for them, or are they getting more than they would get if there was no process at all in place?’

Then I would want to ask myself, ‘Is the process itself in any way responsible for diminishing what the community could have gotten out of a settlement? And, ‘If they had not gone through this process, could they have gotten more in some other venue?’

She would worry about the process being responsible for decreasing what the Community could gain because:

People can place too much faith in a consensus-based process. They expect that parties will come up with a reasonable, fair outcome, because they assume that all the parties are there working in good faith. Then when one or more parties use the process as an opportunity to “defeat” the other side or do an end run around them, especially when the most directly affected parties are excluded, then I feel there has been a misuse of the consensus-based process.

We can read from her statement that even though mediation itself is not a means of achieving justice in the legal sense, parties will believe in the fairness of the outcome, and this should concern the mediator.

Respondents who talked about the responsibility to generate a variety of options and to maximize parties’ joint gains as something for which they are responsible seemed to look at maximizing joint gains as a process responsibility and not an evaluation of the outcome in and of itself. The mediator who felt maximizing joint gains was not a priority explained that, practically, it was not possible to do this, and additionally it was not appropriate because it would require him to evaluate the mediation’s outcome.

When an agreement is barely acceptable to a certain party, as it was in the third “Baxter” scenario, mediators interviewed discussed a range of responses, some particularly due to the fact that the reluctant party was weaker in terms of other aspects like technical knowledge. Although different interpretations of the “Baxter” scenario can account for part of the range of responses, there still seems to be genuine divergence on

how far to push on generating options to an agreement if the mediator perceives that a party is not getting as much as they feel it could. While some respondents identified the situation as an agreement as long as the reluctant community members had thought through their options, others would have gotten more involved in analyzing the tradeoffs associated with accepting the agreement to the point of recommending against taking the agreement if they were unhappy with it.

In the “Baxter” scenario, the Community could conceivably have gained more with a mediator who advised them not to take an agreement just yet, to explore their options, and to help them think through – to the point of evaluating options with them – the tradeoffs the plant expansion would cause, than with a mediator who considered this to be consensus. This approach could also benefit all parties by creating an agreement that increases the gains for all (though more significantly for some) and that may have a better chance of being sustained by all the parties.

Working with parties to analyze and evaluate the tradeoffs related to a potential agreement carries a number of risks. One risk is that the party the mediator is helping think through potential solutions could come to see the mediator as a consultant, and other parties around the table could as well. Another risk is that options the party proposes could look like they are coming from the mediator. Finally, because of the mediator’s intervention the agreement produced may not reflect real power relationships among the parties.

The mediators who felt that this was consensus felt that if the EPA hadn’t already supported the concessions the Community sought, they weren’t going to, and since EPA had the decision making power, the Community had little alternative to the agreement

they found unsatisfactory. In accepting this reluctant consensus, mediators may risk walking away from the potential of an agreement that could better serve everyone. However, considering a party's reluctant acceptance to be the minimum necessary for an agreement does have the benefit of being more firmly grounded in the parties' perception of the alternatives and options and in the reality of the situation. The agreement would be reached more quickly and may more closely reflect the power balance between parties. The wide range of responses to the third "Baxter" scenario indicate that if mediators make the same decisions in their own practice that they said they would make in the scenario, a weaker party could fare very differently depending on the mediator's approach.

Summary of findings

Chapter 9

The responses in the preceding five chapters demonstrate mediators' responses to various inequalities in public disputes, ranging from lightly to heavily interventionist. On one end of the range, actions that I categorize as "lightly interventionist" include:

- Accepting that stakeholders themselves decide who should participate in the negotiation;
- Improving communication among parties, including providing information about interest-based negotiation;
- Questioning parties to help them identify their technical needs and where they might get funding and assistance;
- Questioning parties about their alternatives and casting doubt on those alternatives; and
- Raising questions about options without making suggestions.

Mediators made the case for these approaches by explaining that they were "process-oriented," that it was not their responsibility to think through better alternatives with parties, and that the parties themselves should be the ones to define the information needed, who should be at the table, what their alternatives are and what agreements could be possible.

