

**Advice to City Attorneys:
Choosing a Mediator to Help Resolve Disputes Involving Local Land
Use, Environmental, and Public Policy Decisions
CONCUR Working Paper 93-04**

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This Working Paper is intended to provide city attorneys with practical advice in deciding when to initiate mediation, what kinds of qualifications to seek in recruiting a mediator, and the kinds of steps to build into a mediation process.

Section I presents an overview of the types of disputes faced by California communities and in Section II we consider why mediation may be needed in California cities. Section III suggests what to look for in designing a successful mediation process. Section IV poses some questions to address in deciding whether to pursue mediation, and Section V provides questions to use in choosing a mediator. Finally, in Section VI we outline several specific roles for City Attorneys in promoting successful mediation of local land use, environmental, and public policy disputes.

I. Introduction: Type of Disputes Faced by California Cities

City attorneys in California routinely face a variety of controversial and complex issues. In Table 1, we sketch some of these disputes, and classify them according to the number of parties and number of issues. Some, such as simple contracting issues, most often involve just two parties. Slightly more complex are issues such the terms of employment for public employees. Again, these involve two parties (labor and management), but often involve multiple issues (such as wages, health benefits, and methods of calculating seniority).

We also see a variety of propositions at the local level, which give the voters an opportunity to make decisions on a variety of issues at the polls. While many different parties, or stakeholders, are concerned about the propositions, the initiative process tends to frame issues as simple "yes" or "no" decisions.

The most complex decisions are those that involve multiple parties and multiple issues. In fact, most land use, environmental, and public policy decisions fall into this category. For example, the parties with a stake in a major development proposal might include the developer, the local building trades and chamber of commerce, multiple city departments, state agencies,

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existing homeowners' associations, local environmentalists, and unorganized citizens whose property happens to abut the proposed development.

Many city attorneys have already confronted the effects of two familiar syndromes: LULU's (Locally Undesirable Land Uses) and the NIMBY (Not In My Backyard). Communities throughout the United States are experiencing increasing difficulty in changing the use of status of land within city boundaries.

Table 1: Types of Disputes Faced by California Cities

	Number of Issues	
Number of Parties	One Issue	Multiple Issue
Two Parties	Simple Contract Negotiations	Labor Negotiations
Multiple Parties	Local Propositions	Land Use, Environmental, and Public Policy Decisions

Within our category of disputes involving multiple issues and multiple parties we find that conflicts have arisen over:

- public projects with a development orientation such as construction of schools, affordable housing, highways, landfills, and operation of hazardous waste facilities;
- public projects with a conservation or restoration focus, such as creation public parks, designation of conservation zones, as well as cleanup of toxic waste sites and mitigation of other environmental damage;
- private projects with a development-orientation, such as industrial parks, residential subdivisions and redevelopment projects.
- policies and regulations that would govern the use of limited natural resources, including the use of land, water, and air resources affecting our forests, water and air quality.

II. Why Mediation is Needed in California Cities

California is well-known for being a hotbed of public disputes. As the competition for limited resources grows, due to California's expanding population, and the recession continues, the stakes for all affected parties have dramatically increased. In California, the debate over land and natural resource use has become particularly heated for several reasons:

- the open nature of state government provides multiple points of entry: interest groups may initiate litigation, appeal agency decisions, or pursue governance by referendum and initiative;
- many cities are experiencing a higher level of political diversity, which promotes renewed debates about the appropriate future of communities;

- the State Constitution delegates responsibility for land use planning to local governments, which strengthens local control and heightens the influence of locally-based interest groups; and,
- myriad federal and state laws and policies guiding decisions over land uses, siting of facilities and the allocation of limited natural resources that are subject to ongoing legal and administrative interpretation.

This tradition of open governance, coupled with increased pressure on limited natural resources and the controversy that results, is placing a huge burden on local governments.

