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Danger-Inequality of Resources Present: Can the Environmental Mediation Process Provide an Effective Answer?

Elaine Smith

I. INTRODUCTION

The environmental dispute resolution field has grown rapidly since its advent in 1973, when two mediators, Gerald Cormick and Jane McCarthy, undertook the first documented attempt to settle an environmental dispute.¹ Since this initial effort, the use of mediation in environmental disputes has grown rapidly, leading to the continual evolution and improvement of the field. Despite this progress, mediation in environmental disputes remains as it began: a hotly contested issue, with prominent and influential commentators vigorously debating whether it is an appropriate device to resolve environmental disputes.

One issue critics of mediation focus on is the role, or perceived role, that inequality of resources² plays in the environmental mediation context.³ The research for this article began with the common sense hypothesis that an inequality of resources among the parties always detrimentally affects the mediation process and outcome. Significant empirical evidence to support this hypothesis, however, could not be found.⁴ Of the case studies researched, none specifically focused on the inequality variable. Most did not even address the presence or effect of inequalities on the mediation efforts, even where one of the parties involved was typically viewed as a less powerful group, such as a citizen group. Why is there a lack of deep analysis or conclusions, or even a failure to address this issue when inequality of resources is considered important in other mediation contexts, such as family law mediations?

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1. GAIL BINGHAM, *RESOLVING ENVIRONMENTAL DISPUTES: A DECADE OF EXPERIENCE* xvii (1986).

2. What a resource is, for purposes of this paper, will be defined in section IB.

3. The questions, issues, and ideas posed in this paper are not entirely specific to environmental mediation but are common to most multi-party, public disputes. The label environmental mediation is used, however, because much of the research for this paper was culled from the environmental dispute resolution area.

4. Most of the "evidence" found was in the form of anecdotal "evidence" or theoretical discussions.

The conclusion reached was that such an inequality may not present the danger to environmental mediation efforts that the critics claim. Two assumptions underlie this conclusion. First, most parties will only mediate a dispute if they perceive they possess or can acquire the resources necessary to mediate successfully; otherwise, they will pursue other methods of dispute resolution.⁵ Secondly, measures taken to ensure the fairness of the process provide sufficient safeguards to neutralize any detrimental effects of an inequality on the outcome of the mediation. Such detrimental effects are neutralized at least to the extent sufficient to achieve a fair agreement.⁶

On a more global level, although mediation is an appropriate and successful means of environmental dispute resolution, groups considering its use should determine whether it is in their best interests to use it alone or in conjunction with other dispute resolution mechanisms. Such mechanisms may include political, economic, administrative, or legal processes.

Further, mediation should not be the dispute resolution method which a group utilizes where an important precedent needs to be set or where no degree of compromise of a group's goals is desirable.⁷ Precedential value is at stake in most cases to some extent. An environmental or other public interest group should, therefore, weigh the importance of this precedential value against the better quality, individual substantive outcome which may result from participating in mediation. When the political, economic, and public opinion climates are resistant to such a change, favorable individual outcomes in a party-driven (rather than attorney-driven) process like mediation may be more desirable for reasons of mobilization, organization, empowerment, or publicity-derived precedent than attempting to achieve precedential change through adjudication.

When a group determines that mediation is in its best interest, the issue of inequality of resources remains. Concrete measures of whether inequality affects the likelihood of reaching an agreement and the fairness of the agreement itself are

5. This paper deals only with voluntary mediation efforts, not those mandated by court or statute. Critics contend that parties may not choose mediation but are forced into it because of a lack of resources to pursue litigation. There is, however, no empirical evidence to support the theory that mediation offers time and cost advantages over litigation. BINGHAM, *supra* note 1, at xxv-xxvii, 136, 140-41. Further, some environmentalists believe that parties lack the resources to stay out of court, i.e., the lack of resources operates as a disincentive to mediation. *Id.* at 160.

6. What should be defined as a fair agreement will be discussed in Part II of this paper.

7. For example, the question of whether a hazardous waste site should be developed at all under a certain set of circumstances may be better handled at a regulatory, administrative, legal, or political level. Once the question of whether a site will be developed has been answered, mediation may be the most fair way to decide the "ins" and "outs" of its development. It is worth mentioning that the use of an ADR process, negotiated rulemaking, has recently increased in the environmental regulatory arena with the passage in 1990 of the Administrative Dispute Resolution Act and the Negotiated Rulemaking Act. Negotiated rulemaking is "a consensus-driven process in which stakeholders directly negotiate a proposed rule with the agency." Jodie Freeman, Collaborative Governance in the Administrative State 115-16 (on file with author who is a professor at UCLA Law School). Although the scope of this paper is confined to the specific problem context, not a policymaking one, some of the resource gathering techniques discussed in Part III of this paper may be applicable to the negotiated rulemaking context.

not easily found. In evaluating this issue, Part II will present what is and what should be regarded as a "successful" mediation effort. It will also outline what may be regarded as resources in environmental disputes. Part III will examine how inequality of resources affects a mediation effort. It will also propose procedural safeguards to neutralize the effect of inequality of resources so that a successful mediation solution may be achieved.

II. DEFINING SUCCESS AND RESOURCES IN THE ENVIRONMENTAL MEDIATION CONTEXT

Mediation of environmental disputes is characterized as a consensual, voluntary process where the parties meet face-to-face to reach mutually acceptable decisions with the aid of a third-party neutral.⁸ The premise underlying the use of mediation is that such a process will lead to better quality substantive outcomes that satisfy, to some extent, the interests of all the parties to a dispute. In other words, mediation will result in an all-gain solution as compared to the win-loss paradigm of adjudication and other dispute resolution mechanisms. Despite many efforts, it is difficult to judge the success of mediation as compared to processes like adjudication.

A. Defining Success

Commentators have presented several different definitions of success in the environmental dispute mediation context. Current research has attempted to define success by using criteria such as the number of agreements reached, the stability of the agreement, the parties' satisfaction with the process, the efficiency of the process, the value of the process itself, and the fairness of the process.

1. Number of Agreements Reached

In her comprehensive evaluation of environmental dispute resolution approaches, Gail Bingham defines success in terms of whether the real issues in the dispute are resolved.⁹ Using this definition, the most simple measure of

8. LAWRENCE SUSSKIND & JEFFREY CRUIKSHANK, *BREAKING THE IMPASSE* 77 (1987); JAMES E. CROWFOOT & JULIA M. WONDOLLECK, *ENVIRONMENTAL DISPUTES: COMMUNITY INVOLVEMENT IN CONFLICT RESOLUTION* 19 (1990); BINGHAM, *supra* note 1, at xv.

