

3-15-1999

## Challenges in Multiparty Environmental Mediation

Daniel E. Louis

Follow this and additional works at: <https://digitalcommons.pepperdine.edu/naalj>



Part of the [Dispute Resolution and Arbitration Commons](#), and the [Environmental Law Commons](#)

---

### Recommended Citation

Daniel E. Louis, *Challenges in Multiparty Environmental Mediation*, 19 J. Nat'l Ass'n Admin. L. Judges. (1999)  
available at <https://digitalcommons.pepperdine.edu/naalj/vol19/iss1/6>

This Article is brought to you for free and open access by the Caruso School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Journal of the National Association of Administrative Law Judiciary by an authorized editor of Pepperdine Digital Commons. For more information, please contact [bailey.berry@pepperdine.edu](mailto:bailey.berry@pepperdine.edu).

# CHALLENGES IN MULTIPARTY ENVIRONMENTAL MEDIATION

by  
Daniel E. Louis\*

## TABLE OF CONTENTS

CHALLENGES IN MULTIPARTY ENVIRONMENTAL MEDIATION .....	79
Prologue .....	79
Introduction .....	79
Mediation Styles .....	83
The Doubt and Dissonance Style .....	84
Interest-Based Option Generation Style .....	88
1. Informed Consent to Process .....	88
2. Sharing Perspectives .....	89
3. Common Ground, Common Interest, Interdependence and Points of Agreement .....	89
4. Issues for Discussion .....	89
5. Collecting and Reviewing Substantive Information .....	90
6. Interests, Intentions and Outcomes .....	90
7. Inventing Options .....	91
8. Option Evaluation .....	91
9. Integration and Implementation .....	92

---

\*The author wishes to acknowledge the Mediation Assistance Program at the Government Law Center, Albany Law School, from which portions of this material was adapted and modified, and other resources as well, including various materials from the United States Environmental Protection Agency, the Federal Mediation and Conciliation Service, personal conversations with various ADR specialists and the author's published materials. Daniel E. Louis, Chief Administrative Law Judge, Office of Hearings and Mediation Services, New York State Department of Environmental Conservation, 50 Wolf Road, Albany, New York 12233-1550 telephone: 518/457-3468, fax: 518/485-7714, web site: <<http://www.dec.state.ny.us/ohms>>

**TABLE OF CONTENTS (con't)**

The Hypothesis Generation and Testing Style . . . . . 92

- 1. Normalization . . . . . 94
- 2. Mutualization . . . . . 94
- 3. Strategic Summarization . . . . . 94
  - a. Restatement . . . . . 94
  - b. Paraphrase . . . . . 95
  - c. Active Listening . . . . . 95
  - d. Summarization . . . . . 95
  - e. Generalization . . . . . 95
  - f. Expansion . . . . . 95
  - g. Ordering . . . . . 95
  - h. Grouping . . . . . 95
  - I. Structuring . . . . . 96
  - j. Separation or Fractionizing . . . . . 96
- 4. Hypotheses Development . . . . . 96
- 5. Hypotheses Testing (Revise Hypotheses and Test Revised Hypotheses) . . . . . 96
- 6. Integration . . . . . 96

Facilitative and Evaluative Mediation . . . . . 96

The Caucus . . . . . 98

- Ground Rules . . . . . 99
- Caucus Advantages . . . . . 99
- Caucus Pointers . . . . . 101

Working Through Impasse. . . . . 101

Co-Mediation and Environmental Disputes . . . . .103

- Teamwork. . . . .104

Environmental Case Intake Parameters. . . . . 104

- Other Considerations . . . . . 107

## CHALLENGES IN MULTIPARTY ENVIRONMENTAL MEDIATION

### Prologue

The New York State Department of Environmental Conservation formally embarked on an alternative dispute resolution program in 1996. This followed after the 1994 gubernatorial elections when a number of state agency's were reorganized, re-engineered or were otherwise introduced to new ways of doing business to maximize resources. The sum of this effort is to offer a structure within which to negotiate environmental enforcement, compliance and permitting issues while attempting to achieve maximal gains at less cost or, alternatively, to contain costs. The New York program has led to a number of public policy disputes being resolved in ways the disputants found beneficial. The New York program is one of approximately thirteen environmental/energy dispute resolution programs existing nationally.

### Introduction

For the purposes of this article I will assume the reader has an active interest in assisted negotiation or mediation and an elementary knowledge of it. Accordingly, this article begins with a brief overview of the pertinent mediation models applicable to multiparty matters. The article includes basic mediation information as well.

It is noted that assisted negotiation and mediation are meant to be interchangeable in the context of this article. This is because the author views all mediations as negotiations enhanced through a facilitative mediator. The negotiation component settles on a course of action to resolve the dispute. The conflict resolution component is a persuasive process that shapes the way the parties' relationships interact. These are tied together by a facilitative mediator who helps in the interactive communication between the parties. Thus, in environmental mediations where issues are often emotional and complex, assisted negotiations through a mediator free the disputants to pursue substantive issues and lets the mediator control noise,

interruptions and disturbances while keeping the dialogue and collaborative process on course.

Environmental disputes often pose significant challenges for the mediator. Not only will the environmental dispute involve highly technical and scientific issues intermixed with policy and legal considerations, the controversy may also involve many parties, varied interests, significant emotions, land use issues, siting issues, and a host of others. Accordingly, preparation and planning are required. The mediator should be familiar with the environmental issue, including the regulatory, public and regulated community perspectives, and should review various mediation models and techniques that may be used in a successful mediation. The approaches selected by the mediator coupled with the mediator's style will help drive the mediation process.