The traditional ways of settling differences over public disputes, including land use, planning and environmental conflicts, have been through administrative hearings and the judicial system. While these traditional forums for dealing with land use and environmental conflicts are valid for many kinds of disputes, we believe that voluntary mediation should be explored as an alternative means of resolving differences. We do not intend that mediation should replace existing methods of dealing with disputes, including litigation, administrative appeals, petitions, new legislation or governance by referendum. Rather, we believe that mediated negotiation should supplement these traditional forms of decision making, as it offers several distinct different ways of resolving contentious disputes.

III. What to Look For in a Successful Mediation Process

We place strong emphasis on creating a 'successful' mediation process. While mediation has seen limited use in California over the past decade, it has been increasingly used in the last three years to resolve difficult disputes.

Large scale dialogues, involving many parties and several mediation sessions, have been held to help set policies for the allocation of forests, wetlands, urban growth, salmon and water on a regional or statewide basis. Yet, most of these dialogues have failed to achieve binding agreements.

The reasons for these failures, we believe, can be traced to shortcomings in one or more phases of negotiation: 1) preparation for a negotiation, 2) the actual bargaining phase, or 3) the post-negotiation phase where implementation is discussed.

In the left column of Table 2, we list the key steps in a mediated negotiation process. The right column poses a series of questions that can help city attorneys determine whether each step has been fully addressed.

Table 2: Suggested Steps to Enhance the Success of Public Policy Mediation for California Cities

Steps in a Mediated Negotiation Process	Questions to Help Measure Success
Preparation	
Has a Suitable Auspices for Negotiation been Created?	Which organization served as the host auspices for negotiation? Who proposed the negotiation? How did the mediation team gain entry to the dispute?
Has a Qualified Mediator or Mediation Team been Recruited?	
Is the Issue Framed for Negotiation?	How were the issues for negotiation framed? Who was responsible for drafting the agenda? Was the agenda sufficiently bounded to allow progress to be made, but broad enough to allow trade-offs across issues? Were issues added as the negotiation progressed?
Is there a Clear, Logical Agenda Set for Negotiation?	
Was There Effective Participation of Affected Stakeholders?	Which stakeholders were included? How were they recruited? Were any important stakeholders (city agencies, business and industry, homeowners, environmental groups, other citizens) left out? Was there continuity of representation? Were parties required to report back to their respective constituencies?
Actual Negotiation: Search for Joint Gains	
Was There A Joint Fact Finding Process to Establish a Technical Foundation?	Was available information pooled? Were data gaps identified? Was technical expertise recruited? Did technical experts generate or interpret new information? Was there an effort to "translate" technical information into a form that all parties could understand?
Were Multiple Options Developed?	How were major issues broken into manageable sub-issues? Were multiple options developed? Was technical information applied to evaluate the consequences of policy alternatives? Were parties encouraged to make trade-offs among issues?
Was There an Effective Mechanism to Craft and Finalize a Specific Agreement?	Were actions ranked in order of priority? Did parties use a negotiating text? If not, what was the vehicle used to develop the agreement?
Post Negotiation: Implementation	
Was There an Effective Mechanism to Bind the Parties and Eliminate Barriers to Implementation?	How were parties bound to their tentative commitments? Was there a step of "checking back home"? Was there a formal procedure for ratification? Were some items identified for early implementation?

Table 2 identifies a series of steps that need to be completed. Although each one could be the subject of a much longer paper, we want to emphasize and discuss four themes that characterize a successful mediation process:

- effective representation of affected stakeholders;
- participation;
- accountability; and
- legitimacy.

Effective Representation of Affected Stakeholders: All parties who perceive that they have a stake in the outcome of a dispute need to be represented in the mediated negotiation. There is a tendency for the "serious players" in a dispute to talk just to each other, and to exclude other stakeholders. These other stakeholders--who may be government agencies, organized business or environmental groups, or unorganized homeowners--can upset any agreement reached by the major parties and create a blocking coalition by filing a lawsuit or an administrative appeal. These groups are often left out of the negotiations

A well known example occurred a few years ago in the Bay Area when the Port of Oakland was seeking a disposal site for spoils dredged from San Francisco Bay.² The two agencies with lead responsibility, EPA and the Corps of Engineers, decided to convene a "Blue Ribbon Panel" of experts in Fort Belvoir, Virginia to sort through available evidence and select a suitable disposal site.

