Hastings Law Journal

Volume 34 | Issue 5 Article 8

5-1983

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The Role of Mediation in Public Interest Disputes

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In recent years this country's traditional reliance on the courts to resolve disputes has come under serious question.[1] Although there is some evidence that as a society we are no more litigious than we have ever been, the quality and mix of our litigation certainly has changed.[2] Many rights being asserted in litigation today did not exist twenty years ago.[3] Also, courts have increasingly recognized private rights of action for wrongs for which statutory remedies were non-existent or were lim-

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1. *See, e.g.*, Landsman, *The Decline of the Adversary System: How the Rhetoric of Swift and Certain Justice Has Affected Adjudication in American Courts*, 29 BUFFALO L. REV. 487, 502-03 (1980).

Professor Leonard L. Riskin attributes the American emphasis on adversarial alternatives to our national culture, which places a high value on "freedom as an absence of restraint and on autonomy and individual liberty as the highest goal." He contrasts the Confucian emphasis on harmony as the natural and desirable condition. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 30 (1982).

2. *See* J. LEIBERMAN, THE LITIGIOUS SOCIETY (1981); Cavanaugh & Sarat, *Thinking About Courts: Toward and Beyond a Jurisprudence of Judicial Competence*, 14 LAW & SOC'Y REV. 371, 420 (1980); Friedman, *The Six Million Dollar Man: Litigation and Rights Consciousness in Modern America*, 39 MD. L. REV. 661 (1980); Hufstedler, *New Blocks for Old Pyramids: Reshaping the Judicial System*, 44 S. CAL. L. REV. 901, 907 (1971). These sources are cited in an unpublished paper by Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Alledgedly Contentious and Litigious Society*, presented at the National Conference on the Lawyer's Changing Role in Resolving Disputes, Oct. 1982, at the Harvard Law School (on file with the authors). It is worth noting that in California one out of every hundred citizens files a lawsuit each year. Lundquist, *Humanizing Litigation*, LITIGATION, Spring 1978, at 3, 4.

3. For example, the right not to be discriminated against in employment based on race or sex, the extension of the protections of due process to large classes of individuals including welfare recipients, prisoners, and the mentally ill, and the requirement of environmental impact reports, are all relatively recent developments.

ited to administrative enforcement.[4]

The rapid development of public interest law[5] in the past two decades has contributed to the expansion of legally cognizable rights. Both through landmark decisions [6] and the skillful use of publicity,[7] public interest litigators have had a profound impact on our society and the way we do business. Yet, despite the many dramatic successes achieved by public interest litigants in the courts, there are good reasons to consider alternative approaches for resolving public interest disputes.

The economic motivation propelling other civil litigants toward alternatives to litigation[8] is equally apparent in the public interest sector.[9]

4. On the implication of private rights of action under federal statutes, see articles collected in Note, *Private Rights of Action Under Title IX of the Education Amendments of 1972: Cannon v. University of Chicago*, 3 HARV. WOMEN'S L.J. 141, 142 n.8 (1980). *See also* Ronfeldt, *Implying Rights of Action For Minorities and the Poor Through Presumptions of Legislative Intent*, 34 HASTINGS L.J. 969 (1983).

5. The term "public interest law" first was applied in the mid-1960's to the work of legal groups making efforts to secure legal services for those lacking them. Note, *In Defense of an Embattled Mode of Advocacy: An Analysis and Justification of Public Interest Practice*, 90 YALE L.J. 1436, 1436 n.3 (1981). *See* Cooke, *Public Interest Law and Lawyers for the Public Interest, 34* REC. A.B. CITY N.Y. 6, 7 (1979).

Examples of public interest litigators include the American Civil Liberties Union, which emphasizes personal freedoms and assumes that if government is to serve the public interest, it must be closely monitored from the outside; the NAACP Legal Defense Fund, which uses law strategically to lay the groundwork for political change; the Legal Services Corporation, which acts as an independent monitor of government and private activities affecting the poor; the Lawyers' Committee for Civil Rights Under Law, which involves private lawyers in representing and legitimizing unrepresented interests in constitutional and statutory law enforcement; and the public interest law firms, supported by foundations and the general public, such as the Environmental Defense Fund, the Public Citizen Litigation Group, and Public Advocates, Inc., which address the concerns of environmentalists, consumers, the elderly, children, women, prisoners, and many other under-represented constituencies. COUNCIL FOR PUBLIC INTEREST LAW, REPORT: BALANCING THE SCALES OF JUSTICE: FINANCING PUBLIC INTEREST LAW IN AMERICA 19-21 (1976); Note, *supra*, at 1436 n.3.