Collaboration means to work jointly with others especially in an intellectual endeavor. Environmental matters often draw disputants into this process. Integrative bargaining, as opposed to positional or distributive bargaining, fits well in multi-faceted disputes that are associated with environmental matters.

The collaborative process should strive to satisfy mutual needs and expectations. This means finding common and uncommon ground and designing a calculus to achieve mutual gains. That requires getting beneath the surface to better understand what and why something is being demanded. It is the mediator's job to sharpen the focus and inquiry and to shepherd the disputants through the process. Mediators accomplish this through encouragement, reality checks, comparing evidence, raising doubts, clarifying issues, exposing agendas, reframing issues, caucusing, and other techniques. These interactions are to ideally help the parties resolve the dispute themselves. The ultimate agreement between the parties should be dependent upon getting the best outcome given the realities of the particular case, rather than obtaining everything any party desires.

Shepherding disputants through the mediation process does not come without a price. Mediators need to be aware of negative connotations brought on by their actions. For example; mutual trust

may erode when using some mediation techniques, a mediator's credibility may be weakened, the disputants may ask for another mediator, the agreement may fall apart later, closure may never become a reality, and some disputants may view their particular mediation efforts as a waste of time. At the same time, trust and relationship characteristics as well as previous experiences with the same or similar parties greatly influence the process. All these present significant challenges to the mediator. Accordingly, the ability and experience of the mediator are key to a productive assisted negotiation.

Not one style or particular approach will always work in environmental mediation. Shifting between mediation styles and approaches requires constant analyses of the participants and events. You will find some disputants knowledgeable about mediation and be skillful negotiators while others are unseasoned. Your selected style may require you be mediator-centered or disputant-centered. Your ability to apply different mediation techniques will be dependant on the nature of the case and the skill of the disputants. The 'nature' of the case in this article is within three contexts: environmental enforcement; allocation of finite resources; and environmental multimedia development.

Environmental enforcement contexts are where an alleged wrongdoer must fix a wrong. These involve monetary sanctions and remedial work. The environmental mediation will require convening negotiators from the company and the government. You will help them by exposing perspectives of each side, revealing what is the most important value to each party, finding ground where they agree and disagree and developing options where necessary, or bargain on the cost of the penalty. In their simplest form, these cases are sometimes tense and perhaps emotional and the dispute may center on personalities, cost, shifting blame, or ideological differences. The result will typically be a legally binding agreement resolving the administrative (civil) action.

The next type of environmental negotiation involves the allocation of resources, such as those in a superfund cost recovery, pollutant allocations distributed between industries, or the allocation of

natural resources as in water supply withdrawals. These cases may not be as simple or straight-forward as enforcement cases. The negotiations may take longer. They may involve more parties. The case may generate strong political pressures being placed on agency staff and significant money and resource issues may be involved. These last two levels are usually subservient to the third level case.

The most difficult level, in my judgment, is multi-party disputes that involve all or most of the above. They can include other externalities as well. Negotiators and mediators may need to understand company products and processes, land-use issues, local or regional economic factors, public health issues, traffic impacts and other infrastructure concerns. These cases may be either environmental permitting or enforcement, or involve other regulatory concerns. They usually involve multimedia pollution control and economic development concerns. Frequently they involve conflicting and colliding schedules, i.e., short term economic benefits and long term environmental costs.

This is a time of state and local governments competing for economic viability through industrial and commercial tax base development. This competition increases tension between governmental units to entertain a commercial project. The public residing in the vicinity of the project and environmental groups will also contribute to the tension. The cumulative tension should demand a new, re-engineered approach to project review by government regulators. The old ways of permit application review, agency approval and agency/company defense strategies should be giving way to a more consensus based approach. This can only result in more stakeholder approval and in turn lessen litigation and other transactional costs.

The pressure from public groups only heightens the need for other problem solving mechanisms. The intervening citizens and groups who believe that they were denied their rights have the resources and political savvy to challenge an agency decision. These opposing forces contribute to project delay, denial of permits, and expenditures of state and company monies to defend against legal challenges. In the right calculus, it should be more expedient to gain acceptance and make

trade-offs than to generate defenses. Mediation and forms of consensus building can mitigate or eliminate these tensions. These collaborative processes can supplement traditional negotiations to reach common ground. The result should be an agreement the parties find acceptable.

Each of these environmental conflicts may require different styles of mediation. Since the complexity spectrum of environmental disputes is wide, the challenge for the mediator is even greater. Some environmental mediators require a facilitative approach, meaning the mediator helps the communicators in the exchange of information. Other disputes may require a more evaluative approach, providing mediator feedback to the disputants for evaluation. In addition, on one end of the spectrum are mediations that require substantive technical, scientific or engineering experience and training, and on the other end purely process skills. Although the topic is environmental, which very often requires substance and knowledge about the mediated topic, the melding of substance and pure process is a preferable mix. Sometimes co-mediators, one skilled in process and one skilled in substance, can meet this need as well.

The centerpiece of this material are three styles of mediation that have applicability in environmental mediation. The information offered below however, is not inclusive to environmental matters as it has broad applicability. For example, mediators involved in multi-property and multi-party interests may find the process comparable with those selected for a multi-party environmental mediation. As another example, mediators involved with mediating a government dispute with a health care compliance issue may use the same techniques applicable to an environmental enforcement dispute about an isolated pollution spill. Accordingly, the three styles that follow are relevant to many fields besides environmental.

