RESOLVING ENVIRONMENTAL DISPUTES WITH ENVIRONMENTAL TEAM MEDIATION

A New Mediation Model

By Michael D. Young *

I. THE STANDARD TRIAL MODEL

We peek in at the closing arguments in the case of NewPuke Co. v. IckyGook Corp., an environmental lawsuit brought by the current owner of a contaminated manufacturing facility against the former owner. The dispute revolves around cleanup costs -- and how much each company will be required to pay:

HERE IS WHAT THE DEFENSE ATTORNEY SAYS, as he looks each juror squarely in the eye, fist pounding the podium:

> "And so to conclude, ladies and gentlemen of the jury, as the 15 page chart prepared by EnviroNerd so clearly indicates, my client IckyGook Corp. can at best be responsible for no more than 12.425% of those past costs that are NCP consistent since IckyGook used only sodium chloro-polutinate in its operations from 1963-71 and then switched to the much milder hydro¬-chloro-goopinate through 1982 when the site was sold to the plaintiff NewPuke Co. Moreover, since the background soil conditions contain tri-sulphate-muckinal, which when mixed with the chloro-polutinate forms harmless C2 yuckinate, IckyGook actually improved the soil conditions. It was NewPuke's use of poly-gli-incomprehensate from 1982 to 1989, combined with its total failure to establish a RCRA permitting system which resulted in the gross majority of its past costs, which were not NCP consistent in the first place, and which certainly cannot be passed on to IckyGook. I rest my case."

HERE IS WHAT THE JURY HEARS: "blah-blah-blah-blah-blah-blah-blah-IckyGook-blah-blah-12.4something%-blah-blah-blah-chemical-thing-blah-blah-blah-more-chemical-things-blah-blah-blah-I-rest-my-case."

HERE IS WHAT THE JURY THINKS: "Do you think his wife picked out that tie?" "I wonder what's for lunch today?" "I think IckyPuke did it." "Why do engineers always wear short-sleeved shirts?"

HERE IS WHAT IT COST THE CLIENTS TO TRY THE CASE: Five gajillion dollars.

So maybe the above is a slight exaggeration. Maybe the trial cost only four gajillion dollars. The point is the same nonetheless. The fact is, there are some types of complex cases that simply do not lend themselves to efficient resolution by trial, whether jury trial or bench trial. While our court system does provide a mechanism that will, one way or another, resolve a legal conflict with finality, it is not necessarily the system of choice for all disputes.

It is perhaps because of the excessive cost and the inability to reach a decision- maker with the technical expertise necessary to make a fair allocation that more and more environmental disputants turn to mediation. But, as illustrated below, "mediation" in the abstract covers a wide swath and may or may not provide the dispute resolution process that the disputants need. In light of the special complexities of an environmental dispute, and the unique needs of the disputants, we suggest a team mediation approach, which we describe below. But first, let us understand what mediation is.

II. STANDARD MEDIATION

Mediation is nothing more than a facilitated negotiation -- a negotiation between the parties with the help of a neutral third party. Like many other things in life, mediation can be good, or it can be oh-so-bad, depending on who you chose to do it with.

Generally, a mediator controls the process, but not the outcome. For instance, it is the mediator who determines when the parties will meet in joint session or when it might be helpful to break into private sessions. It is generally the mediator who will try to control the movement of the negotiations, focussing on particular issues at certain times, while ignoring other issues for resolution later. The mediator is generally not one to tell you whether your case is good or bad, but is one who can work with the strengths, weaknesses and uncertainties of cases to craft settlements. While the parties always control the outcome they do not have to agree to anything, and indeed can pack up their lawyers and go home anytime they choose -- the mediator will impact the outcome by suggesting solutions or ways of thinking that may create "win-win" situations. Indeed, in the best of mediations, the parties will come out with a result that satisfies both of their interests and needs in ways that could never be achieved in court.

Here is a very simple example based on a real¬-life case: Tenant operated a car wash on Landlord's property, and in the process contaminated it. If Landlord were to sue in court and win, he would spend many years and hundreds of thousands of dollars in legal fees and expert costs, and would be left with a clean site but no tenant. Tenant would lose the car wash, probably could not afford

to clean the site, and would go bankrupt. In mediation, on the other hand, it was discovered by the mediator in private caucus that the reason Landlord wanted the site cleaned up was so he could sell it. It turned out that Tenant wanted to buy the site since Tenant already owned the neighboring site and could expand his operations to cover both parcels. In a "win-win" result that could only have been accomplished through mediation, Tenant purchased the property at a "clean" value (established by a neutral appraiser) and indemnified Landlord for potential future liability arising from the contamination. This happy ending took a few months with no litigation. No court could have done this.