6. For a list of cases, see Note, *supra* note 5, at 1437 n.6.

7. The public education aspect of public interest practice can be a major service in itself. Although Mr. Wolinsky and Ms. Arriola, in their accompanying Commentary, *Public Interest Practice in Practice: The Law and Reality*, 34 HASTINGS L.J. 1207 (1983), point to *Committee for Childrens' Television Inc. v. General Foods Corp.*, No. 61056 (Cal. Ct. App., 2d Dist., Mar. 30, 1982), as a "non-victory," Arriola & Wolinsky, *supra*, at 1221-23, the publicity surrounding that suit and the F.T.C. hearings which followed have gone a long way toward educating the public about the nutritional value of sugared breakfast cereals. It is not suprising that a major consideration in decisions about the initiation and conduct of public interest litigation is the potential impact of publicity about the litigation. Letter from Greg Thomas (lawyer for the Committee for Childrens' Television Inc.) to Howard Herman (May 24, 1983) (on file at the HASTINGS LAW JOURNAL Office).

8. *See, e.g.*, the Keynote Address by Chief Justice Warren Burger to the Pound Conference, *Agenda for 2000 A.D.—A Need for Systematic Anticipation,* 70 F.R.D. 83, 92 (1976). More recently, the Rand Corporation has released a study which found that the average cost

Public interest lawyers know that resources are scarce and that their commitment to one battle means that another must be foregone. In a time of decreased public funding,[10] survival of public interest lawyering may depend upon the availability of cost-effective alternatives to litigation.[11]

Additionally, the substantial delays involved in litigation[12] may rob public interest litigants of many of the benefits they turned to litigation to achieve.[13] Too often, the remedies available through litigation also fall short of complete relief.[14]

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for processing a tort case through jury trial in federal district court *exceeded* the average award for such cases. Report by Dr. James S. Kakalik and Abby Robyn, "Costs of the Civil District Court: Expenditures for Processing Tort Cases," Rand Corp., Santa Monica, Cal., Oct. 1982. This is, of course, in addition to the costs and attorneys fees borne by the parties. Commenting on a preliminary draft of this study, Chief Justice Burger observed, "If this is correct, we need to ask whether it is wise to continue using taxpayers' money in this manner." Burger, *Arbitration, Not Litigation*, NATION'S BUS., Aug. 1982, at 52.

9. *See, e.g.*, Everett, *Financial Assistance for Public Interest Group Participation in Environmental Decisionmaking*, 10 ENVTL. L. 483 (1980) (mounting financial pressures on public interest groups in the environmental sector).

10. Note, *supra* note 5, at 1437 n.8.

11. *See* Green, Marks & Olson, *Settling Large Case Litigation: An Alternative Approach*, 11 LOY. L.A.L. REV. 493 (1978) (cataloguing the expenses of large suits, and offering an example of an alternative dispute resolution process succeeding in practice in the kind of complex litigation that characterizes many public interest disputes).

12. By way of example, the Judicial Council of California has noted that the *median time* to decision for civil cases (from the date on which notice of appeal is filed to the filing of the Appellate court's decision) ranges from one year to twenty-nine months. JUD. COUNCIL OF CAL., 1982 ANNUAL REPORT TO THE GOVERNOR AND THE LEGISLATURE 62 & Table XIV (1982).

13. Burger, *supra* note 8, at 53-54.

14. *See, e.g.*, Comment, *The Limits of Litigation: Public Housing Site Selection and the Failure of Injunctive Relief*, 122 U. PA. L. REV. 1330 (1974). Using the example of suits against local housing authorities, this comment suggests the extent to which court victories can be nullified by the difficulty of enforcing court-ordered change against a public agency defendant with broad discretionary powers. The author observes that, for a variety of reasons, including the difficulty of identifying a responsible individual, courts are hesitant to exercise their sole real enforcement power—citation for contempt—against public officials.

Even when the defendants attempt to comply with a court-ordered program, the practical problems of implementation and monitoring compliance can be enormous. *See, e.g.*, Note, *The Wyatt Case: Implementation of a Judicial Decree Ordering Institutional Change*, 84 YALE L.J. 1338 (1975) (tracking the implementation of a judicial decree ordering Alabama's state hospital system to deliver adequate treatment to mentally impaired patients).

