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A Case Study in the Use of Mediation to Settle an Environmental Coverage Case by M.J. Bond

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A Case Study in the Use of Mediation to Settle an Environmental Coverage Case

By

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Mediation as a tool for settling cases is increasingly well known and accepted. Many practitioners, insurers, and self insured parties to litigation have come to rely on mediation in all types of cases, ranging from simple soft tissue injury car crashes to complex business disputes.

Some decry the need for the intervention of the third party as an unnecessary and costly exercise. After all, reasonably competent and experienced counsel in possession of all relevant information ought to be able to evaluate the risks of letting the judge or jury or arbitral tribunal decide the case. Advocate lawyers used to perform this function in every case without outside help. But in some cases, the advocate lawyer's best friend might be that third party. One such circumstance exists where one party or the other for one reason or another may need the help of a third party to corroborate the lawyer's advice. Another circumstance in which a mediator may be of significant help is where neither side has the information needed to settle the claim.

This article discusses one very complex case in which an innovative use of mediation assisted the parties in reaching settlement. The case arose from a municipal county's efforts to have its general liability insurers pay for several third party lawsuits and regulatory enforcement actions arising from existing and former landfills located within the county. The lawsuits were relatively easy to resolve. The more difficult claims were the remedial actions at three old landfills.

The state Department of Ecology designated the county as a potentially liable party under the state equivalent of the U.S. Comprehensive Environmental Response Compensation and Liability Act (CERCLA). They were ordered to investigate the conditions existing at three old landfills, and develop remedial action plans to clean up the sites. One site had been in use during the period 1951 to 1961. One site had been in use during the period 1946 to 1977. And the third site had been in use from 1957 to 1989. Each site generally received typical household garbage, but there was reason to believe the sites had also received hazardous waste generated by local industry, including a large U.S. Naval Shipyard.

The county promptly tendered the defense of these enforcement actions to its general liability insurers, who reluctantly agreed to defend the claims. In the meantime, some of the underlying private actions moved toward settlement, while the state agency supervising the enforcement actions appeared to be dragging its heels.

The insurance coverage chart started in 1956 and ended in 1985, with the advent of the “absolute” pollution exclusion. The early years of coverage were characterized by low liability limits and a single layer of primary coverage. The middle and late years typically showed higher primary liability limits and one or two layers of excess coverage providing up to \$10 million in any one year. For the most part, the policies provided occurrence based coverage for property damage that took place during the policy period. Many policies had the “sudden and accidental” pollution exclusion, which in this jurisdiction has some lingering applicability.

Preliminary groundwater testing at two of the landfill sites showed the presence of several contaminants of concern, and these reports prompted the agency to require further testing over an increasingly lengthy period. At one site a neighboring Indian Tribe was granted co-regulatory authority over the site. The insurer’s consultants believed that the preliminary testing showed a natural degradation of the hazardous components in the landfills. With this assumption, the insurers had some confidence that the ultimate remedy would be of a lower order of magnitude in terms of ultimate cost.

The county was unwilling to bet on the opinions of consultants retained by the insurer group. At the same time, the county, perhaps mindful that litigation is no sure thing, and in a good faith effort to defend the claims brought against it, retained qualified consultants whose mission was to advocate to the regulatory agency the least costly testing program and ultimate remedy. Even still, in evaluating the risk of settlement with its insurers the county was reluctant to bet on its own experts’ prescience.

The remedial investigation at these sites took years to complete, and the insurers were stuck with a tar baby. Claims handlers came and went, young law firm associates became old associates and in some cases partners, while claim managers cursed a system that seemed to cost so much to accomplish so little toward claim resolution. Even the federal judge with responsibility for the case expressed dismay at the delay in getting to the point where a trial could be held.

The crux of our problem was how to estimate the future remedial action costs by a means that both sides would accept. We knew that in a general fashion we would attempt to mediate the case, but even the most skilled mediators usually do not have the engineering training and experience necessary in order to evaluate the site, design a remedy, and solicit bids for completion of the work. To fill in this gap, in this case we proposed that the mediator employ his own expert to assist in determining the likely remedy and estimating the ultimate cost.

Both sides agreed to this mediation format. After we chose a mediator with experience in similar complex environmental coverage disputes, we began to search for a “neutral” expert to assist the mediator. This was no simple chore because over the years the county had retained almost every engineering firm in our state for help with its landfill problems. Both sides gave a little in order to resolve any apparent conflicts, and a neutral expert was selected.

Once the mediator's expert was selected, we set about to educate them about the sites and issues. Both sides prepared their experts to estimate the likely remedy and costs at each site. We met with our consultants several times while they developed their estimates, and in one case we demanded a reevaluation of the report because it just did not appear credible to us. We instructed our experts to develop opinions that they felt would hold up in court. It would be necessary for them to justify their conclusions with good science and real experience at other, similar sites. In this case, the "jury" would not be twelve lay people, but rather a technically qualified expert panel of engineers skilled in the same task.

The first two days of mediation were devoted to presentations made by both sides to the mediator's experts. For the most part these presentations were made without counsel present. Throughout this time our experts reported back to us as to the progress of the presentations and questions that had arisen. We used these briefings to help the expert's anticipate and respond to various issues.

At the conclusion of the second day, the mediator's experts asked for time to evaluate the evidence presented. They agreed to present their preliminary conclusions in two weeks time. In two weeks they presented their preliminary conclusions for critique by both sides. We found some arithmetic errors, and questioned the basis for some assumptions. Ultimately, the mediator determined he had heard enough to form a basis for settlement.

For several possible reasons, the parties were unable to exchange offers or demands in any meaningful fashion, and we ultimately agreed to seek a mediator's suggestion as to settlement value. Each side was allowed to make one more written presentation on the merits and value of the claims. The mediator's recommendation was very nearly the middle of both positions. In the end, both sides accepted the mediator's recommendation, and the case has settled.

One interesting note is that the insurers were able to reach an allocation among the years and layers of coverage without mediation.

Did the process work? I think so. The case has now resolved, with full site releases and an end to the flow of money to defense attorneys and consultants. It may turn out that the ultimate cost to clean up the two problem sites is substantially less than projected, but on the other hand there is some risk that the ultimate cost will be much greater. Weighing those risks is what settlement is all about. In this case, our use of a neutral expert greatly assisted the parties in reaching a comfort level with their risk assessment.

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