Mediators interviewed also spoke about actions that I categorize as "heavily interventionist", including:

- Refusing to mediate the process if certain interests that the mediator feels should be represented are not;
- Refusing to mediate if parties cannot adequately represent themselves;
- Helping a party identify potential funding for technical advisors and providing a reference on their behalf to a potential funder;
- Asking questions until the parties recognize better types of alternatives to the negotiated agreement that the mediator thinks they might have; and
- Evaluating with a party the tradeoffs related to a potential agreement and recommending against an agreement if the mediator sees gains to be made.

Mediators justified these interventions by clarifying that they were responsible for ensuring the representation of all interests affected by the dispute or policy decision, for making it possible for parties to “fully participate”, for clarifying existing power relationships and parties’ real alternatives to a negotiation, and for working to maximize parties’ joint gains.

Areas of substantial divergence

I found that mediators interviewed disagreed substantially about the mediator’s appropriate role in deciding what interests need to be at the table, in providing information to parties on finding technical assistance, and in analyzing an emerging agreement.

Some mediators interviewed would leave selection of the participants up to the stakeholders who invited the mediator to manage the process, while others would not accept to mediate a process that did not include the range of stakeholders that the mediator thought should be included. A more moderate approach among the two involved actively questioning stakeholders about who should participate in the agreement, but not proposing or requiring that certain interests be included.

One explanation for this divergence may be that the mediator’s responsibility varies according to the degree that the process is intended to be seen as legitimate by all those it affects. The mediators who spoke about the responsibility to identify missing categories of stakeholders, particularly underserved interests, did so in the context of dialogues to determine future policy. The stakeholders involved represented up to thousands of people, and the goal of the process seemed to be to get the widest

representation possible of people who would be affected by or involved in implementing the policy.

The mediators who spoke of following the parties' selection of participants did so in the context of processes that revolved around particular siting or land-use disputes. Although all the parties weren't necessarily well-defined, an agreement reached would affect people in a small, definable geographical area: a city neighborhood or a town's coastal zone.

The degree to which a mediator intervenes in the selection of parties can have a real impact on the outcome by changing the balance of interests and needs among the participants as compared to what the balance would be if the stakeholders themselves decided the participants. For this reason, the difference among these mediators could result in a real difference in both the outcome and the impact on groups affected by the dispute or policy decision.

Mediators differed substantially as well on the extent to which they would provide information for parties on how to get technical assistance. Some mediators interviewed would make one party's need for technical assistance clear to the group of stakeholders and place the responsibility for responding to that need on the group. Other mediators would go farther by additionally providing the party in need of technical assistance with names of possible funding sources, and even serving as a reference to the party or writing a grant for assistance if the goal of the grant was to serve the process as a whole and not just one party.

Mediators who would make the group "own" the problem would emphasize to the other parties that ensuring that a party lacking in technical expertise had the capacity to

understand the technical discussions related to the dispute would be in the group's best interest. If parties around the table were not able or willing to find funding for the party in need of technical expertise, it seemed that some mediators interviewed would not independently work with the party to find technical assistance. At least one mediator said that while resources for technical assistance have always been limited, they have never been too limited.

Mediators who went farther by helping the party needing technical assistance to identify funders made the case for this intervention as being a way of moving the process forward. Both mediators who talked about potentially serving as a reference or writing a "process-oriented" grant felt their action was not on behalf of a particular party but on behalf of the process as a whole. This argument is in a sense an extension of the argument made directly to other parties that getting technical assistance for the one party would be in everyone's best interest.

The extra intervention in terms of working with the party to get technical assistance arguably would lead to a process in which that party could better follow the technical aspects of the negotiation. Although some mediators may not see this as within their role, those who did would argue that the process is better for it.

When faced with a party considering going along with an agreement they do not find desirable, mediators' responses ranged from declaring that an agreement had been reached to telling the reluctant party not to take the agreement. The difference seemed to revolve around whether they thought the parties could get a better solution, and whether they considered it within their role to get involved in the details of a potential agreement.

