


Environmental Mediation: Cutting to the Chase in Environmental Dispute Resolution

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The following quote from Abraham Lincoln, dated 1850, should be kept in mind by all environmental attorneys: "Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses, and waste of time. As a peacemaker, the lawyer has a superior opportunity of being a good [person]. There will still be business enough." This article discusses mediation and mediation skills as invaluable tools for settling and managing environmental issues.

War, and environmental litigation, are hell for those without a tolerance for high-risk, long-duration, high-stress, costly activities. Enlightened self-interest often reveals that settlement is desirable in environmental matters because the question is often not "Am I liable at all?" but rather, "How much am I going to have to pay/what is my share?" "How much will it cost to defend/pursue this case?" or, "How can damages and delay be avoided or minimized?"

To avoid the expense, stress, delay, uncertainties, and risks of environmental litigation, parties are increasingly making use of mediation and mediation techniques to resolve environmental disputes.

MEDIATION—FACILITATED NEGOTIATION

Actual "mediation" is a negotiated effort, facilitated by a neutral third party, to help parties reach a compromise and solution. It is mutually agreed-upon intervention in a dispute negotiation by a party whose sole agenda is to assist in structuring a settlement that minimizes cost and delay for all concerned. Mediation goals are both dispute and resolution expense avoidance, private as opposed to public discussion of sensitive issues, and preserving (or repairing) business relationships:

MEDIATION TECHNIQUES

Mediation techniques (as opposed to actual "mediation") have also proven extremely valuable in recent cases in which the writer has been counsel. Such techniques avoid, rather than increase, complexity and adversity, and reduce legal fees while enhancing results. If, as a mentor to the writer once counseled, the definition of a good lawyer is a lawyer with happy clients, resolving matters cost-effectively and quickly makes good

lawyers. This can be accomplished best by focusing on the parties' real interests, expanding and confirming areas of agreement so as to make settlement feasible, facilitating interaction, clearly defining real issues, pooling resources, using all available expertise to come up with alternatives, looking for creative—sometimes even mutually profitable—solutions, and working toward compromises that save time and money and promote resolution.

MEDIATORS AS FACILITATORS

In an actual mediation, the mediator is a facilitator and assistant to all parties, and does not dictate the result like a judge or an arbitrator in an adversarial process. With the assistance of the mediator, the parties structure a solution that is *mutually* acceptable. An agreement reached outside adversarial processes eliminates the risk that an entirely unacceptable result will be imposed by a court or an arbitrator, without the consent of the adversely affected party. Mediation can never result in *imposition* of a result, as it is voluntary and nonbinding (until the agreement is reduced to a written contract between or among the parties), and relies on a resolution the parties agree on and execute for success.

CONFIDENTIALITY IS OF GREAT CONCERN

One of the greatest benefits of resolving environmental issues privately is that the parties are allowed to discuss facts and concerns and reach agreements in confidence. Because there is no public record produced, other businesses—including adjacent properties, competitors, vendors, customers, and perhaps even employees—do not learn of the terms of the resolution, or even the dispute, unless the parties tell them. The parties maintain control of information disclosure and are able to proceed on their own schedules, subject, of course, to other legal requirements that may apply.

Furthermore, discovery conducted in the course of litigation or arbitration can backfire big-time. Current owners have little to gain from creating a public uproar over environmental conditions at a property, as the net effect is diminished value, marketability, and financeability. No responsible party has any interest in proving to regulatory agencies that conditions are perhaps even more severe than the regulators originally thought. Discovery may foster public and regulatory interest culminating in both enforcement actions for remediation and/or civil penalties. It may thereby raise the cost of compliance while increasing future regulatory scrutiny and interest.

Public disputes can provoke suits for negligence, trespass, nuisance, toxic torts, or emotional distress from the public or adjacent/nearby property owners. High levels of hostility and extreme claims for damages may lead to workers' compensation cases based on alleged exposures or potential penalties for violations of OSIIA requirements. Mediation must be confidential, if the parties desire confidentiality, and many states have recognized the value of mediation through statutes that protect confidentiality of mediation proceedings. California, for example, among other

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states, has passed legislation protecting the confidentiality of mediation processes, regardless of whether a particular mediation was imposed or required by a court or privately convened.

HIGH COST OF LITIGATION DIMINISHES ABILITY TO DEAL WITH UNDERLYING ISSUES

The cost of litigation greatly diminishes the collective abilities of the parties to manage environmental cleanup costs, particularly when, as in many cases, no insurance is available for defense costs or remediation expenses. In most environmental cases, the facts are already known to the parties, will be available in discovery, or will be very expensive to establish—or refute. To the extent that aggressive discovery is conducted in litigation, the parties may injure their own interests by raising the possibility that conditions at a property are worse than regulators already consider them, and by proving the regulators' case. Public airing of environmental disputes can lead to toxic tort lawsuits, claims from adjacent property owners, employee claims of exposures, and additional regulatory interest due to public concern.

Engaging in settlement discussions with a party whose sole duty is to facilitate a compromise can prevent both public squabbles and the fallout of such altercations, and the drain, delay, and cost of litigation. Use of mediation techniques by counsel enhances the value of legal services.

Mediators motivate and encourage the generation of settlement proposals. They can explore settlement ideas confidentially with each party, and raise, as their own, options that the parties might not be willing to propose themselves, due to concerns about offering too much too soon or revealing weaknesses in their legal positions. An environmental mediator can present and craft solutions, without worrying about posturing and client perceptions about lack of aggressiveness.

