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RECENT SUCCESSES IN ENVIRONMENTAL MEDIATION

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In environmental cleanup and mass tort cases, mediation has proven its effectiveness in meeting the parties' tactical and substantive goals. Lawyers, clients, and regulators extract themselves from often rigid and time-consuming litigation procedures and turn to alternative dispute resolution (ADR) to allocate costs, risks, and benefits among all parties. The results of these efforts can be dramatically superior to those that would have been produced through standard litigation means because each case can resolve on a more adaptive, sagacious, and equitable basis. This article will explore the advantages of using mediation and other ADR allocation procedures in environmental cases, both pre- and post-settlement, and will discuss some innovative approaches that have been used to date.

Pre-settlement environmental mediation is commonly utilized as an alternative or adjunct to traditional federal or state court litigation. Mediation outcomes are not limited to any one statutory scheme. Mediation has fewer technical and tactical delays than traditional litigation because its progress is driven entirely by the parties themselves. The Environmental Protection Agency, the Department of Justice, and their state counterpart agencies can join in the mediated discussions, at the discretion of the parties, even if they are not formally made parties to the case. Since most environmental cases cannot fully settle without approval from one or more regulatory agency, direct input from such governmental agencies can inform the mediating parties about which aspects of the settlement will or will not be approved, thereby avoiding delays in obtaining regulatory approval and in implementing the settlement itself. In appropriate cases, potential penalties can be mitigated through promises to implement projects with positive environmental impacts. Further, mediation does not normally generate the same disproportionate transaction costs that are incurred in traditional litigation. Indeed, in large-scale environmental litigation, transaction costs can often equal or exceed the expenditures for site study and remediation. The mediation process is inherently flexible such that it can address efficiently all case-specific areas of concern.

For example, in one recent Superfund case, the mediation was structured to address sequentially multiple overlapping plumes of groundwater contamination. Mediation sessions were further structured to resolve party-specific insurance issues, thereby facilitating insurer contributions to negotiated solutions. Where helpful, intra-insurer sessions were also held to allocate contributions from multiple policies and carriers. Moreover, agencies with regulatory oversight were invited into the mediation at key points to share their views about contemplated cleanup methodologies. With this "real-time" regulatory input in hand, the parties were confident that their agreements would likely receive regulatory approval.

The parties also utilized a scientific professional in a neutral capacity to assess and help mediate the scientific issues presented. In many cases, the interpretation of scientific data is critical to the allocation of responsibility for investigation and cleanup costs. These data are used to ascertain the type and extent of the contamination at issue, to assess relative fault among the parties, and can provide a basis for allocating responsibility for cleaning up the site. An environmental consultant or scientist—with no ties to any of the parties—was retained to supplement the legal expertise of the mediator. Such a neutral consultant can take on a number of different roles depending on the needs of the case. In this case, the scientific neutral was retained jointly by the parties to assist the "legal" neutral in assessing the parties' competing scientific models for apportioning fault

and allocating costs and then advise the parties and the "legal" neutral on each model's strengths and weaknesses. The neutral consultant added significant value by joining the "legal" neutral in meetings with the parties' technical experts. Together, the mediators and the experts reached important consensuses, supported by the scientific evidence presented, which formed the bases for the settlement and the allocation of proposed remedial costs and actions.

The allocation of post-settlement proceeds in environmental mass tort cases, particularly those in which the settlement provides for an aggregate sum to be distributed among multiple plaintiffs, is also well suited to ADR. Settlements of this kind can involve thousands of individual claimants, all seeking their fair share of the settlement proceeds. A properly designed and implemented ADR process can determine (1) who will receive the benefits of the comprehensive settlement, (2) how much each of these individuals will receive, and (3) what criteria will be used to make these determinations. All this can be achieved in a supervised process that ensures consistency in review, determination, and payment.

An oil refinery case illustrates this point. An accident caused a 16-day airborne release of an allegedly toxic chemical used in the refinery process. Changes in the prevailing wind direction over the release period caused the chemicals to impact several different towns surrounding the refinery before the leak was repaired. More than 10,000 thousand people who lived or worked in the impacted area filed claims in mass tort and class action lawsuits. A mediated settlement was negotiated that created an $80 million fund for those affected. In order to find a process to fairly and efficiently distribute that fund among the clients with different degrees of exposure and symptoms of injury, the parties again turned to ADR.

The mediator, attorneys, and parties worked together to create a process that broadly included three payment options: (1) automatic payment, (2) payment to those that were seriously injured, and (3) payment to those with mid-level injuries. For the first category—automatic payment—the plume of contamination was superimposed onto a street map of the impacted area. The settlement master then dispersed uniform payments to eligible claimants based on their locations within the "geo-coded" area. Those individuals needed only to complete an election form with simple verification of their location during the period of release to receive payment.

Claimants who filed for the second category of relief—serious injury claims—were required to submit medical records and a short memorandum outlining the injuries allegedly caused by the release. Serious injury claimants individually attended abbreviated hearings before a small group of designated hearing officers. The awards to these claimants were case-specific, based on the evidence presented. This process provided a forum for the more seriously injured class members to present their case and to be heard.

For the third category—mid-level claims—individuals were required to submit their medical records along with a short briefing. Determinations were made for these claimants on the papers without hearings. Their compensation was also awarded on a case-by-case basis. The awards of these claimants were lower than the awards for the seriously injured claimants, but higher than the awards for claimants who filed automatic payments claims.

Thus, the process was designed to correspond to the severity of injury alleged, the degree of proof required for each tier of recovery, and the share of settlement proceeds that each category of claimant could seek. In this way, claimants and their lawyers could choose the recovery category appropriate for that client.

As a result of this process, 95 percent of the funds were awarded and disbursed to the claimants within three to twelve months. More than 1200 serious injury hearings were held in this time frame, and $6 million in invalid claims were eliminated.

This tiered approach to allocation was successful for a variety of reasons. First, claimants were part of the process; they were able to self-select into the damages category that they believed best fit their situation. As a result, few claimants challenged their allocated share of the aggregate award because they believed they were entitled to more of the proceeds or because they believed that the allocation formula impermissibly disfavored them. Second, because the allocation process was transparent, and because it provided a forum for injured claimants to be heard, claimants viewed the process as equitable, just, and fair, which avoided the myriad of conflict-of-interest issues that mass tort settlements frequently raise. Finally, under this approach, funds were dispensed to claimants both quickly and cost-effectively. Claimants, therefore, were able to swiftly appreciate the benefit of their compensation. Claimants also knew that the fund for distribution was not being drained by excessive costs and transaction fees. The benefit of this process to defendants was also apparent. Defendants were able to create the fund and then remove themselves from the process of allocation, leaving it to the mediator to design an approach that would fairly compensate the full spectrum of injured claimants with the $80 million fund that they had created. None of this likely would have happened through traditional litigation procedures.

Mediation, unlike formal litigation, allows parties and counsel in environmental suits to thoughtfully and equitably design precise, cost-effective, and efficient allocation schemes that assign the benefits and burdens to claimants and defendants, respectively. Each process can be tailored for each unique situation, and none is exactly the same. This type of flexible, creative approach is what makes ADR especially suitable to these kinds of cases.

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