An additional problem with judicial resolution of public interest law suits is that it forces the judiciary into a legislative role. *See generally* Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976). Although Professor Chayes felt that, on balance, the judiciary could be entrusted with this expanded role, he noted the very serious problems inherent in subjecting both the parties to a suit (and a multitude of nonparties) to continual judicial oversight of regulatory policy devised by the court. By contrast, mediated negotiations allow public agencies to maintain their delegated role of administering policies set by the legislature; the agencies simply are given the opportunity to perform that role with the advantage of input from the most directly concerned sector of the

This Commentary addresses one alternative to litigation: mediation.[15] First, the mediation process is described. Then its application to public interest disputes is explained. Finally, two proposals are advanced for incorporating mediation into the process of resolving public interest disputes.

The Mediation Process

Mediation is facilitated negotiation. Mediators are used by parties to a dispute to: 1) depersonalize the dispute, thus reducing the level of emotion; 2) enable discussion to take place when the parties are not willing to talk directly to one another; 3) permit confidential information to be used to facilitate a settlement without revealing it to the other side; 4) clarify issues and identify the interests of the parties; 5) develop new options for a mutually satisfactory resolution; and 6) prevent conflict aftermath.[16]

Mediation is distinct from arbitration, the most familiar alternative dispute resolution mechanism. The following chart[17] illustrates some of the similarities and differences between mediation and arbitration:

Mediation	*Arbitration*
1. Voluntary	1. Voluntary (usually)
2. Impartial	2. Impartial
3. Mediator selected by the disputants	3. Arbitrator selected by the disputants
4. Mediator can explore broad avenues of cause, help identify issues, and explore alternatives for resolution	4. Arbitrator can address only those issue-questions which the parties have jointly agreed to submit
5. Disputants rarely submit evidence or have witnesses since testimony as such holds no weight	5. Disputants can submit evidence and have witnesses

public. *See* M. CAPPELLETTI & J. JOLOWICZ, PUBLIC INTEREST PARTIES AND THE ROLE OF THE JUDGE IN CIVIL LITIGATION (1975).

15. Although this Commentary focuses on mediation, it should be noted that a wide variety of alternative dispute resolution procedures have been developed, including neutral fact finding, the mini-trial, and a combined mediation-arbitration procedure. *See* "Alternative Methods of Dispute Settlement, A Selected Bibliography," compiled by the Special Committee on Alternative Means of Dispute Resolution of the American Bar Association, Dec. 1979, and updated May 1982.

16. Conflict aftermath is the continuation of conflict after the apparent resolution of a dispute.

17. Reprinted by permission of the American Intermediation Service and William F. Lincoln from a manual on negotiation and mediation.

6. Disputants participate in developing procedures	6. Disputants do not participate in developing procedures
7. Mediator can have private meetings (caucuses) with a disputant	7. Arbitrator cannot have private meetings (caucuses) with a disputant
8. Disputants fully participate in the decision-making process regarding substantive outcomes	8. Disputants do not participate in the decision-making process regarding substantive outcomes
9. Mediator has no authority to render a decision	9. Arbitrator has authority to render a decision
10. No decisions, only settlement agreements between the parties	10. Decision is "final and binding"
11. Primarily interested in "mutual gain" resolutions	11. Determines "right" and "wrong," or guilt and innocence, rectification

Mediators are "process" experts. To be effective, they need not have expertise in the subject of the dispute. Initially, they help the parties decide what is to be discussed and how the discussions are to take place. The parties decide whether, and when, to bring in experts.

Mediation also offers the parties maximum control over the process of resolving the conflict, an opportunity to redefine the area of discussion so that the larger interests can be served, and a collaborative framework rarely found in formal proceedings. Even when direct negotiations have broken down, mediation can provide a face-saving procedure for reestablishing communication among the parties.

For decades, mediation had proven an effective means of resolving complex disputes in the field of organized labor.[18] More recently, mediation has become an important adjunct to litigation in family law matters.[19] Parties frequently involved in general civil litigation also are beginning to investigate alternatives to adverserial processes.[20]

To date, state legislation concerning mediation has been limited.[21] However, the number and scope of mediation programs are increasing

18. For a discussion of mediation in the collective bargaining context, see W. SIMKIN, MEDIATION AND THE DYNAMICS OF COLLECTIVE BARGAINING (1971).

