2008

Panel Discussion: Problem-Solving Mechanisms to Achieve Consensus: How do we Ensure Successful Resolution?

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PANEL DISCUSSION: PROBLEM-SOLVING MECHANISMS TO ACHIEVE CONSENSUS: HOW DO WE ENSURE SUCCESSFUL RESOLUTION?

MODERATOR

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SPEAKERS

Cathy A. Costantino, Federal Deposit Insurance Corporation, Georgetown Law School, George Washington Law School

Sean F. Nolon, Pace University School of Law

Joseph A. Siegel, U.S. Environmental Protection Agency

PROF. NOLAN-HALEY: Welcome once again to our second phase of the program, our panel discussion.

We are focusing this morning on problem-solving mechanisms to ensure and achieve consensus and we are asking the question: "How do we ensure successful resolution?"

As you can tell from the initial lecture this morning with Professor Susskind, we are moving beyond basic ADR in this symposium, to understand, in the public arena, how various ADR processes might be helpful, how they can be used to effect change in important public policy areas.

Our panelists this morning will offer us a rich reservoir of their thinking and their experience to help address this question. My introductions will not do them justice. Their detailed bios are in the materials. But let me just introduce them briefly.

The format will be that each speaker will speak for about twenty minutes. After each panelist speaks, we will entertain one question from the floor. When the three panelists are finished, then we will entertain general questions from the floor.

Our first panelist this morning is Cathy Costantino, who is best known for her expertise in systems design. Cathy is also a facilitator and mediator and an organization development consultant. She is counsel in the Labor and Employment Unit at the Federal Deposit Insurance Corporation, FDIC, where she handles federal class actions and other complex dispute-resolution matters.

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She is also an adjunct professor at Georgetown Law School and George Washington Law School. She came up from Washington to be with us this morning.

Cathy is the author of several publications, most notably her book *Designing Conflict Management Systems: A Guide to Creating Productive and Healthy Organizations.* This book received the Best Applied Book Award from the International Association for Conflict Management.

In addition to her work on the domestic front, Cathy has worked with stakeholders on the international front. She has done considerable work in Africa. She has been a consultant to the Royal Canadian Mounted Police. She was the sole U.S. delegate at the United Nations to the U.N. Commission on the Social Effects of Structural Change in the Banking Industry.

Our next speaker, Mr. Sean Nolon, is perhaps best known for his expertise in land-use law. Sean is the Director of the Land Use Law Center and Executive Director of the Theodore Kheel Center for Environmental Solutions at Pace University Law School in White Plains. Mr. Nolon trains local officials, environmentalists, and developers in land-use law and consensus-building techniques. He has also taught these topics in law school. He mediates land-use disputes and he is a certified mediator and arbitrator in Westchester County.

Mr. Nolon is a member of multiple planning boards, including the New York Planning Foundation, the Housing Action Council, the Hudson Clearwater Sloop, and the Westchester Municipal Planning Federation. He is on the Leadership Council for the Association of Conflict Resolution's Environmental Public Policy Section.

He is the author of several publications dealing with collaboration, land use, and conflict assessment.

Our third panelist, Joseph Siegel, is well known for his work in environmental ADR and air-pollution law. He is an ADR Specialist and Senior Attorney with the U.S. Environmental Protection Agency. At the EPA, he specializes in ADR and air-pollution law. He has worked on enforcement and policy issues for the agency for over twenty years.

He teaches a seminar on air pollution, climate change, and emissions trading at Pace Law School, Center for Environmental Legal Studies. He has taught environmental law for eleven years at CUNY Law School. He also is a community mediator in Westches-

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ter County and has worked as a facilitator on land use and environmental health issues in public housing.

He serves in numerous leadership roles in the American Bar Association. Most notably, he is the Public Service Vice Chair for the ADR Committee of the Section on Environment, Energy, and Resources. He is Co-Chair of the ABA Committee on Climate Change, Sustainable Development, and Ecosystems and he also is the author of several articles on environmental ADR.

With great pleasure, I present our first panelist, Cathy Costantino.

AN OVERVIEW OF CONSENUS BUILDING

PROF. COSTANTINO: Thank you very much, Jackie. Thank you, Phoebe. Thank you, Samantha. And thank you for inviting me to New York. It's always a pleasure to come north, although I have to say, the weather was a bit much yesterday for me. I got a little wet, but it was okay.

Let me also start out by saying that I am here today in my capacity as an adjunct at Georgetown University Law Center and George Washington University Law School. I am not here as a federal employee. I am on vacation today. I am delighted to spend my vacation day with you and delighted to be here for this situation.

I was intrigued by Larry's conversation, particularly personally. I have worn many hats in the consensus-building arena. Interestingly enough, I am actually on the town council in a small town. So in addition to being a neutral and in addition to being an attorney and in addition to being a systems designer, I have actually been one of those decision makers, where people come in and want to make changes. I have to say that in my small town it was probably more difficult to build consensus around the issue of the zoning and planning regulations than it was with some of the work that I did for the United Nations in Africa. There were days when I would sit in the attorney general's conference room and discuss ADR and the federal government, and go home to the Ruritan, where I would spend hours talking to people about land-use planning and speed bumps and cows and pigs and horses.

So I come at this from many different perspectives. I think what is really important to understand when you are looking at a system is that there is the small system—it's kind of like the Three Bears—there is the small system, the medium system, and the big system. There are certain principles that govern all of those systems. There

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are certain things that you can expect to see in any type of collaboration that you do.

I also do a lot of class-action litigation. I have mediated a fair number of class actions. There are certain principles that really transcend all the kinds of work that we do and that the people in this room do.

So I am delighted to be here today.

The Wrong Question

The topic for this group is, "How do we ensure successful resolution?" I got really nervous when I looked at that. I am a recovering litigator. When I train people or coach people to have their deposition taken, I always tell them to only answer the question they are asked. When I looked at this question—and it says, "How do we ensure successful resolution?"—the answer is, we can't.

I could sit down, and you wouldn't have gotten much value for your money, bringing me all the way up from Washington. But I think it's the wrong question. The question matters.

"How do we": First of all, "we" don't do anything. The stakeholders do it. We facilitate the process with them. So the "we" is the royal "we." I think we need to be very clear about that. It's not we, the practitioners; it is we, the royal "we," the stakeholders.

"How do we ensure": We don't ensure anything. We are not guarantors. We don't assure a result. If you want to do this kind of work—and for those of you that have had this kind of work and have done this kind of work—you had better be really fluid, you had better be really flexible, you had better be willing to go with the flow, because everything changes. Every single day is new. There are lots of things that are shifting. There are shifting coalitions. There are shifting systems. So don't get too hung up on the idea of ensuring anything.

"Successful": What is success? If you are in the federal government, if you don't count it, it doesn't count; if you can't measure it, it didn't happen.

"Success" is very, very interesting. I am going to talk a little bit about the concept of "success" in systems design and consensus building, because "success" means many different things to different people.

Finally, "resolution": We never resolve anything. Nothing is ever done. It's always modified. It's always fluid. There are always changes that happen. "Resolution" suggests an endpoint. For those of you who do this kind of work or are aspiring to do it, I

would really suggest that you think about the concept of what I call "beginner's mind." Every day you walk in is potentially a new day, a new system, a new problem. If you become wedded to the idea that X is going to happen or Y is going to happen, if your thinking is very linear, you are going to have a lot of trouble working with these kinds of stakeholders and doing this kind of work. You have to be willing to have lots of balls in the air. You really have to be willing to flow with it and not expect resolution.

So, as any good lawyer would do, when you go to the Supreme Court, you always have Question Presented. I think the question posed by the conference title is the wrong question. I think the right question is: how can neutrals facilitate the process to increase the likelihood of a sustainable system and a durable product?

That's a lousy title to put on this great little brochure. But the point is, we are talking about facilitating a process, increasing the likelihood of a sustainable process and a durable product—sustainability and durability, which I am going to talk about a little bit.

Larry talked about sustainability. Let's not confuse sustainability and stasis. Sustainability does not mean it remains static. Sustainability, if you know anything about systems—organic systems, biological systems, ecological systems, chemical systems—sustainability means they survive and they thrive. It doesn't mean they stay the same.

So don't confuse sustainability with stasis.

Consensus

The next point I want to mention real briefly, again riffing off of some work and conversations that Larry did, is the concept of consensus. He talks about consensus as near-unanimity.

I facilitate a lot. I facilitate small groups, big groups, bankers, politicians. I worked on the Hill. If you really want to talk about facilitation and the need for consensus building, do some work up on Capitol Hill sometime. It's pretty interesting. There is some really interesting conflict floating around in the halls of Congress. For those of us that have been in Washington for a while, you get used to kind of watching it and looking at it with, really, a beginner's mind: What is it that I am seeing here?