## **MEDIATION STYLES**

An explanation and discussion of the mediation styles follow below. These are:



- A. The Doubt and Dissonance Style
- B. The Interests-Based Option Generation Style
- C. The Hypothesis Generation and Testing Style

The nature of the dispute and the parties' expectations and the mediator's style will influence the negotiation. A particular mediation style will also be influenced by the mediator's training and experience. For example, in an environmental enforcement matter there may be a tendency toward the doubt and dissonance style. This is because it will more likely 'fit' the dispute and 'fit' comfortably with enforcement attorneys. If the mediator's experience is in the enforcement context as are many ALJ experiences, the doubt and dissonance style may first appear the best approach.

In environmental disputes where multiple permitting or licensing issues are involved, you may require a different approach. Processing environmental permits takes time to review. Time usually exists for negotiation. Long term relationships often need to be maintained between the permittee and the agency. Based upon these factors the interest-based option generation approach may appear the best. Application of that style may lead to what the parties generally perceive to be the best process to meet their needs.

In mediation where the parties appear unable to work together a mediator-centered hypothesis generation and testing style may prove useful. A mediator-centered style focuses the information through the mediator to release it in a measured and impartial way. Frequently, the mediation will involve elements of each style. An effective mediator will perceive what techniques should be used and when to use them. This is part of the 'art' of mediating a dispute.

### **THE DOUBT AND DISSONANCE STYLE**

This style casts doubt and uncertainty about a party's position, beliefs, values, facts, and opinions. The mediator wants the party to re-evaluate or re-examine its position. This is a pretext exercise for more party flexibility. Disputing parties often need encouragement to

abandon their positional posturing and be more receptive to identifying solutions. A significant amount of work is required to challenge the parties to identify mutual areas of concern. This means they will need to, at least temporarily, abandon their existing perceptions and not to view the other side as being unreasonable or uncooperative.

Creating doubt and dissonance in a party's thinking helps challenge and motivate the party. Properly administered, it serves to undercut or call into question their deeply held perceptions. This style bears down upon all parties to the conflict. It simultaneously induces them to be more open to options. This technique can have its risks however. Improperly administered, it can evoke suspicions and perhaps uncomplimentary reactions. Anytime a mediator challenges some person's existing beliefs and values, the mediator often becomes the focus of an attack.

When to use doubt and dissonance is an important decision. Using it when the parties are not ready can destroy your neutrality. Using it at critical points in the negotiation can have great benefits. You should consider whether it should be used jointly with all parties present or in a caucus. Using it in the presence of all parties in the same way can show impartiality. And using it in a caucus can effectively cause movement. Mediators need to use good judgment in its application.

Some examples of mutualized dissonance techniques follow below:

- ☛ Two Solutions - Ask each party to develop at least two acceptable solutions to a defined issue. Each party will come up with the first acceptable solution (their well-rehearsed position). Their second solution will be more difficult but it will create room for additional discussions.
- ☛ The Offer - The mediator can create movement toward the center by asking: "What are you prepared to offer that you believe they want" and "What would you need to receive from the other to agree to what they would like?"

- ☛ **Undermining Facts** - When challenging factual issues or when the parties or their attorneys have widely divergent conclusions as to value or "the law," suggest the possibility of the parties (and their attorneys) submitting summaries of their respective arguments to one or more mutually trusted experts for consideration.
  
- ☛ **Alternative Legal Analysis** - When parties are counseled to take extreme positions, recommend that legal counsel be invited so they can summarize their perspectives for all parties, opposing counsel and the mediator. Frequently, counsel will temper their position when opposing counsel is present. Doubt and dissonance can be created within each party based upon hearing opposing counsel's presentation.
  
- ☛ **Reality Checks** - This technique can effectively follow either the alternative legal analysis described above or the parties' reports of the polarized conclusions of legal counsel. Sometimes the disputants may ask you (as a mediator/ALJ) to comment on a position. Insertion of this 'neutral evaluation' of facts or opinion is a sensitive area and depends on the context of the issues at stake. Getting a neutral evaluation from someone other than yourself may be best. This 'evaluative' versus facilitative process is discussed later in this article.
  
- ☛ **Undermining Certainty and Predictability** - This technique can follow the previous one or be used on its own. After hearing each party's prediction of the extreme legal position or outcome they believe they are entitled to, the mediator may ask: "Understanding that you have different legal perspectives, can I ask you if your attorneys are prepared to guarantee those outcomes? Will they guarantee that the results will not be ½ or double; 1/3 or triple; 1/4 or quadruple? Have they said how much it would cost to find out if they are right? Are they prepared to guarantee those costs? That the costs will not be double? Have they commented on the likelihood of compliance with a legally imposed result, especially if that result is extreme either way? Have they talked with you about bankruptcy? Or

the risk of appeal? Have they told you how much the cost of an appeal might be?"

- Neutral Inquiring Questions - These questions are meant to gain information for the mediator and to undermine a party's position. What do you see as the strengths of your case or situation? What do you see as the weaknesses of your case or situation? What do you see as the strengths of the other's case or situation? What do you see as the weakness of the other's case or situation? How do you think a judge will view this case or situation and rule? What is the best ruling you could reasonably expect? What is the worst ruling you could reasonably expect? How do you think the other party would answer these questions?

### Guidelines For Using Doubt and Dissonance Techniques

Always establish rapport with the parties as a foundation for doubt and dissonance intervention techniques. This paves the way for the mediator to undermine certainty and predictability.