This strategy, though well intentioned, backfired completely. By convening the meeting in Virginia and excluding representatives of the fishing community near the proposed disposal sites, the agencies cut themselves off from vital information. The agencies chose a disposal site near Half Moon Bay, unaware of both the rich fishery in the area and the depth of sentiment opposed to dredge disposal. Half Moon Bay fishermen organized, retained legal counsel, and filed a series of suits in state and federal court which had the effect of blocking the proposed disposal off Half Moon Bay. Subsequently, the Corps and EPA have entered into a much more participatory process, known as the Long Term Management Strategy (LTMS), which is intended to provide broad scale policy guidance that will lead to multiple acceptable disposal sites.

The dredging case illustrates that stakeholders need to be represented, by being given a seat at the negotiating table or by having their interests represented by another party. Whichever method of representation is chosen, it needs to be clearly understood by all parties. This clarity is provided by crafting a set of groundrules or protocols that set the tone for the negotiation.

Effective Participation: The principle of participation is closely related to representation. Once parties are invited to take part in a mediation, they must be allowed to actively participate. We like to use the concept of creating an 'even playing field' to eliminate barriers and to enfranchise parties that lack requisite financial or technical resources.

Several strategies are available to create this more level playing field. One is to conduct briefings for some non-technical stakeholders to bring them up to speed on the issues under discussion. Alternately, funds could be made available to enable less powerful groups to retain their own professional advisers who play a crucial support role throughout the mediation process. Our preferred technique for dealing with technical information is to use a procedure for joint fact finding, in which available technical information is

² This case is documented in detail in Scott McCreary's dissertation "Resolving Science Intensive Public Policy Disputes: Lessons from the New York Bight Initiative", prepared for MIT's Department of Urban Studies and Planning.

pooled, and technical experts are accountable to the negotiating group, rather than aligned with each "side" in a negotiation.

Other techniques to level the playing field may include directly addressing imbalances in financial resources, such as providing light meals at meetings or providing modest travel stipends to reimburse the costs of attending meetings.

While these measures may seem unusual, we have seen major parties who have financial, political and technical resources to ask other stakeholders to participate in a negotiation session, then to carry own simultaneous "back channel" negotiations with each other. If these unsanctioned discussions are encouraged, they can undermine the trust between the negotiating parties. This may force weaker stakeholders, whose participation is needed to avoid litigation and appeals, to abandon the process.

Accountability: Accountability speaks to the ability of the parties to keep the agreements they make during the mediation process. We find that the best way to ensure accountability is to ask negotiators to make and keep a series of step-wise agreements.

Some of these agreements are procedural in nature. For example, we typically begin our work by asking negotiators to adopt simple groundrules and a statement of purpose for their negotiation. Next, we may ask negotiators to agree on the outline or "Table of Contents" of a final agreement. We ask that each negotiator must commit to keep his or her organization or constituency informed of the progress of the deliberations. Other agreements may revolve around timely sharing of information or focus on the outcome of a negotiation.

Ultimately, each party needs to be held accountable to his or her fellow negotiators. For example, a developer may agree to provide compensation to a community or neighborhood in exchange for a use permit or zoning variance from the City Planning Commission. Alternatively, the compensation may be contingent upon an agreement that abutting property owners will not be opposed in public for permit request. An effective mediated agreement must contain precise language that shows how each party will undertake specific actions by a certain date to implement the overall agreement. This step is often left out of the mediated agreements, so that parties themselves are not sure what they agreed to.