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ENVIRONMENTAL DISPUTES: QUINTESSENTIAL CANDIDATES FOR MEDIATION

The set of circumstances that makes mediation most desirable—high potential damages, colorable claims by all parties, a real desire to reach a compromise and settle quickly at minimal cost to avoid “transactional” expenses such as legal and consulting fees, high potential litigation costs, severe effects of delay, little protection of technical information, and knowledge that litigation may result in a hollow victory due to lack of funds to meet a judgment after litigation expenses are paid—are often present in environmental disputes. Because of the joint and several/retroactive aspects of many environmental laws, there is often little doubt about responsibility. Damage mitigation, and allocation and cost effectiveness of remedies, are of primary concern. Also, parties often wish to maintain an existing business relationship with the other involved parties and so may well desire a nonadversarial approach to environmental issues.

Mediation by the parties, or cooperation through the use of mediation techniques, removes—or at least diminishes—one weapon available to regulatory agencies: the threat of litigation costs regarding responsibility.

It also fosters cooperation and joint action with respect to regulatory demands and requirements.

THE VALUE OF EXPERIENCED ENVIRONMENTAL MEDIATORS

Experienced negotiators who understand issues and technical data can effectively mediate disputes, with proper mediation training. However, when environmental issues are concerned, it is advantageous to use a mediator or practitioner who is experienced and knowledgeable in applicable environmental legal issues, knowledgeable about environmental remediation, and experienced in regulatory agency approaches, options, and requirements.

Knowledgeable environmental mediators are able to facilitate exchanges of ideas, offer novel approaches, and assist in creative and money-saving solutions. They are well connected in consulting and remediation and other technical circles, and knowledgeable about successes and issues that may have arisen in the context of various technical approaches. With their hands-on practical experience in the environmental field, they can consult with others confidentially on behalf of all parties, evaluate technical approaches, and assist and advise with respect to regulatory agency policies and flexibility on such matters as settlement terms, for example.

With the parties' consent, environmental mediators can be advocates with regulatory agencies to obtain approval of cost-effective solutions for all involved parties, or, at a minimum, provide a way to consult with agencies "anonymously" about potential approaches. They can provide experience in implementing agreed-upon strategies, assist in negotiations with consultants and contractors, work with counsel for both parties to finalize agreements, and assist in assuring compliance with such matters as reporting requirements.

A party that hires an environmental mediator with specific, hands-on experience in legal, technical, and regulatory approaches gets much more than just a dispute resolver and a neutral party. It also gets a solid professional assistant to all parties with a focused, mutually beneficial agenda: facilitating and implementing solutions to the problem. They even get a bargain of sorts, because the parties share the cost of the mediator's services.

Experienced environmental practitioners working as mediators or using mediation techniques on behalf of clients can also offer realistic evaluations of the relative strengths of each party's position and provide realistic projections of litigation costs and risks, fostering realistic expectations. They can assist parties in determining whether to retain counsel to pursue such matters as insurance coverage. In short, they become part of the solution, rather than profiting from complicating the problem.

A lawyer who acts as a mediator must be neutral, and both sides must also *perceive* the mediator as free of bias. A lawyer who serves as a mediator cannot later represent a party to the litigation, or act as a witness or expert, if mediation is unsuccessful and litigation ensues despite the effort to settle the matter. It is important to select a mediator carefully, and not disqualify your favorite environmental practitioner from representation should a settlement not be reached.

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The parties usually select a mutually agreeable person as mediator from a list of candidates generated by both parties or provided by a mediation organization, or they contact and interview a mediator jointly. Mediators set their own fees by agreement with the parties, and provide the parties with a written agreement setting out fees, reimbursable expenses, and agreements with respect to confidentiality. Some dispute resolution organizations that provide mediators charge administrative fees and some do not.

MEDIATION ENHANCES SCHEDULES AND ACCOMMODATES THE PARTIES

Mediation is scheduled at the convenience of the parties, not of the courts. It is possible to schedule a mediation within a matter of days. It is typical for the parties to reserve two to three days for mediation, depending on the complexity of the dispute and the amount involved. Often the parties are able to determine in one day or less whether a mediated settlement will be possible.

RECENT CASES

In a recent dispute over remediation of contamination and liability for potential claims related to exposures to, and conditions caused by, the presence of significant "free product" at a major commercial facility, an agreement reached with a major oil company and the lender/owner avoided litigation, allowed the parties to proceed with consummation of otherwise impossible transactions, and appears to have eliminated or substantially mitigated damages due to availability of financing and less concern on the part of potential purchasers. The oil company had formerly owned and operated a gasoline station adjacent to the commercial property, and releases from the station had resulted in migration of product to groundwater underlying the commercial property.

In another recent case, a major chemical company and a developer reached agreement on the cleanup of a property heavily contaminated by old manufacturing operations. The agreement avoided litigation, assisted the parties in proceeding with development plans, and eliminated potential agency delays through cooperation of the parties.

These are just two of our many recent and heartening indications of the reality and value of resolving disputes in a timely, cost-effective manner. They were gratifying professional experiences for both counsel and the parties.

CONCLUSION

In the cost-sensitive 1990s, mediation is an option that many parties would be well advised to use. It can save enormous amounts of time, stress, and money, and provide a risk-free, cost-effective means of resolving very difficult problems with the help of highly qualified and motivated assistance from professionals whose agenda is to solve problems, not generate fees from litigation. Given the cost of environmental litigation, all attempts at avoidance are worthwhile. ■

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