Mediators who felt that, if the parties had thought through their decision and they were willing to go with something rather than nothing, then consensus had been reached, based this decision on their sense that if this problem was coming up at the end of the process, then all the options must have been exhausted. To revisit options that other parties had already rejected would be to try to press the other parties to give more than they had decided to, and therefore would not be realistic, according to these mediators.

Mediators who would analyze a party's tradeoffs in an emerging agreement to the point of saying that the gains the party could get are not very strong or who would recommend against an agreement because they would be settling for something rather than nothing, focused on the dissatisfaction of the reluctant party, not existing power relations or alternatives. In getting the parties to analyze their options, one mediator would refer to the fact that other communities have gotten more. Another mediator would recommend against going along with a solution because he could see more gains to be made.

The outcome for the reluctant party would arguably differ greatly if the first group of mediators managed the process than if the latter group did. A mediator who got involved in the details and analysis of the emerging agreement would likely provide an opportunity for a reluctant party to gain more in an agreement. Mediators who would not get involved in analyzing the agreement but rather would take a party's reluctant acceptance to still be acceptance and therefore an agreement, would more likely see an agreement produced that reflects the existing balance of power among the parties.

Areas of no apparent divergence

Among the interviewees, I did not find anyone who disagreed that mediators should disclose to the entire group their interventions with one party, nor that a mediator should not recommend a specific course of action to a party or a specific solution to the group of parties. In addition, a number of interviewees said that they felt uncomfortable declaring what would be inappropriate for other mediators to do.

A number of mediators highlighted the importance of telling the entire group about interventions that the mediator had done or was planning to do with certain parties. Some mediators called this, “being transparent” while others just described making sure that all parties knew of interventions by the mediator with one or a few parties. This disclosure could take the form of a general comment such as, “I will offer coaching on interest-based negotiation skills to any party and all parties are welcome to ask for this coaching,” to more specific “I have worked with this party to help them identify ways of getting technical assistance.” Disclosure could also take the form of actions and not statements, according to some mediators. These mediators felt that it would be obvious that they were offering process assistance and interventions, such as thinking through their alternatives, to all parties, and therefore did not need to make an announcement.

The general thought seemed to be that if parties were aware of the nature of a mediator’s intervention with a particular party, they would let the mediator know if they considered this intervention to be inappropriate. A mediator would then gauge his or her interventions based on any opposition from the parties, so as not to risk intervening in a way that would be considered unacceptable by the group. In this way, a more accepting group could give the mediator permission to intervene more heavily than a less accepting group would allow.

If a mediator responds to disputes characterized by inequalities in one of the ways I categorize as “highly interventionist,” then using disclosure to the other parties as a way of getting permission for these interventions makes a variety of interventions possible that standard guidelines might limit. A group of stakeholders might be more lenient than general guidelines could be, meaning that the degree to which a mediator intervenes in a given mediation may vary with this leniency. A few mediators pointed out that groups were likely to be more lenient with certain highly interventionist actions if the mediator had earned the parties’ trust or was charismatic.

It was not clear, however, how much this type of disclosure, either in word or in action, can really inform parties about the implications of the interventions, or whether their opportunities to disagree with the mediator are clear to them. Because the mediator is the “process expert,” a party who is unsure about an intervention that was disclosed might not oppose it because they are not sure of its implications and because they are hesitant to question the mediator’s process choices.

Mediators also all agreed that it would be inappropriate and outside their role to recommend that a party take a specific course of action. Respondents identified that as the job of an advocate for or consultant to the party and inconsistent with their role of working impartially with all parties. However, given the range of responses on analyzing potential agreements with parties, providing information on technical assistance available, and thinking through better alternatives to the negotiated agreement, it seems that mediators would disagree where the line between mediator or advocate actually lies.

