



Public Policy Mediation

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Ironically, there is no consensus on the definition of public policy mediation among those in the field. Nonetheless, it has been successfully applied to a great variety of policy challenges and belongs in the array of processes that promise to enhance public discourse. It is an outcome-oriented method for securing actionable agreements among identified parties, who participate as negotiators, often on behalf of constituencies. As such, it overlaps and complements civil court mediation as well as public engagement processes that promote and support civil discourse. These processes are important in helping us to resolve important public matters, such as Superfund cleanups, planning the 9/11 memorial, and siting waste disposal facilities, in a civil manner.

Public policy mediation creates a forum for deliberative negotiations among government, stakeholders and, when appropriate, the public. The parties' contributions of their technical expertise and the resulting greater knowledge of participants' preferences, are woven into discussions that increase mutual understanding and lead to otherwise untapped opportunities for consensus agreements. The intended result is an agreement that sets forth the terms of the future relationships and responsibilities among the parties with regard to the issues they discussed.

With tailored applications across the policy spectrum — from agriculture to fishing, environment to nuclear power, education to health, and land use to transportation policy — public policy mediation appears in many forms. Of course, public policy mediators, like mediators in general, must be responsive to the unique characteristics of case situations. Typically, this involves attentiveness to layered complexities. The examples below — negotiated rulemaking; policy, planning, permitting, and development cases; and administrative prosecutions and court litigation — are provided to help illustrate its procedural and substantive scope.

Varieties of Public Policy Mediation

Negotiated rulemaking, which convenes government and stakeholders, has been used to formulate state and federal regulations on a broad range of issues including the protection of captive marine mammals, the administration of student loans, worker safety in the operation of construction cranes, and the licensing of radioactive waste disposal facilities.

In **planning, policy, permitting, and community development cases**, which require an interface among governmental entities, stakeholders, and citizens, public policy mediation has been used to reach agreements rooted in the diverse interests of the public and relevant parties. Examples include planning for the multiple uses of public forests; the protection of watersheds; the closure of public mental health facilities; and even the development of a city charter required for a municipality to emerge from state receivership authority.

Similarly, public policy mediation has been applied in matters initiated by private sector parties seeking governmental permission or public support for their proposals. Examples include proposed private developments that require approvals by planning and zoning authorities; permitting for waste disposal facilities; and forestry sector efforts to promote carbon emission trading programs.

Negotiated rulemakings and planning, policy, permitting, and community development cases, although usually circumscribed by statutory authorities and sometimes subject to court review, are typically not precipitated by litigation, or conducted “in the shadow of the court.” Rather, they are initiatives of governmental authorities seeking broad participation in public decision-making to achieve fully informed, efficiently implementable outcomes. They are transactions necessary to move forward to a public objective.

On the other hand, **administrative prosecutions and court litigation** have precipitated public policy mediation in cases, for example, where river restoration terms were negotiable; Indian land claims and treaty rights were in dispute; school district racial integration was required; and for Superfund cleanups. In these matters as well, the settlements specify future relationships and responsibilities.

Defining Characteristics of Public Policy Mediation

Common factors that characterize public policy mediation include the necessity for governmental action of some kind; the capacity for “intervention” by numerous stakeholders, who are politically as well as legally relevant; and a potential for future “public” impact. It is also characterized by a reluctance of government to effectuate its interests unilaterally, or an expectation that

broad participation will increase its ability to efficiently achieve its policy goals. In addition, most of the negotiations, other than those based mainly on litigation or administrative enforcement procedures, are conducted under open meeting laws that allow the general public to attend and provide input throughout the process.

Procedurally, public policy mediation cases typically involve as parties multiple government authorities, advocacy and community nonprofit organizations, and private sector entities. The process provides a forum for such parties, who may represent thousands of constituents, to negotiate a set of complex issues and build an unprecedented consensus agreement that addresses a public issue. For example, among the dozen or more student loan negotiated rulemakings we’ve mediated, as many as 20 parties representing state and federal government agencies, all categories of higher education institutions, lenders and loan servicers, and students and borrowers, have developed consensus rules that impact all students who have received federal financial aid, their parents, and the schools they attend.

Public policy mediation includes a host of pre-negotiation activities, the first of which is an assessment. Policy mediators interview relevant parties to determine the agenda of issues, learn the history of past efforts to address the situation, and identify the dynamics likely to affect the negotiations. In addition, sometimes the assessment includes the need to specify or confirm the parties that must be involved to ensure any agreement is actionable, and/or to determine the feasibility of initiating negotiations. These early interviews also provide an opportunity for the mediators to build confidence in the mediation process and initiate relationships with negotiators.