9. BINGHAM, *supra* note 1, at 69-70. In preparing her empirical study, Bingham documented and analyzed 161 cases of environmental dispute resolution. *Id.* at xvi. Bingham found that agreements were reached in 78% or 103 of the 132 cases where agreement was the goal. For this study, Bingham defined reaching agreement as when the parties' "negotiations resulted in a signed, written agreement or that the parties reported verbally that they had reached an agreement and could describe its terms." *Id.* at 73.

success for her is the number of agreements reached.¹⁰ Two assumptions underlie this measure of success: 1) that the parties themselves are good judges of what the real issues are and whether their issues are resolved adequately; and 2) that the voluntary nature of the dispute resolution process allows parties to exercise that judgment freely.¹¹

Bingham's definition of success is problematic. It provides no guidelines as to what the real issues are or to what they should be. Instead, it leaves this decision up to the parties who, contrary to Bingham's free exercise assumption, may be constrained by more powerful parties into accepting an undesirable determination of the issues. Further, Bingham's assumptions only serve to rationalize the fact that an agreement was reached. They do not provide any guarantees beyond the "voluntary nature of the process" that the agreement was the fairest possible agreement for all the parties. Fair process considerations should be included in any concept of success.

2. The Stability of the Agreement Reached

Bingham's next definition of success includes "how stable the agreement is, or the extent to which the parties have implemented agreements after reaching them."¹² Stable agreements are a key attribute of the dispute resolution process. For Bingham, an agreement's stability is measured by the actual implementation of the agreement. This measure is based on the presumption made by participants and outsiders that an agreement enforced is one which the parties and the community feel was fair. The real problem lies in determining what constitutes a fair agreement, a problem which will be addressed in Section II.A.6.

3. The Parties' Satisfaction With the Process

The parties' satisfaction with the process is also a standard used to judge the success of a mediation outcome.¹³ A common concept in party satisfaction is that parties believe that their interests were met and that the mediation achieved a better quality solution than would have been achieved in another dispute

10. *Id.*

11. *Id.*

12. BINGHAM, *supra* note 1, at 71; SUSSKIND, *supra* note 8, at 21, 31 (identifying the four characteristics of a good negotiated settlement as fairness, efficiency, wisdom and stability). Bingham found that of 103 cases where the parties reached an agreement, implementation results could be determined for only 71. BINGHAM, *supra* note 1, at 77. Of those 71, approximately 70% had been fully implemented, 14% partially implemented, and only 15% were unlikely to ever be implemented. *Id.* Parties were more successful at implementing their agreements in site specific cases rather than policy disputes. For instance, of the 54 out of 71 agreements which were site specific, 80% were fully implemented, compared to the 17 of 71 policy disputes, of which only 41% were fully implemented. *Id.*

13. Lynn A. Kerbeshian, *ADR: To Be Or...?*, 70 N.D.L.REV. 381, 385 (1994).

resolution method.¹⁴ Used alone, this criterion presents the most questionable determinant of success because it only reflects expectations that are bound by power, resources, and cultural constraints.¹⁵

4. The Efficiency of the Process

The efficiency of the process, in terms of both time and cost, is widely cited by commentators as an indicator of success.¹⁶ According to Bingham, little information exists to conduct a comparison study of time and costs.¹⁷ Further, conceptual problems, such as finding samples of the two approaches that are sufficiently comparable to each other, make it difficult and misleading to compare litigation and mediation data on the basis of time and cost.¹⁸

Although the two approaches are not comparable, Bingham did compile time data on each approach. She found that the median duration of environmental litigation from filing to disposition was ten months, extending to 23 months if the case went to trial. The median duration for environmental mediation was five to six months with only ten percent (10%) of the cases taking over eighteen months to resolve.¹⁹

The empirical evidence available does not establish that mediation is necessarily cheaper and faster than litigation for citizen and public interest groups.²⁰ Further, a simple comparison of costs leaves out what is perhaps the most important measure of success: the fairness and quality of the outcome.

5. The Value of the Process Itself

A further measure of success is the value of the process itself. Value is defined as a benefit that the parties derive from the process.²¹ For example, parties may feel that they are empowered, have become more knowledgeable about the opposition and the dispute, or have gained some other benefits. Though it is an extremely valuable measure, the concept of a fair process alone is too limited when parties could have used other resources to achieve the same substantive results. The concept of a fair process must be combined with the concept of a fair outcome in order to reach a fair agreement.

14. SUSSKIND, *supra* note 8, at 22, 80-81.

15. Note that these constraints are also found in litigation and other means of dispute resolution when party satisfaction is used as a determinant of success.

16. *See, e.g.*, SUSSKIND, *supra* note 8, at 26; Kerbeshian, 391-92.

17. BINGHAM, *supra* note 1, at xxv.

18. *Id.* at xxv-xxvi.

19. *Id.* at xxvi-xxvii, 136, 140-41.

20. *Id.* at xxv; DOUGLAS J. AMY, THE POLITICS OF ENVIRONMENTAL MEDIATION 72-77 (1987) (noting that expenses and time may be as significant a problem in mediation as in litigation); Charlene Stukenborg, Comment, *The Proper Role of ADR in Environmental Conflicts*, 19 U. DAYTON L.REV. 1305, 1332-35 (1994).

21. BINGHAM, *supra* note 1, at 71; Kerbeshian, *supra* note 13, at 392-93.

6. Fairness of the Mediation Agreement

Success should be defined in terms of the fairness of an agreement. The fairness of an agreement, however, is a difficult concept to measure. Fairness should be defined by subjectively considering what is fair in the eyes of "the group of parties as a whole" and in the eyes of individual parties.²² A "fair balance" should then be struck "between the two objectives when they are conflicting."²³ In other words, success, and thus fairness, should be defined in terms of the parties' perceptions that the result reached was all-gain compared to the result which could have been achieved in another dispute resolution forum.²⁴

To ensure that the parties actually reach the best quality solution, the definition of "fairness" must have a second component: that the parties reached an all-gain result through the utilization of a flexible, party-determined process with safeguards. In such a process, parties, with the aid of a mediator, utilize procedures that not only enhance the parties' subjective perceptions of fairness, but also satisfy objective views of a mediation effort.²⁵ These procedures include the selection of a knowledgeable third-party neutral mediator, the identification of all affected parties and their interests, the establishment of rules and codes of conduct by the parties, the use of integrative procedures to improve communication and trust, the effort to equalize resources to the extent possible, and other flexible,

22. Cecilia Albin, *The Role of Fairness in Negotiation*, 9 NEGOTIATION J. 223, 225 (1993). To define fairness in objective terms, as in the eyes of a reasonable person, would presume that an outsider looking into a mediation effort could know, better than the parties themselves, what was in the parties best interests.