I have gotten sabotaged on the concept of consensus. I think it's very important that we think about what consensus is. I define consensus as a result that everyone can live with and support. I have done some facilitations where I have defined consensus as, everybody can live with it. We all do thumbs-up or down or side-

ways. If the thumb is sideways, it means you can live with it. I have had people turn their thumbs sideways and say, "Yes, I can live with this," and walk out the room and sabotage the process and the result.

Consensus means you can live with it and you will support it.

That doesn't mean I need you to be a rah-rah cheerleader. But let's not confuse consensus. I have a conversation with my stakeholders about the definition of consensus, what it is and how I think it can be supported.

A little off the subject. I recently got a new puppy. It's my second dog. I have a Chesapeake Bay Retriever. If any of you know about Chesapeake Bay Retrievers, they are water dogs. They are very stubborn, and they are highly independent and loyal. I was talking to somebody about training my Chesapeake Bay Retriever. I heard an interesting little quote from somebody. They said, if you have a Golden Retriever, you ask them to do something. If you have a Labrador Retriever, you train them. If you have a Chesapeake Bay Retriever, you negotiate with them.

It's terrific. I get to teach negotiation to law students and I get to negotiate with my dog.

The bottom line is, when you work with stakeholders in this kind of an environment, some stakeholders get asked, some stakeholders get trained, and some stakeholders you have to negotiate with. You need to have all of those skills. You need to know how to ask. We don't ask stakeholders what they want. We tell them. Mistake.

We need to train stakeholders in certain skills that they need to do this. If stakeholders don't know what alternative processes are, they can't pick them. So there may be some skill sets that you need to add for people.

Finally, you are often going to be facilitating a negotiation between and among various stakeholders. Not that I want to compare stakeholders to dogs, but some stakeholders are like Golden Retrievers and some are like Chesapeakes and some are like Labs. You are going to use different skills, with different skill sets, along the way.

Conflict Management Systems Design

What I am going to talk about a little bit is the process of the process, called the meta-process. I will talk about problems that I have run into and things that I have done that I have found useful and things that have not been useful.

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I have done a fair number of interventions. I have worked with the Royal Canadian Mounted Police. I have worked with the United Nations in Africa. I have worked with the Attorney General's ADR Group. I have done some work in Singapore. But the case study that I want to talk about today a little bit is some work that I did, and it's non-land-use and it is intentionally non-environmental, so you can see a little bit of a different model.

I do some work with the Montgomery County public school system, which is the largest school system in the state of Maryland, the tenth-largest school system in the country. You may know Montgomery County as the area where there was a sniper and a lot of shootings a couple of years ago. I work with and have done consensus building with three unions and the Montgomery County public school system: the teachers' union, the principals' union, and the service workers' union.

They have created a model whereby certain types of disputes are resolved in a consensus-building, collaborative, alternative-resolution system that is supplemental to—and I love Larry's conversation about this—the grievance process. It is possible to use these tools in a union context. It's possible to use them in an educational context. It's possible to use them at the county level and local level. You have a lot of people here who do work at the national level, county level. I want to assure you that these techniques work even at what I am going to call a lower level. I don't mean that in any diminutive sense, in terms of "lower."

So I want to spend a little time talking about that.

Systems design is a process whereby you design methods to handle streams of disputes and conflicts. I draw a distinction between disputes and conflicts. Conflicts are intangible. They are not necessarily a dispute yet. Conflicts get managed; disputes get resolved.

A key thing that I do when I work with stakeholders: Do we have conflicts or do we have disputes? I think it's really important. Not every conflict has to be resolved. It might have to be managed. It doesn't have to be resolved. Your job is not to fix everything. Your job is to help the stakeholders decide what they want to do. It is not to fix it.

Public policy consensus building—very similar. You work with stakeholders. You use collaborative processes. You use a systemic approach.

The similarities—exactly that—systemic thinking. If you don't know anything about systems theory, now is a very good time to learn it. Groups of stakeholders are systems. I am going to talk

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about a couple of books and a couple of disciplines that you might think about along the way.

The differences: Systems design is often with smaller groups. It often is not done in what I will call the governance arena. But the principles are very similar along the way.

The principles of conflict-management systems design are:

• Interest-based.

• Stakeholder-derived.

• Consensual. We talked about a definition of that.

• Fluid and evolving. Again, you really have to be able to kind of go with the flow a little bit when you do this type of work.

It's also very important to understand some of the principles of conflict-management systems design and OD—organization development, how organizations seek and sustain change. All organizations seek and sustain change according to some very basic principles. The best book I have seen on this is by Warner Burke up at Columbia—called *Organization Development.*[1] It's a great little paperback. It teaches you how organizations seek and sustain change.

Lots of organizations and lots of groups of stakeholders seek, but they never sustain. I can't tell you the number of organizations I see that spend their whole life seeking and never sustaining. So seek and sustain change. Open and transparent. Also, participatory. Stakeholders can't decide things unless they participate. The importance of feedback. It always has to be feeding back. Feedback loops to stakeholders. Larry talked about this: Here is the map that I have developed. Is this right? Did I get it right? What did I leave out? What did I not leave out?

The stages of conflict-management systems design—very similar, I think, to stakeholders. I am going to go through each of them with an eye toward consensus building and give you some examples.

One of the things that I have found—and I am going to talk about the case study in a minute—is that lots of things happen behind the scenes, lots of things happen *sub rosa.* I'm a big fan of Harry Potter. There is a great line in Harry Potter where Dumbledore says to Harry Potter, "Don't be too enamored with these wizards, with all their smoke and puff. The smoke, bangs, and activity are often the sign of ineptitude, not expertise."[2]

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1. W. WARNER BURKE, ORGANIZATION DEVELOPMENT: PRINCIPLES AND PRACTICE (1982).

2. J.K. ROWLING, HARRY POTTER AND THE HALF-BLOOD PRINCE 558 (2005).

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A lot of times when you work with stakeholders, you will get people that are kind of out there and they are very vocal about things, which is terrific. That doesn't necessarily mean they are effective. So don't get thrown off. If you are getting feedback and you are getting people pushing back, you are doing a great job. If you are not getting resistance, something is wrong. If you are not getting resistance, something is wrong. You need to anticipate your resistance along the way.

Also you want to be thinking about Kurt Lewin's principles of how organizations change.[3] They freeze, they unfreeze, and they refreeze. Frozen organizations are very hard to work with. They are very stuck. You have to chip away at those organizations or chip away at those processes. I love to work with stakeholders where everything is a mess—the ice is melting; it's dripping; there is lots of conflict—because they are changing. They are in a "movement stasis," and that movement allows change and it really invigorates change.

Once a system is refrozen, once a group of stakeholders is refrozen, they don't want to change for a while, because they are tired of changing.

What happened in Montgomery County was, we got something called "initiative overload." There were so many initiatives in the school system that they couldn't process any new change.

So you really want to be looking at systems to make sure that there is not too much going on at the same time, that you are not asking them to make shifts, too many at the same time, along the way.

This was the system. It was about workplace disputes. This is an organization where they have done collective bargaining. They have been trained by the Harvard people to use interest-based negotiation. These unions and this school system have been working together for years, so this was a natural outgrowth.

The skills that they learned in the interest-based bargaining arena were skills that they were able to transfer to the workplace dispute arena. So that was very, very helpful.

The superintendent basically said, "Look, come up with a way to resolve some of these disputes without going to grievance." The unions were very interested in that. We set up a working group. On the working group, I had bus drivers; I had art teachers; I had cafeteria workers; I had principals; I had the chief operating officer

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3. *See Generally* Kurt Lewin, *Group Decision and Social Change*, *in* Readings in Social Psychology 340-44 (Newcomb & Hartley eds., 1947)

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of the Montgomery County school system. They were all sitting in there, in an equal capacity, with an equal right to challenge or raise suggestions.

We did that for about a year. I did some training with them. We did an assessment model, as Larry talked about. We then put together a partnership team, an ongoing partnership team, composed of the school system; MCEA [Maryland County Education Association], the teachers' union; MCAASP [Montgomery County Association of Administrative and Supervisory Personnel], which is the principals' union; SEIU [Service Employees International Union], which is the service workers' union; and we pulled in CRCMC, the Conflict Resolution Center of Montgomery County. They provided us with free neutrals, facilitators, community conferencing, mediators.

So it really was a true partnership. I have included in your materials an example of a partnership agreement so you could see one. I have included for you a couple of the reports that the groups drafted collaboratively and drafted together, so you can see an actual model of what this might look like as we go forward.

Entry and Contracting

Entry and contracting is very important. Entry is how you get in. Who brings you in matters, and how you get there.

Some of you may remember the old *Mission: Impossible*—not Tom Cruise, but the television series *Mission: Impossible*. You may remember that they had Barney, the disguise guy, and all of that. What is really critical about the old *Mission: Impossible* is that fully one-half of the show was devoted to how they got in. They cut a hole in the ceiling or they disguised themselves or they went in in a van.

