Public Policy Mediation: Best Practices for a Sustainable World

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Public policy mediation has the potential to enhance the practice of democratic governance and build sustainable agreements to address contentious policy issues. Over decades of practice in this area, we have seen citizen potential and expertise harnessed to contribute to a more sustainable world.

First, a quick definition. Public policy mediation is a method for securing actionable agreements among a broad range of interested parties who participate as negotiators, often on behalf of constituencies. It creates a forum for deliberative negotiations among government, representative stakeholders, and the general public. The parties’ technical expertise, as well as their critical concerns and preferences, are woven into deliberations that increase mutual understanding and lead to otherwise untapped opportunities for consensus agreements. Policy mediation is used by a broad array of federal, state, and local governments to develop all manner of public documents that reflect complex decision-making, including plans, policies, regulations, city charters, settlements, and memoranda of understanding.

**Best Practices**

Best practices of policy mediation are grounded in the development of policy that values, and is improved by, stakeholder participation. Today, unfortunately, policy mediation is often a last resort, used only after government institutions and practices have failed to yield agreements. Government officials who turn to policy mediation may not be familiar with its complexities and so seek shortcuts that can inhibit success. As we all know too well, participants in a failed mediation are often unlikely to try the process again. To help the field grow – as well as help people reach agreement in the complex kinds of disputes that are so common in public policy matters – mediators and participants must understand best practices.

Although the initiating agencies often resist it, the assessment phase, during which policy mediators interview relevant parties to understand and help organize the issues, learn the history of past efforts to address the situation, and identify the dynamics likely to affect negotiations, is critical. In some cases, the mediators will determine that convening negotiations is infeasible, thereby protecting government officials (and the field of policy mediation) from predictable failure. These early interviews also provide opportunities for mediators to build confidence in the mediation process, identify relevant stakeholders and key issues, and develop relationships with negotiators.

Starting complex negotiations without an assessment is like performing surgery without any diagnostic tests. The participants’ initial negotiating task – developing ground rules – serves to clarify expectations and preempt procedural conflicts during the process. These agreed-upon terms specify understandings such as the group’s definition of consensus, the roles and responsibilities of the negotiators and mediators, the extent to which an ultimate agreement will commit the parties, and the nature of appropriate media contact. Negotiating these
ground rules provides participants with opportunities to learn how to develop consensus documents and form agreements with perceived opponents on procedural issues – all before beginning the more difficult negotiations on substantive issues.

The concept of mediator independence, another critical part of best practices in the public policy arena, is often confusing for government officials as well as for other parties’ representatives. Government officials typically hire consultants to accommodate their needs and accomplish required tasks, so policy mediators often need to clarify that their benefit to the government is an ability to provide a forum for an exchange of ideas and for complex negotiations to solve a festering problem. In other words, mediators must remind clients that serve the process and all its participants, not just one party. Similarly, participating stakeholders often presume that a mediator is biased in favor of government, which usually covers the cost of the mediation. Mediators often must expend a great deal of effort to overcome such assumptions, by both government officials and participants, and build confidence in the fairness of the process.

Critical Challenges

Critical challenges for building the field of public policy mediation stem from the current atmosphere of intense political polarization, government concerns about relinquishing authority to ad hoc groups of stakeholders and citizens, and simply put, the “business” of mediation.

For those situations where policy mediation is possible, government officials, particularly elected officials, often express the critical concern of maintaining their responsibilities to constituents and their authority under the law. In direct response to this concern, the procedural ground rules usually consider the product of the negotiations – be it a policy, regulation, or plan – to be a recommendation to the process-initiating government agency. Concurrently, the participating government officials agree to support implementation of the product if it reflects a consensus among the parties as defined under the ground rules. However, the government agency can decide not to implement the consensus recommendation because it has no legal obligation to do so – its authority and responsibility are not transferred to an ad hoc group of citizens. Of course, failure to use a broadly supported product, one that was developed with full government participation throughout the negotiations, could result in negative political implications, although the negotiators would not have recourse in the courts. Given such complex dynamics, one can understand why government officials enter into such processes cautiously.

Finally, the business practices of policy mediation sometimes create impediments within our practice field. As stated above, the need for mediator independence and the nuanced construct of the negotiated product as a recommendation to government contribute to an understandable reluctance on the part of government to initiate a process to invite stakeholders and the public to participate in policymaking. Consequently, policy mediation is often viewed as a last resort when the status quo must change and all usual efforts have failed to provide a sustainable shift. As such, the mediation community, with its conspicuous lack of political clout, often offers potential clients a service that carries some unappealing risk. On the other hand, that risk is shared when important constituents or high-level politicians advocate for policy mediation.