23. *Id.*

24. Telephone Interview with Lawrence Susskind, Associate Director of the Program on Negotiation at Harvard Law School (Dec. 1, 1995). (hereinafter "Susskind Interview"). Mr. Susskind, also a prominent mediator, formally refers to this concept as BATNA—the best alternative to a negotiated agreement. SUSSKIND, *supra* note 8, at 81.

25. Lind and Taylor have advocated this standard due to findings that procedural fairness, in the sense of process control by the parties, is a potent force for citizens' satisfaction and acceptance of the outcome of a dispute which cuts across lines of race, income, and politics. E. ALLEN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 64-65, 110 (1988). Further, Lind and Tyler seem to conclude that, as an empirical matter, such fairness enhances the accuracy of the outcome. In other words, the outcome reflects the parties' conception of the relations between each parties' interests and values. *Id.* at 79-80.

This standard for success can be broadened to adopt a transformative approach which, while including such considerations of success as agreement and efficiency, seeks to broaden the scope of dispute resolution to encompass notions of success such as accessibility, affordability, empowerment, education, and other benefits of participation in the dispute resolution process. Frank Dukes, *Public Conflict Resolution: A Transformative Approach*, 9 NEGOTIATION J. 45, 51 (1993). Thus, the transformative approach envisions a broader role for public dispute resolution efforts. *Id.* at 48. According to Dukes, a Senior Associate at the University of Virginia's Institute for Environmental Negotiation, "this movement rejects that aspect of post-modern critical thought and practice which is infused with a sense of victimization and hopelessness and which offers no realistic program of change." *Id.* Rather, it regards society as capable of productive change through democratic participation. *Id.*

party-determined procedures.²⁶ As these same factors work to neutralize the effect of an inequality of resources, they will be more fully discussed in Part III.

B. Defining Resources in the Environmental Mediation Context

Resources in the environmental mediation context and, more broadly, in the public dispute resolution process can be defined as different qualities, powers, or assets that a group may possess. For purposes of this Article, resources include financial assets, information, scientific and technical expertise, negotiating skills, political power, and the power to threaten to sue or to pursue other means of dispute resolution.

III. DOES COMING INTO THE MEDIATION PROCESS WITH AN INEQUALITY OF RESOURCES AFFECT THE SUCCESS OF THE AGREEMENT? OR, CAN PROCEDURES UTILIZED AS PART OF THE MEDIATION EFFORT NEUTRALIZE THE EFFECT OF AN INEQUALITY OF RESOURCES?

Mediation is not always the appropriate means of dispute resolution for citizen and public interest groups. Citizen and public interest groups frequently begin, and often continue, their existence with limited resources. As a result, these "disadvantaged" groups must decide which method of dispute resolution will most advantageously utilize these limited resources and accomplish their goals. A broad range of alternatives exist and include: legislation, the political process, media coverage, mediation, other ADR processes, and litigation. A "disadvantaged" group's most effective use of resources may lie in utilizing several options concurrently, such as using political pressure and mediation with the threat of litigation, other combinations, or litigation itself.²⁷

Traditionally, litigation has been the method employed by public interest groups in the environmental arena. Some legal theorists, however, have concluded that the courts have seldom met environmental litigators' goals.²⁸ In many cases, courts have failed to force substantive environmental change. Instead, the courts have focused on procedural considerations out of deference to administrative agencies, which is heightened by the technical nature of many environmental

26. In any one case, the circumstances may indicate that the use of all procedures is not necessary to achieve a fair agreement.

27. In fact, community and public interest groups should always utilize political pressure gained through adverse publicity, demonstrations, and other means because political pressure is a necessary part of bringing about change. Further, it does not necessitate the profuse use of resources. For instance, well-timed phone calls may generate significant publicity which, in turn, may generate significant financial and membership resources.

28. GERALD ROSENBERG, *THE HOLLOW HOPE* 276-85, 292 (1995).

matters.²⁹ Unlike litigation, mediation offers groups the chance to address substantive issues and influence decision-making processes.³⁰

When, however, mediation is chosen as a mechanism for change by public interest or community groups, the issue of inequality of resources must be addressed. The following section discusses critics' theoretical concerns that an inequality of technical, informational, political, and other resources will adversely affect the mediation process. Following this discussion, there will be a description of safeguards which parties and mediators can utilize to overcome inequalities of resources.

A. Theoretical Effects of an Inequality of Resources

Several opponents of mediation criticize its use in environmental disputes, believing that the informal nature of the mediation process coerces those with less resources to make undesirable concessions which undermine their best interests.

Owen Fiss argues that an informal process allows decisions to be made without procedural safeguards which less powerful groups may need.³¹ For example, a disadvantage in the ability to collect and analyze information may

29. *Id.*; AMY, *supra* note 20, at 210 (citing rulings which limit the rights of environmentalists to challenge administrative decisions on substantive environmental grounds: *Vermont Yankee Nuclear Power Corporation v. NRDC*, where the "Court found that environmentalists could only challenge administrative decisions to develop nuclear power on procedural grounds, not on substantive ones"; and *Chevron v. NRDC*, where "the Court's ruling further restricted the role of the judiciary in independently reviewing agency interpretations of environmental regulations" by finding that "in complex environmental decisions, the courts should defer to agency expertise and not interfere."). Rosenberg does acknowledge that litigation has on occasion been effective in improving environmental quality. *Rosenburg*, *supra* note 28, at 277-78, 284-85. Courts' efficacy, however, is dependent on political and public opinion support. *Id.* at 284-85. Until that time for more global, systemic change, ADR methods may be as useful as adjudication, if not more so, in resolving disputes fairly, especially when the setting of precedent is not an issue.

30. Litigation and ADR may not be as different as commentators note, especially with the rise in the practice of environmental poverty law (EPL). Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 *ECOLOGY L.Q.* 619 (1992). EPL seeks to provide justice for groups most affected by environmental problems. *Id.* at 636. These groups tend to be comprised of minorities and have traditionally been excluded from the mainstream environmental movement. *Id.* at 637-38, 640. As a result, they have a greater distrust for the law. *Id.* at 640-41, 647-48. Environmental laws actually legitimate the pollution of their communities and may further disempower these groups. *Id.* Thus, these groups are more willing to explore and use non-legal strategies than mainstream environmentalists. *Id.* at 640. The EPL approach seeks to use a political tool, rather than legal tool, to achieve change: community empowerment and education aimed at pressuring those persons or agencies making the environmental decision. *Id.* at 648. If chosen as a method of dispute resolution, the practice of EPL may ultimately benefit ADR and those groups who use it. The community empowerment model and pressure tactics may result in these groups using ADR and becoming more effective participants.