Highlighting a party's vulnerabilities *before* effective rapport will seem like an attack; highlighting a party's vulnerabilities after effective rapport is established will show *you* care about the party. They may be more receptive to critical questions and thus consider their impact in the context of their position.

Doubt and dissonance techniques are sometimes safest when utilized in the caucus. This occurs when the trust level is sufficiently high between the parties and the mediator. If the trust level cannot be sufficiently high and doubt and dissonance must be applied, it may be best to use the technique when all disputants are present. To the extent that creating doubt and dissonance may result in an individual party losing face, the mediator must use caution when using this approach. The general rule is to apply doubt and dissonance techniques consistent with the mediator's impartial and balanced role. If the mediator takes this approach with one party, the mediator should be prepared to do so with each party.

Push gently when using doubt and dissonance techniques. The mediator needs only raise doubt so strongly as necessary to create room for movement. If the mediator pushes hard, the mediator may create unnecessary resistance to both the idea being offered or the mediator and the facilitated process.

### **Interest-Based Option Generation Style**

The Interest-Based Option Generation Style is the intervention model mediators are most familiar and experienced in using. We may view it as the most empowering of, and dependent upon, the parties themselves for coming up with their own solutions. This approach appears as a series of discussions that will help the parties in discovering their fairest and most constructive agreement. The mediator works to gain permission to guide the parties through these discussions and should view themselves as part of a team. The mediator must also be responsive to whatever is going on between the parties. It is critical that the mediator meets the parties where they are. The mediator must help resolve an issue to gain respect and to take the facilitative lead.

An Interest-Based Mediation Style may have the following steps: informed consent to the mediation process; sharing of perspectives; identification of common ground; identification of issues; identification of information and documentation; identification of interests, intentions, and outcomes; development of options; evaluation of options and; integration and implementation.

In environmental mediation where so much of the dispute can center on differing raw data, differing interpretations of the same data, varying expert opinions, evaluating the information and testing conclusions will be time consuming, intense and often volatile. Each stage described below may be used in an environmental mediation. A more detailed description of each of the above factors follows in hierarchical order.

1. Informed Consent to Process

Advise the parties that negotiation on any matter is possible if the disputants agree on the process. The mediator uses the parties' desire to mediate and their perspectives on the problem or dispute to begin to formulate a mediation factor in the mediation model. The initial meetings should help build rapport and credibility, educate the parties about the various processes available to resolve the dispute, help the parties to assess various approaches to resolving the conflict, and increasing commitment to the selected procedure.

## 2. Sharing Perspectives

The disputants often need to share their perspectives to more fully understand each other's view. The mediator can help by inviting perspectives and clarifying view points, and by encouraging the exchange of information. The parties will frequently discover something about another party that they did not know or appreciate. Often this will change the dynamics of the negotiation.

## 3. Common Ground, Common Interests, Interdependence and Points of Agreement

Parties will always have some common interests as for example, wanting to resolve the matter sooner rather than later, for less money rather than more money, in a way that they maintain control and confidentiality, and to improve rather than worsen their relationship.

Parties can also be dependent upon the other party for their needs. A mediation exercise or homework to identify points of agreement may be an initial first step. This creates interdependency that can tie the parties together. This strengthens their relationships and in turn can help to motivate cooperative and collaborative behavior. It often begins to move parties to closure on those points.

## 4. Issues for Discussion

The parties will offer issues for discussion. The mediator can structure the sequence and handling of the issues with the parties. These interests will likely fall within three different zones; procedural,

psychological and substantive. One technique applicable to all three zones is for the mediator to help the parties in discussing their issues through problem-solving statements. Here the mediator helps the parties to develop their agenda in mutualized, affirmative problem solving language such as: "How can we best ...?" or "What is the best way for us to..?"

#### 5. Collecting and Reviewing Substantive Information

After issues are identified, the mediator may help the parties in collecting and analyzing relevant data, verifying data, and reducing the impact of inaccurate or unavailable data. In environmental matters it is critical that all parties have the same objective information on which they can base their decisions. The mediator may ask the parties "What information and documentation do you need on this/these issue(s) to make the best possible decisions?"

#### 6. Interests, Intentions and Outcomes

One way to help the parties to generate content for their agreement is simply to ask them: "On this issue, what do you want to create?" To the extent that the parties respond in positional terms, the mediator will need to help the parties in uncovering the underlying interests beneath their demands. One method of doing this is to ask: "If you had your (positional outcomes), what would be satisfied?" or "...what would that do for you?" The mediator cannot direct the content of the parties' agreement. That would be a violation of the mediator's neutrality.

To the extent that the parties answer about negative interests or respond with revenge motives, the mediator can again ask: "Imagine that you were successful in (avoiding or in getting your revenge), what would you then have?" Through such questioning, you can help parties recognize that even they can appreciate negative intentions and revenge motives about their underlying intentions, such as a desire for acknowledgment, appreciation, safety, security, or respect.

By reframing the context, the mediation can become a joint search for the mutually acceptable positive intentions. This reframing of the entire mediation effort can dramatically shift the parties' perspectives.

## 7. Inventing Options

Inventing options is central to the Interests-Based Option Generation Style. Brainstorming generates options on the most important substantive issue before the parties. Brainstorming works best when avoiding premature evaluation of all possible solutions. The mediator must hold the parties back and suspend judgments to ensure all suggestions or options are fully evaluated. Sorting and evaluating the options is the next step.