19. In California, for example, mediation is mandated for child custody matters in divorce cases. CAL. CIV. CODE § 4607 (West. Supp. 1983). A substantial segment of the family law bar nationwide is beginning to utilize collaborative processes, including having the same lawyer—or in some cases a lawyer and therapist team—work with the separating couple. *See generally* AM. BAR ASS'N, ALTERNATIVE MEANS OF FAMILY DISPUTE RESOLUTION (1982); Riskin, *supra* note 1.

20. *See, e.g.*, *"Managing" Company Lawsuits to Stay Out of Court*, BUS. WK., Aug. 23, 1982, at 59.

21. For a compilation of state laws relating to mediation, see STATE LEGISLATION ON DISPUTE RESOLUTION (A.B.A. Special Committee on Alternative Means of Dispute Resolution Monograph No. 1, June 1982).

dramatically.[22] There is reason to believe that mediation also can contribute substantially to the resolution of public interest disputes.

The Value of Mediation in Public Interest Disputes

Three characteristics of public interest litigation particularly suggest the value of mediation in public interest disputes: 1) the tendency of the parties to take positions based on principle that put the essentials of discussion beyond negotiation; 2) the fact that much public interest litigation never actually resolves the underlying controversies; and 3) the frequent failure of government defendants to identify someone to take responsibility for settling disputes. Following the discussion of each of these characteristics is a description of how mediation can help.[23]

Much Public Interest Litigation Is Instituted and Maintained Because the Parties Take Positions Based on Principles That Are Beyond Negotiation

Professor Marc Galanter of University of Wisconsin Law School has analyzed nonsettling cases to determine the reason for their longevity. He concludes that these hard-to-settle cases often involve situations in which a party needs the judicial declaration itself, rather than simply a settlement of the immediate dispute.[24] In some cases a litigant wants to secure a declaration of "good law."[25] In others, a premium is placed on having an external agency make the decision.[26] Frequently, accepting a negotiated resolution is perceived as weakening the future

22. Ronald L. Olson, Chair of the A.B.A. Special Committee on Alternative Means of Dispute Resolution, notes in his foreword to the monograph STATE LEGISLATION ON DISPUTE RESOLUTION, *supra* note 21, that more than 400 private and government agencies are currently providing informal dispute resolution services. In addition, 188 communities in 38 states have established "neighborhood justice centers." For a description of an exemplary program of this type, see SAN FRANCISCO COMMUNITY BOARDS, 1981 ANNUAL REPORT (1981) (on file with authors). Mediation also has come to play an important role in the juvenile justice field. *See* E. VORENBURG, A STATE OF THE ART SURVEY OF DISPUTE RESOLUTION PROGRAMS INVOLVING JUVENILES (1982).

23. There are other characteristics of public interest litigation that suggest the potential value of mediation. For example, it is the authors' experience that public interest litigants often use the threat of litigation to encourage settlement of the underlying issues. Mediation, as a more direct method of bringing the parties to the negotiating table, would be a more efficient use of time and money and would better serve the public interest.

24. Galanter, *supra* note 2, at 24-25.

25. *Id.* at 26. Among the "good law" cases, perhaps the most famous is Brown v. Board of Educ., 347 U.S. 483 (1954).

26. Galanter, *supra* note 2, at 25. For example, a government or corporate employee not wanting to take responsibility for a settlement might be very anxious to have a third party decide the cause.

bargaining credibility of a party.[27] In other cases a vindication of fundamental values is sought.[28]

Although such perceptions make settlement more difficult, the fact is that parties in general civil litigation frequently change their perceptions of what is and is not negotiable. Almost ninety percent of all civil lawsuits eventually settle.[29] In contrast, perhaps only fifty percent of the public interest cases settle.[30] It is unclear how much of this difference in settlement rate is attributable to the inability of particular parties to establish and maintain effective communication and how much is attributable to the unique nature of public interest litigation. A look at the process of mediated negotiations suggests, however, that its application to public interest disputes could substantially reduce the need for litigation.

The most important function of any negotiation is to educate the parties about their own and opposing interests. This enables them to take into account the perspectives and needs of all parties to the dispute in considering settlement options. By utilizing an intermediary, this educational process may even take place without face-to-face discussions by the parties. The intermediary permits the parties to explore possible resolutions without either party giving up its litigating stance or revealing confidential information to other litigants.

Sometimes this educational process of settlement talks will induce even the most committed believer in principle to substitute a negotiable objective for a non-negotiable one which has contributed to impasse. For example, a group that in principle opposes the building of nuclear power plants might be persuaded to negotiate over the terms and conditions on which a power plant would be built (or completed) if the plant would use only waste fuels already generated by the nation's nuclear weapons program.