31. Owen Fiss, *Against Settlement*, 93 *YALE L.J.* 1073, 1076-77 (1984). Note that in his article, Fiss specifically argues against settlement itself as distinguished from mediation, negotiation, or other ADR processes. His arguments have, however, been applied by other critics to the ADR process.

influence predictions and expectations regarding the outcome of the dispute. Such an influence may disadvantage the "disadvantaged" party in the bargaining process.³² Further, a party without adequate finances may be unable to engage in protracted negotiation or may be forced to settle more quickly. This inability to continue the process could result in an outcome which is less fair than an outcome achieved by another method of dispute resolution.³³

Some politicians contend that the mediation process undermines environmental interests because its informal nature co-opts inexperienced parties.³⁴ More specifically, Douglas Amy further argues that parties with affected interests will be excluded from the process because mediators, due to their professional self-interest, have an incentive to limit the number of parties to increase the chances of the parties reaching an agreement.³⁵

Even if "disadvantaged" groups are included in the process, it is argued that they will be ignored or cajoled into making "sweetheart" deals excluding environmental interests.³⁶ Furthermore, the bargaining process itself will not be conducted in good-faith when there is an imbalance in technical expertise. This lack of technical expertise is characteristic of environmental groups who have minimal resources for bringing in technical experts or gaining access to proprietary information.³⁷ Amy believes that "it is clear that unequal power between participants in environmental mediation can undermine the extent to which this process is representative, fair, and voluntary."³⁸

In addressing the issue of safeguards, Amy is doubtful that professional mediators can remedy the imbalance. Most mediators are not interested in balancing the power of participants, as such an interest would be unprofessional for scrupulously neutral mediators.³⁹ Instead of balancing the power of the participants, mediators pressure environmentally-minded groups to be "reasonable" and accept questionable outcomes because mediators have a professional stake in reaching an agreement.⁴⁰

Amy believes that mediators are in a no-win situation: "They can either accept the situation as is and risk legitimizing an unfair agreement, or they can attempt to help balance out the power relations, and risk undermining their own neutrality and career."⁴¹ In essence, the only real option for mediators is not to

32. *Id.* at 1076.

33. *Id.*

34. AMY, *supra* note 20; *See also*, THE POLITICS OF INFORMAL JUSTICE (RICHARD ABEL, ED.) (1982).

35. AMY, *supra* note 20, at 132-33. Amy's statement is pure theory and relies on no empirical evidence, either from a primary analysis or secondary compilation of data. Bingham rebuts this theory with empirical evidence. *See infra* notes 53-60 and accompanying text.

36. AMY, *supra* note 20, at 134, 136-39.

37. *Id.* at 143-45.

38. *Id.* at 148.

39. *Id.* at 157-58.

40. *Id.*

41. *Id.* at 160.

participate in unfair bargaining situations.⁴² "The only short-term safeguard against the problems of power in environmental mediation is a growing public awareness of their existence," so that the public can "see through the misleading aura of equality and fairness that accompanies mediation efforts."⁴³ This illusion masks the fact that mediation is biased in favor of the more powerful parties.⁴⁴ By masking this bias, mediation disempowers groups by distracting them from other more effective forms of political action such as litigation.⁴⁵ Because of the limitations of mediation, Amy feels that the most appropriate role for environmental mediation is a relatively minor one.⁴⁶

Generally, Amy raises a valid concern regarding the cooptation of groups with less resources. He does, however, impart upon his political concerns an exaggerated importance by theorizing that such concerns work to adversely affect all mediation efforts. Amy pays only face value to the fact that some of these same political problems are found in most processes that deal with environmental issues.

Further, Amy's broad statement that mediators are disinterested in balancing the parties' power ignores the fact that not all mediators share such a view. According to Larry Susskind, a prominent environmental mediator, a mediator's tasks actually involve training parties in basic negotiation skills; helping parties draft fact-finding protocols, identify technical advisors, and raise and administer a pool of funds; serving as a repository for confidential information; and balancing other tasks which can work to balance power.⁴⁷ This does not include balancing the level of political power with which each party came into the process. A balance of political power, however, is not necessary to the success of reaching an agreement. Success in reaching an agreement takes into account all interests when resources, skill level, and other sources of power reach a more balanced level.⁴⁸

Amy's judgment that "disadvantaged" groups will inevitably be coerced into accepting undesirable concessions that undermine their interests must be criticized. This judgment is speculative at best, even paternalistic, for it assumes that an outsider can second-guess what is in the parties' best interest. When voicing his

42. *Id.* at 161.

43. *Id.* at 162.

44. *Id.* at 129-62; See also, Richard Delgado, et. al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WISC. L. REV. 1359 (criticizing ADR on the grounds that deformalization may increase the risk of racial and ethnic prejudice, placing the very groups which ADR is aimed at serving at an even greater disadvantage than that which they usually suffer). Delgado's argument is beyond the scope of this article because it concerns a more global problem than inequality of resources. Delgado, like Amy, Fiss, and others, discounts the presence of safeguards in ADR processes which are supposed to control bias. Such safeguards include: the parties' ability to select their own mediator, mediator accountability for displaying bias such as a loss of credibility, the use of integrative procedures, and others.

45. AMY, *supra* note 20, at 194.

46. *Id.* at 200.

47. SUSSKIND, *supra* note 8, at 142-43.

48. Lawrence E. Susskind, *Mediating Public Disputes: A Response to the Skeptics*, 1 NEGOTIATION J. 117, 118-19 (1985).

theoretical concerns, Amy also discounts procedural safeguards and other benefits available in the practical mediation context.

B. Safeguards Which Can Be Employed in the Mediation Process to Neutralize the Effect of an Inequality of Resources

Critics of mediation highlight the safeguards of traditional dispute resolution processes while decrying the lack of safeguards in the mediation process. Safeguards, however, do exist in the mediation process and can neutralize the effect of an inequality of resources. In fact, the premise of collaborative problem-solving efforts, such as mediation, is that a cooperative, flexible process will result in the better use of resources and create a decision more satisfactory to the parties. Therefore, mediation will generate a result more likely to be implemented, i.e., a fair agreement.⁴⁹

Contrary to Amy's heavy reliance on political power, the power at the negotiating table in most, if not all, disputes is not commiserate with political power carried outside of the process.⁵⁰ Instead, whether an inequality of resources is likely to affect the outcome of a dispute or whether it can be neutralized by procedural safeguards depends on other resources the parties may possess unequally. For example, if one party has a better alternative relative to others and can go outside the mediation process, then that party has the power to walk away. This power is likely to result in an outcome favoring the advantaged party.⁵¹ If, however, power is a function of technical knowledge or informational resources, then safeguards such as utilizing coalitions, information sharing, and resource pools will almost always overcome the inequality.⁵²

1. Pre-Dispute Assessment

Before mediation is undertaken, a pre-dispute assessment should be conducted between the mediator and key stakeholders to determine if mediation is the appropriate process. Mediation is not the appropriate process in situations where the issue is a matter of precedent or where parties determine that their interests would best be served in another dispute resolution process. When mediation is appropriate, efforts should be employed to include all affected parties.