## 8. Option Evaluation

Option evaluation can adjust a party's position or perceived Best Alternative to a Negotiated Agreement (BATNA). With options available the parties will have little difficulty assessing which of the options are most acceptable or in their best interest. If a final agreement is not evolving due to mutually exclusive settlement options, the mediator may need to use doubt and dissonance to stimulate further discussions.

The criteria or standards used to evaluate options depend on the specifics of the dispute. Environmental disputes often involve a host of regulatory criteria. Additional objective criteria can include property market value, precedent, scientific judgment, professional standards, efficiency, costs, what a court would decide, moral standards, equal treatment, tradition, reciprocity, etc. By creating objective standards to evaluate options, one refocuses each party's perspective away from their preferred position and into a mutually satisfactory standard.

Another approach would be dispensing with objective criteria and basing the evaluation upon subjective and idiosyncratic criteria, standards, principles, rationales or rationalizations. Sometimes it is helpful in environmental disputes to consider options absent regulatory



criteria and legal constraints just to generate 'out of the box' thinking. The key point is that parties will move to agreement only when they can come up with some reasoning to explain to themselves and to others why accepting a certain arrangement is a good decision for them. It is this ability to plan that makes the movement to agreement safe. It enables the party to sell it to their superiors, constituents, or clients. This is most critical in environmental mediation when representatives must get consent from another to enter any agreement.

## 9. Integration and Implementation

Before completing discussion of a topic or the mediation as a whole, the mediator may ask the question: "Can we do any better in a way that may be acceptable to you both (all)?" If the answer is "yes," then the mediator may say that: "We are not yet done working." If the answer is "no," the mediator may confirm: "Then you are telling me that we have reached what you perceive to be the best possible mutually acceptable agreement?" If the parties' heads nod "yes," the mediator could conclude that we have in fact done our best. Most mediators are hesitant to ask the parties if we can do any better out of fear this will lead to a breakdown of the mediation and any agreement(s) achieved up to that point.

The most influential factor in the success of mediation efforts is the will of the parties to settle. No mediator--no matter how experienced, skilled, creative, resourceful, or determined--can help disputing parties toward an agreement if they have little desire or motivation to resolve the matter through negotiations. Accordingly, mediators can help motivate a party by identifying areas where it would be in the party's best interest to settle.

### **The Hypothesis Generation and Testing Style**

In this style mediators might ask what the disputants perceive to be their most constructive and fairest possible agreement. You help the parties to find the right path through a process of successive approximations. Successive approximations sift out extraneous material and begin to identify areas of agreement. Asking questions

leads to ever more accurate hunches or hypotheses as to the parties perceived best solution. You begin with open-ended questions which lead to increasingly focused "*hypothesis testing*" questions. To set the stage for all this questioning, also employ three facilitative techniques: normalization, mutualization, and strategic summarization.

An overview of Hypothesis Generation and Testing Style Facilitative Model follows below.

1. Normalization
2. Mutualization
3. Strategic Summarization
  - a. Restatement
  - b. Paraphrase
  - c. Active Listening
  - d. Summarization
  - e. Generalization
  - f. Expansion
  - g. Ordering
  - h. Grouping
  - I. Structuring.
  - j. Separation or Fractionating
4. Hypotheses Development
5. Hypotheses Testing
6. Revise Hypotheses
7. Test Revised Hypotheses
8. Integration

1. Normalization - Normalizing puts all parties on the same level - that is, they become convinced they have a chance to resolve the dispute. Parties will typically come to the mediation convinced that their dispute might be unresolvable - if their dispute was reasonably resolvable, they would have already resolved it! A first task as a mediator is to assure the participants that their situation is, in fact, fully resolvable. You may state, from your experience, that even much more difficult cases are routinely resolved in mediation. By so "*normalizing*" their situation as fully resolvable, the parties can focus on solutions that may work for them and move off their generalized anxiety and doubt as to solvability.

2. Mutualization - Mutualization directs energies to mutual problem solving. Parties in a dispute usually frame the problem in a way that places blame on the other and denies personal responsibility for the situation. The mediator's task is to help the parties let go of their individual perception and move toward mutual problem solving. "If they would just be reasonable (and recognize that everything I say is true), we could have this matter fully resolved in no time. It is their problem..." In response to this blame game, the mediator is smart to "mutualize" the situation as it is both parties' problem.

3. Strategic Summarization - Strategic summarization is the feedback of selected or edited information by the mediator. In facilitating an agreement, the mediator does not reflect back all information from the parties as if it were all of equal value. Rather, strategic summarization requires that the mediator reflect back only that information that is useful to the parties to reach agreement. Using this approach, the mediator lets all kinds of accusations, demands, and expressed emotions evaporate except important information needed to help the parties agree. Prudent judgments are required to avoid the appearance of partiality or bias at this stage of the mediation.

The following communication techniques are the means of strategic summarization:

a. Restatement - The mediator listens to what they have said and feeds back content to the party in the party's own words. This

technique is used to prove that we do not ignore the party's statements.

b. Paraphrase - The mediator listens to what they have said and restates the content back to the party using somewhat different (but similar) words that have the comparable meaning to the original statement. The mediator's goal here is to create 'facilitative space' by blurring the edges of the party's statement.

c. Active Listening - The mediator decodes a spoken message and then feeds back to the speaker the emotions of the message. Note that active listening in mediation will tend to endear the mediator to the speaking party, but may be simultaneously counter-productive with the other non-speaking party who may be wondering whether the mediator is favoring the speaking party.

d. Summarization - The mediator condenses the message of a speaker including both the substantive content and emotion to capture the meaning of what the speaker is saying.

e. Generalization - The mediator identifies general points or principles in a speaker's presentation.

f. Expansion - The mediator receives a message, expands and elaborates on it, feeds it back to the listener, and then checks to verify accurate perception. Note that expansion can lead to 'facilitative control' over a party. The party will recognize that the mediator understands what they have said and they feel they have contributed substantively to the discussion.

g. Ordering - The mediator helps a speaker order ideas into some form of sequence (historical, size, importance, amount, and so forth).

h. Grouping - The mediator helps a speaker identify common ideas or issues and combine them into logical units.