Legitimacy: Legitimacy is related to the relationship between perception and fact. At the start of a mediation process, the stakeholders normally are hesitant to talk with each other about the deeper, more personal motivations for their disagreement. Often, there is an obvious lack of trust.

In order to gain access to these deeper, personal issues, which have to be translated into the more practical interests that motivate them, stakeholders need to perceive that they are being taken seriously. If a dispute has been festering for some time, we find that it is useful to give stakeholders a chance to "vent" at the first meeting, and then use their comments to help get at their underlying interests.

Participants need to know that their adversaries (or negotiating partners) view them and their needs as legitimate. If this doesn't happen, the mediation will not proceed. The mediator has the responsibility to create this sense of legitimacy, with the cooperation of all the parties. We reinforce the spirit of legitimacy through the groundrules we propose. For example, we might include these protocols for a dialogue, as shown in Table 3.

Table 3: Excerpts from Groundrules from a Local Government-Sponsored Mediation on Emergency Water Storage

<p>Representation:</p> <ol style="list-style-type: none"> 1. Members of the project committee have been recruited by project staff and consultants based upon several qualities: willingness to work cooperatively with other committee members; demonstrated ability to represent an important organization or constituency concerned with water supply in San Diego County; receptivity to other points of view, and a willingness to consider several options before recommending policy choices. 2. The personal integrity and values of each Committee member will be respected by other participants. This includes the avoidance of personal attacks and stereotyping. The motivations and intentions of participants will not be impugned. 3. Commitments will not be made lightly and will be kept. Delay will not be employed as a tactic to avoid an undesired result. Disagreements will be regarded as problems to be solved rather than battles to be won. 4. Every Committee member will endeavor to check back with his or her respective organization or constituency and to keep them aware of ongoing Committee decision-making processes and timelines. 5. Every Committee member is responsible for communicating his or her position on issues under consideration. It is incumbent upon each participant to state his or her views. Voicing these views is essential to enable meaningful dialogue and full consideration of issues by the ESWC. 6. In order to establish trust and maintain the integrity of the process, consistent participation of all Committee members is essential. ESWC members will commit to attend meetings consistently. Substitutes are not encouraged. However, if a Committee member must send a substitute, the member will inform Project staff and brief the substitute in advance of the meeting.
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³ Excerpts from Groundrules adopted by the Emergency Storage Working Committee, a 30-member group representative of the full range of stakeholders concerned with the San Diego Water Authority's Emergency Water Storage Project. Adopted on August 11, 1993.

Other groundrules might address issues such as information sharing, expectations for reaching consensus, and relations with the media.

IV. Some Questions to Ask in Deciding to Initiate a Mediation Process

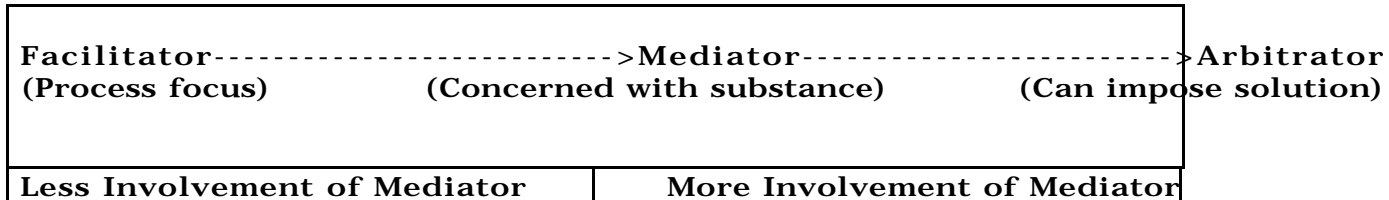
- Are the key stakeholders (city agencies, homeowners, development interests, community organizations) at an impasse? Has one group already threatened to file litigation, or to file an appeal to block a decision?
- Even if stakeholders have not reached an impasse, does the history of contentious relationships suggest that adversarial tactics are likely? If so, it may be useful to convene a mediated negotiation.
- Are key parties willing to try to sit down face to face and try mediation? (Answering this question represents a sort of Catch 22, since many parties do not really understand that mediation is a voluntary process.)
- Is there a local or regional organization that is capable of serving as a credible nonpartisan auspices, or institutional home for the mediated negotiation? Such auspices may be a community-based dispute resolution program, a local college or university, a religious institution.
- Have any of the potential participants in a negotiation identified preconditions for their participation? For example, some groups might ask that certain technical information be prepared, or that they receive a travel stipend to support their work. In some cases, the sponsor of a mediation provides a light lunch or supper as a courtesy to participants.
- Is there a potential pool of qualified mediators? (The exact definition of "qualified" will flow, in part, from the answers to the questions posed in Section III.)
- Does the potential mediator or mediation team have a good working relationship with the organization that has potential auspices of the mediation? Again, the answer to this question will depend in part on the selection of the mediator, which should be guided by answers to the questions posed below