The mediator who felt it was appropriate for him to recommend against a particular action separated this from recommending for a particular action, because

recommending for a particular action would close the discussion off to other options whereas recommending against a particular solution would still leave the parties free to explore and choose other options. Although no mediator explicitly challenged this assertion, and I did not raise it in subsequent interviews, it seems that mediators like the one who felt it was not his job to tell a party that they could get something more if they held out (he likened it to saying, “There’s a sale tomorrow, don’t buy that now.”) could consider recommending against a solution to be in fact acting as a party’s consultant and not the group’s mediator.

Although these and other mediators interviewed here differ strongly on certain points, many mediators interviewed were very reluctant to talk about whether what they considered inappropriate and appropriate should apply to other mediators. Some of the quotes included in earlier chapters express this reluctance. Other mediators spoke comfortably about what they thought were better practices, or what style they felt best about employing, but did not think that mediators who did not employ what they considered to be best practices were necessarily acting inappropriately. They described a lot of room between “best practice” and “unethical”.

One mediator did characterize mediators who did not get involved in some of the details of the dispute or policy under discussion to be too lightly interventionist. However, even he felt that as long as the process was accessible to all parties, including to those weaker in terms of resources and technical expertise, and the mediator had disclosed his or her approach to the parties, then that mediator would be acting appropriately. Given these comments, there seems to be not only a tolerance of but also an appreciation for different approaches among mediators.

Implications

Chapter 10

In the preceding chapters, I have sketched some of the potential risks and benefits to mediators and weaker parties implied by interviewees' range of responses to inequalities among parties in public disputes. As long as these significant differences in practice persist, weaker parties run the risk of participating in a process where their weaknesses will not be compensated to the extent they would with another mediator. When mediators disagree on how to respond to inequalities among parties, weaker parties will potentially fare differently depending on the mediators' approach and will have more or less of an opportunity to influence and contribute to the eventual agreement. This means that potential clients of mediation do not have a consistent way of knowing what it is they are getting in to. Weaker parties risk buying into a process where they will have less opportunity to contribute than they think they will have.

Part of the drive behind ethical guidelines has been a desire for quality control in order to avoid disappointing parties and turning them off to future mediation processes.¹⁸ People concerned with developing ethical guidelines for public disputes mediators would do well to address the range communicated here. Several responses to these findings are possible.

One potential lesson to be drawn from these findings is that mediators do not need ethical or practice guidelines specific to public disputes characterized by inequalities. A number of mediators interviewed made the case for their interventions in very practical terms: they were trying to move the process towards an agreement, and working with weaker parties was a necessary part of moving forward. A mediator summarized this

¹⁸ Daniel Bowling, personal communication, March 6, 2003.

reasoning well in a quote in Chapter 7: “They’re not hiring me for a good conversation, they want to resolve the issue, so therefore all of the interventions and activities that I do are to lead people to closure.” If the primary justification for process interventions is to move the process forward to get an agreement that will last, then arriving at that agreement may be the only criteria by which a process needs to be measured.

Many of the interventions mediators discussed in response to inequalities among parties can indeed be justified solely for purposes of getting an agreement that will last. These include making sure all parties fully participate (or else they may say no at the end, and excluded parties could hinder implementation of the agreement), think through their alternatives (or parties to the agreement may later determine it is not in their best interest to uphold it), and understand the technical information being presented (or the process may be slowed or stalled). In the absence of fixed guidelines for disputes characterized by inequalities, the breadth of responses discussed here would be acceptable as long as they contributed to moving the process forward.

The problem with making arriving at an agreement the only criteria for measuring a process is that it overlooks other goals. One risk of this approach is that parties may be encouraged to revise down their expectations for alternatives to the process. Another risk is that parties may not be “noisy” enough to be included if the only criteria is whether excluding them would undermine a potential agreement. The mediators in Chapter 4 who felt certain underserved populations needed to be represented in policy dialogues acted on a principle of including all affected interests, not just those who could undo an agreement. Still another risk is that the process can move forward without some

participants understanding what is going on. The mediator describing the difficulties one neighborhood represented had in keeping up with the group demonstrated this.