27. *Id.* Some trial lawyers feel impelled to try the hard cases, to maintain credibility in further negotiations. Belli, *Pretrial: Aid to the New Advocacy*, 43 CORNELL L.Q. 34 (1957). A frequent defendant such as a utility company may not want to make settlement too easy for fear of encouraging further claims. An employer might be reluctant to compromise in a dispute with one employee for fear that other employees will demand equal treatment.

28. Galanter, *supra* note 2, at 26. The National Rifle Association's efforts to strike down legislation aimed at gun control is one example.

29. *Id.* at 23.

30. Letter from Sidney M. Wolinsky, co-founder of Public Advocates Inc. (May 19, 1983) (on file with the authors).

A lower rate of settlement is also suggested by statistics published by the Aministrative Office of the United States Courts. For the 12-month period ending June 30, 1981, 16.8% of all civil rights cases (excluding United States cases and prisoner petitions) reached trial. This is compared to 6.6% for all civil cases generally. AD. OFF. OF THE U.S. CTS., 1981 ANNUAL REPORT at table C4 (1981). The Administrative Office does not keep separate statistics for public interest litigation other than civil rights cases. Civil rights cases (excluding United States cases and prisoner petitions) terminated within the same period also were pending an average of one-third longer than civil cases in general. *Id.* at table C5A.

Much Public Interest Litigation Never Resolves the Underlying Controversy and Is Incapable of Doing So

Litigation, as well as settlement discussions ancillary to an adversarial process, generally addresses only the legal issues in which the suit is framed. Because the parties stand "in the shadow of the law,"[31] they may never address many of the real interests involved in the dispute.

Consider, for example, the action filed by Ralph Nader against Allegheny Airlines seeking damages for being "bumped" from an overbooked flight.[32] Although the publicity generated by the suit apparently did induce corrective measures by the airline industry and the Civil Aeronautics Board,[33] the remedy actually sought by Nader—CAB prohibition of overbooking—was not even at issue in the litigation.[34]

Much of the litigation over environmental impact reports also falls into this category. Usually, the plaintiffs want either to stop or to force modification of a project. The legal issue employed to reach this result is a claim that the project's environmental impact report is deficient. In *Las Raza Unida v. Volpe*,[35] plaintiffs alleged that a California highway project had failed to comply with various federal statutes dealing with impact on the environment and housing. After protracted litigation, plaintiffs obtained an injunction, which was upheld on appeal,[36] and attorneys fees.[37]

The underlying interest of the plaintiffs in this case was to minimize destruction of homes and parklands.[38] The interest of the defendants was in furnishing improved transportation facilities. Were these interests so adverse that no plan satisfying all parties could have been developed? Or was it the absence of an effective alternative to litigation that forced these parties into adversary roles, in a lengthy and costly series of court actions paid for by the public? This "successful" public interest litigation did force some degree of consideration of the conflict between the public interest in housing and recreation on the one hand, and in transportation on the other. It did not meet the need

31. The phrase is taken from Mnookin & Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 997 (1979).

32. Nader v. Allegheny Airlines, 365 F. Supp. 128 (D.D.C. 1973), *rev'd & remanded*, 512 F.2d 527 (D.C. Cir. 1975), *aff'd*, 426 U.S. 290 (1976), *on remand*, 445 F. Supp. 168 (D.D.C. 1978), *rev'd*, 626 F.2d 1031 (D.C. Cir. 1980). *See* Note, *Court Usurpation of CAB Function: The Problem of the "Bumped" Passenger*, 43 UMKC L. REV. 112 (1974).

33. B. WEISBROD, PUBLIC INTEREST LAW 413 (1978).

34. N.Y. Times, Oct. 21, 1973, § 4, at 12, col. 1.

35. 337 F. Supp. 221 (N.D. Cal. 1971).

36. 488 F.2d 559 (9th Cir. 1973), *cert. denied*, 409 U.S. 890 (1972).

37. 57 F.R.D. 94 (N.D. Cal. 1972).