How you get in matters. Who brings you in matters. When you get in matters.

In Montgomery County, SEIU, my service workers' union, came in late, because they were involved in a very heated election, and their resources and their energy were going somewhere else. We could have pushed them, and we chose not to. We chose to wait. It was well worth it. When they came in, they came in really anxious to work with us.

So timing matters.

Access matters. Who can you get access to?

Reprisal: Are people going to get in trouble for doing this? Are they going to get in trouble for working with you?

Also, publicity: Are you going to use the press, not use the press? Is the group going to use the press?

Larry talked a little bit about confidentiality. I don't have enough time to do it, but there are some real issues around confidentiality. There are legal issues around confidentiality. The last time I checked, there was no collaborative-process privilege. There is no systems-designer privilege, unlike mediators. So what I do is construct my confidentiality usually by contract, in a written document.

But know that this is a different kind of confidentiality than mediation. It is a very different kind of confidentiality. I can assure you individual confidentiality, but that doesn't mean that you are not going to go out and tell other people what you told me. It's much more complicated. It's much less linear. There is much less legal protection to it.

So I want you to really think about the confidentiality that you can promise and make sure that you don't over-promise.

Cultural Implications

Make sure that you are doing an assessment that is culturally appropriate, that you are using the right language, you are using the right jargon, you are respecting people's sense of time and place, you are asking questions in a way that they can be understood.

I once had a student who said to me that his philosophy of negotiation was, if you don't ask, you don't get. He happened to work for one of the news organizations and he came back to law school. He said, "My theory is, if I don't ask, I don't get."

If you don't ask stakeholders what they want, you won't get it. You have to ask. You have to ask it in a way that they can hear it. Focus groups, interviews, surveys—however you want to do it.

I did some work on the Hill. I did a conflict-management assessment. I was allowed a very short period of time with this particular congressional group. I did what I call a stop-continue-start. It's a very quick way to get lots of information: What are we doing that we should stop? What are we not doing that we should start? What are we doing that we should continue? "Stop" gets you from the past, "continue" gets you in the present, and "start" gets you to the future.

I use stop-start-continue a lot with stakeholder groups. It is a very easy way to get information quickly.

Force-Field Analysis

What are your restraining forces? What are your driving forces?
What is driving people to do something? What is driving them to
change? What is restraining them?

In a Western context, we always focus on the driving forces, be-
cause we are real gung-ho. What the research shows is that if you
focus on the restraining forces—what is holding people back—that
is where you get the most movement with change. Why can't you
do this? Why don't you like it? What's wrong with it? What is
your fear? What is not going to work?

I work on the back end. I work on what I call the cross-examina-
tion end, the side that people don't like, the things that are wrong.
I don't really care if I have 100 supporters. I want to know about
those two people that are not with me. They are the ones that I
really have to focus on. So I spend a lot of time on that.

If I do a focus group, if I do a partnership, I always put people in
my partnership group who hate the concept of collaborative pro-
cess, because they are going to tell me what I can't see. They are
going to give me that view that is larger than my narrow focus and
the stakeholders' focus along the way.

Buy-in versus buy-off: One of the big mistakes I see is people
saying that everybody has to buy in. That's nonsense. Sometimes
all they have to do is buy off. They just have to get out of the way.
Buy-in doesn't necessarily mean that they are rah-rah cheerleaders.

I do a matrix, like Larry does. I do an issue matrix, but I also do
a support matrix. What stakeholders absolutely have to be on
board? Which stakeholders—if they are in the margins, is that
okay? Which stakeholders just have to comply with the process?
Which stakeholders really need to be committed? Which stake-
holders really need to be champions?

One of the things that we ran into when we did the assessment
with Montgomery County was that these people just get assessed
to death. They have a chief performance officer, a chief operation
officer, No Child Left Behind,[4] No Child Going Sideways—
whatever it is, they are always doing testing. So we really had to
focus our assessment.

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4. *See* Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified at scattered sections of
20 U.S.C.).

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Goals and Evaluation

An important thing to think about here is, what is the goal? It's not your goal as the practitioner, but what is the group's goal? What is the definition of success? How are you going to measure success—qualitative, quantitative, feedback, climate surveys? What is success? Very, very important.

When we first did the program with Montgomery County, we didn't have a lot of people coming into the process to use our mediation. For the service workers, that didn't bother them at all. They said, "It will happen eventually. It's okay." The teachers' union wanted people right away. They wanted to know that there were lots of people coming in the doors.

SEIU said, "That's not our definition of success. Our definition of success is that people know about it, and perhaps because they know about it, it changes the way they approach a problem. Just because they don't call 911-HELP-ME doesn't mean that we haven't been successful."

So we had competing models of success, which was kind of interesting along the way. You want to think about that. In the public arena, measuring is often very difficult. What is the goal, and who measures it?

Design Architecture

The design architecture is the ADR tool you are actually going to use. You need to make sure that the methods you are using work with these particular groups. You want to focus on the front end, on prevention.

There may be questions about the [Government in the] Sunshine Act,[5] and FACA [the Federal Advisory Committee Act].[6] Transparent is better. You don't have a FACA problem, you don't have a Sunshine problem, if you are open and transparent and everything is public.

I had a situation at Montgomery County where a couple of stakeholders wanted to use facilitation, a couple of people wanted to use mediation, and we really negotiated what methods we were going to use in this process.

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5. *See* Pub. L. No. 94-409, 90 Stat. 1241 (1976) (codified as amended at 5 U.S.C. 552(b)).

6. *See* Pub. L. No. 92-463, 86 Stat. 770 (1972) (codified as amended at 5 U.S.C. app. § 2).

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Training and Education

I am not going to spend a lot of time on training and education. Training in some milieus right now is kind of a no-no. A lot of people don't like the "T" word anymore. I educate people. I make them aware. You really need to be aware of what your groups need and what they don't need, and what skills they need along the way.

What we managed to do at Montgomery County, which was very interesting, was, we leveraged off another initiative. They had something called the Culture of Respect. We leveraged our education efforts off of something else which already had a springboard, tied them together, and got a synthesis and a synergy (as much as I hate that word) of initiatives going forward together. That was very, very helpful.

Implementation and Modification

As you actually work with these stakeholders, at some point you have to do it. You have reached a decision. Something is going to happen. I like to start small and think big. Where am I going to be going as I go further out?

I like to team it where I can, groups of people working together. I test it. I tailor it. Just because the model that you used with the city council in Omaha worked doesn't mean it's going to work with the city council in St. Louis. There are certain principles that are transferable, but don't make that mistake.

To the extent that you can, publicity helps, if you can get any kind of publicity for what you have done. People won't use what they don't know.

I love pilots. I love small consensus building. People don't worry about pilots because they are just pilots. I have a program now that has been a pilot for ten years. It's a pilot with a little "p." Nobody worries about it because it's just a pilot. Terrific.

Resistance and Constraints

Anticipate resistance. I talked about that. If you are not getting resistance, something is wrong.

I like to invite disagreement. I like to invite debate. I like to bring in the demons and have tea with them. I like to know what is out there. I like to know what is coming back at me. I like to feel the resistance along the way.

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I use a direct-examination approach. Again, I am a lawyer, a recovering litigator. I want to take the difficult questions up front. I don't want to wait and have my adversary ask them on cross-examination. If I have a problem, if I know the stakeholders have a problem, bring it on now. Let's hear about it. Let's deal with it. If we really are transparent, we shouldn't be afraid of conflict. If we really are transparent, we shouldn't be afraid of disagreement. If we really are transparent, we shouldn't be afraid to invite disagreement with us, with the practitioners, along the way.

When I teach mediation, I talk about "the royal M." The royal M is not mediation; it's manipulation. Facilitators have the capacity to manipulate. You can manipulate the agenda. You can manipulate who speaks, when they speak, where they speak, whom you address.

I would really encourage you to think about that. Why won't it work? What don't you like? If you are really true to what you are doing, you are going to invite that resistance and deal with it along the way, and not shut it off. I think some neutrals want to control everything. If you want to do this kind of work, you need to get over control. You need to let it go. You don't control anything. The most you can hope to do is to influence the process along the way.

Ethics Concerns

Let me wrap up by talking a little bit about ethical issues along the way. We can have a conversation about this over questions or drinks or lunch or whatever. An interesting question here: Who is the client? It's a critical question to me. Is the client the process? Is the client the problem, the issue? Is the client the stakeholders? I don't want to say, "To whom are you beholden," but who is the client here, when you are brought in to one of these processes? How do we respect self-determination? That is really, really critical. In a previous lifetime I was a family therapist. Self-determination is really, really critical. If the stakeholders don't want to do it, it doesn't get done, no matter how good you think it is for them. It doesn't matter.