Amy argues that parties with affected interests will be excluded from the mediation process because mediators have a self-interest in limiting the number of parties in order to increase the likelihood that an agreement will be reached. Contrary to this argument, Bingham has found that the likelihood of agreement is

49. CROWFOOT, *supra* note 8, at 20.

50. SUSSKIND Interview, *supra* note 24.

51. *Id.* Mr. Susskind believes that the power of having a better alternative, ie, a BATNA, is the single most important source of power in any mediation. *Id.*

52. *Id.*

not clearly affected by the number of parties involved.⁵³ Further, during Lawrence Susskind's twenty-five years of experience as a prominent mediator, he has found that the number of parties involved in the process has no impact on the outcome. Rather, the number of issues involved and the "richness" of the discussions between groups are the important factors.⁵⁴ Based on Susskind's observations and experience, Amy's claim that a mediator has an interest in excluding groups to keep the process minimal is not well-founded.

Instead, the mediator's interest seems to be best served by achieving a fair and stable agreement. Such an agreement is achieved by including all groups with affected interests or by ensuring that the interest of all the groups who are unable to participate are represented.⁵⁵ If any interested party is not included in the mediation, it may disrupt the mediation process itself or later try to block the implementation of whatever agreement the parties reach through its power to bring legal or political action.⁵⁶

When it is impractical for a group to participate directly in the mediation, the group's interest can still be represented by forming a coalition with other groups having similar interests.⁵⁷ The coalition would then be represented in the mediation process by either a single person or the smallest number of representatives feasible.⁵⁸ When choosing a representative, coalition members should consider whether a person has prior negotiation experience, strong bargaining skills, technical expertise or leadership skills. Throughout the process, the coalition must maintain effective communication with all of its group members

53. BINGHAM, *supra* note 1, at 99. Bingham states that:

there is no evidence among the cases studied to indicate that a large number of parties in a dispute resolution process makes it more difficult to reach an agreement. The average number of parties in the [over 100] cases examined in this study was just over four, and the range was between two and 40. In fact, the average number of parties for cases in which the parties failed to reach an agreement was lower than the average number of parties in cases in which an agreement was reached.

Id. at 99.

54. SUSSKIND Interview, *supra* note 24.

55. In June of 1986, the Society for Professionals in Dispute Resolution ("SPIDR") adopted ethical standards for mediators. The following standard pertains to unrepresented interests:

The neutral must consider circumstances where interests are not represented in the process. The neutral has an obligation, where in his or her judgment the needs of parties dictate, to assure that such interests have been considered by the principal parties.

DISPUTE RESOLUTION: AN OPEN FORUM 1986 PROCEEDINGS OF FOURTEENTH INTERNATIONAL CONFERENCE, (Society of Professionals in Dispute Resolution, Cheryl Cutrona, eds.) (1986).

56. John Charles Sassaman Jr., *Sighting Without Fighting: The Role of Mediation in Enhancing Public Participation in Siting Radioactive Waste Facilities*, 2 ALB. L.J. SCI. & TECH. 207, 219 (1992).

57. CROWFOOT, *supra* note 8, at 5, 21, 77.

58. SUSSKIND, *supra* note 8, at 208.

to ensure that each affected group's input and core objectives are not sacrificed.⁵⁹ Further, the representatives chosen to participate directly in the mediation process should have the authority to implement the agreement reached.⁶⁰

2. Safeguards During Participation in Mediation

When the involved groups have decided to pursue mediation, the process must provide each member with an equal voice. This applies even if the groups do not have equal power outside mediation. Because of its flexible, non-adversarial nature, mediation may provide several safeguards to neutralize inequalities among the groups.

a. Procedures to Prevent the Cooptation of "Disadvantaged" Groups

1. Training

In the words of Lawrence Susskind, "while informal dispute resolution efforts should not be construed as a means of altering the fundamental balance of political power, the parties to a dispute need not have political power for an informal negotiation process to produce better outcomes than those produced through more traditional means."⁶¹ In Susskind's experience as a mediator, individual negotiating skills have "altered traditional power relations."⁶² Furthermore, a representative chosen by a group or coalition should have prior negotiating experience or other bargaining, persuasion, or leadership skills. It is likely that at least one person in the community possesses these skills, even if technically untrained.

Contrary to Amy's view, Susskind believes that mediators play an important role in balancing power between the parties.⁶³ To this effect, a mediator should offer initial, basic negotiation training to help equalize ability levels.⁶⁴ Initial

59. *Id.* In the interest of suppressing conflicts of interest among coalition group members, the representative should also keep the mediator informed of all core member objectives. The mediator should continue to enrich the discussion of interests and create additional issues and value. Thus, all coalition group members can observe the "package" of issues agreed upon as a satisfactory outcome.

60. BINGHAM, *supra* note 1, at xxiv. Bingham found that a representative's authority to implement a decision was the single most important factor for reaching agreement. *Id.*

61. SUSSKIND, *supra* note 48, at 118-19.

62. STEPHEN B. GOLDBERG ET AL., *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES* 351-52 (2d ed. 1992).

63. SUSSKIND, *supra* note 8, at 208.

64. *Id.*; CROWFOOT, *supra* note 8, at 167-68. Crowfoot offers an example of training by the U.S. Environmental Protection Agency in their negotiated rule-making program:

All participants...are invited to attend an eight-hour training session that occurs before the first full negotiation meeting. The objectives of this training are:

1. To educate participants about fundamentals of negotiations;
2. To improve the participants' awareness of the dynamics of disputes;
3. To develop negotiating skills, bargaining strategies and style; and

training can empower groups and provide them with the confidence and skills needed to prevent their co-optation as the "inexperienced" party. Further, this training should not affect the perceived neutrality of the mediator since training is available equally to all groups.