Within our field, provider organizations (i.e., direct service providers, roster managers, and procurement contractors) seeking business growth opportunities, and in some cases, possessing more facilitation than mediation skills, have offered clients more easily accepted non-agreement-seeking processes. Those processes often result in broad or non-consensus recommendations, which may
or may not be implemented. These alternatives have competed with mediation and won a sizeable “market share.” Lacking the efforts required to reach consensus agreements, such processes fail to create the mutual learning required to integrate vastly different perspectives in the context of political and resource constraints. In addition, rather than mediator independence to serve all the representative-negotiators as the “client,” these practitioners tend to focus on the government agency that retains them as the client. This may seem like a sensible commercial strategy, but in failing to follow best practices, it may inhibit opportunities for actual mediation and does not necessarily result in actionable and sustainable policymaking.

Benefits for the Future

We remain optimistic that the inherent strengths and societal benefits of public policy mediation, when conducted according to best practices, will gain broader appreciation and application. We have seen its increased use at the local and state levels. Negotiated rulemaking is congressionally mandated under a number of laws and is being initiated more often for inter-governmental disputes within and among federal agencies. In addition, we have seen an expansion of its use internationally to resolve national and local policy disputes within countries as well as international disputes among nations.

Local government officials, leaders from cities, towns, counties, and school districts, cannot escape to capitol but rather must respond daily to their constituents’ direct demands for essential services such as fire and police protection, water and sewers, and K-12 education. Importantly, even with diminished resources, local leaders cannot find refuge in blaming others, support from remote donors, or ideological arguments. They must produce results. Many strategies for maintaining service levels now involve sharing among such local units. That, in turn, requires negotiations that are sensitive not only to the objectives of the governmental units but to the political “realities” that influence their officials. Mediators are working with local governments to elicit those interests and discreetly bring them into play. Local governments are also applying mediation tools when economic development proposals are both supported and resisted by community groups: Mediators can convene those stakeholders, encourage them to share data, disclose interests and agendas, and jointly examine various approaches to such proposals.

School districts, most of which are dedicated to their missions of high-quality public education, are especially besieged by criticism while suffering reductions in financial resources. When collective bargaining negotiations, particularly with teacher unions, are conducted behind closed doors, they often provoke cynicism in the public, particularly among non-parent taxpayers. Public policy mediation could enhance participation to include, for example, parents, other taxpayers, and perhaps other district stakeholders, thereby providing for increased transparency and integration of community-based advice, which should translate into increased public support.

Negotiated rulemaking, mandated under the Higher Education Act for student loan regulations and the Native American Housing Assistance and Self-Determination Act for allocation of federal resources provided for affordable housing among tribes across the nation, is also used by agencies with sufficient foreknowledge of potential challenges to regulations that they may try to promulgate without gaining support from stakeholders. During a time when highly resourced groups lobby and cajole to achieve their agendas, the Negotiated Rulemaking Act and the Federal Advisory Committee Act take such discussions out of back rooms and into the sunlight of open meeting laws and requirements for participation by balanced groups of representative stakeholders.

In the international arena, policy mediation is being championed at regional and local levels of government in many European nations. The World Bank is building infrastructure for participatory budget processes in Latin America and Africa, and the United Nations is training its special envoys in inclusive mediation processes. In all these cases, people are looking to the United States for its best practices to apply and refine for their own contexts.

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The Promise Worth Sustaining

As the United States grows more polarized and many nations around the world collapse from internal conflict, policy mediation offers an alternative approach that is likely to be embraced by the general public. In this country, cynicism regarding traditional representative processes and the role of “special interests” in campaign financing seems to be an established feature of our political landscape. Internationally, demands for greater freedom and opportunity will continue to be heard until the demands are met or those voicing them are suppressed by force. Greater participation and inclusive processes, professionally designed and mediated, are strategies for creating actionable and sustainable outcomes.

Policymaking, mediated or otherwise, is inherently political. Mediated policymaking is most often used when power is so diffuse that no individual or group can unilaterally impose its will to change a status quo. Throughout mediated negotiations, participants display and envisage the distribution of power in the context of particular substantive issues. They gain new appreciation of power differentials and limitations as well as strategies for enhancing and projecting political power. A lasting outcome of mediated policy negotiations is increased sophistication of citizens in the practice of politics.

Such an enhancement of democracy is itself a benefit to society, but in expanding the community of interests, values, and perspectives that inform and support a resulting policy, public policy mediation has the more concrete effect of providing for effective and efficient public administration that is as inherently self-sustaining as the laws and policies that emerge from such interactions.

Endnote