People say to me all the time, "They just don't get it." Okay. And your question is? If they don't want to go there, they don't go there. It is not your job to convince them of a result. I think we really need to look at ourselves as practitioners in that regard.

What standards of conduct do we follow? We have standards of conduct for mediators. There are guidelines for facilitators. The

last time I checked, there were no standards of conduct for consensus builders. There are no standards of conduct for systems designers. This is a new area. I think we really need to think about it: How do we respect self-determination? How do we respect confidentiality?

When I contract, I do a memorandum of understanding. You could, as a collaborator, get called in to testify in subsequent litigation, and you don't have a privilege. For those of you that act as mediators, it's a different focal point.

What confidentiality can we promise? Probably not much. We can promise it. We can back it up with a contract. But this is a much more open process than mediation. The biggest thing I see is that people who are mediators come in to do this kind of work and they think they have confidentiality. You don't. You don't have it by law. You don't have it by case law. So be very careful about what you promise.

The other thing I would say is that I think we really need to think about the Hippocratic Oath, which is, "First, do no harm." If you are lucky, you won't go in and work with a system and make it worse—although sometimes making it worse is what needs to happen to move it forward. Sometimes we need to take two steps back to take a step ahead.

The other thing here is that I think, ethically, we need to understand that there is a difference between understanding and agreement. I can understand Jackie and not agree with her. I can understand Larry and not agree with him. I can understand my sixteen-year-old son when he wants to take the car and bring it home at 4:00 in the morning, but I don't agree with him. ("I understand perfectly well that you want to take the car and come back at 4:00 a.m., but I don't agree with you, and it's not going to happen. Is there something else we should discuss?")

We have to walk the walk here. We have to talk the talk if we are going to do this kind of work. I need to be able to understand you and not talk you out of your viewpoint, to think about that along the way.

Humility

Finally, I would wrap up by saying that as practitioners, I think we owe these processes a certain amount of humility. These are very, very powerful processes. It is democracy at work. There is a lot of energy here. You need to be humble in the face of that. It's not your system. It's not your design. It's not your consensus

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building. It's theirs. If it works, it's their joy, it's their pride. If it doesn't work, it's their joy and it's their pride. It is not mine. They do it.

I also think that we really need to think about the concept of stewardship along the way. I happened to bring a little excerpt from my book that really gives you some sense of where I come from, and I think it's something we should think about: "The answer lies in whether we aspire to be stewards of the systems we live with or whether we settle for being mere spectators."[7]

Stewardship involves more participation. Stewardship involves more energy. Stewardship involves more work than spectatorship, but the rewards can be greater. It's a concept that we talk about a lot in land use, the stewardship concept, which I know that the speakers after me will be talking about. You might think about that. You are kind of a steward of the process here. What are the problems that are caused by that?

I honor all of you for the work that you do. I honor the other two panelists. Land use is just an incredible area. I really just encourage you to be very mindful about what you do, to really watch the process, watch the system, and to really look at what it has to teach you, as well as what you have to offer it.

This is a symbiosis; it's a system. It is sustainable. It's moving. Think about that along the way. All systems do certain things. You should expect them to do certain things. You will be fine, as long as you are mindful, respectful, and humble about this process, because the stakeholders are inviting you in. They are inviting you. That's a big deal.

Let me take one question, and then we will go to the next speaker.

QUESTION: When you said transparency, what did you mean about transparency? Did you mean the transparency to your client, to yourself, or even to your opponent?

My second question is, is there any possibility of conflict between the transparency and confidentiality?

PROF. COSTANTINO: It's two questions. The first is, what do I mean by transparency? The second question is, what is the difference between transparency and confidentiality?

They are good questions. They are great law review articles. I won't be writing one, but maybe somebody in this room will.

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7. Cathy Costantino, Designing Conflict Management Systems: A Guide to Creating Productive and Healthy Organizations 227 (1996).

Transparency, in my view means that I am what I purport to be. You can see through the process.

Some of you may remember, back in the early computer days, WYSIWYG, "What you see is what you get." On your screen you had WYSIWYG. Some of you are looking at me like, "What the heck is she talking about?" Those of you in the new IT field don't know that.

What you see is what you get. What you see is—you ask me a question and I give you the answer. The process is transparent. It's open. Anybody can show up. Anybody can debate. Anybody can offer their opinion. Transparent—you know exactly what it is. There are no secrets—no secrets.

There is a difference between secrets and confidentiality, too. We can have a different conversation on that. But transparency means it's open. I can look through the window and see it. I can look through the process and see it. I am transparent as your practitioner. Here is what you can expect from me. Here is what you can't expect from me.

Confidentiality is a little bit different. Confidentiality means what you tell me will not be transparent. What you tell me I will not share. What you tell me will not go anyplace else. It's one-way transparency with no reflection back.

MAKING GOVERNMENT ADR LESS ADVERSARIAL

MR. NOLON: How ever we describe our topic today, I think it's fantastic that we are looking at the role of ADR and consensus building in government. The reason why was pretty much highlighted in Professor Susskind's presentation, which is that decisions involving government are essentially designed to be adversarial. That is the way they are set up.

I am going to take a little bit of time to explain why that is, so we are on the same page, and then discuss some ways that practitioners have used consensus building and ADR techniques to make governmental decisions less adversarial, more collaborative.

We are at a law school, so I can start with a story about the Constitution. We heard from Professor Susskind about how the process becomes adversarial when it starts rolling out in either a land-use or environmental context. It happens, as Professor Costantino pointed out, in health law situations; it happens in employment situations; it happens in education situations. In any situation involving government, this adversarial process rears its head.

It is not the fault of the decision makers. It is not the fault of the adversaries or the constituents. The fault for this adversarial climate actually lies squarely at the feet of the founders of our country.

When our Constitution was being created, there was an important debate about what the purpose of government is. Professor Susskind was sort of nagging us about this, saying we can do better than the system of governance that we are currently using; we can do better.

The reason why we have this system of government is because there was a debate among the founders. There were the Federalists that thought that the purpose of government was to protect us from the tyranny of government—to protect us from our meanest instincts. Then there were the Republicans, who thought that what government should do is inspire us to our noblest of civic virtues. Thomas Jefferson was an advocate for the Republican viewpoint that we should have government to inspire noble civic virtues, and it was Madison and his Federalist colleagues that were looking to create a government that would protect us from our meanest instincts.

Which form do you think we got? We got the Madisonian version, the Federalist version, the one that protects us from our meanest instincts.

This form of government is codified in our Constitution, and it filters down from the federal system of government to the state and local system of government. Essentially, the idea is that there is a series of procedures that serve to check the governmental authority—to make sure that it is not abusing its power. The system is very good at making sure that government isn't being abusive, very good at protecting us from our meanest instincts; not very good at inspiring us to our noblest of civic virtues, not very good at looking at the big picture to help solve problems.

One of the reasons that this is a valuable topic for a law school and for us is that ADR techniques, consensus building, and collaboration basically create a structure that can sit on and around and in front of our "procedural republic" to make it more collaborative. Professor Susskind talked about how that technique can be used before the process begins, how it can supplement it. If he had more time, he would probably talk about ways that it can be used at later stages of the process. ADR professionals—mediators—have used a variety of consensus-building techniques at a variety of stages in the decision-making process, not just the beginning.

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We, as mediators, if we had our choice, if we had our druthers, would like to see clients come to us early in the process, before everything gets gummed up, hostilities erupt and bad feelings prevent open conversations and misinformation is disseminated. It's just a mess if you don't do it early. So as mediators, we want decision makers to come to us early in the process. But if they don't, we can work with them. We can create structures that will take the adversarial process, take the procedural republic, and make it more collaborative. There are ways that we can do that.

In the handouts that I have included in the material, there are some charts and diagrams. It talks about five stages of a land-use decision-making process. It shows what mediators can do at different stages in those processes.

Since I don't have time to talk about that, what I would like to cover are some techniques to help decision makers and stakeholders be more collaborative earlier on in the process. I am going to tell a few stories that illustrate techniques that mediators have used to convince decision makers to become collaborative earlier in the process. So, first the tricks and then an example.

Evaluating the Purpose of a Governmental Decision

The first one is to talk with the decision makers about what it is they are trying to do with this particular decision. We can take the example that we started off with this morning, the large industrial plant coming into a city. There is a presumption of certain benefits coming to the community from this plant. There is a presumption of certain risks and harms coming to the community from this plant.

What the decision makers are trying to do when deciding whether or not to approve this plant, and in what form to approve this plant, is taking government and expanding its purpose beyond what the required decision-making process allows. What I mean by that is that the required decision-making process, what we have been calling the usual process or the traditional process, is designed to protect us from the tyranny of government. If I am a council member, if I am an elected representative of the community and I am faced with this situation of improving my community, I want to do more than just protect the community from the tyranny of government. I want to inspire my community to the noblest of civic virtues.