2. Agenda-Setting By All Groups

Parties should then be given an equal chance to determine the agenda.⁶⁵ Determining the agenda includes setting the rules, protocols and codes of conduct.⁶⁶ Through agenda setting, the parties can establish procedures to ensure that each party has an equal opportunity to be heard. For instance, parties can set forth an order of speaking, a time limit, rules against interruption, attendance requirements and other procedures. Also, the parties should decide the issue of each party's responsibility to provide information and technical support.⁶⁷

Prominent proponents of environmental mediation, including Gail Bingham and Larry Susskind, note that mediators play a very important role in ensuring that the participants abide by these rules and conduct a fair process.⁶⁸ Mediators in this role should continue to abide by professional standards and ethics to maintain their credibility.⁶⁹

3. The Use of Integrative Procedures

Integrative procedures such as workshops, brainstorming, role-playing and other tools can be used by the mediator to ensure that the groups conduct the process in good faith.⁷⁰ These procedures can improve communication and trust between the groups and endow the parties with a win-win conception of the process.⁷¹ This type of close interaction can result in a greater appreciation of opposing views⁷² and lead toward a consensual solution that considers the

4. To demonstrate ways to apply these skills in the upcoming session.

65. Cecilia Albin, *The Role of Fairness in Negotiation*, 9 NEGOTIATION J. 223, 228 (1993).

66. *Id.*; See also Gerald W. Cormick, *Strategic Issues in Structuring Multi-Party Public Policy Negotiations*, 5 NEGOTIATION J. 125, 126-27 (1989).

67. BINGHAM, *supra* note 1, at 119-20; CROWFOOT, *supra* note 8, at 21-22.

68. BINGHAM, *supra* note 1, at 162-67; SUSSKIND, *supra* note 8, at 140-50; see also Judith L. Maute, *Public Values and Private Justice: A Case For Mediator Accountability*, 4 GEO. J. LEGAL ETHICS 503, 521 (1991).

69. See SPIDR's ETHICAL STANDARDS OF PROFESSIONAL RESPONSIBILITY (1986); MODEL STANDARDS OF CONDUCT FOR MEDIATORS (1995).

70. Albin, *supra* note 65, at 232-33.

71. *Id.* at 232-33, 237; Carrie Menkel-Meadow, *The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Paradigms and Practices*, 11 NEGOTIATION J. 217, 227 (1995) (book review). Menkel-Meadow reviews WHEN TALK WORKS by Deborah Kolb, which explores the use of several innovative techniques. Menkel-Meadow lists several of these techniques, including among many others "Linda Colburn's use of surprise or 'disorientation' ... to shake parties out of their usual repertoires of behavior, to encourage their creativity or to get them to be more revealing" and Albie Davis's communication models "of encouraging the parties to treat each other with respect - an 'as if you were equal' approach that can help balance power and create greater appreciation of equality in a mediation." *Id.* at 227.

72. Freeman, *supra* note 7, at 139.

interests of all groups.⁷³ Even though a group should constantly assess and revise its position, it should always focus on its goals and not compromise its core interests.

If a group refuses to act in good faith, the other groups in the coalition are free to walk away from the mediation process. In such an event, a group may lose the opportunity to have its concerns met.⁷⁴ The mediator should keep the parties aware of this potential loss.⁷⁵ This awareness along with the integrative procedures should sufficiently act as incentives for the groups to proceed in good faith. Another technique to ensure good faith participation would be to publicize the process or the outcome through media attention, a consent decree, or other measures. If utilized, all parties should agree on one of these techniques.

b. Procedures to Increase Access to Information and Technical Support

As mentioned above, critics of mediation are concerned that parties coming into the mediation process with unequal information and technical skills will unwittingly compromise their interests or have their interests undermined by others. These concerns can also be mitigated through actions taken by parties and the mediator to equalize such resources.

1. Sharing Information Between Groups

Guidelines for formalizing and legitimating the exchange of existing information and its impact should be established during the agenda-setting stage of the mediation process.⁷⁶ Good faith sharing of information is more likely to

73. *Id.* Central to this notion is that each group brings different resources and interests to the mediation. Because each party views resources and interests differently, the parties may trade to their mutual gain and arrive at a mutually satisfactory solution. *Id.*

74. BINGHAM, *supra* note 1, at 116-17. Bingham cites, as an example, a case where citizen opposition arose to the development of a recycling plant after the company had obtained local permits. Both groups, however, agreed to mediation and were exploring options when one member of the citizens' group acted unilaterally, initiating litigation without consulting anyone. The company withdrew from the mediation. "In the end, the court authorized the company to proceed with the new plant site, and the local citizens lost the opportunity to resolve some of their concerns." *Id.*

75. SUSSKIND, *supra* note 8, at 164. In fact, "the long-term credibility of a mediator depends on ensuring that every possible effort was made to meet the interests of all the parties involved." *Id.*

76. CROWFOOT, *supra* note 8, at 21-22, 165. Unlike the adversarial nature of litigation, where it is common practice for attorneys to bury critical evidence in a mountain of paperwork or otherwise hide information, parties in the collaborative mediation context should be more willing to share information in good faith. Here though, one must query whether the mediation context can, in reality, change the culture to the extent that typically adversarial groups can work together in good faith. More empirical evidence is necessary. Based on Bingham's and Susskind's experiences, however, it appears possible for parties to successfully work together in a non-adversarial nature. For example, Susskind found that in a negotiated rule-making session used by the EPA as a demonstration, relations between traditionally adversarial parties, including the EPA, environmental groups, state organizations, agricultural user groups, and manufacturers, improved markedly. GOLDBERG, *supra* note 62, at 349-50 (citing Lawrence Susskind and Gerald McMahon, *The Theory and Practice of Negotiated Rulemaking*, 3 YALE J. ON REG. 133, 143-59 (1985)). Further, "in the eyes of the participants and others closely

occur as trust builds between the mediation groups through the use of integrative procedures and as these groups keep in mind the goal of finding a mutually acceptable solution. Companies concerned about the release of proprietary or confidential information can use a mediator as a "repository for information, issuing summaries of findings without mentioning particular companies."⁷⁷

A developer, company, or other entity proposing a project has an incentive to share information. Such sharing can help the proposing entity clarify misunderstandings about its proposal and the related consequent environmental impacts and prevent later litigation.⁷⁸ Furthermore, if the community or a public interest group shares information about its concerns, then the project proponent may modify its proposal or make additional offers that satisfy these concerns more effectively.⁷⁹ Further incentives to share information can be provided by pressuring a political figure to use the Freedom of Information Act or other political and legislative means to compel government groups involved in the dispute to provide pertinent information.⁸⁰

2. Methods Other Than Group Sharing

Information on a particular project and its potential impacts may not exist, or community and public interest groups may wish to independently assess the impacts of a proposed project. When information does not exist, groups must agree on formalized measures to develop the needed data. When community or public interest groups seek independent analysis or clarification of data, several techniques are available to do so.

a. Technical Expertise of Members

Community and public interest groups can develop a membership which includes individuals with technical expertise.⁸¹ It is likely that within any one community, regardless of its class or race, there are individuals willing to become involved in the group(s) who have technical expertise directly relevant to the dispute, or knowledge that is transferable to the dispute, or skills necessary to achieve that knowledge. These individuals can apply their expertise and share their understanding of the issue with other group members.

b. Sympathetic Groups

Community groups can look to mainstream environmental groups, science and technical organizations, universities and other groups that might have relevant

observing the process, negotiated rulemaking appeared to produce more legitimate outcomes . . ." *Id.* at 350.