In most cases, an initial negotiating task of developing organizational protocols serves to clarify expectations and to prevent procedural conflicts from arising during the process. These agreed upon terms specify many procedural understandings including the group’s definition of consensus, the roles and responsibilities of the negotiators and mediators, the compliance to which ultimate agreement commits the parties, and the nature of appropriate media contact.

Upon completion of such preliminaries, public policy mediators manage substantive issues to enable parties



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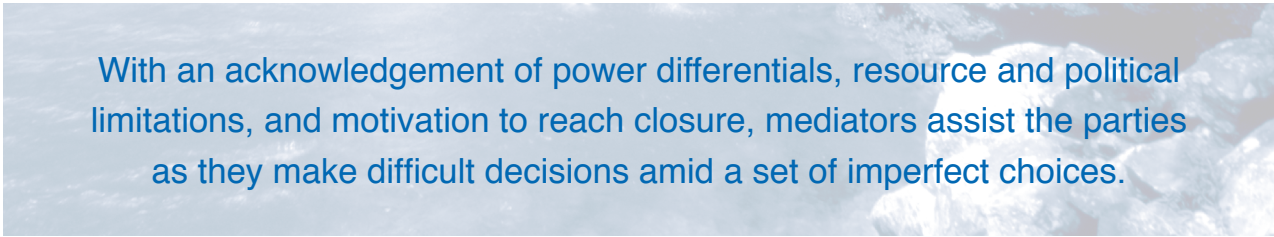


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Over the years since 1965, **Howard Bellman** has mediated in nearly every category of dispute. His work has ranged from the most ordinary civil and labor matters to international diplomacy. A significant portion of his practice has included high-profile, multi-party cases of public concern such as controversial land-use determinations, large-scale environmental remediations, school district desegregation, state-wide education financing litigation, and Indian land claims.

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to explore and deepen their understandings of policy issues of concern. The negotiators generate and refine options until they reach conceptual agreements. Such early agreements are then reflected in written drafts and repeatedly revised until consensus is achieved.

Ultimately, the participants' enhanced grasp of relevant factors, including the interests of others gained by carefully designed discussions, provides opportunities for agreements not previously perceived through the limited lens of each negotiator. With an acknowledgement of power differentials, resource and political limitations, and motivation to reach closure, mediators assist the parties as they make difficult decisions amid a set of imperfect choices.

Public Policy Mediation in Comparison to Other Processes

Public policy mediation is related to and overlaps substantially with civil litigation settlement mediation as well as with various public engagement processes. Among the key similarities and differences between public policy mediation and these other categories of process interventions are the objective of the process, the participating parties, and the process components and dynamics.

Civil Court Mediation

The Objective: The objective of both public policy mediation and civil court mediation is an actionable agreement. The latter typically results in settlements of disputes that would otherwise be adjudicated by a court, for example, negligence and breach of contract cases. Such settlements represent an application and enforcement of existing laws, and first and foremost, resolve disputes arising from past interactions. It may be said, however, that the evolution of civil court mediation has led to a growing appreciation of its value in "broad" disputes and the problem-solving capacity of transactional negotiations even in cases apparently precipitated by litigation. For example, the mediator who helps litigating parties develop a new business arrangement, in conjunction with settling a lawsuit over a past dispute, has added this relational element to the case evaluation he may have been expected to provide.

Public policy mediation outcomes are referred to as "settlements" for the subset of cases initiated in response to administrative prosecutions and litigation, and "consensus agreements" for those cases that result

in sub-statutory regulations, policies, plans, permits, or other forms of public agreements. In most instances, the agreement reached is a consensus recommendation to the government agency with jurisdiction over its implementation.

When the outcome is a consensus recommendation, organizational protocols agreed to prior to substantive negotiations often speak to the government's commitment to implementation. In some cases, for example, negotiated rulemakings, the consensus agreement is subjected to additional public review.

Most public policy mediation cases focus on building agreements related to future actions and activities. They are initiated because of existing or expected substantive and procedural disputes that may prevent the parties from addressing their shared issues. As a result, such mediated agreements establish the future relationships and responsibilities among the participating government entity and the parties and their constituents with regard to substantive issues. Public policy mediation, in that it creates arrangements to be applied in the future, is similar to mediation in collective bargaining, perhaps, historically the most common application of mediation.