I. Structuring - The mediator helps a speaker to organize and arrange his or her thoughts and speech into a coherent message.

j. Separation or Fractionizing - The mediator divides an idea or an issue into smaller component parts.

4. Hypotheses Development - Through hearing from the parties and reflecting back for further definition the information that seems useful, the mediator comes to develop "hypotheses" both about what type of resolution will satisfy each party. The mediator's evolving hypotheses about what it is going to take to get agreement are the result of identifying the parties' desired outcomes, their interests, and their underlying positive intentions and the principles (standards, criteria, and rationales) that makes sense to them.

5. Hypotheses Testing (Revise Hypotheses and Test Revised Hypotheses) - The mediator's evolving hypotheses drive his or her questioning. Questions allow the mediator to test, revise, and refine their hypotheses about what it is going to take to get agreement. The revised and refined hypotheses are then further tested until it seems that they have identified the best resolution.

6. Integration - Under this approach, the mediator helps the parties to identify their best possible or available agreement. The mediator seeks to identify what might be the maximized integration of the parties' desired outcomes, underlying interests, positive intentions and principles. This does not mean that all parties will choose to accept what is apparently the best available agreement. The approach only gives the parties possible opportunities and points of agreement to help them reach potential closure.

### **Facilitative and Evaluative Mediation**

Facilitative and evaluative mediation relates to the approach taken by the mediator in fostering a resolution. On one end of an idealized spectrum are facilitative methods and at the other evaluative methods with degrees of subsets between. All mediators fall somewhere in the spectrum. In the field of environmental mediation it

is common to use both approaches depending on the nature of the issue and the context in which the mediation is held.

Facilitative mediation generally refers to a process largely dependant on facilitating communication. The emphasis is on the disputants who are not evaluated by the mediator. The facilitative mediator, in the extreme, places all power on the parties. Facilitative communication addresses underlying interests in joint sessions, develops optional or alternative solutions and otherwise stays away from engineering or scientific data and other information that may be in conflict with opposing data or information.

Evaluative mediation generally refers to a process of evaluating or studying conflicting data or information. The emphasis shifts to the mediator who urges acceptance of certain settlement ranges or offers, makes predictions about the likely legal outcomes and otherwise tries to persuade the parties to accept the mediator's analysis of the information.

Generally, in prospective permitting where the terms of permit conditions or operating standards are at issue the facilitative approach may be more appropriate. In the environmental context of project development or modification which may impact a variety of interests and parties, facilitating communication between parties and allowing them to adjust their own positions may be seen as less threatening and a preferred way of doing business.

Generally, matters in the context of environmental enforcement and of limited parties, i.e., the government and the defendant, sometimes benefit from evaluative mediation. This tends to happen in situations when the mediator provides highly probable outcomes, risks and analysis of the dispute, after reading depositions, reports and pleadings.

Sometimes both parties will ask for an evaluation by the mediator. Assuming the disputants are bargaining in good faith and they appear earnest in seeking the mediator's evaluation, giving such may not have adverse consequences. Conversely, providing an

evaluation at the request of the parties, but when you sense they are not prepared or ready, can sink all collaborative efforts and progress made to date. Evaluative mediation has a place in certain types of disputes.

ALJ mediators can be said to more easily fall into the evaluative mode because of their function as ALJs and fact finders. Often times they are really doing a neutral evaluation of the facts and law. Sometimes the ALJ mediator may act as a settlement judge instead of a mediator.

In summary, the use of facilitative and evaluative styles can be dependent on the expectations of the parties, the type of environmental dispute being discussed, the law, and agency precedent. Moreover, what works in one area of the state or region may not work in another. Accordingly, the mediator should be sensitive to cultural influences and behavioral conduct overall in making any conscious decision about which style may be appropriate.

## THE CAUCUS

A caucus is a private meeting. Caucuses serve two broad purposes. They allow the mediator to create a structure to solve problems by controlling disruptive emotions, thinking space or timing issues and secondly, caucuses otherwise create a learning climate conducive to problem solving, all in a non-adversarial private setting.

When to use a caucus is an art that requires good judgment. Calling a caucus is dependant on the participants' dynamics and the mediator's style. It is usually up to the mediator to decide whether a private meeting with each party is desirable. The purposes of a caucus may vary but the intention is to allow the party and the mediator to discuss some sensitive matter in a forum that does not compromise one party's bargaining position.

In environmental negotiations it is sometimes better not to use a caucus too soon. Parties need time to absorb the issues, react to them,

reconsider what they mean and recalculate a bottom line. This is most usually true in settings where the interest based style is used due to the multiplicity of issues at play.

### Ground Rules

There are two ground rules for using the caucus. First, it is essential that if a mediator meets with one party, they meet with the other party also. Even if one held the caucus specifically to speak with one party, the other party should have the opportunity to meet privately with the mediator as well. This does not mean that it is necessary to spend the same amount of time with each party. Rather, the idea is to preserve mediator neutrality. Accordingly, the mediator should be equally available to all parties.