38. The project, as originally planned, would have diplaced 5,000 persons and destroyed a number of parks. *Id.* at 100.

to bring all interested parties together to develop options for satisfying these conflicting interests.[39]

Public Interest Disputes May Be Forced to Trial Because the Government Defendant Fails to Identify Someone Who Will Take Responsibility for Settling the Dispute

Public Advocates Inc., a public interest law firm with an impressive record of court victories, believes that the failure of government defendants to find someone who will take responsibility for settling disputes is one of the most exasperating features of public interest practice.[40]

In *Larry P. v. Riles*,[41] Public Advocates Inc. successfully sued to prevent placement of black children in classes for the mentally retarded on the basis of discriminatory I.Q. tests. Early in the dispute the State Department of Education had grounds to decide that the tests were, in fact, of questionable validity.[42] The plaintiffs' counsel have told the authors that they believe that the inability of the department to find someone to take responsibility for settling the dispute forced the case to trial. The result was that this case, filed in 1971, went on for nearly a decade.[43] Had a mediator helped to identify the interested parties and to clarify their settlement authority in the early stages of *Larry P.*, it is possible that the judgment and lengthy appeal could have been avoided.

39. A particularly poignant example of the need for effective mediation is furnished by Bracco v. Lackner, 462 F. Supp. 436 (N.D. Cal. 1978). In that case plaintiffs sought to prevent the abrupt closing of a San Francisco convalescent hospital for failure to comply with state standards. Most of the primarily low income patients were on Medi-Cal and were to be relocated to several facilities outside of San Francisco. Although the plaintiffs agreed that the facility needed to be brought up to code, they wanted to avoid relocation, the resulting "transfer shock," and disruption of patient relationships. They brought suit on a due process theory and won in district court. *Id.* The victory slowed down the closing process, but the patients eventually were moved, the facility closed, and the much needed convalescent beds lost.

Both the state and the patients had a strong interest in maintaining this facility. In fact, a bill was subsequently passed by the state legislature providing for the appointment of a receiver in such a situation. In a real sense, both the state and the attorneys for the plaintiffs were seeking to care for the interests of the same clients. A mediation could have brought together all of the interested parties at the beginning of the dispute, allowing exploration of a variety of options including receivership before mounting time pressures forced a closure of the facility.

40. *See* Arriola & Wolinsky, *supra* note 7, at 1225-27.

41. 495 F. Supp. 926 (N.D. Cal. 1979).

42. *Id.* at 931-35. *See also* Larry P. Riles, 343 F. Supp. 1306 (N.D. Cal. 1972), *aff'd*, 502 F.2d 963 (9th Cir. 1974) (per curiam) (ordering and affirming preliminary injunction).

43. *See* 495 F. Supp. at 932-34 ("For a period of time it was thought that the Master Plan for special education in California, enacted in 1974, would address and perhaps remedy the problems raised by this case, but that hope never materialized. The case had to be brought to trial on the merits.").

The Value of Mediation

Mediation can solve these problems of public interest litigation. The mediation process focuses on each party's underlying interests from the beginning, when the issues for discussion are being developed and clarified. Mediators can help the parties use their differing needs and perspectives as the basis for achieving a mutually acceptable resolution rather than just seeing these differing interests as reasons to disagree.

Mediation of complex public interest disputes has proven successful in practice. The Institute for Environmental Mediation in Seattle, Washington, has investigated the applicability of mediation in more than fifty disputes and has settled a dozen complex lawsuits. One representative case is the *Riverside Community Landfill Dispute*,[44] which involved a dispute over a proposed replacement site for two existing landfills. With the aid of the Institute mediators, the parties realized that there could be no negotiated resolution as long as the focus was solely on an agreement over the proposed site. They therefore broadened their discussion to address the basic issue: what to do with the garbage. Industry representatives and environmentalists were included in the discussions. The result was that the entire group reached an agreement on a much broader set of solid waste issues in addition to agreeing on a replacement landfill site.[45]

As this case shows, failure to pursue collaborative discussions may be more costly than losing any particular settlement opportunity.[46] It is a lost opportunity for mutual education, for building consensus which will serve important long-term interests, and for resolving differences which otherwise cause additional clashes in the future.

One factor impeding the use of mediation in the public interest sector is that many public interest disputants only rarely become involved in the legal process;[47] they are consequently less experienced than corporate disputants at developing and implementing preventive strategies.[48] Public interest law firms and organizations do engage in

44. Institute case files are case name-indexed. This case was mediated by Alana Kastner.

45. THE INSTITUTE FOR ENVIRONMENTAL MEDIATION, SUMMARY REPORT TO THE VISITING COMMITTEE (May 1982) (on file at HASTINGS LAW JOURNAL Office).