The Participants: In civil court matters, the negotiating parties are usually predetermined as plaintiffs and defendants (or as divorcing spouses and their children, or unions and employers, as in family court matters and collective bargaining). In contrast, public policy mediation cases often require intensive pre-negotiation activities to identify representative negotiators, who may number in the dozens. For example, in negotiated rulemakings, an initiating agency may request stakeholder nominations through a formal federal register notice. After considering the nominees, it specifies negotiating committee members in a second notice and asks for public comment to ensure its participants represent a balanced group of interested parties. In other cases, as part of the assessment, the mediator may identify and recommend potential negotiators to represent stakeholders and/or segments of communities. The negotiators are the primary participants, and they must represent the interests of their constituents, and sometimes consider the opinions and preferences of the public at large.

Unlike civil court mediation and the administrative prosecutions and litigation subset of policy cases, most parties in public policy mediation cases are not

represented in the negotiations by legal counsel, although some may consult with counsel.

The Process: The process components of public policy mediation and civil court mediation have many similarities. Both rely on an assessment of the situation, protocols regarding how the process will proceed, and methods for managing negotiations.

Most mediators conduct some form of assessment prior to or early in the negotiations. In civil court cases, a diagnosis may be completed via a pre-negotiation exchange of documents or during early caucuses, or in complex cases, through pre-negotiation interviews. Before formal negotiating sessions, as indicated earlier, public policy mediators usually conduct intensive interviews with identified negotiators, and sometimes, with potential negotiators as well. Sometimes the findings of the assessment are documented and shared with the parties and the public.

Shared protocols provide process structure and clarify what is expected of the parties and the mediators. In civil court mediations, such protocols may be briefly stated or even implied by custom. Often, attorneys rely on the pre-existing norms of settlement negotiations.

In many public policy mediations, by contrast, the parties must develop organizational protocols to create the norms that will govern their negotiations and to make explicit their future commitments under agreements reached. Mediators assist the parties in formulating an agreed-upon protocol document prior to commencing substantive discussions.

Managing Negotiations: In all mediation cases, parties examine interests and develop options. There are caucuses and sidebars. The mediators work to avoid and overcome impasse and depend on the growing trust they develop with negotiators concerning confidence in the process and mediator competence. The role of “agents of reality” is familiar to all mediators.

The scope of issues typical to public policy mediation cases and the amount of time required to attend to them, is similar to the most complex civil court cases. In addition, since public policy cases typically involve comparatively large numbers of parties, negotiations require large group meeting facilitation as well as time and mechanisms for consultations with constituents.

Public Engagement Processes: Dialogue, Facilitated Meetings and Workshops, Facilitated Advisory Committees

Public policy mediation is also related to and overlaps with other processes that engage citizens in discussions of public concerns. Dialogues, facilitated meetings and workshops, and facilitated advisory committees are similar to and different from public policy mediation in relation to their intended objectives, the participants, and process components and dynamics.

Objectives: Public policy mediation and the above public engagement processes are generally initiated to provide forums for vigorous and open, yet safe, exchanges of ideas, opinions, and perspectives on public issues. The expected outcome of public policy mediation, as has been stated above, is a consensus agreement. Examples include a plan to reduce the incidental take of marine mammals during commercial fishing operations and the resolution of Indian land claims.

Dialogic processes generally focus on discerning similarities and differences, increasing understandings, mutual respect, and breaking down of stereotypes among people with differing world views and deeply held values. Examples include dialogues on the issue of abortion and inter-faith dialogues. Sometimes dialogue participants elect to take individual actions in light of their new understandings.

The results of *facilitated meetings and workshops* are usually recommendations rooted in participants’ shared preferences and priorities concerning the issues under discussion. These recommendations, and the public support for them, are meant to inform and influence decision makers. Examples include meetings concerning siting a waste disposal facility, pandemic influenza planning, and the 9/11 redevelopment and memorial.

Facilitated advisory committees are typically convened to provide government officials with advice on a range of related issues and topics. Advice may be offered as consensus recommendations, in minority and majority reports, or as individual opinions. The government agency requesting advice may choose to adopt some or all of the committee’s recommendations. Examples include a governor’s task force on health care policy, federal advisory committee on environmental justice, and a citizen advisory group concerning a Superfund cleanup.

Participants: *Dialogues* typically involve individuals, who may act in their capacity as citizens or as representative of a group, for example, a religious leader; but they usually do not represent constituents. Individuals may voluntarily self-select for a particular dialogue, or a sponsor may identify and invite participants.

Facilitated meetings and workshops cover the broadest range of possible participants and may include citizens and/or technical experts and/or stakeholders or any combination thereof. As with dialogues, participants sometimes choose to attend or they may be invited to do so.