That is the most important thing for an elected official to understand. What they are trying to do in many of these situations

where we have a controversial decision is, they are using the system that is set up for a different purpose. They are using an adversarial system that has a very small purpose—protecting us from the tyranny of government—to accomplish a much larger purpose.

There are three purposes of the required decision-making process—this system that protects us from the tyranny of government: First, it insulates us from adverse legal rulings. Second, it only informs a small number of people, the minimum number of people required. Third, it only protects legally recognized rights.

In most cases, when we have a controversial land use or any type of public policy situation, local officials, elected officials, want to do more than just inform the minimum number of people; they want to inform as many people as possible. They want to do more than just insulate themselves from an adverse legal ruling; they want to avoid a lawsuit. They want to do more than just protect legally recognized rights; they want to advance community interests going into the future.

So it's important for the local officials to recognize that if they want to use this expanded purpose of government, this Jeffersonian model of government, they can't use the Madisonian structure that was created in the Constitution. They need to supplement that constitutional form of democracy with more consensus-based processes. Professor Susskind laid out the case for that, and we are going to hear more about that from Professor Siegel and hopefully during the master class.

That is what the purpose of supplementing is—to create systems of governance that go beyond protecting us from tyranny to inspiring us to our noblest of civic virtues.

Have a conversation with a local official, with a decision maker, as to what the purpose of the required system is and inform them that if they want to do more than that, then they need to add more procedures; they need to supplement.

Promoting Stakeholder Involvement

Involve the stakeholders in the creation of the process. There are two reasons that you want to involve the stakeholders.

The first is that when local officials decide to involve the stakeholders and invite them in, they are doing more than just communicating verbally that they want a consensus-based or collaborative process. They are communicating nonverbally. As humans, you can tell me everything that you think is true, but I am not going to believe it until I know it from experience. So one must create a

process where the stakeholders experience collaboration and are involved in designing the process.

Another reason why it's good to involve stakeholders in the design and management of the process is that if an agreement is reached it will be more durable. I think Professor Costantino made a very important point, that sometimes we can't get an agreement. That's fine, from a mediator's perspective. But if you do get an agreement, you are more likely to have the stakeholders support it if they are involved in creating it, because they have a commitment to the process. They were involved in creating it.

Some of the ways to do this are to create process design committees if it's a large group. If it's a smaller group, you can have people involved in creating the ground rules, making sure that the agenda is right and adding things to the agenda. There are lots of things that you can do.

Adjusting Stakeholder Language

The third of the top three tricks is to help the parties to adjust the language that they are using in their interactions from the adversarial context to a more problem-solving one. This is a little trickier, but it's very important, because it creates a different culture that moves from the adversarial culture to the problem-solving culture. The reason this is significant is that—and this is important—we have this history of defining our system of governance, our constitutional democracy, as a "procedural republic." It's a specific kind of democracy that promotes adversarial interactions. So we, as a culture, are geared towards adversarial interactions, because that is how the Constitution says we should govern.

Helping the parties to change their language and their interactions communicates that a consensus-based process is a different type of process, that we have different purposes to this governmental action than just protecting you from our bad intentions. Our purpose here is to inspire the noblest of civic virtues, to inspire the direction for our community, the way we want to see it go.

Here is an example of how mediators can help create a new language. A friend of mine mediated a dispute between animal-rights activists and trappers. She did a great job setting the stage for the first meeting. She met with all of them, had them involved in the agenda, and set up the room the right way. She was very clear about what the purpose of the meeting was—very clear. The purpose of the meeting was to come up with better trapping regulations than there currently are. The animal-rights advocates didn't

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like current trapping regulations. They wanted new regulations, and the trappers wanted the old ones.

The local official said, "Let's set up this consensus-based process. We will hire this mediator, and you can work out better guidelines. We don't want to make new regulations for you. We want you guys to do it."

The mediator did all this great work, set everything up, and everything was going well. Then one of the animal-rights advocates got up, and everything that he was saying, he prefaced by saying, "The murderers over there." The room just started vibrating. You could see the steam coming out of their ears. The mediator hustled to try to get everyone back on track and focus on what they were doing.

After about twenty minutes of reining it back in and pulling in the energy, she said, "Okay, let's take a break," and pulled the person aside, the person that called them murderers, and said, "Hey, why did you do that?"

He said, "Because they are. They're murderers."

She said, "When you call them that, it's going to make it harder for us to work out an agreement."

He said, "That's okay. I don't care. I want them to know that they're murderers and that's how I feel."

The mediator said, "Is that why you came to this meeting? Is that why you traveled two hours and you are going to sit here for four hours in this meeting, so that you can tell them that you think they are murderers? Is that the purpose of coming to this meeting?"

The advocate thought for a second and said, "No, it wasn't."

The advocate realized in that moment that this was not the moment to use the techniques of the adversarial. What the advocate was there to do was to see if they could get something, to see if the advocates could get better regulations for trapping than were currently on the books.

When the meeting resumed, the advocate didn't use the term "murderers."

So the mediator can help the parties to use different language that creates a different climate, a different culture.

These are three techniques that you can use with decision makers and stakeholders to move the collaborative process into the decision-making process. A lot of times we get rolling with a decision-making process, and we think that we have all our ducks in a row and we think we can get it done, and we all of a sudden hit

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a wall. Once we hit that wall, then we call in the mediators and say, "Help! Bail me out." We can bail you out in some situations, but the longer the process keeps unfolding, the harder it is going to be for us and the less likely it is that we can help you out.

Consensus Building on the Local Level

Another reason it's good to start early is that you don't have to involve a mediator as intensively, in some situations. You can involve a mediator to create a system of collaborating, a system of interacting, that allows for consensus agreements to be reached.

Here is an example from a community just south of Albany—the town of Bethlehem. For ten years, this town was struggling to create a comprehensive plan for rezoning the community. The current plan was very old, and there were actually portions of the town that were mis-zoned, according to some opinions. There were even portions of the town that had no zoning at all.

So there was this debate for over ten years about how to do this. The community was struggling and fighting, and they were using adversarial techniques. But they couldn't generate any movement to develop a plan.

Then a new supervisor was elected. She ran on a platform of creating the comprehensive plan. She was elected by a narrow margin and she hired a team of planners and lawyers and other advisers to help her create a process that was going to engage citizens in the creation of this comprehensive plan. It wasn't one of these plans that is created by the planner and then shoved down the throat of the community. It was started with the community input and would then be adopted by the local officials.

They set up a process that I think is very important and very illustrative of the different stages and the different things you need to think about when you are creating a collaborative process. One of the things she did was to set a timeframe. She said, "We're going to do this in a year. We have twelve months to do this."

It was managed by a representative committee. She set up a committee that was modeled on the conflict-assessment approach. It was a very representative committee, a lot larger than you would have expected. It was very representative of the community, so that, for the most part, when someone from the community looked at the committee, they saw their interests represented on that committee.

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The committee met once a month, at a minimum, in the same place, at the same time, with the public present, and the public was able to comment at the end of each meeting.

They had about seven or eight large informational meetings, where 100 to 150 people attended, to update people on the progress. So in addition to the monthly meetings, there were large plenary community meetings, where progress on the plan was updated.

Local officials and committee members went out to portions of the community that had been traditionally underrepresented in elections in the past and were, you could argue, sort of the disempowered segments of the community. They went out to them, put information in their boxes, made sure that they knew about it. They identified all the civic organizations in the community, all the social organizations in the community, and got them to put information on their Web sites and in their newsletters about comprehensive planning effort.

So there was tremendous outreach—there were formal moments to interact and informal moments to interact.

The committee, whenever they got a phone call from anybody or a request for a meeting or a request for information, volunteered to go to the person's place of business or their house to have a conversation.

The supervisor tells great stories about being in a freezing auto body repair shop for three hours talking to someone or being in someone's living room and having people from the neighborhood stop by and find out what was going on. Those types of meetings are very important.

Some important things to point out: Afterwards, when the committee members were interviewed about how this process went, they said, "For the first ten months, it was brutal. For the first ten months of these monthly meetings that we had, they were just unbearable, and we wanted to throw in the towel." They were two-hour meetings and then they would go another two hours with public comments afterwards. So they were four-hour meetings. It was just brutal. It was really intense.

But after ten months, something started to happen, where people started to change their perspective. They started to generate movement and they started to understand that they were really being heard.

These are the opportunities that communicate nonverbally that this is a different type of process. Local officials, citizen stakehold-

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ers are not going to give up on the adversarial tradition right away. The collaborative approach has to be communicated in a variety of ways. They need to trust it. They need to trust that it is going to be collaborative.

Another thing that happened was that it went eighteen months, not twelve months. So the process was flexible. They needed a little bit more time, so they added a little bit more time. No problem.

