

MEDIATION ETHICS

Chapter 10
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Accountability

- To whom and how will environmental mediators be held accountable?
- How can those affected by the actions of mediators effectively chastise, sue, or fire them?

Accountability

- The moral, legal, and economic pressures that ensure the accountability of mediators in other fields do not apply to environmental mediators
- The success of most mediation efforts tends to be measured in narrow term, but in the environmental field success needs to be broader

Accountability

- If the parties involved in environmental mediation reach an agreement but fail to maximize the joint gains possible,
 - environmental quality and natural resources will actually be lost
 - the public health and safety could be seriously jeopardized now and in the future

Accountability

- Mediator's responsibility as an objective observer to insure that the final solution secures the greatest overall net benefits for each party, without leaving any party worse off than it was in its original configuration (Pareto-optimal principle)
- Near impossible to attain
- Become a social conscience, environmental policeman or social critic who has no other obligations than assuring Pareto-optimality

Criteria for Judging the Fairness of a Mediation Process and Agreement

- The outcome is better if it is consistent with shared notions of equity and justice
- The resolution should well reconcile the interests of the parties
- The resolution should be consistent with principles reflecting pre-existing practice
- The agreement should set a good precedent for the parties involved as well as for other parties
- The agreement should be reached quickly at low cost

Criteria for Judging the Fairness of a Mediation Process and Agreement

- The process of decision should be one that tends to improve rather than exacerbate the relationships among the parties
- The agreement should be readily acceptable to the parties to ensure acceptability and compliance with its term

3 Procedural Approaches for Accountability

- Credentials
- Links to Regulatory Agencies and the Courts
- Creating an Informed Public

Credentials

- Licensing, certification, or registration
- Done at state and federal levels
- Code of ethics
- Knowledge of environmental and regulatory issues, technical background
- Newsletters, seminars, and workshops

Links to Regulatory Agencies and the Courts

- Creating environmental mediation offices attached to regulatory agencies or to the attorneys' general offices at the federal or state levels
- Legislation could describe the circumstances and conditions under which mediation would take place
- Responsibilities would be spelled out in the legislation

Creating an Informed Public

- Increase the public's capacity to demand fair and effective behavior on the part of mediation
- Funds available to appoint qualified agents to represent groups not competent to participate in technical aspects of negotiation
- Mediation sessions should be open to the public and community should be keep aware of the negotiation's direction

Concerns for Environmental Mediators

- The impacts of negotiated agreements on underrepresented or unrepresentable groups in the community
- The possibility that joint net gains have not been maximized
- The long-term or spill-over effects of the settlements they help to reach
- The precedents that they set and the precedents upon which agreement are based

Qualities of Mediators

- Need the flexibility to adjust procedures to meet specific needs which may arise from time to time, including the intervention of new parties and the interjection of new issues
- Need to reorient the thinking of the parties so that they will be more receptive to new ideas and compromise

Incentives to Mediate

- Mediators have their own goals and priorities
- Financial - to help offset their time and energy
- Prestige – successful resolution of seemingly intractable disputes
- Social Responsibility – interest in the process by which settlements are reached
- Calculation of cost vs. benefits
- Chances of success

Criteria for Ethics

- The mediator should be explicit as to the basic elements of the mediation process
- The mediator should foster and protect the proportional relative power relationship between the parties in decisions regarding entry, strategy, and tactics, and the shaping of agreement
- The tactical decisions of a mediator should be based on an explicit, conscious rationale capable of later explanation and evaluation
- The mediator must be concerned with enhancing the ability of the parties to jointly administer any agreement which is reached
- The mediator should not permit him or herself to be a party to any agreement which violates the basic principles of freedom, justice, and proportional empowerment

Criteria for Ethics

- The primary responsibility of the mediator is to enhance the collective bargaining or other relationship existing between the parties
- The mediator should promote the ability of the parties to negotiate joint agreements
- The mediator must familiarize him or herself with the specific dynamics of the dispute situation being intervened
- The mediator must have a concern with the viability of any agreement reached by the parties in his or her presence
- The mediator should keep before the parties a consideration of the realities of the broader public interest