For this reason, the case can be made for broad ethical guidelines that more specifically state what interventions are appropriate in public disputes involving inequalities. As discussed in Chapter 3, general ethical guidelines for mediators do exist, and the Association for Conflict Resolution Standards Committee has recently begun to revise them. After the Standards Committee has revised general guidelines, sections of the Association, including the Environmental/Public Policy section, will have the opportunity to craft guidelines specific to their types of disputes.¹⁹

Given the range of responses in this study, people interested in crafting ethical guidelines for public disputes mediators could take a number of approaches, including embracing the range through very general guidelines, endorsing only part of the range, or creating guidelines only for the aspects of the range on which mediators agree while providing no guidelines for areas of disagreement.

While guidelines that embrace the range would be responding to the reality that these interviewees depict, it is hard to see how they could be specific enough to be useful in guiding mediators who are unsure whether their actions are appropriate. Ethical codes that approve of only some of the interventions described here while disapproving of others would limit the field and exclude interventions now deemed acceptable by some experienced public disputes mediators. Guidelines that address only the areas of agreement among mediators could be useful in affirming a common sense of some aspects of the field, but would do little to illuminate appropriate actions in many of the situations involving inequalities. Indeed, this latter type of guideline would likely

¹⁹ Sharon Press, personal communication, February 25, 2003

identify very obvious values – such as mediators should not recommend a specific course of action to parties – but leave mediators to work out their own sense of what is ethical in many problems where mediators disagree on appropriate interventions. It would hardly improve on the present situation.

If guidelines for public disputes mediators were to approve only some of the interventions described here, the fact that this range does exist among experienced mediators suggests that experienced practitioners would need to discuss these issues before making a decision that an overwhelming majority of mediators could accept. It is possible that the range depicted here does not represent the actual range among experienced practitioners. An honest discussion of these issues would clarify the significance of this range and how “far apart” most mediators really are. This discussion could take the form of a conference or series of meetings and working papers.

This intervention would take time and may not be possible until the Association for Conflict Resolution Standards committee has revised the guidelines for all mediators. In the meantime, I suggest a third response to the findings in this study: that the field of public disputes mediation is not yet ready for ethical guidelines that specify appropriate and inappropriate actions in disputes involving inequalities among the parties. I recommend that people interested in creating ethical guidelines should agree on what aspects of their approach mediators should disclose to parties.

By disclosing certain approaches consistently, mediators would be giving the parties an opportunity to decide the extent to which they want a mediator to intervene in the process, and in what ways. The range of responses discussed in this study provide a starting point for what could or should be disclosed. A number of mediators interviewed

already do disclose some of these approaches. For example, the mediator of the transportation dialogue in Chapter 4 made it clear to the convenor of the dialogue that their team would insist on the representation of certain stakeholder interests. However, it did not become apparent in my interviews that respondents consistently disclosed any other aspects of their approach.

To encourage consistent disclosure, a group of mediators responsible for ethical guidelines would produce a list of what to disclose, and to what extent. Based on this study, I strongly recommend that mediators disclose how they will select parties, how they will intervene if parties are not fully participating, what they will do to lead parties to get the technical assistance they need, how they will get parties to think of their alternatives to the process, and to what extent they will involve themselves in the details of an eventual agreement. They should provide clients with examples of how they will react and how far they feel comfortable in intervening in the process and the substance of the dispute.

I understand that most mediators' actions greatly depend on the context of the dispute. Nearly every mediator interviewed stressed that the extent to which they feel comfortable intervening depends greatly on each particular situation. A mediator may have trouble foreseeing before the process starts the degree to which he or she will intervene. However, by discussing the potential limits of their intervention, they can provide a way for parties to compare across mediators and contexts.

Drawbacks to this approach mainly relate to how the recipients of this information will react to it. A potential convenor or party to a process could be scared off by the prospect of a heavily interventionist approach, even if they would actually accept the

same types of interventions when done gradually during the process. Another potential drawback is that even if a mediator discloses his or her approach, it is not clear that the party will know the implication of the intervention the mediator is talking about.