46. For other examples in the public interest field, see generally AM. ARBITRATION ASS'N, MEDIATION: A TRANSFERABLE PROCESS FOR THE PREVENTION AND RESOLUTION OF RACIAL CONFLICT IN PUBLIC SECONDARY SCHOOLS (1976); Conference Report, "Conflict Management: Its Application to Energy Disputes," Engineering Foundation Conference, Rindge, N. H. (Aug. 1979) (on file with authors); Reynolds & Tonry, *Professional Mediation Services for Prisoners' Complaints*, 67 A.B.A. J. 294-97 (1981).

47. Galanter, *Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 98 (1974).

48. G. HAZARD, ETHICS IN THE PRACTICE OF LAW 141 (1978).

dispute resolution planning similar to that in the private sector.[49] However, the planning often centers on selecting targets for litigation. It is not preventive planning that encompasses consideration of alternative dispute resolution procedures. How then, can alternative dispute resolution processes such as mediation be incorporated into the process of resolving public interest disputes? The present under-utilization of mediation comes not so much from a rejection of the collaborative approach as from a misunderstanding of the process and from excessive and conditioned reliance upon litigation. Also, governments make no budgetary allowance for such settlement services.[50]

Some Modest Proposals

The following proposals are modest in that they do not require major commitments of resources before they can be tested in a variety of situations. Indeed, as funding for public interest advocacy becomes increasingly scarce,[51] the cost-effectiveness of mediation as compared to litigation will be more readily appreciated: mediated settlement discussion are measured in days, or even in hours, rather than in the years required by litigation.

Nor is complicated new legislation needed at this time. It seems wiser to test new mediation programs experimentally before enshrining—and thus limiting—them in legislation. Moreover, because the mediation process works only with voluntary participation, there is less need for legislative mandate. All that really will be needed is the opportunity to see how mediation can help; the marketplace will decide whether it should be incorporated formally into our dispute resolution processes, and on what scale.

Our first proposal is that the courts screen cases for mediated settlement discussions.[52] In this way, the courts could do much to help test the viability of mediation in the public interest field.[53]

The courts are already in the referral business in many areas for the purpose of channeling cases into arbitration.[54] Although mediation

49. L. MAYHEW, LAW AND EQUAL OPPORTUNITY 164 (1968).

50. From the authors' personal experience litigating both on behalf of and against the United States government, it would appear that the Department of Justice approaches litigation cost control solely by tinkering with the amounts available for expenditure in litigation. Perhaps no one has considered any other alternative.

51. *See supra* note 13 & accompanying text.

52. For some time such projects have received serious consideration in federal court administration policy discussions. *See, e.g.*, Dunlop, *The Limits of Legal Compulsion*, 27 LAB. L.J. 67 (1976); Johnson, *Let the Tribunal Fit the Case—Establishing Criteria for Channeling Matters into Dispute*, 80 F.R.D. 166, 167-80 (1980).

53. The authors believe that until non-adversarial processes are much better known and much more widely understood, court referral is essential.

54. Local Rule 500 of the United States District Court for the Northern District of

would require initial screening of a sort quite different from that required for arbitration, arbitration programs do demonstrate that a referral process is feasible. Cases appropriate for mediation could be referred by the court on its own initiative or at the request of the parties. Court referral has the advantage of letting the parties undertake negotiations without either side having to be the first to propose settlement talks.[55] Settlements could be entered as orders of the court in appropriate cases.

Mediators could be drawn from panels of appropriately trained persons including but not limited to lawyers. Such a mixed panel is recommended to provide for situations where process considerations outweigh formal legal considerations. Mediation is faster and less expensive than litigation,[56] so a pilot program in the court could be funded for a relatively small amount. Costs could be defrayed by requiring modest fees from participating parties, thus giving them an added psychological investment in making the process work. If a pilot project demonstrates cost-effectiveness and settlement results, mediation referral programs in the courts can readily be made self-supporting by fees charged.[57]

Our second proposal is that the federal government explore the possibilities for mediated negotiations to resolve its own disputes. The United States frequently is involved in public interest litigation as a result of efforts by both corporate and public interest advocates to forestall unwanted governmental action.[58] Government officials often rely on litigation to avoid politically difficult decisions. This reliance is expensive and time-consuming as well as questionable as a matter of policy.[59]

California is representative of this type of court ordered arbitration, with trial de novo available on demand of either party within thirty days of entry of the arbitrator's award.

55. In the world of the advocate, the initiative and timing of an offer to discuss settlement is often a carefully planned part of litigation strategy because of the perceived risks of an untimely overture.