77. SUSSKIND, *supra* note 8, at 145.

78. BINGHAM, *supra* note 1, at 86.

79. *Id.*

80. CROWFOOT, *supra* note 8, at 165.

81. *Id.* at 164; SUSSKIND, *supra* note 8, at 210.

studies or that have been involved in similar processes to obtain needed data and clarify issues.⁸²

With the advent of new technologies, the scope of attainable knowledge is broadened considerably. The World Wide Web, a global network of computers that is part of the Internet, was originally created in 1989 to help scientists share information.⁸³ Community groups can access these global computer networks to obtain this scientific and technical knowledge for use in the mediation process.⁸⁴ Furthermore, these groups can establish home pages detailing their experiences in mediating or opposing development projects which can be used by subsequent groups.

The Internet remains in its infancy in terms of exploring its development and capabilities and gaining access to the Internet by those unable to afford computers and modems. The city of Santa Monica, however, has funded and set up fifteen public access terminals in libraries, banks, outdoor shopping areas, and other sites.⁸⁵ Surprisingly, the homeless were among the heaviest users of these terminals.⁸⁶ Precedent now exists for other cities to follow Santa Monica's guidance and provide access to the Internet for disadvantaged groups. Furthermore, although it is early in the Internet's life cycle, the possibility exists that regulations or laws might be initiated to mandate access to the information superhighway for disadvantaged groups.

c. Mediator Expertise

Lawrence Susskind espouses and practices the controversial notion that a mediator should bring technical knowledge to the mediation process.⁸⁷ A mediator can accomplish this by either possessing such knowledge himself or herself or by creating a team of mediators which include technical experts possessing such knowledge.⁸⁸ The advantage of mediators possessing such expertise is that every party seeking access to that expertise has it granted free of skewed interpretations of the data.

82. SUSSKIND, *supra* note 8, at 210. For instance, in a dispute involving the development of a trash incineration plant, the city council looked to the local Academy of Sciences, a private organization of scientists with a long record of service to the community, for help in reviewing available scientific and technical evidence regarding the impact of the plant. *Id.* at 69.

83. Vic Sussman & Kenan Pollack, *Gold Rush in Cyberspace*, U.S. NEWS & WORLD REPORT, Nov. 13, 1995, at 72, 74.

84. Community groups can find guidance on how to use the Internet from members or organizations providing access to the Internet or from other information available at local libraries.

85. Enid Coulsen, *The Hole in the Donut: Electronic Redlining and Universal Access to the Superhighway 33-35* (Fall 1995) (on file with author).

86. *Id.*

87. *Susskind Interview, supra* note 24.

88. *Id.*

*c. Procedures to Fund Disadvantaged Groups' Participation
in the Process and Access to Information*

1. Resource Pool Among Parties or Independently Funded

Once parties agree in earnest to pursue mediation, it may be necessary to ask the mediator to assist in creating a resource pool to fund mediation activities such as travel expenses and joint fact finding.⁸⁹ A resource pool is a "kitty" of money which each group can draw upon as needed.⁹⁰ Citizen groups are likely to have the least resources to contribute to such a pool. Such citizens' groups, however, may be unwilling to accept money from a more wealthy project proponent out of concern that such acceptance would undermine the group's credibility.⁹¹ This concern makes it essential that the mediator appoint an independent resource pool manager.⁹² The mediator himself or an outside organization that has no involvement in the mediation could be the independent resource pool manager.⁹³

In the agenda-setting stage, each group should be given an equal role in drafting guidelines for the use of the funds in the pool.⁹⁴ Once the funds are turned over to the independent manager, however, individual contributors should have no say in how the funds are allocated.⁹⁵

Another approach is to draw finances from a revolving fund financed by organizations independent of the ongoing mediation effort. This approach is especially attractive to citizen groups who are adamantly against taking funds from a proponent-funded resource pool.⁹⁶ In the mid-1980's, the National Institute for Dispute Resolution ("NIDR") grappled with the issue of establishing a national revolving fund, the Fund for Public Interest Mediation ("FPIM").⁹⁷ Unfortunately, the fund never got off the ground because of the lack of donor funding.⁹⁸ Seeking primarily corporate funding, NIDR found it very difficult to

89. SUSSKIND, *supra* note 8, at 145.

90. *Id.*

91. *Id.* at 205.

92. *Id.*

93. *Id.* at 205-06. Examples of organizations that could serve as independent resource pool managers are the local state office of mediation, the National Institute for Dispute Resolution ("NIDR"), private foundations such as The Conservation Foundation, and many other credible organizations sympathetic to the mediation effort. From 1988 through 1991, NIDR served as the independent repository for Environmental Protection Agency funds for use in negotiated rulemaking situations. Telephone Interview with Tom Fee, Independent Consultant, former Vice President of NIDR (Nov. 8, 1995) (hereinafter *Fee Interview*).

94. *Fee Interview*, *supra* note 93.

95. *Id.*

96. Note that Lawrence Susskind finds that, in his experience, the resource pool once funded and independently managed, with no further party control, is not seen by the parties as politicized, but is seen only as a means to achieve shared informational resources and technical analysis. *Susskind Interview*, *supra* note 24.

97. *Fee Interview*, *supra* note 93.