Despite these challenges, guidelines for disclosure would be valuable in that they would allow parties to better understand how they can expect mediators to handle inequalities among them. Increased disclosure would give parties a better sense of what to expect, as well as show them that because there are a range of ways mediators in which respond to inequalities, if one mediator's style does not work for them, another's might.

Future questions to consider

Mediators of public disputes would also do well to understand how their responses to inequalities among parties differ from other mediators' approaches. A number of research questions could improve mediators' understanding of some of the issues raised in this study, including:

- What percentage of mediators feels comfortable with the interventions on the extremes of each range described here? What are their explanations and their rationales? Are the rationales captured here common?
- How do differences in interventions affect who gains and loses in disputes characterized by inequalities? What gains and losses are associated with this?
- What other professions rely on ethical guidelines to cover a range of approaches to practice? What can we learn from them?

These questions would build on the findings in this study by clarifying how a larger number of mediators' interventions fit along the range of responses presented here and by identifying other ways in which standards of practice and a diversity of approaches can coexist.

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Interview Protocol and Questions

Interview protocol: I would like to especially explore examples of cases you've handled. I realize that this may be sensitive information. I will write the summary and analysis of interview responses in such a way that neither mediators nor the cases they have mediated are identifiable. I will provide you with sections of my writeup that you have contributed to in order for you to approve your responses, so that I can be assured that you feel your identity and the identity of your cases have been kept confidential.

Can share with JFF and LES without name but before attribution cut out (if even applicable)?

Questions to start with:

1. Let's consider a case you've handled in which:
 - One or more of the parties lacks the negotiation skills and/or technical background to represent their interests or understand the implications of a decision
 - One or more of the parties does not have the financial resources to adequately represent themselves (including attending the meetings and taking time to prepare)
 - One or more parties who will be affected by the proceedings (including future generations) is not included in the discussions
 - One or more of the parties is not aware of legal processes and alternatives available to them
 - One or more parties traditionally has less access to public decision making, perhaps because of language barriers, geographical barriers, or mistrust of government agencies
2. What, if anything, in hindsight do you think you ought not to have done? Anything you think you should have done but didn't? Anything that you think other mediators would find objectionable?
 - [Goal is to understand how they define the case, then what they see as ethically problematic.]
 - Has anything given you an "ethical twinge"?
 - What have you been proud of?

Follow-up questions include:

- What is important to you to take into account when mediating disputes characterized by power imbalances that you would not need to take into account in more balanced cases?
- Under what conditions would you act differently?
- What choices have made you uneasy/ "kept you up at night"? OR What would worry you about your approach?
- Have you ever found it harder to act in a way you thought appropriate because the dispute was characterized by significant power imbalances?
- What treatment can a party who feels less powerful expect from you?
- If you believed that a party was missing an important piece of information or an important issue, how would you respond; how far would you go?
- Do you believe that challenging the parties – probing, questioning them – is part of your job?
 - If you believed that a party would do well to explore a certain line of questions, would you suggest that (in private)?
 - How far would you go?

- Do you believe that assisting the parties (in many ways: how?) is part of your job?
- What is your own role conception?
- Under what circumstances would you not take on a case, and why?
- What do you consider going beyond your role of the mediator/ Why?
- What tradeoffs do you make among the principles that are important to you (ie informed consent, neutrality, etc.)?
- What impact does your action/intervention have on the weaker party? On the other parties to the dispute?
- If another mediator felt that this action improved a party's chances OR changed the relationships among parties, how would you explain this action to them? OR make the case for this action to them?
- How would you persuade a skeptic who thought this wasn't the right thing to do?
 - How would you make the case to them, argue, persuade?

Other, less frequently used follow-up questions include:

- To what extent do you try to meet with the parties in caucus, privately, before or during the mediation (and to what ends do you do that)?
- If you meet with parties "in caucus, separately," in cases involving inequalities, what might you do differently with one party than from another?
- What practices (or principles) did you employ before that you don't employ any more? (Ian)
- What are the wrong practices?
- What principle guides you in that behavior?
- What ethical dilemmas have you had? Why?
- When has a mediator gone from not very good practice to unethical practice?
- Have you ever done something that you felt favored one of the parties?
- When do they shift from best practices to good practices to ethical guidelines to ethical prohibition? What's the line where they cross there?