The public hearing: Larry said, if you do this process you will have the public hearing, and no one will come. That's exactly what happened. They held a public hearing at the end of eighteen months. They had a bottle of champagne in the back of the office that they were all excited to pop. They really wanted to engage the community. They went out there for the meeting, and there were three people in the audience—three people in the audience. Two of them were for it; one of them was against it.

They asked the person why he was against it, and then they said, "Actually, we address that right here in the plan." He said, "Oh, okay. I'm not opposed to it anymore," and he left.

This eighteen-month process started out brutal, but ended up with consensus, ended up with agreement. A few things to point out that were also interesting.

I asked the supervisor, "How is it that you knew to do this? Are you trained as a mediator? How did you know how to do this?"

It comes back to Professor Costantino's comment. She said, "I'm a lawyer, and in my years of practice, I know that it's better to deal with all the bad stuff up front. It's better to do it first before you get in too deep."

I said, "How did you pull it off?"

She said, "I was part of a team. I had a team of people that had been through a lot of these processes that had gone wrong. We knew what we didn't want. We had been involved for ten years in this debate about comprehensive planning in our community, and we knew that the old approach didn't work. So we put our heads together, and it worked." They pulled it off.

Conclusion

So I think it's appropriate, the fact that we are at a law school. We started with Dean Treanor's comment saying that law schools have been challenged to connect what they are teaching to what lawyers actually practice.

So I am very happy that Fordham has created this forum for us to talk about the relationship between ADR and government, because government needs ADR. Our U.S. system of government is adversarial. It separates people. What ADR does, what consensus building does, is brings people together, brings us more to that Jeffersonian model and vision of government, as opposed to the Madisonian one.

Thank you.

PROF. NOLAN-HALEY: In the interest of time, we will take the next presenter, and then we will take questions.

ENVIRONMENTAL ADR

MR. SIEGEL: First, let me say thank you to Fordham Law School for inviting me here, and in particular, to Samantha Springer and Phoebe Stone and Professor Nolan-Haley for working with me beforehand and for planning the event.

It's an honor to be here with the other speakers and Professor Susskind. I am glad to talk a little bit about environmental conflict resolution.

What I plan to do is talk about a few different things. First, I will speak generally about what we call environmental conflict resolution at the Environmental Protection Agency [EPA]. Then I will focus a little bit on mediation in a more typical enforcement litigation context, and then offer some comparisons to consensus building at EPA. Finally, I will get to one of the other topics that is suggested in the title, which is institutionalizing effective policy and practice on conflict resolution in the federal government.

My father always said to me, "Watch out for the fine print on the bottom of the page." So I draw your attention to that disclaimer in your program. [Making reference to his disclaimer, "the views expressed during this presentation do not necessarily represent the views of the U.S. Environmental Protection Agency"]. Unlike Professor Costantino, I am not on vacation today. I always like to give my disclaimer, regardless.

Before I get into discussions about process, I want to talk about what environmental conflict resolution is all about. It's about a tremendous amount of passion about issues that people hold very near to their hearts.

It's about air pollution. This is a smoggy day in the summer over New York City. It's about the air we breathe and about how many hospital admissions we are going to have this year due to asthma attacks and elderly people who have cardiopulmonary disease as a

result of air pollution. That is what the conflict is about in environmental conflict resolution.

It's about water pollution and our children drinking water that may have dangerous contaminants in it. People get very passionate about that.

It's about hazardous waste on the property right next door and leaching drums that may be ending up on our soil or in our groundwater.

It's about climate change—a very important issue we have to face today and one that there is tremendous interest and passion about, and a variety of opinions about as well.

So conflict in the environmental context arises in many different forms.

We have talked about justice and the ability of the public to deliberate in our government. For many years, many communities did not have the opportunity to be part of the decision-making process on environmental issues. There is a very strong environmental justice movement now, where these communities—often communities of color, but going beyond that as well—are saying, "We didn't have an opportunity to participate. We want to be at the table. We want to have a role here."

Environmental Conflict Resolution in the EPA

What I will do next is talk a little bit about environmental conflict resolution at EPA. First, I just want to draw your attention to this diagram. You can see, if you look on the left side, that we have unassisted negotiation, which is a form of dispute resolution that does not involve a neutral and is not something that we typically think of as alternative dispute resolution. All the way on the other side we have litigation, where the parties have very little involvement in the decision-making process or the design. The ones in between are processes that have somewhat more of a consensual element to them.

As you get farther to the left, the participants have more involvement in designing the process that is going to resolve their disputes. As you get even farther to the left, the participants have more involvement in the decision itself. Finally, as you get farthest to the left, the participants are more directly participating in the whole process.

When you get all the way to the right, the typical litigation mode, you have a judge making a decision. There may be court rules. There are judge's orders. The parties don't have much opportunity

to design their process, to participate. Often it's just lawyers that are up there in the court.

At the EPA, we tend to have most of our environmental conflict-resolution processes in the second box from the left, which is the process assistance box, where we find mediation, consensus building, facilitation, sometimes substantive assistance as well.

ADR in Action

Let me get a little more specific. How do we use ADR at the EPA? You see that triple green line there. The actions that are on the right side of that line are where the conflict has been joined in a formal manner, like litigation, if EPA sues a company. There may be a challenge to a rulemaking that we have proposed and promulgated. On the left side, those are where we have more opportunities for consensus building—things like developing a rule on a consensus basis, or developing policy with the help of stakeholders and the public.

Case Study: Environmental Enforcement Mediation

Let me now shift to an example of the right side of this slide, where the action has been joined in a formal manner. I will give you an example. This is based on a real case. I am using some license to adjust it a little bit.

This was a case involving EPA suing a village that was failing to comply with certain requirements that it test a power plant. The village owned the power plant. There was a legal deadline by which it had to test the emissions coming out of that power plant to see whether it was in compliance with health-based standards. The village didn't do that. They were late. They failed to comply with the deadline. The EPA filed an action. It was actually an administrative action. The village filed an answer. We ended up in quite a dispute.

What ended up happening, though, was that ultimately the parties agreed that it would be worth considering mediation. We got a convener to talk with both EPA and the village. The convener concluded that, based upon the recommendations of the parties, mediation could be possible and set up a process that was effective, in light of the input from the parties.

One of the things that the convener found was that the village was very suspicious of the big, bad federal government. The mayor of the town felt like he had been a good environmental steward and had done, in fact, a lot on sustainability in that town. He felt

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that the agency had rushed too soon to bring an action against the village and was not very trusting of the federal government.

What ended up happening was, when the parties were reviewing the potential mediators, the EPA decided to select and propose a mediator that used to be an attorney in town government, so he would be likely to garner some of the trust of the village.

The convener also concluded that the best way to initiate this mediation would be for the mayor to attend himself and make a personal statement about why he was so disturbed by EPA bringing this action against his town. Sure enough, that actually was a very successful process designed by the convener. We then hired a mediator.

I want to mention a few things about mediating in the government. Alternative dispute resolution is somewhat different when you are dealing with government than when you are dealing with private parties. A few things I will mention in particular.

Settlement authority: Does the negotiator for the government have authority to settle the matter? You will see that I have a whole list of players. Among them we have the enforcement staff engineer, the enforcement manager, the staff attorney, the supervisory attorney.

Does the supervisory attorney appear at the mediation? Even if the supervisory attorney does, does that mean that she can decide whether to settle for a number that is proposed by the other side?

Often in government, there is a long chain of command that has to be consulted before a settlement is approved. But a mediator can help with sorting through whether the government authorities have had a bottom-line figure approved, whether there is a series of officials that have to be consulted, and communicating that reality to the other party. So there are ways that mediators can help in that regard.

I want to mention that even within the government, there are often disputes. A mediator, as in this case, was very helpful in mediating within the government itself.

For example, in this case, the enforcement staff engineer had an interest in making an example of this village, because he had seen too many companies and towns and government officials who just disregarded the deadlines that we have in our regulations, and he was concerned about continuing pollution that might have been coming out of this power plant. We didn't know, because they hadn't tested. So how could we possibly know? That was his concern.

The staff attorney was interested in setting good precedent. This was a great case for EPA to not settle, to litigate. It was a clear-cut case. Let's get some good law out of an administrative law judge.

Then we have permit staff and permit engineers. These are people who aren't the enforcement folks, but they are the ones who decide the appropriate method of testing this facility. A settlement between the enforcement staff and the village that does not provide a specific test method, specific criteria for the village to use in testing this power plant down the road, would be very disturbing to a permit engineer.

My point is, within the government we have very different interests, different goals, and often a mediator has to work with those individuals in order to ensure a cohesive position and figure out what all the interests are of these various players and work through them.

What I didn't have in this case, but I will mention, is that often we have other layers. We have the Department of Justice, who represents EPA when cases are not administrative, but filed in federal court. They may have different interests as well.

Finally, the political leadership may have an interest in how this settlement is going to play in the press. So there are many layers when you are dealing with government in a mediation context.