98. *Id.*

sell the concept of a public dispute fund to outcome-oriented corporate funders.⁹⁹ NIDR did, however, begin giving small, outright grants under \$10,000 to subsidize parties in the beginning stages of the mediation process.¹⁰⁰ The current President of NIDR, Margie Baker, believes that a national revolving fund remains a good idea.¹⁰¹

To be a viable resource, however, implementation issues will have to be resolved. These issues include marketing the idea of a fund to potential donors by creating incentives such as positive publicity; determining who is responsible for its administration by asking such questions as whether it has to be a credible non-profit agency or whether it can be a governmental agency; determining who is responsible for deciding what groups shall receive funds; and determining what criteria that person should use to decide what groups shall receive funds.¹⁰²

Another source of independent funding consists of grants provided by foundations such as the Conservation, Ford, and William A. and Flora Hewlett foundations.¹⁰³

2. Fundraising

A group may pursue its own fundraising efforts by selling t-shirts, washing cars, pursuing personal donations from members and local companies, and conducting various other fundraisers. Because of the generally less public nature of mediation, mediation may be seen as lowering the citizen groups' visibility. This perception reduces the groups' ability to attract financial resources which are critical to their survival and effectiveness.¹⁰⁴ Despite this, the citizen group may feel empowered through its participation in the process because it is given a direct opportunity to inform the other parties of its priorities, to confront the views of those parties and, as a result, to influence the decision making. Because of these opportunities, a group and its potential members or donors may view the group's efforts as having more substantive results than it would have in a process which is not so party-determined. This feeling of empowerment may encourage the group to devote more effort to informing its current members of the vital need for funds to aid the mediation process and to renew its efforts to organize and canvas for new members or donations with added success.

3. Donated Services

Many mediators volunteer their time or provide it at a substantially reduced cost. Through environmental dispute resolution institutes, several state universities provide mediation and other services.¹⁰⁵ Further, several law schools have

99. *Id.*

100. *Id.*

101. Telephone Interview with Margie Baker, President of NIDR (Oct. 31, 1995).

102. *Fee Interview, supra* note 93.

103. BINGHAM, *supra* note 1, at 156.

104. CROWFOOT, *supra* note 8, at 4.

105. *Id.* at 154.

established environmental justice law clinics.¹⁰⁶ Many of these same law schools now have some type of negotiation or mediation classes available for students. Because of these available resources, other environmental law clinics can establish or access mediation services such as training mediators to aid a group the clinic is involved with or which contacts the clinic. Groups can also look to local science and technical organizations for fact-finding and clarification of technical issues.

IV. CONCLUSION

In the end, the potential for an inequality of financial, technical, and other resources to affect the mediation process is a potential also found in other environmental dispute resolution contexts.¹⁰⁷ Empirical research is needed to fully explain the role of inequality of resources. Until this role is fully explained, the mediation process still allows groups to more actively and democratically participate than they could in other dispute resolution contexts. Also, the flexible setting of procedural safeguards in mediation helps mitigate any potential effect of the inequality of resources. In providing these safeguards, mediation also makes it more likely that the parties will be satisfied with the process and the eventual outcome. Moreover, parties will reasonably perceive that they reached a better agreement than they might have reached in another dispute resolution forum.

106. Hope Babcock, *Environmental Justice Clinics: Visible Models of Justice*, 14 STAN. ENVTL. L.J. 3, 6 (1995).

107. For example, Marc Galanter has acknowledged that litigation may offer an "artificial equalizing of parties...by insulation from the full play of political pressures-the 'equality' of the parties, the exclusion of 'irrelevant' material, the 'independence' of judges...." Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 138 (1974). Such resources, however, reassert themselves at the implementation stage and, thus, the "haves" will once again come out ahead. *Id.*

BIBLIOGRAPHY

1. RICHARD ABEL, *THE POLITICS OF INFORMAL JUSTICE* (1982).
2. DOUGLAS J. AMY, *THE POLITICS OF ENVIRONMENTAL MEDIATION* (1987).
3. GAIL BINGHAM, *RESOLVING ENVIRONMENTAL DISPUTES: A DECADE OF EXPERIENCE* (1986).
4. JAMES E. CROWFOOT & JULIA M. WONDOLLECK, *ENVIRONMENTAL DISPUTES: COMMUNITY INVOLVEMENT IN CONFLICT RESOLUTION* (1990).
5. STEPHEN B. GOLDBERG, FRANK E.A. SANDER, NANCY H. ROGERS, *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES* (2d ed. 1992).
6. E. ALLEN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988).
7. GERALD N. ROSENBERG, *THE HOLLOW HOPE* (1991).
8. LAWRENCE SUSSKIND & JEFFREY CRUIKSHANK, *BREAKING THE IMPASSE* (1987).
9. Cecilia Albin, *The Role of Fairness in Negotiation*, 9 NEGOT. J. 223, (July 1993).
10. Hope Babcock, *Environmental Justice Clinics: Visible Models of Justice*, 14 STAN. ENVTL. L.J. 3 (Jan. 1995).
11. Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 ECOLOGY L. QTRLY. 619 (1992).
12. Gerald W. Cormick, *Strategic Issues in Structuring Multi-Party Public Policy Negotiations*, 5 NEGOT. J. 124 (April 1989).
13. Enid Coulsen, *The Hole in the Donut: Electronic Redlining and Universal Access to the Superhighway* (Fall 1995) (on file with author).
14. Richard Delgado, et. al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WISC. L. REV. 1359 (1985).
15. Frank Dukes, *Public Conflict Resolution: A Transformative Approach*, 9 NEGOT. J. 45 (Jan. 1993).
16. Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (May 1984).
17. Jodi Freeman, *Collaborative Governance in the Administrative State* (on file with author who is a professor at UCLA Law School).
18. Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (Fall 1974).
19. Lynn A. Kerbeshian, *ADR: To Be Or...?*, 70 N. DAK. L. REV. 381 (1994).
20. Judith L. Maute, *Public Values and Private Justice: The Case for Mediator Accountability*, 4 GEO. J. LEGAL ETHICS 503 (1991).
21. Carrie Menkel-Meadow, *The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Paradigms and Practices*, 11 NEGOT. J. 217 (July 1995).

22. John Charles Sassaman Jr., *Siting Without Fighting: The Role of Mediation in Enhancing Public Participation in Siting Radioactive Waste Facilities*, 2 ALB. L.J. SCI. & TECH. 207 (1992).
23. Charlene Stukenborg, *The Proper Role of Alternative Dispute Resolution (ADR) in Environmental Conflicts*, 19 DAYTON L. REV. 1305 (Spring 1994).
24. Lawrence E. Susskind, *Mediating Public Disputes: A Response to the Skeptics*, 1 NEGOT. J. 117 (April 1985).
25. Vic Sussman, *Gold Rush in Cyberspace*, U.S. NEWS & WORLD REPORT, Nov. 13, 1995, 72.
26. Telephone Interview with Margie Baker, President of NIDR (Oct. 31, 1995).
27. Telephone Interview with Tom Fee, Independent Consultant and former Vice President of NIDR (Nov. 8, 1995).
28. Telephone Interview with Lawrence Susskind, Associate Director of the Program on Negotiation at Harvard Law School (Dec. 1, 1995).

