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LITIGATION

Environmental mediation holds challenges

By Eleanor Barr

Environmental litigation is often so complex, and usually involves so many parties, that each environmental mediation requires a unique combination of approaches — far beyond the classic caucus-only mediations that are standard today. While some environmental cases can certainly be settled quickly in a caucus format, many others require significant joint sessions and real dialogue among the participants. As a mediator, my goal is to work with the parties to structure the very best mediation process, hand-tailored to achieve a sustainable resolution — be it a CERCLA cleanup case, a regulatory air matter or a CEQA dispute.

CERCLA Cleanup Matters.

When mediating cleanup litigation matters, I find that much key information is developed during the mediation process itself — such as identifying the nature and scope of contamination and the proposed remedial action plan. The environmental consultants play a vital role in the mediation, and I will often set up a process that allows them to work together to discuss the scope of testing and the scope of the cleanup. These joint sessions are indispensable to helping the parties reach agreement on these pivotal issues.

In my experience, managing the allocation discussion in a cleanup action is the true key to a successful settlement and is also often the biggest obstacle in cleanup matters. It's rare that the parties are willing to openly discuss their respective allocations together. In my mediations, I first work with the parties collectively to help them reach broad agreement on the most critical allocation factors. Next, I ask each party to use those factors as a guide in allocating 100 percent of liability to the other parties, excluding itself. I've found this informal voting process to be an invaluable tool in promoting settlement.

Outside-the-Box Resolutions.

When we focus exclusively on the classic "liability, damages, negotiation" discussion, we may miss other important possible resolutions. It's always important to ask whether there are other ways to make a deal in addition to, or in lieu of, a discussion of damages. To do this, I facilitate the dialogue so parties can discuss their real interests and needs.

The following scenarios describe two outcomes in my mediations where the parties agreed to unique resolutions of the litigated matters — once their interests were clearly identified.

Cleanup Matter: A Win-Win Solution.

In this case, the plaintiff purchased a piece of property only to learn later that it was contaminated; accordingly, he sued the defendant for cleanup costs under California Superfund law and the common law.

During negotiations in a joint session, the plaintiff expressed his regret for having purchased the property at all. It was just an offhand comment, but I was persistent in exploring it further. Hearing this, I suggested — privately — that the defendant offer to buy the property from the plaintiff at its fair market value as if it were clean property. Since the defendant actually wanted the property, it agreed to repurchase the property and be solely responsible for the cleanup. The plaintiff agreed.

The settlement satisfied the plaintiff's interest to get out of the deal and to make money on the investment. At the same time, it also satisfied the defendant's interest to spend the money on cleaning up the property rather than in litigation. As it turned out, after the defendant cleaned up the property, it sold the property at a profit.

Although this solution seems simple, and even obvious, once we think about it, it doesn't always present itself easily when the parties are having a classic "liability, damages, negotiation" discussion.

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This is why it's important to be open to the "exploring interests" discussion, and if the parties so choose, this discussion can happen in a private caucus or in a joint session. The four essential elements to an interest-based discussion are:

First, seek to understand the other side's real, underlying interests. Parties sometimes have unstated interests that — once revealed and understood — can help lead to creative settlements.

Second, explore solutions that satisfy the interests of all parties.

Third, explore ways to satisfy the interests of other side that do not undermine your client's interests.

Fourth, give something that has high value to other side but has low or no value to your client.

Air Regulatory Matter: A Continuing Relationship.

In this mediation, I was working with a government regulatory agency and a manufacturer on the issue of whether the manufacturer was violating an air emission rule. The parties could have engaged in the classic, caucus-only mediation, but I encouraged them instead to meet in joint session to discuss the regulation at issue. During joint session, the manufacturer expressed its difficulty with complying with the rule's testing requirements. The discussion resulted in an agreement where the regulatory agency and the manufacturer participated in a joint study of the rule to determine whether or not the rule should be amended. The parties worked together for nearly a year and, based on the study, certain testing procedures were in fact altered.

In agreements such as this, where adversaries agree to work together, two things are essential: a certain level of trust between the parties, and the ability to verify the activities and data generated by each side. I've found it very useful to build verification procedures directly into the settlement agreement itself, to ensure continuing trust between the parties.

CEQA Matters: Ripe for Mediation.

Parties involved in CEQA litigation benefit greatly when they negotiate a mutually agreeable resolution in a single or multiple day mediation. Not only do they avoid substantial litigation costs, and long delays caused by litigation, but they also avoid the unpredictable and often inconsistent judicial outcomes that arise in this area of the law.

Why not spend a day or two in mediation seeking to resolve a challenge to an Environmental Impact Report, rather than months or years in court?

Indeed, the recent changes to CEQA laws that allow a project challenger to request mediation before filing a lawsuit will likely encourage parties to mediate. *Moreover, Berkeley Hillside Preservation v. City of Berkeley*, 203 Cal. App.4th 656 (2012), will also likely increase CEQA claims. In this unprecedented case, the appellate court held that the construction of a single residence is subject to CEQA review. In these cases, it's crucial that the mediator tailor a mutually agreeable process to effectively and efficiently manage the multiple stakeholders who have seemingly competing interests.

Conclusion.

I enjoy mediating environmental matters precisely because they are complex. There is much satisfaction to be gained from working with the parties to tailor a mediation process appropriate to the specific dispute and then using that process to facilitate a successful outcome.

Eleanor Barr, Esq. *is a mediator with PMA Dispute Resolution, and has been mediating complex cases, including environmental matters, since 1999. Prior to that, Ms. Barr spent nearly a decade litigating CERCLA matters when she was a named partner at Denney & Oths (her maiden name). She is a co-author of the California Environmental Law Handbook from 1994-1997. She can be reached directly at eleanor@eleanorbarr.com.*