56. While hourly fees for mediators are comparable to those of litigation lawyers, a mediation may require only a few hours of a mediator's time, and rarely more than a few days, as contrasted with the enormous billing for litigation.

57. Fees could be apportioned among the parties, to reflect their relative economic capacities. For example, when one party is substantially less prosperous than another, it is not unusual for it to offer to pay the first few days of mediation costs or some substantial percentage of the daily rate. Arrangements such as this tend to even out the risks of trying this alternative.

58. An experiment in involving interested parties in negotiations over the terms of federal agency regulations prior to promulgation has already been set in motion. *See* Harter, *Negotiating Regulations: A Cure for the Malaise?*, Report to the Comm. on Interagency Coordination of the Administrative Conf. of the United States (Jan. 1982). While it is still too early to appraise the effectiveness of this model, its existence is a healthy sign of willingness by the federal government to explore alternatives to litigation.

59. Litigation against the government in the public interest area is often a prime exam-

It will not be enough to make federal mediation services available.[60] Officials charged with the responsibility for developing and implementing government policy must learn to think in terms of collaborative rather than adversarial processes. This would require a major commitment from the highest levels of government, for the litigation habit is deeply ingrained.

The current economic situation is a good environment for such redirection, however. Even if Congress did no more than include a line item in every budget for settlement services, leaving it to each agency to decide how to use the money, we submit that there would be measurable savings by the end of each fiscal year.

Conclusion

Public interest groups, state and federal governments, and private corporations that frequently engage in public interest disputes should take the lead in increasing the use of negotiated alternatives to litigation. Even without the creation of new opportunities for the use of mediation, public interest litigants can avail themselves of the services of a growing number of private dispute resolution services.[61]

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ple of the limitations of litigation in addressing the underlying issues in a dispute. Consider the following two cases. In Environmental Defense Fund v. EPA, 636 F.2d 1267 (D.D.C. Cir. 1980), the Environmental Defense Fund (EDF) challenged regulations of the Environmental Protection Agency (EPA) which exempted from statutory ban roughly 95% of commercial PCB users. In a second case, Standard Oil Company attempted to secure judicial review of FTC procedures in a pending administrative law action concerned with charges of monopoly practices. Standard Oil Co. v. F.T.C., 475 F. Supp. 1261 (N.D. Ind. 1979).

The EDF eventually obtained a court order requiring reconsideration of the exemptions. During the reconsideration period (which was extended to almost two years) no comprehensive regulation of PCB usage has been in force, other than a limited interim inspection program negotiated by the parties. The first of the revised EPA regulations were not published until August 25, 1982—and were promptly challenged by both industry and environmental groups. The regulations dealing with the bulk of the PCB problem are slated for publication before December 1, 1983, with final regulations targeted for July 1, 1984. This time the regulations have been the subject of intense negotiations among the interested parties, the results of which have served as a framework for the EPA's proposals. Conversations with Jacqueline Warren, former EDF counsel, Sept. 1982, and with the EPA's Office of Toxic Substances, Oct. 1983.

In the FTC case, after two rounds in the federal district court wrangling over discovery rights in the administrative action, the parties ended up before the court of appeals just in time for the FTC's voluntary dismissal of the underlying administrative action. Conversation with Marge Coleman, FTC attorney, Sept. 1982.

The question posed is whether or not these broadside attacks and protracted lawsuits were the best way to resolve the legitimate concerns of the parties to these disputes.

60. The Federal Mediation and Conciliation Service, which operates pursuant to 29 U.S.C. § 173(a) (1976), and the Department of Justice's Community Disputes Resolution Program are already in place to serve as models and provide specialized services.

61. Representative are the Center for Public Resources' Judicial Panel in New York and the San Francisco-based American Intermediation Service. Such organizations provide

Failing some positive commitment to collaborative processes, we will remain the victims of our own expertise. Litigation, through increased refinement and abstraction, has become unbearably burdensome and is incapable of meeting the needs of litigants in many cases. It is as if, by improving our trial techniques, we have actually reduced our ability to resolve conflicts.[62] Both economy and social justice will be served by introducing collaborative conflict resolution techniques into our procedures for settling public interest disputes.

panels of attorneys and retired jurists to assist parties in private dispute resolution processes such as mediation, "mini-trials," and neutral fact-finding. The American Arbitration Association has also begun to offer assistance in non-adjudicatory dispute resolution proceedings.

62. As one commentator has pointed out: "At times it is as if litigation technology and support dominate the lawyers' art." Lundquist, *supra* note 2, at 4.