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## ARTICLE

# Effective Representation of Clients in Environmental Dispute Resolution

GAIL BINGHAM, PAMELA ESTERMAN, AND CHRISTOPHER RITI\*

### I. INTRODUCTION

Parties embroiled in environmental conflicts have numerous resolution process options to consider. These dispute resolution methods range from informal, interest-based negotiations (or consensus-based techniques) to formal, trial-type arbitration proceedings. Regardless of the dispute resolution option that is selected, the attorneys representing the various parties in an environmental dispute require both litigation and negotiation skills. A majority of the skills lawyers will need to address environmental conflicts will be applicable to each of the different types of dispute resolution methodologies.

This article explores and evaluates the skills that lawyers need to be successful in the representation of clients in environmental dispute resolution. Section II provides a brief description of the characteristics of environmental conflicts relevant to shaping effective dispute resolution processes. Section III addresses specifically how, and when a lawyer should decide the appropriateness of employing Alternative Dispute Resolution (ADR) to resolve an environmental conflict, otherwise known as Environmental Dispute Resolution (EDR).<sup>1</sup> Section IV

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1. For the purposes of this article the terms ADR and EDR are used interchangeably.

addresses selection of the neutral and Section V details the specific skills needed by lawyers that represent clients in environmental dispute resolution negotiations. The application of these skills to particular phases of each process is also discussed. In the last section, this article describes certain cutting edge issues that may impact upon the success of future environmental dispute resolution processes.

## II. CHARACTERISTICS OF ENVIRONMENTAL DISPUTES RELEVANT TO SHAPING EFFECTIVE DISPUTE RESOLUTION PROCESSES

Environmental disputes have important attributes that affect the successful conduct of negotiations.<sup>2</sup> The disputes tend to be complex and expensive, and include controversies and concerns that typically involve the allocation and protection of public goods, such as air, water, and biodiversity. Parties to such disputes can, and often do, include many and diverse stakeholders, including: members of the public, the government, private sector interests, environmental organizations, and advocacy groups as well as nearby or adjoining property owners. Very often, environmental disputes also involve one or more layers of government including local, state, or federal agencies. Resource and power disparities often arise to which careful attention should be paid, whether one's client perceives him or herself in a power position or not. Trust and respect among the disputants may not be necessary but it has been shown to play a significant role in reaching agreements. Those with more power are well advised to invest in trust-building activities, whether that includes sharing data, paying for joint fact finding efforts, or initiating action to redress a grievance prior to the conclusion of negotiations. The diverse characteristics of parties to environmental disputes also may include social or cultural differences, whether manifested in language, customs, times of day at which meetings should be held, or other factors.

Environmental disputes also typically involve multiple forums for decision making, whether because multiple statutes

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2. See generally Gail Bingham, *Applying ADR Techniques to Environmental Matters*, ALI-ABA COURSE SC56 STUDY MATERIALS (Feb. 11-14, 1998).

apply or because parties seek to be heard simultaneously in legislative, administrative and judicial settings, as well as in local, state or federal venues. As a result, parties often must work with more than one agency with decision-making authority and must deal with uncertainty as to whether a decision in one forum will constitute a final resolution of the matter. In addition to multiple parties and forums, environmental disputes also tend to involve multiple issues where parties' underlying interests and concerns may diverge to the point of disagreement on which issues should be "on the table" for discussion.<sup>3</sup> At times, differences in values or philosophies toward environmental risks or resources contribute to the "intractability" of environmental conflicts.<sup>4</sup>

Environmental disputes also tend to involve complex technical issues and scientific uncertainty.<sup>5</sup> There are typically gaps in scientific information, different models or assumptions for interpreting existing data, and multiple disciplines each with their own terminology, and all of which complicate the dispute.<sup>6</sup> Technical working groups and joint fact finding processes are frequently utilized to resolve disagreements among experts.

Another factor that distinguishes environmental disputes is that they often involve actions that have irreversible impacts on the physical environment.<sup>7</sup> This element of irreversibility can lead to reluctance on the part of some disputants to engage in dispute resolution.<sup>8</sup> Finally, environmental matters tend to be further complicated with a public/political dimension.<sup>9</sup> As a result, parties often must engage in a dispute resolution process in public forums and/or with scrutiny from the press.

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3. *Id.*

4. ROY J. LEWICKI, MAKING SENSE OF INTRACTABLE ENVIRONMENTAL CONFLICTS 46 (2003).

5. *See* Bingham, *supra* note 2.

6. *Id.*

7. JANE MCCARTHY & ALICE SHORETT, NEGOTIATING SETTLEMENTS—A GUIDE TO ENVIRONMENTAL MEDIATION 5 (1984).

8. *Id.*

9. *Id.*

### III. ASSISTING THE CLIENT: WHETHER AND HOW TO PARTICIPATE

When faced with the daunting prospect of a worsening environmental dispute, it is often the role of the lawyer to assist the client in clarifying their goals and to identify and gauge their options.<sup>10</sup> It is during this preliminary assessment that the lawyer should take the initiative to explore the appropriateness of employing alternative dispute resolution processes, especially if the client has not already done so.<sup>11</sup> As has been discussed, parties mired in a dispute may have any number of options, ranging from ADR to litigation, or from legislative lobbying to regulatory petitioning, to community outreach.<sup>12</sup> Lawyers have an important opportunity to serve as their client's strategic partner and to assist in objectively evaluating these options based upon a number of determinative criteria.

It is generally expected that lawyers should explore all available options for their clients and every possible avenue of strategy as part of their reasonable diligence.<sup>13</sup> An important component of this responsibility is the ability of the lawyer to understand and embrace, where appropriate, alternative means to dispute resolution. Some lawyers appear to fear the notion that considering such alternatives connotes weakness in either position or ability.<sup>14</sup> However, receptiveness to new and creative options, aside from litigation, should be viewed positively. To

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10. Ann L. MacNaughton & Gary A. Munneke, *Practicing Law Across Geographic and Professional Borders: What Does the Future Hold*, 47 *LOY. L. REV.* 665, 708 (2001) (discussing how "[l]awyers must remember that they bring something of value to transactions. The knowledge and skills of those trained in the law will always have a place in resolution of complex problems, because human problems by their nature have legal implications.").

11. Carrie Menkel-Meadow, *The Lawyer's Role(s) in Deliberative Democracy*, 5 *NEV. L.J.* 347, 467 (2004) (describing how "[l]awyers may be particularly well suited to the design, management, and facilitation of consensus building processes, especially those which implicate law, such as environmental, regulatory, governance, land-use and other 'legal' problems.").

12. GAIL BINGHAM, *RESOLVING ENVIRONMENTAL DISPUTES: A DECADE OF EXPERIENCE* 2-3 (1986).

13. See *MODEL RULES OF PROF'L CONDUCT* R. 1.2-1.4.

14. See, e.g., Rosemary O'Leary & Susan Rainse, *Dispute Resolution at the U.S. Environmental Protection Agency*, in *THE PROMISE AND PERFORMANCE OF ENVIRONMENTAL CONFLICT RESOLUTION* 253, 266 (Rosemary O'Leary & Lisa B. Bingham eds., 2003).

advise clients effectively, lawyers need to develop their skill-sets, bring their practical understanding of the law to another level, and bring their legal knowledge to the strategic assessment of EDR options.<sup>15</sup> Lawyers willing to think innovatively on behalf of their clients, who strive to safeguard interests rather than defend immovable positions, and who look to protect the preexisting relationships between their client and other stakeholders should be viewed as highly desirable.<sup>16</sup>

On a more conceptual level, lawyers can play important roles in creating, engaging, and managing EDR processes and removing the “barriers that prevent the cooperative resolution of conflict . . . [including] strategic, psychological, and institutional barriers” to ensure that EDR processes can indeed be successful and mutually beneficial for the involved parties.<sup>17</sup> Lawyers have an opportunity to participate in a significant paradigm shift that began decades ago and that now has become integral to the legal system and the goals of public justice. From this perspective, dispute resolution processes allow the lawyer to better serve the client by shifting the dynamics of the dispute to consensus-building. The predominant skill necessary to broker this evolution is a strong sense of balance—to be active in advancing the tools available for resolving disputes, generally, while guiding the individual client toward a more satisfactory outcome in particular matters.

#### **A. Advising Clients to Choose Between Litigation and EDR**

Clients will not always have or wish to take the option of avoiding litigation. There are numerous instances in which litigation is strategically preferable to alternative dispute resolution simply because of its potential precedential value. For

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15. Menkel-Meadow, *supra* note 11, at 360 (stating that “[c]onsensus building processes are often multi-disciplinary, taking account of legal requirements and standards, but focusing on issues beyond what might be denominated as ‘merely legal.’”).

16. *Id.* (noting that “[l]awyers may be particularly well suited for ‘translating’ between spheres . . . consensus building lawyering is one of the concrete ways in which the vision of deliberative democracy can be realized”).

17. Tom Melling, *Bruce Babbitt’s Use of Governmental Dispute Resolution: A Mid-Term Report Card*, 30 *LAND & WATER L. REV.* 57, 61 (1995).

instance, a certain injured class of plaintiffs might benefit more from a judicial ruling of statutory interpretation or equitable injunction than from a mediation session. In certain situations, the threat of litigation has value, particularly when looking to compel behavior, enforce statutory provisions or (often for citizen groups) to get a seat at the table.

Deciding whether to participate in an EDR process is just as important as considerations that arise when parties discuss which process to employ or how to tailor that process once selected. Surely, not all situations and conflicts will be amenable to EDR for any number of reasons. Litigation will be the appropriate choice for some disputes, or for some parties in some disputes,<sup>18</sup> but it is not the best choice in all circumstances. Further, there is significant value simply in the thought process of strategically evaluating these choices.

### 1. Advantages and Disadvantages of Litigation Versus EDR

Lawyers can offer significant benefits to their clients by developing the skills necessary to perform informal cost-benefit analyses to determine the situational merits of proceeding with litigation versus alternative dispute resolution processes. Lawyers should draw upon both their own individual experience and those of colleagues to decide whether EDR or litigation offers the greater potential benefit for their client. While not appropriate in all situations, the potential benefits of EDR are far too promising to be consistently overlooked by attorneys.