V. Some Questions to Ask in Choosing a Mediator

City attorneys may be called upon to recommend that mediation be explored as a supplemental decision making process, to propose selection criteria for guiding the choice of a mediator, or to serve on a screening panel to select a mediator. Clearly, there can be no one correct "formula" to use in recruiting a mediator. Here are several questions that can help bring a sharper focus to each of these tasks:

- How important is detailed knowledge of the local community? Is necessary to recruit a mediator with strong links to the community? Is detailed knowledge of the community necessary to gain trust and identify the key players in a dispute? Or, are the sides so polarized that only a mediator who is truly an "outside" professional can be perceived as more neutral.

• Do you want to recruit a facilitator, who emphasizes process primarily, or a mediator who is concerned about the outcome as well as the process? The simple diagram below suggests that we can envision several kinds of process assistance along a spectrum, ranging from facilitation (which includes primarily a process focus) through mediation (which includes a greater emphasis on the substance of an agreement), and on through arbitration. Arbitrators generally have the authority to impose solutions.



Tasks of the facilitator include, at a minimum, making sure that the process flows smoothly, that meeting agendas and related materials are prepared, and that all participants in a facilitated dialogue have a chance to air their views. Mediators generally take a more active role in recruiting unorganized or underrepresented constituencies, in ensuring that relevant technical information is presented, and in proposing "straw person" options that might be included in a final agreement.

• How important is the prospective mediator's professional training in the theory and practice of negotiation and mediation? Currently, mediation is essentially an unregulated profession. That is, unlike law or medicine, there is no licensing procedure that screens potential members of the profession. For this reason, cities considering the use of mediators need to look closely at the credentials and qualifications of prospective applicants. In our view, the most effective environmental mediators should have some training in natural science, law or public policy, and some exposure to the theory of negotiation. Of course, this knowledge can be obtained either through graduate education, hands-on experience, or a combination of the two.

• How important is subject matter expertise? Would 'dual expertise' in both process and substantive issues under discussion be beneficial to the stakeholders? Can a mediator without substantive expertise understand adequately the issues at stake? Will a "generalist mediator" lose the respect of the parties if he or she cannot keep up with the level of discussion.

In our view, one of the most important functions of a mediator is to act as a "translator" to help citizens and lay decision makers understand the technical aspects of issues under discussion. If the mediator is to act in this capacity, he or she must possess a reasonable level of expertise with the planning, zoning, or other environmental issues under discussion. For example, knowledge of General Plan law and the CEQA process, could be a prerequisite for effective mediation of many local land use disputes.

We also acknowledge that in some cases, a mediator with substantive knowledge could be perceived as aligned with one side, or perhaps viewed as threatening by local technical experts.