The second ground rule is that you hold everything that they transmit in a caucus in strict confidence. The exception is where the party gives the mediator permission to reveal the content of the discussion. This confidentiality must be real - in both letter and spirit.

### Caucus Advantages

The caucus may be used appropriately for a variety of purposes.

Separate the parties if they are too tense, too hostile, locked in an escalatory spiral, or too willing to concede points.

Caucuses allow the private expression and examination of motives, sensitive subjects and issues, and alternatives.

Caucuses change the flow of the dispute. They can de-escalate or slow down the pace, escalate or speed up the pace, and overcome deadlocks.

The mediator has an opportunity to share ideas about the situation with the parties alone.



The mediator can make alternative suggestions with respect to a single party's position that would not be possible in a joint session.

The mediator can encourage a party to explore the "what ifs" of a situation with greater depth and candor.

The mediator can appeal to a party to adopt more realistic goals.

The mediator can discover the limits of each party's position.

The mediator can test proposals that may come from another side but would not be accepted if they were recognized as such.

You can help the party to understand the process and the mediator can make suggestions on how to conduct the negotiations in an orderly way.

You can prevent a party from making a premature concession in a joint session that would eventually destroy an agreement or that would be accepted later but not now.

You can provide an opportunity for each party to express feelings and thoughts that they were unable to express in the face-to-face joint session.

You can help each party to examine its position and evaluate the possibility of reaching a settlement.

The mediator can communicate between the parties to focus on substantive issues and block out emotional material loaded into messages.

The mediator can discover confidential information that does not come forth in the joint session.

The mediator can raise doubts and thus encourage a party to explore other positions.

The mediator can establish credibility and acceptance by a party.

### Caucus Pointers

Meet first with the party that seems most willing to compromise or change its position. If neither shows this, start with the most inflexible.

Do not criticize one party to the other.

When one side takes a stand that makes settlement impossible, take a firm position concerning the effects of this behavior.

If stuck on a problem, continue the separate conferences as long as you think that exploring alternative solutions is necessary. When a lead is found for agreement, return to a joint session.

At the separate sessions make suggestions, not proposals for resolution. Work to generate energy and ideas the parties can create.

When one party wants to try out a proposal before making it, take it to the other side as a "suggestion" that you would like to make.

When you are meeting with one party, give an assignment to the other. That is, give them a problem to work on, a task to do, or something that can help lead to a solution.

When a party with whom you are meeting in a separate session wants to caucus privately, encourage him or her to do so and get out of the way.

## **WORKING THROUGH IMPASSE**

An impasse is a roadblock. Impasses occur when parties do not see any advantage, reason or room to change their positions. The following approaches may be used when working through an impasse:

- ☛ A useful tool is to explore with the parties, perhaps in a caucus, the consequences of not arriving at a resolution. The consequences may include financial costs, the frustration of ongoing hostility and soured relations, no environmental project versus something that may be acceptable, court rulings, inadequate permit operating conditions that do not address needs and concerns, etc.

Use the information in the mediation styles' section of this article to develop ways to break through impasses. Use doubt and dissonance to undermine the certainty embraced by a party. Use the interest-based option generation style to identify and evaluate key areas. Use the hypothesis generation and testing style to 'normalize,' and 'mutualize' the group, and the strategic summarization tools to inspect messages, facilitate communication and otherwise facilitate ways to develop settlement opportunities.

- ☛ Focus on continuing long term relationships or an environmental project over the long term. Yielding a little now to realize greater gains in the future may be beneficial. Discipline the disputants to more easily give up components in the interest of the long term gain. Be prepared to give a short term gain in environmental disputes where attaining short term goals will help motivate or encourage a party for further concessions in the long term.
- ☛ Ask the parties why or how an impasse developed. Their responses are a starting point to inspect the validity of their answers, to test their resolve, to get information that will help you decide whether to backtrack to missed issues or reroute the discussions into another area or technique.
- ☛ Take some time. Adjourn the session. What seems like an impasse sometimes evaporates in time. People need space to think, mull over an idea or sleep on it. A simple break can interrupt the dynamics and change the direction. If you adjourn to another day, give them homework to figure a way around the

impasse. However, adjourning at an impasse can result in the parties giving up unless you can make them come back to the table.

- ☛ Agree on a means by which the parties can gain some additional information (attorneys, technical experts, business partners, etc.) or a way to work through the impasse. Homework can bring new information or ideas that they can test and present as additional bargaining chips.

Impasse can result when the participants revert to their initial position although new information was presented. Mediators can create an exercise where the parties restate the opposing party's position or needs and what they would need to move forward.

- ☛ Impasse may occur because the matter is inappropriate for mediation. Or it may be that mediation is only one of several alternative techniques that can better help resolve the dispute. Educate the parties to other ADR options.
- ☛ Homework can be used to generate new data. New information can sometimes break impasses. Homework sometimes reveals items of value that have been overlooked. By adding more items to the pie, there is more to trade and bargain for. Items of little value to one side may be highly valued by the other side.
- ☛ Bring pressure on the parties by imposing deadlines.
- ☛ Create subcommittees to work on issues in a new and less adversarial atmosphere.

### **Co-Mediation of Environmental Disputes**

While many mediators prefer to work independently, co-mediation has certain advantages in environmental disputes. One important advantage is thinking space. It allows room for the

mediators, to better employ their skills. Simply, two heads are better than one.