Litigation is far better suited to handle cases involving the settlement of legal *rights*, rather than those in which the dispute is predominantly situated around *interests* or *facts*. “Proponents and opponents of ADR in environmental disputes generally agree that once litigation has laid the legal framework, ADR mechanisms are a more satisfactory means of resolving disputes than traditional litigation because the ADR mechanisms

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18. Frederick R. Anderson, *Negotiation and Informal Agency Action: the Case of Superfund*, 1985 DUKE L.J. 261, 335 (1985) (observing that the “fewer and more focused the issues, the clearer and more bipolar the conflict, and the more vigorous the advocacy, the better formal adversarial processes function”).

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concentrate on compromise.”<sup>19</sup> Litigation is therefore the better option for those looking to establish or confirm a legal entitlement or principle.<sup>20</sup>

In addition to the precedential value of a favorable judicial decision, one author outlines several additional benefits of undertaking litigation:<sup>21</sup>

- The empowerment of citizen groups or other such beleaguered individuals;<sup>22</sup>
- The well-defined structure featuring predictable rules;
- Litigation traditionally forces action, in some form or another;
- Filing a complaint is inexpensive; and
- Reinforcing or establishing public perception.<sup>23</sup>

Parties seeking to achieve certain principles or changes in power relationships may be more interested in the value of the conflict itself than in settling any specific matter at less than advantageous terms. For these disputants, “resolving that specific dispute without achieving a more sweeping change in precedent or policy may be viewed not as a success but as a failure,” and thus makes litigation enticingly attractive.<sup>24</sup> Additionally, litigation can “define the roles, rights, and responsibilities of the various institutions and branches of government regulating environmental matters.”<sup>25</sup>

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19. Charlene Stukenborg, *The Proper Role of Alternative Dispute Resolution (ADR) in Environmental Conflicts*, 19 U. DAYTON L. REV. 1305, 1336 (1994).

20. As an example, declaratory judgments are frequently employed for just such a purpose.

21. LAWRENCE S. BACOW & MICHAEL WHEELER, ENVIRONMENTAL DISPUTE RESOLUTION 12 (1984).

22. *Id.* (noting that “mere filing of lawsuit may give an environmental organization important leverage”).

23. *Id.* (finding other benefits of litigation to include “educating the public and galvanizing opinion . . . Bringing a lawsuit may also help strengthen an organization by demonstrating its vigilance and dedication.”).

24. BINGHAM, RESOLVING ENVIRONMENTAL DISPUTES, *supra* note 12, at 66.

25. Carol E. Dinkins, *Shall We Fight or Will We Finish: Environmental Dispute Resolution in a Litigious Society*, 14 ENVTL. L. REP. 10398, 10399 (1984).



Under other circumstances, lawyers evaluating the potential benefits of EDR might come to realize that the only possible outcome to be realized through such a proceeding will be completely untenable for the client's constituency. While this resolution might be predictable and entirely inescapable, the lawyer might decide that the best option is to proceed to litigation, where the judge will make the "anticipated, though unpopular decision."<sup>26</sup>

The relationship between disputants can be an important factor in whether to select an EDR process. Where relationships are important and/or have decayed significantly, lawyers and their clients may choose an EDR process in part to help maintain or repair those relationships. On the other hand, if the relationships are truly irreparable, EDR may be counter-productive or futile. Other factors may include lack of management support, or lack of time and resources. Although litigation ultimately may be the more time consuming and expensive option, costs of an EDR process often are incurred earlier or by a different part of an agency or organization.<sup>27</sup>

Notwithstanding its relative benefits, the critics of litigation offer a persuasive list of objections, frequently citing the exorbitant amount of time, financial resources, and human capital necessary to undertake and execute litigation proceedings.<sup>28</sup> Not only is protracted litigation itself costly, but it can delay plans, proposals, development projects, permitting, clean-ups, redress of grievances, or new regulations intended to protect the public. Time is money—or solutions delayed—for just about everyone. The related issue of cost-effectiveness is also a factor—"How much bang for the buck is the client getting?" Studies are challenging to implement, but parties often report that the resources spent in an EDR process yield greater results than similar time and money spent in litigation. Obviously this

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26. BINGHAM, RESOLVING ENVIRONMENTAL DISPUTES, *supra* note 12, at 74.

27. Rosemary O'Leary, Tracy Yandle & Tamilyn Moore, *Recent Research: the State of the States in Environmental Dispute Resolution*, 14 OHIO ST. J. ON DISP. RESOL. 515, 610 (1999).

28. Kirk Emerson et al., *The Challenges of Environmental Conflict Resolution*, in THE PROMISE AND PERFORMANCE OF ENVIRONMENTAL CONFLICT RESOLUTION 3, 7 (Rosemary O'Leary & Lisa B. Bingham eds., 2003).

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will not always be the case, but the possibility should warrant consideration.

Another concern is that courts are often ill equipped to address the underlying substantive questions of science, technology, or policy that are intrinsic to environmental disputes.<sup>29</sup> This, in combination with the often procedural basis on which many matters are decided, leads some to conclude that the “litigative approach . . . is not designed to resolve differences, but rather to decide issues.”<sup>30</sup> The judicial requirements of standing exacerbate this problem, as courts “simply will not address most situations of potential, rather than actual, conflict.”<sup>31</sup> Obviously, this tends to result in “disjointed, episodic, and possibly contradictory ‘solution[s]’” to complex environmental problems that the courts are not able to truly understand.<sup>32</sup>

Citing the limitations of the judicial scope of review, one author notes that “court procedures constrain the introduction of evidence, they limit the relevant arguments, and they define the way in which judges must view disputes.”<sup>33</sup> Furthermore, the facts in adjudicatory proceedings “are developed through a complex discovery process, in which each side typically will provide as little information as possible.”<sup>34</sup> This is contrary to the core tenets of deliberative processes, where sharing facts and open discussion are encouraged, in the hopes of ascertaining a clear picture of the situation and generating more satisfactory solutions.

As lawyers make these comparisons, it should be noted that the choice among processes is rarely irreversible. Litigation and EDR both remain available options in most situations, and often

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29. Lawrence Susskind & Alan Weinstein, *Towards a Theory of Environmental Dispute Resolution*, 9 B.C. ENVTL. AFF. L. REV. 311, 320 (1980) (discussing how by limiting the “information available for consideration, restricting the range of concerns to legally recognizable causes of action, and “segmenting” complex and interrelated problems into discrete legal actions, the courts make it practically impossible to reach a judgment that acknowledges the real concerns of all interested parties”).

30. Emerson et al., *supra* note 28, at 7.

31. Susskind & Weinstein, *supra* note 29, at 320.

32. *Id.*

33. BACOW & WHEELER, *supra* note 21, at 14.

34. Dinkins, *supra* note 25, at 10399 (this obviously does not match up to the goal of EDR, which is developing a clear understanding of the entire issue and all its various aspects).

can be used in complementary ways. EDR processes are voluntary, so there are no penalties for turning to litigation if progress is not being made in EDR. In such situations, the time and effort often produces the benefits of better pre-trial preparation. Issues, positions and interests are clarified by each side and better understood by the others; relationships can be improved and options are put on the table that otherwise would not have been examined. Litigation also may be commenced before or concurrently with the initiation of an EDR process. Many lawyers prefer this method, believing that “it is foolhardy to begin to negotiate without first bringing a suit, so that there is some sort of credible threat to the other side.”<sup>35</sup>

Ann MacNaughton provides a very useful analytical framework that any lawyer might employ when mapping the parameters of a conflict and assessing the potential suitability of an EDR-type process. These preliminary questions should include: (1) the type of dispute (i.e. which parties are conflicted over what?); (2) the optimal outcome (from the unique perspective of each party); (3) the process most able to achieve that solution (or something close to it); and (4) the resources available to facilitate the chosen process.<sup>36</sup> These processes are beneficial in part because they provide opportunities for the lawyer to help the client clarify his or her own interests, understand the interests of others, compare where these interests align or diverge, so as to plan an effective negotiation strategy within a larger tactical context.

### **B. The Choice Among EDR Processes**

If all parties determine that an EDR process may be more appropriate than litigation and logistically feasible, the next step is for the parties to decide among a variety of process options and tailor the option chosen to the specific needs of the case. At this stage, the lawyer has already found that EDR may be beneficial

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35. BACOW & WHEELER, *supra* note 21, at 14 (noting that conversely, other representatives “contend that litigation tends to polarize the parties; hence, litigation may make any talk of compromise more difficult”).

36. See Ann L. MacNaughton & Jay G. Martin, *Environmental Conflict Management and Dispute Resolution*, in ENVIRONMENTAL DISPUTE RESOLUTION: AN ANTHOLOGY OF PRACTICAL SOLUTIONS 3, 11-12 (Ann L. MacNaughton & Jay G. Martin eds., 2002).

to the interests of their client. Therefore, it is critical that the attorney be prepared to advocate for that process thereby maximizing the client's ability to protect their interests.<sup>37</sup> The spectrum of options available—spread within the two extremes of ignoring the conflict or proceeding to the courthouse—is functionally limitless.<sup>38</sup> A lawyer may represent their client just as vigorously at the stakeholders' table as in the courtroom, but the attributes of the specific process must be tailored to fit the circumstances of the dispute.<sup>39</sup>

### 1. Relevant Factors Critical to the Decision

As with the parties' initial, joint decision about whether to proceed with EDR, there are a number of factors that must be considered to determine the optimal approach. These factors will include, but are certainly not limited to:

1. The relative power of the parties involved;
2. The composition of the involved stakeholders;
3. The resources available;
4. The desired outcomes;
5. The type of dispute (policy, site-specific, informational); and
6. How fully evolved or ripe is the decision making process?<sup>40</sup>

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37. See BACOW & WHEELER, *supra* note 21, at 4 (according to these authors, lawyers, among other professionals, "need both the technical skills and knowledge of their particular disciplines and a broader capacity to analyze and employ competing modes of dispute resolution").