Citizens who choose to participate usually populate citizen *advisory committees*, as in a Superfund citizens advisory group. On the other hand, members of government advisory committees, such as those governed under the Federal Advisory Committee Act (FACA), are appointed by the sponsoring government agency to represent particular stakeholder groups or due to their technical expertise. Committees established under FACA must

include parties that represent the spectrum of interests and perspectives indicated by the issues under discussion.

In both government advisory committees and public policy mediation processes, the range of relevant interests are represented, and the public may be provided with opportunities to participate. However, in policy mediation the sponsoring government authority participates as an active negotiator, and the public involvement component may be very specifically designed to inform and influence the negotiators, as occurred in a consensus process to develop a city charter to restore local governance.

The Process: The process components of public policy mediation and other public engagement processes are similar in relation to required pre-meeting activities and differ in the structure and dynamics of the meetings. All require assessments to develop a meeting design specific to the substantive focus and goals; and in some cases, to identify or confirm the participants. Additionally, within the context of the processes, participants are furnished with trusted information, and they develop shared norms and expectations regarding how the meeting will proceed, its expected results, and how those results will be used.

All of these processes rely on facilitators to promote civil discourse on public issues, but with varied dynamics. *Dialogue* facilitators sustain participant focus on substantive issues as well as on how ideas and perspectives are conveyed. They work to surface underlying beliefs and assumptions in an effort to cause shifts in understandings and emphasize human connections despite differences in values and beliefs. *Facilitated public meetings and workshops* often involve facilitation teams, including a lead facilitator for plenary sessions and small group facilitators. In small groups, participants typically discuss the issues and generate ideas, all of which is reported and compiled. Priority recommendations and preferences of the large group may be identified as those common across multiple small groups or through a voting mechanism.

Advisory committee facilitators promote discussions that enable participants to pursue a great range of ideas and options. In these processes, the goal is to explore the issues and provide feedback and advice to the government. In some cases, it is not necessary to synthesize the feedback among the various participants as government officials attend as observers. In others, facilitators may assist the group in developing consensus or majority/minority recommendations on a topic discussed only at that meeting or on others that straddled multiple meetings. For example, at some meetings, an Iron and Steel Advisory Committee provided consensus recommendations for redeveloping closed industrial facilities and at other meetings, offered regulatory revisions. The initiating agency may accept or reject any recommendations.

In public policy mediation, mediators also facilitate discussions, however, with a narrower focus than other

facilitated meetings because of the intent to prepare a written agreement. Analysis of options, for example, may be more limited due to existing laws, power differentials, and/or resource constraints that the agreement must respect. Additionally, after reaching conceptual agreements, participant discussion is focused on revising proposed written text into a consensus agreement. The process typically occurs over a period of months and includes mediator activity between meetings to promote efficiency at the plenary negotiating sessions.

It is important to understand that public policy mediation is not an alternative to any of these other public engagement processes. Indeed, whereas these processes may be designed to inform the public, interest groups, and government so as to mitigate and even avoid conflict in the development of public policy, mediation is often applied only after conflict is well developed. Dispute resolution experts understand that the array of processes constitute a repertoire of “process options” to be applied by an astute practitioner, who understands the capacities and limitations of each option. Moreover, these processes may be implemented in a sequence or in tandem so that, for example, facilitated meetings inform negotiators of public views and advise the public of the progress of negotiations.

The Future of Public Policy Mediation

Given the polarization and unusually contentious state of political behavior and strategies across the nation, we anticipate an increased reliance on public policy mediation in the near future. The general awareness of mediation continues to grow in the public and the media: recently editorials have called for mediation as public issues deadlock, and political leaders have appealed for mediation. It appears that there is an increasing appreciation of the potential value of mediation in the political process.

In well-publicized events in Wisconsin during the summer of 2011, for example, there have been requests for mediation to assist in the resolution of issues arising out of the occupation of the State Capitol by protesters; to support negotiations to bring home legislators, who had left the State to frustrate the passage of certain bills; and even to assist in the development of better relations among Supreme Court justices following a shocking allegation of an altercation in the Court’s chambers. Mediation was accepted and successful in one of those cases. It may be that the convergence of the current political climate and confidence in mediation indicate an increasing role for mediation in the public arena.

Whereas the potential for seemingly unproductive episodes and impasses in political decision-making is inherent in representative democracy, it may be that mediation can be useful amid agreement on the need to overcome sustained gridlock for the public good. ◆