- Would it be beneficial to recruit a mediation team in order to amplify the skills and experience that would be brought to bear? Among the traits that might be sought are: a track record in local issues, perspectives from outside the community, expertise, credibility with the stakeholders, ethnicity, gender and geographic balance?
- How important is it that the mediation process produce a specific agreement? Some mediators prefer not to write a specific agreement; others are adamant about the need for a written agreement. What experience do the mediators have in producing the kinds of agreement the City seeks?
- Does the mediator have skills in translating the informal agreement into a binding agreement? Several choices may be available in finding a way to bind the parties. Often, a ratification step, in which participants sign an agreement, makes an important bridge between the informal agreement and a binding, formal agreement.
- Do you want the mediator to provide other services to assist City staff and stakeholders? For example, some cities are finding it beneficial to include training in conflict management as one part of a package of services provided by mediators. In this way, they can build the capacity of city staff and ensure a local, cost effective source of mediation skills. In other cases, mediators are asked to take on policy analysis tasks or to take the lead in public information and outreach tasks.

VI. Potential Roles of City Attorneys in Promoting Successful Mediation of Local Land Use, Environmental, and Public Policy Disputes

This paper has considered the kinds of disputes that California cities face, and outlined the need for and elements of mediated negotiation. We have also provided some advice on deciding when a dispute might be subject to mediation, and how to go about choosing a qualified mediator.

We want to conclude this paper by offering several observations about the prospective roles of City Attorneys in using mediation techniques successfully. We believe that cooperation between the mediator (or team) and the City attorney during mediation process is essential. Moreover, we believe that there are specific opportunities for City attorneys inherent in this approach.

The most obvious, perhaps, is the avoidance of the direct costs, stress, and lost opportunities inherent in more adversarial processes. Less obvious, but perhaps more powerful is the potential satisfaction and goodwill of the parties who participate in successful mediation as a source of capital in advancing the interests of the city.

We believe that City Attorneys can provide six key roles in a mediated negotiation:

- Clarify the legal and administrative context in which mediation will occur. This may include explaining laws, regulations, public notice requirement, and deadlines that may be driving the mediation.
- Serve as one of the convenors of an initial meeting. The first meeting in a mediated negotiation is often kicked off by remarks by a respected member of the community.
- Act as a guardian of the process. By guardian, we mean that the City attorney can help ensure that an appropriate auspices for the mediation is found, that administrative arrangements are in place to retain the mediator, all sides get a fair hearing, and that relevant information is presented.
- Act as a liaison with other key decision makers. City Attorneys are well placed to see that other senior officials such as the Mayor and members of the City Council, or Planning Commission are kept informed of the progress of the mediation.
- Provide expert advice as to the legality of possible solutions to a dispute.
- Help translate informal agreements into binding agreements. Perhaps the single most important role of a City Attorney is to ensure that the results of a mediation can be implemented. This might include preparing such documents as settlement agreements, development agreements, or budget amendments that will carry out the terms of an agreement.

About CONCUR

CONCUR was founded by Scott McCreary and John Gamman to provide services in environmental policy analysis and conflict management. Both Scott and John have worked as land use and environmental planners in California since the mid-1970s. CONCUR's current local government clients include the County of San Diego Water Authority, the Santa Clara Valley Water District, and the County of Santa Barbara. They have successfully mediated agreements over cleanup of contaminants, policies for land use and development and wetlands monitoring, and ranking of statewide environmental priorities.

CONCUR principals each earned their doctorates at MIT's Department of Urban Studies and Planning, with an emphasis in public policy analysis and dispute resolution. They also served as Associates at the Program on Negotiation at Harvard Law School. John earned his MPA from the Kennedy School of Government at Harvard University; Scott's Masters Degree is in Landscape Architecture with an environmental planning emphasis from UC Berkeley. Martha Neuman holds a Master's Degree in Land Resources from the University of Wisconsin-Madison.

CONCUR regularly leads professional training courses at UC Berkeley which carry MCLE credit. The next courses are scheduled for October 29-30 and November 19-20, 1993. CONCUR can be reached at (510) 649-8008 or (408) 457-1397.