38. Joseph A. Siegel, *Alternative Dispute Resolution in Environmental Enforcement Cases: A Call for Enhanced Assessment and Greater Use*, 24 PACE ENVTL. L. REV. 187, 188 (discussing how "[d]ispute resolution, in general, can be viewed along a continuum from less formal private decision-making by the disputing parties to highly coercive adjudicatory decisions by third-parties.").

39. Numerous books, articles, and reports have been written which describe the various processes, diffuse experience with both success and failure, and optimal utilization of environmental dispute resolution. Many of these works provide recommendations for determining the appropriate process based upon the specific circumstances. See generally BINGHAM, *RESOLVING ENVIRONMENTAL DISPUTES*, *supra* note 12; BACOW & WHEELER, *supra* note 21; O'Leary & Rainse, *supra* note 14; MacNaughton & Martin, *supra* note 36.

40. For example: Where in the process is the matter at any specific point in time? Are parties still trying to understand the nature and magnitude of the problem? Has the science been settled? This question further relates to the

This list is by no means comprehensive or exhaustive, but does form a suitable starting point for the determinations. Moreover, EDR might be the better option *at the time*.<sup>41</sup> Because these processes are voluntary, clients can always withdraw at any time and pursue litigation if that seems more advantageous in light of any changed circumstances. It is the responsibility of the lawyer to continually gauge the progress of the negotiations on behalf of his or her client.

“The relative power of the parties may vary considerably, as may the legal, economic, or political constraints within which they must act.”<sup>42</sup> This reality obviously affects the strategizing of the attorney, depending upon the power of their individual client.<sup>43</sup> To help prepare for this disparity, it is the attorney’s responsibility to help the client to develop a strong, well-prepared “BATNA”—the best alternative to a negotiated agreement—to assess their relative negotiating position and enhance their bargaining power.<sup>44</sup> The lawyer should excel at this preparation, simply because weighing the relative strengths and weaknesses of their clients’ cases is effectively second nature. This calculation will vary depending upon the economic resources, established legal rights, and leverage possessed by the client.<sup>45</sup> When confronted with a disparate power dynamic, the attorney must

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discussion of upstream and downstream disputes, as the processes available will differ significantly depending upon the answers.

41. Melling, *Bruce Babbitt’s Use of Governmental Dispute Resolution*, *supra* note 17, at 86 (noting that “mutual gain is not always apparent *ex ante*. Parties may not discover ‘win-win’ solutions until they begin collaboratively brainstorming.”).

42. BINGHAM, *RESOLVING ENVIRONMENTAL DISPUTES*, *supra* note 12, at 4.

43. Anderson, *supra* note 18, at 329 (finding that “[u]nless each party possesses both countervailing power and uncertainty about outcome, joint gain is virtually impossible. A powerless party cannot confer gains.”).

44. ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 100* (Bruce Patton ed., Penguin Books 1991) (1981) (the authors explain the value of investing in the development of a BATNA, finding that “[i]nstead of ruling out any solution which does not meet your bottom line, you can compare a proposal with your BATNA to see whether it better satisfies your interests”). *See also* BACOW & WHEELER, *supra* note 21, at 38 (affirming that “[t]o enhance your bargaining power, then, work to improve the consequences of non-agreement”).

45. Menkel-Meadow, *supra* note 11, at 356 (describing the requisite “adhocracy”—“the importance of tailoring processes to particular decision making in particular cases, without requiring or relying unnecessarily on more formal, regularized and institutionalized processes.”).

first determine the foreseeable consequences of withdrawing from the process altogether before he can make a good choice of process.<sup>46</sup> Moreover, “an accurate assessment of the *future* distribution of power may be critical for any party deciding” whether EDR may be the best option.<sup>47</sup> By shifting the focus, the lawyer can protect his client’s interests in certain situations where he may never even make it to court because of procedural or substantive barriers.

Any participating lawyer should also attempt to identify what the various stakeholders want from the process. Only then might the lawyer coordinate the client’s interests with the group’s interests to determine which process will best facilitate achieving the ends.<sup>48</sup> Outcomes need to be realistic and practical, and the process should reflect that. Further, desired outcomes should never be confused with entrenched positions—“[c]onsensus building processes are designed to change all parties’ views of what they need and what is possible.”<sup>49</sup> The approaches will clearly differ whether the origin of the dispute lies in some specific site, policy or value divergences, or simply in facilitating communication. Moreover, the potential for joint gain will always be limited by power disparities, placing all the more importance upon the compilation of the client’s list of bargaining incentives. Advising the client as to which process might be effectively employed should also be based upon how much authority the lawyer is given—if they are not able to make certain compromises or concessions, it will be a great deal harder to extract or create much value from the process.

## 2. Honing the Skill of Upstream Resolution

A lawyer will always have far more options if he or she is able to initiate EDR proceedings as far upstream in the process as possible. This concept of “upstream” resolution is based upon the notion that disputes might be represented as flowing streams,

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46. FISHER & URY, *supra* note 44, at 106 (“[d]eveloping your BATNA is perhaps the most effective course of action you can take in dealing with a seemingly more powerful negotiator.”).

47. BINGHAM, *RESOLVING ENVIRONMENTAL DISPUTES*, *supra* note 12, at 67 (emphasis added).

48. See MacNaughton & Martin, *supra* note 36, at 13.

49. Menkel-Meadow, *supra* note 11, at 467.

becoming increasingly more unmanageable the further downstream it is allowed to travel. "A policy-level dispute is an upstream dispute, whereas a site-specific dispute is considered a downstream dispute."<sup>50</sup> That is, nascent policy disputes usually have the potential to engender site-specific disputes that are far more volatile, as parties' tangible interests are directly implicated. This means that lawyers willing to engage in consensus-building activities on behalf of their clients should aim to do so at the earliest possible point, before the conflict worsens any further. Lawyers should seek out opportunities for their clients, by which overarching policy conflicts are tackled through EDR well before the time that these policies culminate in site-specific altercations. Similarly, clients that possess the foresight to think ahead and attempt to preempt the conflict should be rewarded with a competent lawyer that is willing and able to bypass the contentious adjudication frequently associated with environmental disputes.

The more time that is allowed to lapse, the greater the likelihood that emotions and biases will overwhelm the process and positions will become entrenched. It is far more productive to evade these extraneous factors by operating upstream as frequently as practicable. For resolving upstream disputes, lawyers unequivocally must be skilled in community organizing, in their ability to marshal the relevant facts, and in succinctly characterizing the issues. These skills will be highlighted and explored in a later section.<sup>51</sup>

### 3. Wide Variety of Options

Academics and practitioners alike have already defined the processes, detailing: the variety of options available, varying advantages and drawbacks of each, the common factors most conducive to success, and other application-based analyses.<sup>52</sup> In the interest of brevity, this article will not retread this ground. On a rudimentary level, EDR processes may be divided into three general categories. First, there are the consensus-building

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50. Emerson et al., *supra* note 28, at 4.

51. *See infra* Part V.

52. *See generally* Bingham, *supra* note 2; BACOW & WHEELER, *supra* note 21; O'Leary & Rainse, *supra* note 14; MacNaughton & Martin, *supra* note 36.

processes of mediation, facilitation, joint fact-finding and unassisted negotiations. Then there are the evaluative processes of early neutral evaluation or summary proceedings. Finally, there are the quasi-judicial processes of arbitration or mini trials. Lawyers also may create hybrid processes or invent new ones altogether. The flexibility inherent in the EDR enterprise offers important opportunity to tailor a situation to the client's circumstances. "Consensus building is democratic because parties decide their own rules but they are also facilitated or 'guided' by those who have some expertise about process (and sometimes substance)." <sup>53</sup> Lawyers, serving as "process experts," can help to structure a process carefully tailored to satisfaction of their clients' interests.<sup>54</sup>

Undoubtedly, lawyers should not be responsible for pressing advocacy for EDR upon the client if in fact this is not the better course. But the lawyer *is* under a duty to explain the relative merits of using an alternative approach to resolving their environmental conflict.

#### 4. Barriers and Misperceptions

When assisting the client, a lawyer is expected to be dedicated to the client's case. But a fixation on narrow legal rights may not achieve that goal. A focus on the larger issues underlying any dispute might actually be better for the client in the long term. There are two barriers to advancing this agenda, though; one is institutional while the other is behavioral. Institutionally, the model rules are not very applicable to ADR, and many authors have written about the inadequacy and counter-productivity of these rules in relation to ADR proceedings.<sup>55</sup> Compounding this is some lawyers' uncertainty

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53. Menkel-Meadow, *supra* note 11, at 362.

54. *Id.*

55. John M. Barkett, *Ethical Issues in Environmental Alternative Dispute Resolution*, in ENVIRONMENTAL DISPUTE RESOLUTION: AN ANTHOLOGY OF PRACTICAL SOLUTIONS 231-257 (Ann L. MacNaughton & Jay G. Martin eds., 2002); Jennifer G. Brown, *Ethics in Environmental ADR: An Overview of Issues and Some Overarching Questions*, 34 VAL. U.L. REV. 403, 407 (stating that rules encourage adversarial behavior with participants, "which does not mesh with what we know about ADR"); Menkel-Meadow, *supra* note 11, at 431 (noting that zealous advocacy may be the norm "where it may be dysfunctional").



about the processes in general—EDR requires behavior that may frequently cut against their classical legal training.

For example, lawyers generally seek to keep as many people out of the litigation proceedings as possible, e.g. by contesting disputants' legal rights to bring claims against their client. Under the EDR scenario, lawyers may serve their clients well by encouraging them to *voluntarily* involve as many parties as necessary to resolve the dispute. While this may seem to cut against the short term interests of the client with regard to some legal claims, the process—and ultimately the client—may be better-served when the necessary parties are involved from the beginning. Similarly, the “principal-agent problem” can also pose a considerable obstacle to the process.<sup>56</sup> This concept suggests that the agent—frequently with a strong incentive to prolong the conflict and undertake litigation for his own remuneration—may frustrate or derail the process. The negotiator's dilemma is another common impediment that must be avoided.<sup>57</sup> This will be discussed at length in a later section.