I won't spend much time on the village side. I will say that there were complexities because the mayor, who did ultimately appear at the mediation, couldn't confirm the settlement until going to the town board, and he had to wait a month in order to do that, to get the vote of the town board on the subject.

Hovering in the mediation with the local village was public opinion. If I have to pay a penalty of $100,000 and that creates a deficit in my town, how is that going to play? These are the kinds of things that enter into the dynamics of a mediation involving government.

The result here was excellent. The result was, because the parties came together, because they were willing to consider creative solutions, as they wouldn't have done in litigation, we ended up with what is called a supplemental environmental project. This is when a company, in lieu of paying all of the penalty, ends up doing what we call an environmentally beneficial project. In this case, the village decided to buy hybrid vehicles, at a time when that was really cutting-edge technology, a number of years ago. They decided to install a green-lights program in the village offices. These

are things that never would have come out of a judge-ordered decision.

There was good cooperation going forward between the parties, because the mayor had an opportunity to voice his views about how he really is a good environmentalist, despite the slip-up on this timing requirement. That affected the government and made some of the government players a little less concerned about setting an example in this particular case. The cooperative process moved forward beyond the settlement itself.

Consensus Building and the Public

Let me talk a little bit about consensus building and make some comparisons. Consensus building typically is done out of our headquarters office. It's called the Conflict Prevention and Resolution Center. They do a wonderful job on a lot of ADR processes for the government. In particular, one of their focuses is consensus building.

Ideally, the first thing we do—and I think Professor Susskind alluded to this—is a conflict assessment. We call it a situation assessment. We will do an internal screening, looking at what the various offices within EPA think about potential processes for going forward in a consensus manner. We will do an external assessment, looking at stakeholders. The facilitator who is doing the situation assessment will look at what the parties' interests are, what issues they raise, what kind of process they imagine going forward, what kinds of data needs they have to resolve this matter, what resources they have available, what their timing is, who else should be at the table. There are a lot of things that go into a situation assessment. Often there is a written document that is produced at the end.

I am going to talk about a specific matter, but first let me discuss how the public gets involved in EPA decision making.

There is a range of different things, everything from outreach, which you see on the left, which typically is not at all consensus-based—it is about the agency making known to the public information that will inform their ability to comment and so forth. It's more traditional. We have, on the other extreme, stakeholder action, where EPA is not involved in a consensus process, but may contribute to an external consensus process. For example, in the CARE, Community Action for Renewed Environment, we may give grants to local communities to do some visioning about toxic pollution in their communities and what they might be able to do

about it. They may have their own consensus process that we are typically not involved in.

The middle three are the ones where we get closer to a consensus process—information exchange, not so much, but we often are involved in collaborative processes with the stakeholders on information exchange.

The two that I would say really involve consensus-building processes are recommendations and agreements, things like having dialogues on policy, joint fact finding, negotiated rulemaking, consensus permits, policy consensus.

Let me give you one example of that. A number of years ago, a matter handled by our Conflict Prevention and Resolution Center involved a rulemaking regarding woodstoves. There was a time when woodstoves were not regulated in this country. People just burned wood. There would be no control over what was coming out or the manner in which the wood was being burned, or the process of designing the woodstove so that it was more environmentally friendly.

A number of states began to regulate woodstoves. They each had their own different regulations. The environmental groups were concerned, because they wanted to see a broader use of regulation of woodstoves throughout the country. The woodstove manufacturers were interested in maybe doing something beyond the regulation in those states, because they were having a patchwork of regulations that they had to comply with. These tend to be smaller manufacturers. They would have to have many process lines to meet the requirements of each state. So they had an interest in coming to the table and formulating a national rule for woodstoves.

The situation assessment was done. The facilitator in that case recommended, based upon the parties' input, that all the various stakeholders had something to be gained by going through a consensus-building process.

There was a nine-month process. At the end of that, the stakeholders and EPA together wrote a proposed rule. The EPA and the parties agreed that if they could come to language in the proposal and in the preamble, then EPA would propose it, as agreed, the parties would not litigate, and EPA would finalize the rule as well, unless there were significant comments to the contrary.

They were able to write every word together, both in the rule and the preamble. The rule was proposed. There were no significant comments. It was finalized, and everybody was happy.

This resulted in some better solutions.

I mentioned in the mediation context how we ended up with a better environmental result because we had those environmental projects—the hybrid vehicles and the green lights. In this process, even though it's quite different, we ended up with a better environmental result. The EPA's Office of Air and Radiation commented that they never could have written a rule that stringent without significant risk of challenge. But because all the parties were at the table, we ended up with a better environmental result. So there is a parallel.

We also had the opportunity to check in on the woodstove issue about ten years later. It turned out that our Office of Civil Enforcement reported that there were very high rates of compliance in this industry, unlike other industries, and when there was non-compliance, the disputes were resolved very quickly and very easily.

In fact, there was a collaboration among industry, EPA, states, and environmental groups to create certain voluntary change-out processes for people who wanted to change their woodstoves. So there was a very good process going forward, similar to the result that I mentioned with the mediation case, which was interesting because in that case there was a cooperative spirit going forward, as the agreement unfolded. So different kinds of processes, but both having excellent results.

We talked about transparency. Professor Costantino mentioned that before. In the mediation context, where you are talking about an enforcement dispute, often these are private meetings, they are confidential, and there is no public involvement. If there is a consent decree that is filed in federal court, there will be an opportunity for the public to comment on the decree. But in the administrative process, there is not even that. It's a very private process, whereas this, in the woodstove context, was a very public process. That is often a very clear distinction between consensus building and mediating enforcement disputes.

Institutionalizing Effective Policy and Practice

One of the things that we are concerned about today is institutionalizing effective policy and practice. Let me just talk for a few minutes—I am not going to spend much time. I put a lot of resources in your materials.

There are statutory authorities for environmental conflict resolution. There are policy documents for it. I will mention the Execu-

tive Order on Facilitation and Cooperative Conservation,[8] which is intended to help build collaborative efforts and consensus building on the environment. The next one, the Memorandum on Environmental Conflict Resolution, I will talk about in a moment.

As for institutions, I mentioned EPA's Conflict Prevention and Resolution Center.[9] There are a number of other environmental conflict resolution offices in other federal agencies.

Benefits of EPA-driven Conflict Resolution

We have to ask the question: Why should we institutionalize environmental conflict resolution? It may seem obvious to us, as mediators and consensus builders. But there have been some studies done. My review of the literature shows that there is a tremendous amount of support for the fact that environmental conflict resolution results in lower transaction costs, earlier resolution, problem solving rather than positioning. Tough technical issues can be addressed more readily in this context. We end up, as I mentioned in those examples, with more environmentally beneficial projects. There are higher rates of resolution and satisfaction and avoided costs.

Why should we do additional studies? There is a paper I wrote, which is in your materials, where I advocate for additional studies. If we want to get government doing more of this, we ought to convince government that it is in its interests to do so. We need to confirm the studies we have to date. But there is a lot of variety in environmental conflict resolution. There haven't been a whole lot of empirical studies—I am not sure how easy it will be to do it—a whole lot of empirical studies on consensus building. There is great variety, even within typical mediated types of disputes.

There are other things to look at. There are rates of compliance with agreements. Professor Susskind mentioned that a good neutral should ensure a process and an outcome that the parties view as fair, efficient, stable, and wise. Let's find out whether, in fact, that is the result of these processes.

Obstacles to Government Environmental ADR

Let me talk about a few reasons why maybe we haven't had as much environmental conflict resolution in the government.

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8. *See* Exec. Order No. 13,352, 69 Fed. Reg. 52,989 (Aug. 26, 2004).
9. *See* U.S. Environment Protection Agency, Conflict Prevention and Resolution Center, http://www.epa.gov/adr.

First, one barrier that is identified in much of the literature is the government having a fear of losing control. Of course, this is a fallacy, because in reality no one loses control in the conflict-resolution context. In fact, I would argue that we gain control, because we have an opportunity to form the process that works for everybody, as opposed to waiting for litigation and not knowing what a judge is going to ultimately do.

There are strategies mentioned in this Environmental Conflict Resolution Memorandum which are now gradually being implemented to address that fear—staff outreach, education, letting the government officials know that they get to be involved in picking the neutral, so that they don't lose control.

Another barrier is our litigation culture. I am glad to see Fordham Law School and other law schools starting to change the way lawyers are taught. Outreach and training is what is needed. The memorandum discusses that. We need to build expert knowledge to address that issue.

Another barrier is lack of management support. There is discussion in this memorandum about how management within the federal government needs to do more to support all kinds of environmental conflict resolution.

Another barrier is inadequate funding and staff resource constraints. The memorandum talks about upfront investments and leveraging cost savings, and measures to do that.