Interview Scenario

The city of “Baxter” is an industrial center in a region that includes a major port and the state’s primary financial district. For many years, the city has housed basic industrial processes important to the region, including a major oil refinery, railroad yard, and a number of chemicals and metals manufacturers. The cost of housing in “Baxter” is lower than the rest of the region, and the majority of residents are unable to afford housing elsewhere. The population of “Baxter” is a mix of new Latino and Asian immigrants, more established families of earlier immigrants, and long-standing African-American and white families, many descendants of Depression-era migrants from the South and Midwest.

Allied Plating is a metal plating plant, was sited in “Baxter” during World War II, and is one of the oldest businesses in “Baxter”. Allied’s facilities abut a residential neighborhood. State E regulators have found Allied Plating to be exceeding state and federal pollution levels five times in the last three years for two chemicals: chromium and cadmium. Both are known carcinogens. Allied Plating has been fined each time, and continues to be monitored. No documented illnesses among residents have been directly linked to the chemicals released.

Allied Plating has recently applied to the State EPA for a permit to expand its operations by 10% onto non-developed land the company already owns. The expansion will create about 15 more jobs, and the company has said the expansion is critical to their financial stability. Upon hearing news of this permit request, local residents have protested the expansion, fearing that increasing Allied Plating size will increase the number of times each year the company exceeds limits on air toxics. Allied Plating representatives have contended that by expanding operations, they will eventually be able to afford better antipollution technology, therefore decreasing the risk to the community. The State EPA has not yet made its findings or decision known, but the Mayor of “Baxter” has been quoted as saying that both economic development opportunities and residents’ health are important to the city.

Because past permitting decisions in other cities have been highly contentious, the State EPA has convened a consensus-based advisory effort with relevant stakeholders and has asked you to facilitate the process. A 15-person advisory committee has already been selected based on a careful conflict assessment conducted by a professional neutral who has now handed the mediation off to you. Five of the members of the advisory committee are from the community, and most are older women of color. The other stakeholder groups are primarily represented by younger white men.

Questions

1. Immediately after the first meeting of the advisory committee, some residents who have called this decision a question of Environmental Justice say privately to the mediator that they don't feel it is worth coming back because even though they are all

educated, they clearly don't have the technical background or the money to buy the scientific help that the industry and some of the other stakeholders do. What do you do?

2. As the advisory committee continues to meet, you begin to hear from the representatives of the plating company and the city of "Baxter" that they have come to an agreement together on compensation for the expansion, and they have begun communicating with the EPA to show that "the city is behind the expansion." Community representatives to the negotiation are unaware of this development, but the "agreement" being promoted by the city runs counter to some of the interests expressed by the neighborhood representatives. You feel that the city and Allied Plating are working to exclude the less powerful neighborhood representatives. What do you do?

3. At the second to last advisory committee meeting, before the final meeting in which recommendations will be presented to the State E, the mediator begins to address what appears to be an emerging consensus on a proposal to the State. At one point, a community resident who has contended all along that the community is owed compensation for the health risk burden that they bear disproportionately, takes the mediator aside and says that they are inclined to go along even though they know that they are not getting a very good deal.

She knows through the grapevine that other Environmental Justice groups have not only gotten promises of more money to make neighborhood improvements of various kinds, but that other groups have been able to get agreements to sit on formal monitoring panels, and scholarships to send community people to get appropriate monitoring skills and credentials. She has proposed these kinds of compensation measures, but Allied Plating has refused to consider them because of the cost, and the representatives from the State and City have been reluctant to create a standing community post on a monitoring board. The community resident thinks the company, State, and City's reactions are not fair and show they are not making a good faith effort. However, she and other community residents have started to think they should settle for something rather than nothing. What would you do?