An important component of resituating the lawyer within his or her conventional environment is the formulation of ground rules. “The opportunity to negotiate ground rules is an important preliminary step in designing an assisted negotiation process, which may be overlooked by disputants and lawyers more accustomed to operating in the familiar environment of litigation and arbitration where all rules are specifically prescribed.” This is a practicable way for the lawyers to make sure that the parties retain control over the process or that procedural safeguards are in place.<sup>58</sup> Moreover, definitive ground rules can provide the measure of guidance necessary to deal with unpredictable

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56. Tom Melling, *Dispute Resolution Within Legislative Institutions*, 46 STAN. L. REV. 1677, 1681 (1994).

57. DAVID A. LAX & JAMES K. SEBENIUS, *THE MANAGER AS NEGOTIATOR: BARGAINING FOR COOPERATION AND COMPETITIVE GAIN* 29-45 (1986); *see also* Melling, *Bruce Babbitt's Use of Governmental Dispute Resolution*, *supra* note 16, at 65-66 (“focusing on interests rather than positions helps reduce claiming tactics that create the negotiator's dilemma”).

58. *See, e.g.*, O'Leary & Raines, *supra* note 14, at 259. *See generally* LAWRENCE E. SUSSKIND & JEFFREY L. CRUIKSHANK, *BREAKING ROBERT'S RULES: THE NEW WAY TO RUN YOUR MEETING, BUILD CONSENSUS, AND GET RESULTS* (2006).

situations that might manifest later in the process, or simply for managing the logistics of any public participatory process.<sup>59</sup>

Communication with the client is critical throughout this entire preliminary process. Lawyers must work closely and consistently with clients to find out how far the client wants to push the capabilities of the process by reaching out to the involved parties, involving the necessary parties, and finding and gathering all relevant facts. Clients should be the final arbiters, for example, of how much time and effort they want the lawyer to put into brokering a solution or what concessions might be made. These and other considerations must be thoroughly discussed between the client and counsel, but then again offering well-informed counsel should be familiar territory for the lawyer.

#### IV. SELECTING A NEUTRAL

In most cases, the parties involved in an environmental dispute have the ability to mutually select a neutral. There are a variety of ways to locate dispute resolution professionals. These include referrals from community officials, public and private rosters through neutral service providers, and academic contacts. Moreover, in jurisdictions with court-annexed ADR programs, neutrals may be selected from rosters maintained by the courts.<sup>60</sup> There are also a number of organizations and individuals who provide EDR services for a broad range of environmental disputes.<sup>61</sup>

To select the neutral, parties may provide each other with a list of possible names. The parties may either choose a common

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59. BINGHAM, *RESOLVING ENVIRONMENTAL DISPUTES*, *supra* note 12, at 92.

60. With increasing frequency, many courts are appointing mediators or neutrals for the parties. These courts typically maintain their own roster of court-trained, mediators. In court annexed mediations, the method of selection and appointment of the mediator is dictated by local court rules. In many courts, the Clerk appoints a mediator without input from the parties, whereas in other courts, the parties may accept a court-appointed mediator, choose their own mediator from the court's roster or engage the services of an outside neutral. Court annexed mediation programs are now available in most federal and state courts.

61. In addition, many government agencies have ADR options available. For example, the EPA has trained professionals on staff to serve as neutrals in environmental disputes. Similarly, many state environmental protection agencies also have trained professional mediators on staff.

name from their respective lists, or agree to interview one or more individuals from the list. Processes for selection can include the application of explicit criteria, striking candidates based on past experience, or some subsequent combination. Attorneys should be cautious about processes that rely exclusively on striking candidates, as it is possible to end up with someone with only average qualifications. Any neutral candidate that is chosen for consideration should be asked to submit his or her qualifications including relevant neutral experience with cases involving similar characteristics or issues, training, professional memberships, and/or references.<sup>62</sup>

In choosing a neutral, counsel should consider the background and experience of the neutral as well as his or her personality traits and style. What cases has he or she mediated that have similar characteristics or challenges? What was the record of success? What is the reputation of the individual in the community or with opposing parties? The mediator's ability to communicate with all sides is to each side's benefit. What is the reputation of the individual in the field of dispute resolution?

The parties must decide whether the neutral should have special skills or attributes such as subject matter expertise, an understanding of the needs of community groups, the dynamics of politicized processes, the use of online forums for large scale disputes, or document processing for cases with extensive records relevant to the negotiations, etc. It is often helpful for the neutral to have environmental training and expertise, at the very least so that they understand the conversation and can ask useful questions.<sup>63</sup>

Where contested or uncertain scientific information complicates resolution of the dispute, process expertise in joint fact finding or other tools may be equally or more important than knowledge of the scientific and technical issues themselves. The neutral, unless arbitrating, may not need to be an expert.

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62. D. Davenport, *The Use of Alternative Dispute Resolution in Toxic Tort Disputes*, 12 TOXIC L. REP. 1158, 1163 (1998).

63. Bert B. Krages II, *Mediation as a Tool for the Environmental Advocate*, 12 NAT. RESOURCES & ENV'T 209, 211 (1998); *see also* Davenport, *supra* note 62, at 1163. There is an ongoing debate as to whether a mediator should be required to have subject matter expertise. The United States District Court for the Eastern District tries to select a mediator with particular experience in the type of case.

Sometimes, too much expertise can get in the way of the neutral's ability to assist the parties in reaching their own solutions. Fundamentally, the neutral should have a frame of reference that permits him or her to assist the parties in gaining an increased understanding of the issues and a greater capacity to find common ground and consider creative solutions.<sup>64</sup> The ability to choose a neutral that has a particular expertise or background, an option unavailable in the judicial setting, is one of the advantages of ADR.<sup>65</sup>

Lawyers may also want to advise their clients to look for neutral candidates with a versatility of skills, such as mediation, arbitration, and joint fact finding, knowing that there may be a need to adapt the dispute resolution process as needed.

## V. PARTICIPATING EFFECTIVELY

Many excellent books have been written about principles and practices for successful negotiation.<sup>66</sup> Even more have been published about conflict resolution and its dynamics<sup>67</sup> as well as

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64. There is not complete consensus within the ADR field as to the ideal mix of skills a mediator of environmental disputes should possess. In a survey conducted of environmental corporate counsel by JAMS/Endispute and Coopers & Lybrand in 1995, those who reported a negative experience with ADR cited the lack of expertise of the neutral. In contrast, "[m]any corporate counsel surveyed . . . named the technical expertise of the ADR decision-maker [sic] as the driving force" in resolving disputes. Davenport, *supra* note 62, at n. 67 (quoting Kelly A. Fox, *Survey Tracks Use of ADR for Environmental Disputes*, CORPORATE LEGAL TIMES, Apr. 1995, at 2).

65. Aseem Mehta, *Resolving Environmental Disputes in the Hush-Hush World of Mediation: A Guideline for Confidentiality*, 10 GEO. J. LEGAL ETHICS 521, 525 (1997); Krages, *supra* note 63, at 210 (observing that "[t]he problem with using adjudication to resolve environmental disputes is that . . . communication is . . . hampered when the people who must decide the matter are unable to readily comprehend technical issues.").

66. See, e.g., THOMAS C. SCHELLING, *THE STRATEGY OF CONFLICT* (Harvard University Press 1960) (1981); LAX & SEBENIUS, *supra* note 57; RICHARD WALTON & ROBERT MCKERSIE, *A BEHAVIORAL THEORY OF LABOR NEGOTIATIONS* (1965); P.H. GULLIVER, *DISPUTES AND NEGOTIATIONS: A CROSS CULTURAL PERSPECTIVE* (1979); FISHER & URY, *supra* note 44; OTOMAR J. BARTOS, *PROCESS AND OUTCOME OF NEGOTIATIONS* (1974); ROY J. LEWICKI & JOSEPH A. LITTERER, *NEGOTIATION* (1985); HOWARD RAIFFA, *THE ART AND SCIENCE OF NEGOTIATION* (1982).

67. KURT LEWIN, *RESOLVING SOCIAL CONFLICTS* (1948); MORTON DEUTSCH, *THE RESOLUTION OF CONFLICT: CONSTRUCTIVE AND DESTRUCTIVE PROCESSES* (1973); William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming and Claiming*, 15 LAW & SOC'Y

ADR processes.<sup>68</sup> This article does not attempt to summarize that literature, but rather to draw out and highlight items that have particular relevance to lawyers participating in EDR processes. Readers interested in a more complete understanding of conflict dynamics and negotiation practices are encouraged to read more deeply into this literature.<sup>69</sup>

We should note again here the obvious point that environmental disputes vary enormously. Some are two-party enforcement matters between a regulator and a business, where representation by lawyers is common and mediation assistance is rarely needed. In other enforcement situations, such as many hazardous-waste cleanup settlements, literally thousands of parties are involved. In some situations, community groups have mobilized around issues of great personal concern, such as the risks associated with chemical releases or nuclear waste transport, or other concerns near where they live or their children go to school. The scale may be very large in some matters, such as the restoration of the Everglades, or the siting of a transmission line. Or the issue may be one of allocation (e.g. water supply) or of policy (e.g. drinking water or air quality standards). Sometimes the parties are in litigation or there is the

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REV. 3-4 (1981); JOSEPH HIMES, *CONFLICT AND CONFLICT MANAGEMENT* (1980); JEFFREY Z. RUBIN & BERT R. BROWN, *THE SOCIAL PSYCHOLOGY OF BARGAINING AND NEGOTIATION* (1975); DEAN PRUITT & JEFFREY Z. RUBIN, *SOCIAL CONFLICT: ESCALATION, STALEMATE, AND SETTLEMENT* (1986); MARK HOWARD ROSS, *THE MANAGEMENT OF CONFLICT: INTERPRETATIONS AND INTERESTS* (1993); I. WILLIAM ZARTMAN, *RIPE FOR RESOLUTION: CONFLICT AND INTERVENTION IN AFRICA* (1985).

68. CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* (Jossey-Bass 1947) (2003); LINDA SINGER, *SETTLING DISPUTES: CONFLICT RESOLUTION IN BUSINESS, FAMILIES, AND THE LEGAL SYSTEM* (1994); ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* (1994); CARRIE MENKEL-MEADOW, LELA P. LOVE & ANDREA K. SCHNEIDER, *MEDIATION: PRACTICE, POLICY, AND ETHICS* (2006); KENNETH CLOKE, *MEDIATING DANGEROUSLY: THE FRONTIERS OF CONFLICT RESOLUTION* (2001); STEPHEN B. GOLDBERG ET AL., *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES* (2007); *see also* DWIGHT GOLANN & JAY FOLBERG, *MEDIATION: THE ROLES OF ADVOCATE AND NEUTRAL* (2006); HAROLD I. ABRAMSON, *MEDIATION REPRESENTATION: ADVOCATING IN A PROBLEM-SOLVING PROCESS* (2004).

69. This section draws on an unpublished article written by Juliana Birkhoff and Gail Bingham as part of the deliberations for a report of the National Academy of Sciences on *Public Participation in Environmental Assessment and Decision Making* and on training materials developed by Gail Bingham for courses in environmental negotiation for advocates delivered by RESOLVE. Please see the bibliography in the NAS report for additional readings.

strong potential for a lawsuit, while in other situations stakeholders are trying to work together without the consideration of litigation. The discussion that follows is applicable to many if not all of these situations, but the specific challenges that arise and the way these ideas are implemented will vary based on the types of issues, numbers of parties affected, as well as the combination of individuals and types of organizations involved.

### A. PREMISES ABOUT CONFLICT

Participating in any negotiation-based process, which is the foundation of most EDR, is a combination of thought and action. Preparation is clearly important, but most negotiations require choices made in the moment. What point is the other side (or sides) trying to make? Do I understand that correctly? What are their assumptions? What are their interests? What could I ask? What should I say? Do I have the information I need? Should we push harder? Where should I compromise? Is there another option we haven't thought of? Should we take a break? Can I forge an alliance with another party? What would that take? Who has expertise we could turn to? The questions and choices are almost endless.

An advocate's assumptions about the nature and dynamics of a conflict consciously or unconsciously affect his or her perceptions of the situation and, thus, the choices or reactions that are made in the moment. Experience suggests that the more conscious the advocate is of his or her assumptions, the more clear or intentional—and, therefore, the more effective—he or she will be in a negotiation or EDR setting.

Assumptions about whether conflict is a problem or inevitable, whether the “other side” is bad or just different, and whether negotiations are a competition to “win as much as I can” or a collaboration to find solutions that maximize the realization of as many interests as possible, are fundamental ones. In reality, situations vary in the degree of trust one can or should have in others and in the degree to which collaboration or joint gains solutions are possible. However, generally each of us also bring to each situation an orientation toward these assumptions that, unless we are aware of them, can affect our ability to see the specific dynamics clearly enough to make an accurate assessment.

The conflict resolution field rests on the premise that conflict is inevitable and can be a positive force in human interactions.<sup>70</sup> This is a different stance from some other disciplines in which the existence of conflict is seen as a problem of deviance, which then requires a clearer exposition of social norms or imposition of punishment. In contrast, conflict resolution views the *handling* of conflict as the problem, as opposed to the existence of conflict. Conflict resolution notes that people will always have different interests and values and will seek to shed light on behaviors to expect when people either have competing goals or strategies for managing those differences. The goal of a negotiation process, from this perspective, is for people to express their differences and work collaboratively with others to resolve disputes that have emerged over specific decisions. The importance of voice and self-determination are other relevant norms that help shape both the questions that are asked and the propositions considered in the conflict resolution literature.

Among the most accepted conceptual frameworks for organizing an inquiry about conflict resolution is the proposition that there are predictable stages of conflict,<sup>71</sup> looking first at how conflicts begin, the dynamics of conflicts as they emerge, conflict management or conflict handling strategies, and conflict outcomes. This conceptual framework developed from the study of legal cases,<sup>72</sup> community controversies,<sup>73</sup> and community and international disputes.<sup>74</sup> Lawyers can be more effective in an EDR process if they understand basic premises regarding how disputes emerge and either escalate or de-escalate and, with those premises in mind, if they prepare their clients for the different objectives and activities that need to occur at each stage in a conflict resolution process.

A simple, but critical premise is that negotiations start before and continue after the obvious, substantive negotiation sessions. Preparation by lawyers and their clients prior to a first negotiation session is critical to the success of any negotiation, as is taking into account what needs to be done and by whom to anticipate problems

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70. *See, e.g.*, DEUTSCH, *supra* note 67.

71. LOUIS KRIESBERG, *SOCIAL CONFLICTS* (1982).

72. Felstiner, Abel & Sarat, *supra* note 67, at 3-4.

73. JAMES S. COLEMAN, *COMMUNITY CONFLICT* (1957).

74. PAUL WEHR, *CONFLICT RESOLUTION* (1979).

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that may emerge as parties seek to implement their agreement. Further, there are natural stages within the substantive discussions themselves, particularly if the parties share the premise that a more satisfactory solution may result from taking a collaborative, problem solving approach. Much like chess, one can see an opening game, mid-game and end game to the process, with a heavy emphasis on learning at the beginning, options generation and evaluation in the middle, and decision-making and closure at the end. These stages are discussed in more detail below.

The following table highlights what a lawyer and his or her client might consider at these different stages.

<b>Stage</b>	<b>Desired Outcome</b>
Assessment, Convening, and Preparation	Agreement on <ul style="list-style-type: none"> <li>• Purpose</li> <li>• Product</li> <li>• Process (who, when, assistance of a neutral, open/closed meetings, etc)</li> </ul>
Substantive Discussions <ul style="list-style-type: none"> <li>•Opening</li> <li>•Middle</li> <li>•End game (closure)</li> </ul>	<ul style="list-style-type: none"> <li>• Shared understanding of the problem</li> <li>• Full exploration of possible outcomes</li> <li>• Recommended solutions (agreement)</li> </ul>
Implementation	Observable change

### **B. Preparation**

Strategic factors in advising clients about whether to choose an EDR process and, if so, how to structure it, are discussed above. In addition, lawyers need to cultivate specific skills in helping their clients prepare thoroughly for an EDR process in advance of the first face-to-face meeting of the parties. Questions lawyers may want to consider when preparing to participate in an EDR process can be drawn from questions asked more generally in the conflict resolution literature. Examples include:



- What are the causes of this particular dispute? Who are the players, what are their current positions, and—most importantly—what are the interests each player has in the process and the outcome?
- How confident are we in our understanding of others' interests and concerns, and what questions might we ask to check those assumptions?
- Who should participate from the client organization (and what should our relative roles be)? Who are the decision makers in the other entities involved, and how will they be involved (either in meetings or consulted between meetings)?
- What has transformed different perspectives or interests into a dispute in this situation?
- What contextual variables, e.g., relative power, legal considerations, scientific uncertainty, history of past relationships, etc., have affected how this conflict arose? How could or should these variables affect choices about conflict handling strategies? What conditions have or could lead to increased competition (escalation) versus collaboration (and an agreement)?
- Where there is a history of past relationships, how have the individuals and organizations in this matter customarily pursued their differences? Would some conversation about how all sides might want to change these dynamics be useful?
- What is the role of cultural differences in this situation? (This can apply when participants are from different racial or cultural groups. However, government agencies, community groups, national NGOs, and private business all have different internal decision making processes, values about process, and language).
- How might choice of language and communication patterns influence behavior and processes?
- How might internal motivations, attributions, cognitive biases and how individuals create meaning out of their experiences affect interactions?

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- How do the individuals and groups in this situation reach decisions?
- What are the potential effects of intervention by a “third party?”
- How can parties maximize joint gains? Have the questions for discussion been framed in a way that all sides have something to gain from the negotiation? What options are on the table, and where might they be improved to add value to one or more players without harming the interests of others?
- What information (e.g., scientific, technical, legal, economic, etc.) is relevant to generating or evaluating options and reaching agreement on the decisions at hand? What are the difficulties in this situation with respect to gaps in the science, complexity of the information, trust in the sources of information, and/or shared understanding of what it means?
- Where government agencies are involved, what are the legal requirements for open versus closed meetings? When community groups have an interest, what role(s) can they play, and/or how can the process be organized to increase transparency and trust?
- What steps need to be taken to ratify tentative agreements reached by negotiators? What should be the relationship between the negotiation (or at times, public participation) process and official governmental decision-making processes?

No cookbook exists for what the answer should be to these questions. Similarly, there is no cookbook for process decisions; such as when lawyers should be the lead negotiator and when a client-representative should be the lead, whether briefs should be prepared and exchanged with the other parties or when more informal conversations are more effective for clarifying the issues and concerns involved, or when a written participation agreement or protocols for the EDR process are desirable and what should be in them. However, a skilled lawyer should have some understanding of the pros and cons of each option. Models for various kinds of protocols also are useful to obtain. Specific knowledge should include an understanding of the applicability and limits of Rule 703 provisions for cases in litigation; of open meeting laws at the state and local level; and the procedural

requirements of the National Environmental Policy Act,<sup>75</sup> the Administrative Procedures Act,<sup>76</sup> the Administrative Dispute Resolution Act,<sup>77</sup> the Federal Advisory Committee Act,<sup>78</sup> and trust relationships with Tribes at the federal level.<sup>79</sup>

As noted earlier, research and other scholarly writing in the general field of conflict resolution suggests that conflicts are rooted in the values, priorities, and interests held by different constituencies. A critical part of preparing to participate in an EDR process is to help one's client clarify their own goals and interests, to think about the interests of others, and to understand the importance of understanding the difference between these interests and each side's stated positions.<sup>80</sup> One way to think about interests is that they are people's preferences about what is basically desirable.<sup>81</sup> Interests, seen this way, are an individual's or group's articulations of their reasons for acting. However, the substantive issues are only one dimension. Conflicts also originate in culturally shared ways of understanding and responding to others' behaviors.<sup>82</sup> Individual and group dispositions are learned ways of feeling and knowing. These dispositions reflect the political, social, and cultural messages about our identities and roles.<sup>83</sup> They provide individuals and groups with political and socially acceptable ways to interpret motives, behaviors and events.