The government can start to realize that it actually will save itself money. Sometimes it's hard to quantify. But if you take the example of the woodstove industry rulemaking that I mentioned, think about all of the avoided compliance disputes, all of the lawyers and technical people who would have been needed to sue all those woodstove manufacturers, if we didn't have a rulemaking that resulted in better collaboration between the government and industry.

Finally, we need more data collection. The Institute for Environmental Conflict Resolution is doing just that.

Conclusion

A few final thoughts. As a result of this memorandum that is designed to build capacity on environmental conflict resolution within the federal government, the agencies were required to report on how they are meeting the objectives of the memorandum. There are certain questions they have to specifically answer.

Agencies are responding in a number of ways to the memorandum. This was articulated in a report this year. There will be another report for the coming year.

But for now we know that the federal government is tending to implement more training programs on environmental conflict resolution. They are establishing more infrastructure. They are integrating goals into their planning and reports, into their strategic planning goals, to ensure that we are doing more environmental conflict resolution and measuring performance results. They are establishing or refining policies on environmental conflict resolution and are developing more performance measurement goals.

What I hope we will see in the future is broader use of environmental conflict resolution, including everything across the spectrum—mediation, consensus building. I am hoping that as a result of this effort, we will see more environmental conflict-resolution processes and more awareness about how to run them effectively.

I will stop there. Thank you.

QUESTION & ANSWER SESSION

QUESTIONER: I just had to get my hand up to check in here, because I want to thank you all for this brilliant discussion this morning.

First of all, I agree with Professor Susskind's approach on the traditional model. Ms. Costantino mentioned that she is a recovering litigator. I am a recovering Wall Street financial service person. That is what brings me here today. I, too, am a big proponent of ADR solutions, in addition to and supplementary to the traditional model and litigation and so on and so forth. I have heard a few different themes that I wholly agree with.

I just want some advice on how to better get the word out about ADR. I think, through greater dependence on the traditional model, we have enough agencies, committees, professionals out there, both in the service industry and others—lawyers, financial services, all sorts of professionals out there, and paraprofessionals as well—who are doing their jobs as effectively and efficiently as they can to help everyone with a win/win solution and get to conflict resolution more quickly, and managing change through change management.

How do we get the word out? Is it just simply to continue holding these group-think symposiums and then sharing it with our colleagues? Do any of the panelists have any suggestions on how we

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can immediately, after today's session, take action to further propel the project?

PROF. NOLAN-HALEY: A great question—how to get the word out. Who wants to take this?

PROF. COSTANTINO: I will take a first crack at it and then go to everybody else.

It's a bit of a loaded question. Again, not to use my lawyer hat, but the process will get itself out, in some senses. I think the risk we run is, if we try to sell this, there is a certain diminution of it. It almost has to grow from the parties. It has to be them coming and either asking for it or knowing about it.

One of the things that I do with clients is educate them about the choices that are out there and let them choose it. I think there is a lot of education.

I would lean toward the education arena, the awareness arena, as opposed to a marketing approach. We can have a conversation about this. But I think one of the disservices we have done in the ADR profession is that we have tried to market it. When you market it, you have packaged it and you have set it up as a product instead of a process.

So I think awareness is important. I think education is important. I think all of us, and the systems we work within, whether it's as a consultant, whether it is an employment situation, should be talking about it. I think it is going to be more education, awareness, and less marketing. I think, as you hear more about it, you will see more of that kind of thing in the paper.

I want to encourage people to ask for it. I don't want to be pushing it down their throat. That's the approach that I take.

MR. NOLON: I do agree that we need to make sure we don't trivialize it through marketing. But we also need to recognize that our media structure in the United States is pretty much geared towards reporting adversarial conflicts.

Someone, when I was done with my presentation, said, "I live in Albany. I never heard about what happened in Bethlehem." That's because the newspapers don't care about it. Newspapers aren't going to report that.

So to a certain extent, the field does have a responsibility to get the word out, with the assistance of stakeholders, I think, as the best way to do it, through education. Logic is always very useful, but the key there is the platforms. There are currently, I think, twenty or more dispute-resolution programs at law schools in the United States. One was just started at Pace two weeks ago. So the

dispute-resolution programs are starting to infiltrate into law schools, which are sort of the bastion of adversarial thought. That is starting to happen.

But I will agree—training, education, and informing decision makers and stakeholders.

MR. SIEGEL: I would agree with what we have already heard and add to it that if you are in a particular industry, there is no reason why—as mediators, as people involved in the dispute-resolution field, we don't want to push it on others. I completely agree with that sentiment. But if you are in an industry and you see this as a potentially valuable tool for your industry, it may be, first of all, that you can show decision makers in your own company or your own organization that this is being done by others in your industry, in a successful manner, or that it is being done by other industries and we could transfer some of those benefits over here.

So I think there is nothing wrong with some advocacy within your organization.

PROF. COSTANTINO: The other thing I would say is, get yourself a couple of happy stakeholders, because they really sell it. Get yourself a couple of people who have used it and loved it. You will get a lot of feedback from that, and I think you will get a lot of people using it.

My experience is that the process sells itself and that the stakeholders will sell it for you. I think we need to be very careful. Again, awareness is just a big one.

MR. NOLON: And then put it on YouTube.

QUESTIONER: I have a response, actually, to that question and then I do have another question. They are related, I now see.

If anybody in the room is interested in a public education and awareness effort, there is an organization here in New York, the New York Mediation Alliance, which is an organization of organizations that is currently in the process of selecting some professional help and a strategic plan. If you are interested in that, I will be happy to take your card and you can contact it through me.

But when that question was asked, I noticed that the panelists responded by talking about the process. I also noticed that during some of their presentations they mostly used the word "mediator." That brings me to the question that I have for all of the panelists: How important is it, do you think, to distinguish between roles—mediator versus facilitator versus process designer—processes, particularly when it comes to this education or awareness of the public, and also regarding metrics?

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I get nervous when we use the word "mediator" to talk about, in my opinion, other processes. I know many mediators who are fabulous mediators and would be really not as successful in dealing with groups. There are a lot of training and additional skills when a mediator wants to do another process, in my opinion.

MR. SIEGEL: I have a few thoughts on that. It's a very important point you raise. I have had many conversations with other ADR specialists and ADR professionals within EPA about this. The term "mediator" has a certain stereotype to it that actually is often unproductive.

I think the term itself is less important than how we define the role in a particular instance. Sometimes by using a term, we end up confusing people about what it is that the neutral is going to do.

There are many who feel that we should be using the term "neutral," as a noun, and then define specifically what that means in the particular context. There are some who feel, in my agency, that we ought to be calling all of us "facilitators," because that opens the door to a number of different kinds of processes.

I think it's an important issue. I am not sure that I have the solution, but I'm glad you raised it.

PROF. COSTANTINO: I think it's a great question. I think it's a very, very, very important distinction. I don't think that people who are trained in mediation necessarily are capable of doing big systems-design work, not because they are not willing, but because it's a different skill. They have a ground-floor, core skill set to start with. But systems-design skills, collaboration skills, facilitation skills skew off of mediation skills.

One of the things that I find is that some people who are very good mediators think that they are going to walk in and do a huge systems design, and they are just shocked. They don't think about the confidentiality issue. They don't think about the leverage issue. They don't think about the resistance issue. They don't think about a lot of this awareness issue.

So I think we need to be quite careful with our terms. I don't want to discourage people from doing it, but I want to be very clear that when I present myself to a client, I am presenting as a mediator—and I get privileges—or I am a facilitator or I am a convener or I am a designer. Those all have different roles to me. Those all have different ethical issues that go along with them. They all have different standards of conduct.

So for me, I think we need to be quite careful of what we promise and what we purport to be, because I believe it's different. I

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know a lot of OD consultants who go in and do this kind of work. They are not mediators, and they are really good at it.

So I think we need to be very careful when we talk about collaboration, what the skills are and what we call ourselves, and also what standards of conduct we choose to adhere to.

MR. NOLON: I will just agree with everything that was said and point out one thing. A lot of the public policy practitioners—we can call them that since we are in this context of government—have been spending a lot of time in the last few years, in their organizations and in their studies, looking at the field of deliberative democracy and collaborative governance, and taking some of the experiences from those practices and integrating them into their work, whatever it is they are calling it.

It's important to point that out for today.

PROF. NOLAN-HALEY: I just want to add one short postscript because I find the question very probing. Years ago, at the beginning of the ADR movement, many judges assumed that they would be good mediators and there was much debate on the topic from the mediation community. Today many mediators assume that they are competent serving in other neutral roles and a different debate has begun.

QUESTIONER: I notice that many of you are members of the ABA Dispute Resolution Section. There is a committee, the Expanded Conflict Management Processes Committee, which is very busy doing exactly this. I'm glad to hear you say that we all agree that there is a need to clarify different processes and standards of skills, et cetera.

Thank you all very much for your participation. We look forward to your afternoon presence. Thank you, panelists.