Co-mediation is two people sharing the tasks of a mediator between them. A continuum runs from a completely coequal relationship that is based on trust and is very loosely structured, to a relationship that is a very highly differentiated and formalized separation of tasks. Either approach can work well if both mediators agree on the method they are using and are clear in their role responsibilities.

In order for co-mediation, to succeed you need to find an approach with which you feel comfortable. Would you like to "take a back seat" for a while and let your partner take the lead and be responsible for making the transitions through the various phases of the process? How does your partner feel about this? Based on people's experience levels, one member of the mediation team can be the "lead mediator." Meeting before the mediation session to prepare is essential for each mediator team. Spending time after the mediation session exchanging feedback on how it went is an important part of the process and should not be neglected.

### Teamwork

*If you have not mediated with your co-mediator before, a meeting before the session can be useful. Some things you might discuss include.*

- How you are feeling now about your energy level, enthusiasm for the task at hand or "back home" concerns that may distract you, etc.
- A quick review of the mediation phases to refresh your memory in case you or your partner have not mediated in a while. Review your training manual or handouts to get you focused.
- Who, if anyone, will take the lead role.

- How tasks will be divided: opening statement, writing the agreement, facilitating the exchange, and uninterrupted time, etc.
- Signals: How one will step in when the other is nearing dangerous waters; how each will pass the lead to the other, how you might ask for help if you are feeling stuck.
- Your individual mediation style, what you do well, what you do not do as well, what you enjoy, what you would like feedback on afterwards, etc.
- Potential difficulties with the upcoming mediation and how you might handle them.

If your signals cross, if you are uncertain about how to proceed, if your co-mediator does something you think is unwise, it is okay to call for a break and meet separately without the parties to discuss your concerns and plan your strategy for getting back on track.

- Remember, try to evaluate each other honestly after the mediation session.

## **ENVIRONMENTAL CASE INTAKE PARAMETERS**

Environmental case intake parameters are important to deciding which case may best benefit from mediation instead of adjudication. The questions presented below will help in case selection. The questions are 'universal' in that they presume applicability to any case. In reality however, the jurisdiction controlling each case will help establish the parameters for selecting cases that should be subject to mediation. Of course, if the philosophy of those in charge is that mediation is applicable to all environmental cases without regard to time or expense, then we can thus apply mediation. Some questions are presented below for consideration.

Can the lack of an agreement work to one side's benefit? How do you use this reality to get the parties to talk and try to agree in a meaningful way?

How does timing affect your entry into a dispute? How does timing affect your continued involvement in a dispute?

How does the mediator decide when to maintain control and when to let go? How does the mediator determine whether a blow-up is productive or counterproductive?

If the parties are making progress and a scheduled or requested recess occurs, do you adjourn?

At what level does the environmental mediator concern him/herself with the fairness of the settlement?

How do legal procedures likely affect the way in which concurrent processes, like negotiation, are carried out?

What specific aspects of judicial decision making might make mediators more or less attractive to environmental disputants?

What if both parties in a pending lawsuit knew precisely what the judge would order: Would they have an incentive to negotiate?

In some jurisdictions, it can take years to get a court date for trial. This can be an important inducement to negotiate. Is the effect of court congestion felt equally by all litigants; whose bargaining power is enhanced by delay?

How is it possible to tell when a refusal to negotiate or a refusal to discuss a particular issue represents a sincerely held value and when is it merely a bargaining ploy?

**Other Considerations**

Other considerations might prove useful depending on your jurisdiction and agency culture. Within the ADR program currently operating in the Office of Hearings and Mediation Services at the New York State Department of Environmental Conservation, there are selected classes of cases for ADR treatment. These are addressed below.

*Those cases that we cannot try* - in theory, all cases are susceptible to adjudication but at what cost? Cases that we cannot try will frequently involve many parties with conflicting interests and positions. They involve issues that we would likely litigate for years with no real 'winners.' Policy questions may be involved.

*Those that do not absolutely require an attorney* - these are cases where technical staff is able and willing to enter negotiations to resolve an environmental dispute. The cases vary in size but the issue is whether the case warrants the time of the agency attorney. Culling out this class of case allows technical staff the ability to exercise its program responsibilities through mediation.

*Those where 'one last chance' is offered* - these are knotty cases where the legal pursuit in an administrative hearing or court would not likely be as productive as would be a structured negotiation. We can identify these cases as having potentially uncollectible judgments, insufficient resources to remedy an environmental problem completely and where the action is too small to warrant use of litigation. Often these cases also contain significant amounts of personality conflicts between the party and the agency.

*Those that would benefit from long term relationships* - these are cases where disputants need or depend on continuing communication and interaction with the agency. Municipalities are often good candidates for ADR as cooperative efforts, setting milestones for completeness or compliance is in everyone's interest or where iterative exchanges of data to both the municipality and the agency gets the job done.



*Resource allocation issues* - these are also in the mediatable issue category. These disputes involve apportionment, contribution, and an allocation of things between multiple parties. They might be disputes over a supply of water between municipalities, persons and commercial or agricultural interests, cost recovery of monies spent to clean up a hazardous waste site, the distribution of pollution credits or tonnages, or any matter that has a fixed parameter that requires a redistribution of things.

*What cases would not be mediated* - this depends on the agency culture and perspective. Cases that have novel issues of fact and law are arguably set for hearing rather than mediation. Why? Because the agency wants hopefully to make a point via an agency decision or order. There are also deterrent values to be considered, intermixed with political realities. Selection of cases not to be subjected to an ADR method often requires considerable forethought and consideration.

\* \* \*