It also is important to understand other factors that will affect our own behavior and that of others in the EDR process. For example, people do not always perceive different interests as a conflict or a dispute unless there is some triggering event that transforms differences into grievances and grievances into

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75. National Environmental Policy Act, 42 U.S.C. §§ 4321-4370 (2006).

76. Administrative Procedure Act, 5 U.S.C. §§ 553-554 (2006).

77. Administrative Dispute Resolution Act, 5 U.S.C. §§ 571-583 (2006)

78. Federal Advisory Committee Act, 5 U.S.C. App. 2 (2006)

79. For a discussion of this fiduciary duty see Reid Peyton Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213 (1975).

80. FISHER & URY, *supra* note 44.

81. BERTRAM H. RAVEN & JEFFREY Z. RUBIN, *SOCIAL PSYCHOLOGY: PEOPLE IN GROUPS* (1983).

82. ROSS, *supra* note 67.

83. BETH ROY, *SOME TROUBLE WITH COWS: MAKING SENSE OF SOCIAL CONFLICT* (1994).

disputes.<sup>84</sup> For example, underlying differences can erupt into disputes if individuals or groups are not involved in decisions that affect them or if resources are distributed inequitably. Research on conflict indicates that a dispute is more likely to occur when people perceive that a decision or event significantly affects them; there are questions whether the distribution of risks, benefits, and costs is fair; and people perceive that they can take some action that is a political decision rather than fate.<sup>85</sup>

A skilled lawyer will recognize that more than one way exists to interpret the causes of a dispute and, therefore, to organize an effective approach to resolving it. All parties, including their lawyers, more often than not, have an incomplete or distorted understanding of the perspectives of others with different interests, cultural values and experiences; or from different social systems and institutions. While preparing for negotiation, therefore, it is often more valuable to list as many questions as possible to ask once the proceedings begin than it is to prepare the best possible arguments for one's own positions or proposals. Checking one's assumptions at the door is as important as checking one's weapons!

### C. Skills for Participating in Substantive Discussions

How a lawyer, or client, pursues their interests in an EDR process matters both positively and negatively.<sup>86</sup> Although conflicts begin many different ways and over a variety of issues, they follow a predictable path and share a similar dynamic after they emerge. Without intentional action by the parties or a mediator, conflicts proceed through a cycle of escalation that changes the issues and the social organization of the groups, communities or organizations involved. Typically, if no specific effort is made to deescalate a conflict, specific issues expand to more general issues and entirely new and different issues

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84. Lynn Mather & Barbara Yngvesson, *Language, Audience and the Transformation of Disputes*, 15 LAW & SOC'Y REV. 3-4 (1980).

85. COLEMAN, *supra* note 73.

86. KRIESBERG, *supra* note 71; BARTOS, *supra* note 66; GULLIVER, *supra* note 66; WEHR, *supra* note 74; Felstiner, Abel & Sarat, *supra* note 67, at 3-4; RAIFFA, *supra* note 66; LEWICKI & LITTERER, *supra* note 66.

emerge.<sup>87</sup> Having too few options or too little time can also be exacerbating factors.

If conflict escalates during an EDR process, parties' positions harden, their images of each other become more stereotypical and negative, communication atrophies, and interactions become more destructive. Furthermore, without productive engagement, disagreements over policy choices may escalate to personal antagonism between parties. These hostile interpersonal dynamics may begin instrumentally, as one party seeks to differentiate itself and its view of the issues from others by negatively characterizing the other parties.<sup>88</sup> New organizations and leaders may spring up and/or additional groups and organizations can be drawn into the conflict and may polarize relationships. Finally, word of mouth communication increases as people begin to mistrust traditional sources of information and news.<sup>89</sup>

Clearly, the intent of an EDR process is to accomplish the opposite. The most common notion of how to do this emphasizes the importance of taking a problem solving approach. This generally includes the following elements: problem identification, problem analysis, creation of outcome criteria, option generation, assessing options, choosing an option, and drafting an agreement. These elements usually are thought of as sequential steps, as expressed in the figure above; however, the more complex the matter, the more likely the parties are to return to earlier stages periodically as they learn more and explore their options. (Implementation of the decision is critical and will be further discussed below).

### **1. The Opening Game—A Process of Learning and Trust-Building**

Timing is critical. The importance of focusing on questions when preparing for negotiations lies in actually asking them later on in the process. Starting a negotiation by asking questions is a skill that requires conscious attention, largely because it is hard

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87. COLEMAN, *supra* note 73; DEUTSCH, *supra* note 67.

88. PRUITT & RUBIN, *supra* note 67; RUBIN & BROWN, *supra* note 67.

89. T. GLASL, KONFLIKTMANAGEMENT: EIN HANDBUCH FÜR FÜHRUNGSKRÄFTE, BERATERINNEN UND BERATER (1997).

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to resist the urge to jump into a proceeding with one's best arguments. A serious commitment to learn about one another's concerns and about the issues at the beginning of an EDR process pays off later by avoiding dead ends. Skilled questions and sincere listening also pays by avoiding negative conflict dynamics in the dispute resolution process, particularly if involved individuals are skilled in the use of neutral language and active listening.

A related "question asking" task at this stage (either to confirm or to do) is to agree on the questions to be resolved. Parties to environmental disputes often seek the answers to very different questions, and this can lead to disagreements on the focus of the negotiation itself. Clearly, the question of *whether* a new wind-energy facility should be permitted is a different question than *what* the terms of the permit should be or where a turbine should be sited. Similarly, *whether* to build a new reservoir or pipeline is very different from *how* to achieve greater water conservation goals. "Reframing" is a critical skill for lawyers and their clients. A formula that is often (but not always) successful is to start the question with "how" and include the interests, rather than positions, of all parties. In a case involving the latter issue of water supply, parties were able to agree to address the question of how a growing metropolitan area would meet its water supply needs in the next twenty years; this allowed consideration of water conservation and water supply options, along with varying growth scenarios.

Lawyers and their clients are well served by paying careful attention to issues of procedural justice and the multiple dimensions of satisfaction sought by the other parties. The conflict resolution literature suggests that parties care about three aspects of their interactions—substance, process and relationships—each of which benefit from at least some explicit conversation at the beginning of an EDR process.<sup>90</sup> This can be very pragmatic, such as considering whether meetings should be at night or during the workday, depending on whether any of the parties are representatives of community groups who are spending time away from their regular jobs to participate.

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90. JOHN THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* (1975); E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988).

Cultural differences also play a role throughout the cycle of conflict, and need to be considered with respect to the effectiveness of different dispute management strategies. People also create meaning and misunderstandings in different ways.<sup>91</sup> Insights about differences in communication styles can be drawn from literature in anthropology and other disciplines. Examples include: norms and interpretations about direct and indirect forms of interaction, implicit and explicit messages, and approaches to problem solving (such as letting relationships emerge from engaging in shared tasks versus a focus on relationship building before addressing issues).

The effects of various other contextual factors should also be considered during the opening sessions of a negotiation. For example, the longer parties have been fighting and/or the more punishing the consequences they have imposed on one another, the more patience and investment in the resolution process may be needed to achieve constructive outcomes. Power relationships, history, and the relative advantage of forums outside the EDR process for achieving satisfaction—or for influencing the EDR process from the outside—are among the many factors of interest. The limited empirical research that has been done on these contextual variables suggests that certain factors (such as the degree of trust) are very important.<sup>92</sup> Lawyers and their clients are therefore well advised to behave in ways that build trust.

## 2. Mid-Game—Generating and Evaluating Options

Once parties have made progress clarifying the issues, understanding the interests and concerns that underlie positions, framing the questions for discussion, and exploring the scientific, technical, legal, economic or other relevant information pertinent to these questions, it is time to actually put options on the table.

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91. Mather & Yngvesson, *supra* note 84, at 3-4; Sara Cobb & J. Rifkin, *Practice and Paradox: Deconstructing Neutrality in Mediation*, LAW & SOC. INQUIRY 16, 35-62 (1991); ROSS, *supra* note 67.

92. William Leach, Neil Pelkey & Paul Sabatier, *Stakeholder Partnerships as Collaborative Policy-Making: Evaluation Criteria Applied to Watershed Management in California and Washington*, 21(4) J. OF POL'Y ANALYSIS & MGMT. 645-70 (2002); William Leach & Paul Sabatier, *Turning the Mirror on the Conflict Profession: Evaluating Facilitators, Coordinators, and Outcomes*, in EVALUATING ENVIRONMENTAL AND PUBLIC POLICY CONFLICT RESOLUTION PROGRAM AND POLICIES (Rosemary O'Leary & Lisa Bingham eds., 2003).

Conflict resolution literature makes a point of encouraging parties to consider multiple options and to evaluate those options based on interest-based criteria.<sup>93</sup> There are several aspects to this—the fact of multiple options, the continued focus on interests, the time taken to be creative, the integration of subjective interests into a process that attempts to be objective (joint application of criteria)—all of which have a positive impact both on improving the substantive outcome and on strengthening the collaborative quality of what inevitably will also continue to be a competitive relationship between parties with different interests.

When parties focus on their own interests and the interests underlying the positions of others being taken on issues, they are more likely to invent creative options to which all sides can agree because they have information on which to craft a solution that will satisfy more interests than would otherwise have been achieved. This is expressed in a variety of terms. The language for this distinction in game theory is zero-sum versus non-zero (or positive) sum games;<sup>94</sup> and within negotiation theory, it is known as distributional bargaining versus integrative bargaining.<sup>95</sup>

Pragmatically, though, a lawyer and his or her client still face decisions about which side goes first in making proposals (or whether this can be done simultaneously by submitting options to a mediator), how many proposals to put forward (or whether to use a brainstorming approach), and/or whether to use the mediator or another surrogate such as technical consultants to put options on the table without “claiming” them as specific offers. Other decisions include whether to ask for a lot at first or whether to signal an interest in compromise with more moderate proposals and whether to generate options as packages or for one issue at a time. A question, if the latter approach is taken, is in what order to take the issues (the ‘hard ‘ones first or the easy ones or in some other sequential order). Much of this situation is dependent and related in a significant degree to the level of trust among the parties.

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93. FISHER & URY, *supra* note 44.

94. RAIFFA, *supra* note 66.

95. LEWICKI & LITTERER, *supra* note 66.



Evaluating options can be done in many ways, and lawyers should be familiar with the pros and cons of different approaches when advising clients. In simple situations (for example, which options to evaluate or discuss first) simple ranking techniques such as multi-voting can be used. Multi-voting is a better sequencing or sorting technique than a decision making approach, because it feels more like a popularity contest than an objective evaluation on the merits. A discussion of criteria before multi-voting, however, can be very helpful. In more complex situations, parties may wish to rely on a technical work group made up of representatives from all perspectives or to write a joint scope of work and jointly select a consultant to provide comparative information that is credible to all. This latter approach can be used for joint fact-finding early in a process to define issues, fill information gaps or for evaluation of options at that stage in the process. Numerous other techniques for integrating information and analysis into multi-party EDR processes can be found in the literature.<sup>96</sup>

A lack of trust creates a substantial obstacle to achieving more optimal (or satisfying) solutions, e.g., the “prisoners’ dilemma.”<sup>97</sup> Game theory helps focus on the need to manage the tension between cooperation and competition, recognizing that parties create value by cooperating (e.g. exchanging information or inventing options together) but compete to claim the value created. The dilemma is that if one side cooperates and the other competes, the solutions are poorer but those who compete may “win” more. Raiffa suggests that parties separate creating from claiming behaviors—creating through cooperation first and then looking at different ways to divide the pie—although this is often difficult to do because the level of trust required is high.

Regardless of how high or how low the level of trust, the most effective negotiators also remember and use in their negotiations what they learned about the interests of others. For example, to be explicit about how the approach would affect another party—

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96. GAIL BINGHAM, RESOLVE, WHEN THE SPARKS FLY: BUILDING CONSENSUS WHEN THE SCIENCE IS CONTESTED 3 (2003), [http://www.resolve.org/publications/reports/When\\_the\\_Sparks\\_Fly.pdf](http://www.resolve.org/publications/reports/When_the_Sparks_Fly.pdf).

97. Douglas Hofstadter, *Metamagical Themas: Computer Tournaments of the Prisoner’s Dilemma Suggest How Cooperation Evolves*, 248 SCI. AM. 16-26 (1983); ROBERT AXELROD, THE EVOLUTION OF COOPERATION (1984).

either for good or ill, will often lead to a powerful positive impact when making proposals. It seems simple, but it does matter when someone hears one's own concerns brought up by an adversary describing either how they took what they heard into account in shaping their proposal or what the disadvantage of an option might be, based on their understanding of how it would affect someone else.

Other important considerations during a negotiation of options includes: whether the lawyer or the client plays the principal speaking role, multi-party dynamics versus two-party matters, open versus closed meetings, confidentiality, and the merits of different mediator styles. Some mediators, particularly those more familiar with cases in litigation, may tend to keep the parties separate and engage in shuttle diplomacy. This style may be helpful in some situations, but it does not provide robust opportunities for parties to hear and inquire about the reasons behind their adversaries' positions. It also puts the solution-finding responsibility more in the hands of the mediator than the parties' themselves, when lawyers should be discussing the pros and cons with their clients.

### **3. The End Game—Reaching Closure and Drafting Agreements**

The cookbook for reaching agreement has also not yet been written but the basic variables are relatively easy to grasp. Sometimes an option simply solves a problem better than any other option, and all parties agree on the merits. In other situations, insights from game theory are helpful. When parties remain deeply divided over two or more options, lawyers are well advised to explore each of the following four strategies with their clients: trade-offs, adding issues, contingent agreements and phased agreements. Tradeoffs involve evaluating the component parts of options and asking whether one component is more important to one party while another component is of higher priority for others. In such situations, parties may be able to agree to one another's preferences on these different components. In some situations, the options on the table simply do not give one or more parties a better solution than they would achieve in the absence of an agreement. In those situations, it can be helpful to add value for those parties by adding issues to the scope of the EDR process that are important

to the parties. If these issues are outside the control of the other parties or affect parties not at the table, then it may be required to add parties as well. Contingent agreements can be helpful when uncertainty or different forecasts about the impact of an agreement is the reason parties have reached an impasse, while phased agreements can help in situations where trust is low.

Where trust is low, a “single-text” approach to reach closure may be useful. This approach involves asking the mediator to draft a “straw” agreement based on the discussions to that point. In some situations, such a document can include multiple options for those elements of the total package where parties have strongly opposing views. Parties can then critique the mediator’s draft in joint session rather than critiquing one another’s drafts, or the mediator may engage in separate discussions with the parties, revising the draft iteratively until he or she thinks it might be the basis of a successful joint session. In most situations, when the parties are at the point of putting the terms of their agreement into writing, asking a mediator to do an initial draft and then having the lawyers review that draft can save time, because the mediator may have more knowledge about the sensitivities or concerns of all parties and may be able to avoid reopening concerns that could be triggered by a zealous advocate.

#### **D. Implementation Considerations**

It sounds obvious, but it must be remembered that the goal of an EDR process is not just to reach agreement—it is to reach an agreement that solves real concerns and that can be put into practice. Thus, the measure of any success should be based on how effectively an agreement is implemented and what the outcomes are. The key tasks in the implementation phase include securing ratification of the agreement by decision makers (who may not all be at the table), action by parties based on their commitments, and, if needed, renegotiation or dispute resolution during the implementation phase.

It is important to plan ahead for ratification, in part because the internal decision making processes of government agencies, tribal governments, corporations, NGO’s and community organizations differ widely. Without an explicit discussion among the parties about who needs to be consulted and how widely that means the agreement needs to be circulated, how much time that

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will take, and other required procedures (e.g. public comment in some situations), the parties may make different assumptions that could lead to avoidable frustrations at sensitive points in the negotiation.

There are many reasons why implementation of agreements can run into difficulties—most of which are not bad faith. These include:

- Agreement was not technically feasible;
- Agreement was not institutionally feasible;
- Changes in circumstances;
- Process did not involve all parties;
- New parties emerged;
- Negotiators lacked the ability to bind their organization and/or future policy makers; or
- Willful non-compliance

Mediators (and participants) can seek to avoid implementation problems by satisfying the interests of all parties, ensuring that all key parties are at the table, creating continuing relationships, and being explicit about who does what and when in the agreement process. However, some problems cannot be anticipated—and the differences in parties underlying interests generally do not go away, so lawyers can benefit their clients by being skilled in creating self-enforcing or third-party dispute resolution mechanisms in agreements. Examples of these mechanisms can include: renegotiation clauses, a structured implementation timetable, contingent agreements, positive incentives to comply, negative consequences for non-compliance, and monitoring committees. Likewise, “third party” mechanisms can include: mediation clauses, arbitration clauses, monitoring by a third party, and court supervision.

## VI. CUTTING-EDGE ISSUES FOR THE LAWYER

There are a number of cutting-edge issues inherent to the increasing dissemination and employment of environmental dispute resolution processes, of which all lawyers should be aware. These advances in technology and innovation have

enabled EDR practitioners to expand the options available to clients and have the potential to improve both the quality and variety of experiences for environmental disputants, drawing in more stakeholders and opening more lines of communication.

### A. Employing Computer and Internet-Based Technologies

One of the more powerful features of EDR is its ability to bring the parties to the table to communicate face-to-face.<sup>98</sup> However, this can be a challenge where disputes involve large geographic regions or large numbers of parties. Internet-based media has the ability to complement face-to-face interactions, if used carefully.<sup>99</sup> Commentators have cautioned policymakers, for example, about the danger of the “digital divide,” where access to online resources is “not equitably distributed, with the possible results that use of the Internet will diminish the participation of some groups.”<sup>100</sup> Notwithstanding these potential pitfalls, the Internet has numerous benefits, not the least of which is its ability to involve more participants in the process and/or lower the costs of participation.<sup>101</sup>

The Internet has featured prominently in creating opportunities for participants in EDR processes to interconnect as never before. The advent of Web 2.0, Google Earth, common access to documents “in the cloud” and perhaps even an extension into “Second Life” or virtual realities may create new opportunities for enhanced interactivity, draw more people into the process, and help stakeholders to conceptualize competing interests in a more tangible manner. These Internet-based

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98. ETHAN KATSH & JANET RIFKIN, *ONLINE DISPUTE RESOLUTION: RESOLVING CONFLICTS IN CYBERSPACE* 9 (2001) (noting that while the lack of face-to-face encounters is troublesome, “there are many disputes where face-to-face meetings are not feasible, and in these cases, without ODR [online dispute resolution] there would be no dispute resolution process at all”).

99. *PUBLIC PARTICIPATION IN ENVIRONMENTAL ASSESSMENT AND DECISION MAKING* 115 (Thomas Dietz & Paul C. Stern eds., 2008) (while there is “limited evidence” that online resources can help to successfully resolve disputes, “the conditions for success are not yet established”); *see also* KATSH & RIFKIN, *supra* note 98, at 94.

100. *Id.* *See also* KATSH & RIFKIN, *supra* note 98, at 3 (citing the fact that new technology can be “disruptive”).

101. *Id.*

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resources are particularly helpful in situations, such as land development proposals, that require close working relationships with the general public that are far more easily coordinated, planned, advertised, and conducted when using new technological resources. Access can be open or password protected, depending on the situation.

Additionally, the Internet has enabled shared drafting and the widespread dissemination of documents in ways that can enhance consensus-building sessions.<sup>102</sup> “Interdisciplinary teams, combining legal, business, industry psychology, and information management training and experience, are creating remarkable solutions.”<sup>103</sup> While mutual education is part of all applications of ADR, environmental disputes particularly require multidisciplinary solutions.

Other groups have employed specialized computer software to enhance the EDR experience. For example, “PlaceMatters” has developed an online resource called Planning Collaborative with examples of “the range of tools, case studies, methods and practitioners that support land use planning, community development, and ecosystem-based management.”<sup>104</sup> Other resources provided by this group are a Smart Growth Tools Database to bring sophistication to community planning, and an “iCommunity.TV,” a local broadcasting network tool.<sup>105</sup> The 2003 Online Dialogue on Conflict/Situation Assessment Project employed an online software program known as “vBulletin” for interactivity among stakeholders.<sup>106</sup> Programs like these develop and expand traditional online communication software to allow real-time chatting, access to relevant multimedia, research tools, local broadcasting, question and answer sessions, and other dialogue media. The Deliberative Democracy Consortium has

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102. MacNaughton & Munneke, *supra* note 10, at 705 (finding that “[d]istance learning through web-based internet and intranet systems and CD ROM libraries makes it possible to deliver skills training directly to an employee’s portable workstations.”).

103. *Id.*

104. PlaceMatters, Home, Resources, <http://www.placematters.org/node/15> (last visited Dec. 15, 2009).

105. *Id.*

106. U.S. INST. FOR ENVTL. CONFLICT RESOLUTION, FINAL REPORT: ONLINE DIALOGUE ON CONFLICT/SITUATION ASSESSMENTS 7 (2004), <http://www.ecr.gov/pdf/OnlineDialogue.pdf>.

created a “knowledge-building ‘wiki’<sup>107</sup> which coordinates knowledge and experience sharing resources between different countries, government agencies, interested stakeholders, and other potential participants in collaborative governance network. A variety of tools are available through these and other sites.<sup>108</sup> If employed properly, the Internet can help enhance this practice and prove to be applicable in EDR processes as well.

### B. Relationships with the Media

“Negotiation theory has long acknowledged that outside intervention—whether in the form of public pressure, press coverage, political involvement, or otherwise—can dramatically complicate the negotiating dynamic.”<sup>109</sup> Managing media coverage of negotiations or other consensus-building activities has become increasingly complicated with the proliferation of Internet-based media. Web blogs, news feeds, and social networking sites like Facebook and Twitter have enabled the practically instantaneous dissemination of local political dealings and news stories.<sup>110</sup> For public issues, this can be both a tool and a challenge. It is undoubtedly in the best interests of the client for the lawyer to closely monitor these developments, and to proactively embrace this shift in technology. As such, the lawyer should be prepared to aid in this extension of news coverage, for conveying a sense of positive progress can be critical for fostering the process itself. While public relations firms also may be involved, there may be an opportunity for lawyers to play a useful role in the technological realm through careful preparation and attention to new media.

Finally, the great “fourth estate” can be a force for good or ill throughout the process. Pundits and the press can convey useful

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107. Posting of Lars H. Torres to The Deliberative Democracy Consortium, [http://www.deliberativedemocracy.net/index.php?option=com\\_content&view=article&id=84&Itemid=279](http://www.deliberativedemocracy.net/index.php?option=com_content&view=article&id=84&Itemid=279) (Nov. 7, 2008, 16:35 EST).

108. *See also* Mediate.com, <http://mediate.com/> (last visited Dec. 15, 2009); The Conflict Resolution Information Source, <http://crinfo.com/> (last visited Dec. 15, 2009); ADR Resources, <http://adrresources.com/> (last visited Dec. 15, 2009).

109. Thomas C. Beierle & Jerry Cayford, Dispute Resolution as a Method of Public Participation, *in* THE PROMISE AND PERFORMANCE OF ENVIRONMENTAL CONFLICT RESOLUTION 53 (Rosemary O’Leary & Lisa B. Bingham eds., 2003).

110. Facebook, <http://www.facebook.com/> (last visited Dec. 15, 2009); Twitter, <http://twitter.com/> (last visited Dec. 15, 2009).

information or they can inhibit the formation of trust if and when informational leaks occur. Parties can also affect negotiation dynamics by adopting different faces inside and outside the negotiating table. One author finds that the press “can monitor and confirm information; it can give bystanders more confidence that their interests have been represented and accommodated; and . . . [the press] can be used to commit parties to agreements that otherwise would be difficult to enforce.”<sup>111</sup> Parties may try to manipulate or exploit the press as much as possible, or avoid it at all costs. Thus, the media’s impact upon public perception can be a determinative factor to the eventual success of the deliberations. A lawyer can serve their clients by being proactive, initiating discussions about how parties agree to interact with the media as a part of forming ground rules for the process in order to prevent an unintentional derailing of progress by the participants. ‘Everyday Democracy’ provides a media kit detailing how to interact with the media for public issues,<sup>112</sup> and lawyers may want to explore additional options for positive coverage and enhanced public participation.<sup>113</sup>

### C. Governmental Advocacy of Environmental Dispute Resolution

The continued emphasis placed by governments at all levels on employing EDR-type processes in resolving environmental disputes is encouraging. Statutes and executive orders encouraging and establishing procedures for the use of EDR go back almost twenty years and have been supported by both Democratic and Republican administrations.<sup>114</sup> As a part of these

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111. BACOW & WHEELER, *supra* note 21, at 246.

112. Everyday-Democracy, Ideas & Tools for Community Change. Plan and Carry Out Communication, <http://www.everyday-democracy.org/en/Page.Organizing.Communications.aspx> (last visited Dec. 15, 2009).

113. BACOW & WHEELER, *supra* note 21, at 247 (describing Lawrence Susskind’s belief that “narrowcasting,” or utilizing the local cable television network, has an important part to play in facilitating interactivity).

114. *See* Administrative Dispute Resolution Act, 5 U.S.C. § 571 (2006); Negotiated Rulemaking Act, 5 U.S.C. § 561 (2006); Environmental Policy and Conflict Resolution Act of 1998, 20 U.S.C. § 5601 (2006); Alternative Dispute Resolution Act of 1998, 28 U.S.C. § 651 (2006); Civil Justice Reform Act of 1990, 28 U.S.C. § 471 (2006). *See also* Civil Justice Reform, Exec. Order No. 12,988, 61 Fed. Reg. 4,729 (Feb. 5, 1996) (urging that where “the benefits of Alternative



initiatives, many federal agencies responsible for environmental issues (enforcement or otherwise) have instituted environmental conflict resolution Centers.<sup>115</sup>

Most recently, on his first day in office, President Barack Obama signed an order to improve the transparency of government agencies through a greater reliance on the Internet to deliver information.<sup>116</sup> This “Open Government Directive” aims to increase transparency, participation, and collaboration within the federal government—three qualities of fundamental importance to the environmental dispute resolution process.

In a conformance with this mandate, Attorney General Eric Holder recently sent a memo to the administrative agencies detailing a new “presumption of openness.”<sup>117</sup> While reaffirming the Administration’s commitment to open and transparent governance, he strongly encouraged voluntary disclosure of information in the face of Freedom of Information Act requests. Another example of this new spirit of enhanced accessibility is the Environmental Protection Agency’s recent move to solicit online public input “on the future direction of its national water enforcement program.”<sup>118</sup> This online forum “is part of a larger

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Dispute Resolution . . . may be derived, and after consultation with the agency referring the matter, litigation counsel should suggest the use of an appropriate ADR technique to the parties”); Agency Procurement Protests, Exec. Order No. 12,979, 60 Fed. Reg. 55,171 (Oct. 25, 1995) (finding that agency heads must, “to the maximum extent practicable, provide for inexpensive, informal, procedurally simple, and expeditious resolution of protests, including, where appropriate and as permitted by law, the use of alternative dispute resolution techniques, third party neutrals, and another agency’s personnel”).

115. See, e.g., U. S. Env’tl. Protection Agency, Conflict Prevention and Resolution Center, <http://www.epa.gov/adr/> (last visited Dec. 15, 2009); Federal Energy Regulatory Commission, Dispute Resolution Service (DRS), <http://www.ferc.gov/legal/adr/drs.asp> (last visited Dec. 15, 2009); U. S. Dep’t of the Interior, Office of Collaborative Action and Dispute Resolution, <http://mits.doi.gov/cadr/main/main.cfm> (last visited Dec. 15, 2009).

116. Memorandum from President Barack Obama to the Heads of Executive Departments and Agencies on Transparency and Open Government, 74 Fed. Reg. 4,685 (Jan. 26, 2009).

117. Memorandum from Eric Holder, Office of the Attorney General, to the Heads of Executive Departments and Agencies (Mar. 19, 2009), available at <http://www.justice.gov/ag/foia-memo-march2009.pdf>.

118. *Water Pollution: EPA Seeks Online Input on Clean Water Enforcement*, DAILY ENVIRONMENT REPORT, Aug. 10, 2009, available at [http://news.bna.com/deln/DELNWB/split\\_display.adp?fedfid=14126887&vname=dennotallissues&fcn=11&wsn=495779000&fn=14126887&split=0](http://news.bna.com/deln/DELNWB/split_display.adp?fedfid=14126887&vname=dennotallissues&fcn=11&wsn=495779000&fn=14126887&split=0).

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agency effort to improve the performance and to enhance public transparency” of their enforcement program.<sup>119</sup> Efforts like these are anticipated to continue at both the state and federal levels.

### CONCLUSION

This article has presented an in depth discussion of the skills lawyers need to represent clients in EDR proceedings. The article initially addressed a lawyer’s decision to counsel a client as to whether, when, and how to participate in a dispute resolution process. It then discussed the various strategies that lawyers may employ in each stage of the proceeding including selection of the process, preparation, participation in substantive discussions, reaching closure, and structuring implementation. Suggestions are made throughout the article about how to avoid potential situations that could jeopardize the EDR process. It is hoped that through the implementation of the suggestions made in this article by lawyers, more environmental disputes will be successfully resolved by means of alternative dispute resolution processes.

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119. *Id.* See also U. S. Env’tl. Protection Agency, Clean Water Enforcement Action Plan Discussion Forum, [http://blog.epa.gov/cwaaction plan/](http://blog.epa.gov/cwaactionplan/) (last visited Dec. 15, 2009).