Not all mediations are written in Hollywood, however. Here is another true story: A current owner of a manufacturing facility was suing the prior owner over cleanup costs. The question was who had to pay how much. One legal issue was the validity of a clause in a pre-CERCLA purchase and sale agreement that allocated certain liabilities to the former owner. If this clause were enforceable, the prior owner would arguably be liable for a greater share of the costs than if the allocation were made under CERCLA guidelines. The parties spent considerable time and money preparing for the mediation, having their experts ready to discuss the site, the contaminants, the historical manufacturing processes, and the like. They did not, however, brief the contract issue.

Just as the parties were beginning to discuss the issues with the mediator, the mediator made an off-hand comment that in his opinion, the contract clause was unenforceable. The prior owner, of course, took this opinion to heart and refused to budge off of its low settlement position. The current owner, on the other hand, believing nonetheless that the contract clause was valid, refused to budge off of its high settlement position. The mediation went belly-up within the first hour and the parties went back to court (where, by the way, the judge ruled on summary judgment that the contract clause was enforceable.)

The difference between these two stories is in the selection of the mediator. The first mediator was trained in the mediation process and understood how to use differences between the parties to help them create a solution they could both live with. The second mediator was a former federal court judge who had retired in the early years of CERCLA and without much CERCLA experience; and was trained to give his opinions, whether asked for or not, and whether helpful to the process or not. The judge did not understand that by evaluating a key legal issue without the consent of the parties, he was inhibiting rather than promoting settlement.

III. A NEW MODEL OF ENVIRONMENTAL MEDIATION

Environmental disputes are a unique breed. They are not particularly well-suited for judicial determination because they are so technically complicated and incredibly expensive to try. Nor are they as easily susceptible to the standard meditation with a retired judge, particularly one not well versed in modern environmental law and mediation theory. So what is to be done with them (the disputes, not the judges)?

Our proposal is Environmental Team Mediation. As developed by this writer's firm, Environmental Team Mediation is a model consisting of (a) a lawyer/mediator trained and experienced in mediation theory and process, (b) a neutral environmental attorney with subject matter expertise in the legal area of dispute, and (c) a neutral environmental expert with expertise in the technical issues in dispute. This potent team has many advantages over a single person mediation, and can accomplish much more at less cost.

Technical Issues Addressed: Much of the frustration experienced by disputants is the feeling that their technical case is not being given a proper hearing by the court or single mediator. This is because a judge, jury or inexperienced mediator does not have the technical or even legal background to understand the issues at the level that the parties need for them to be understood. An experienced panel of neutrals can address these issues on levels that the attorneys understand as well as the technical consultants. They can help the parties discuss and evaluate legal issues, for instance (such as the validity of a pre-CERCLA indemnity clause); or they can discuss on terms familiar to the experts whether the sampling protocol undertaken to date conclusively determines that the contamination came from one facility or another.

Creative Business Solutions Explored: The courts cannot craft creative solutions to meet the true needs and interests of the parties. Either the defendant pays the plaintiff or he doesn't. In standard single-neutral mediation, the ability to brainstorm solutions is limited by the neutral's lack of technical knowledge. In Environmental Team Mediation, however, environmental experts and attorneys with experience in the type of dispute at issue can help the parties think about and create solutions that might meet their underlying interests, but that had simply not been broached yet. The panel approach can provide a multi-party "brainstorming" session that is simply unavailable in any other setting. It can address the true business concerns of the parties and help craft solutions that fit within those concerns.

Solutions the Parties Can Live With: Because it is inevitably the parties' solution, the resolution of the dispute is one that both parties can live with. The "winner" is not the one who was best able to snow a judge or jury, or who could best oversimplify what is in all respects a complicated task. The resolution is one that the panel has helped the parties themselves create.

Process Control: With a trained mediator guiding the "process", there is a much lower risk that the mediation will fail as a result of mediator error. For instance, trained mediators understand that the parties will disagree as to almost everything having to do with the dispute -- legal theories, factual issues, costs, fault, blame, liability.

However, so long as all parties come to the table agreeing about one thing -- that they want the dispute resolved -- a trained mediator can use those differences, uncertainties and risk as leverage to encourage the parties to move their settlement positions closer. Generally, to create solutions, the parties do not need a neutral to present an opinion on disputed factual or legal issues. And a good mediator will not so opine unless requested by all parties, and required to move the process along.

Legal Resolutions If Necessary: There are times where settlement is impossible because of a disagreement over a threshold issue, be it factual or legal. In the example of the dispute over the pre-CERCLA indemnity provision above, it is possible that the parties could never settle until the contract issue was adjudicated by a neutral. If the parties so desired, the Environmental Team Mediation panel could render an advisory (or binding) decision on that legal issue, supported by a written, researched legal opinion. This binding opinion could be based on legal briefing by the parties, or the parties could leave the briefing and research to the Panel, thereby saving money. Ofttimes, resolution of one isolated legal issue is all that is keeping the parties from fully resolving the dispute between themselves. In the alternative, if the dispute is in court litigation, the parties can often resolve threshold issues on motion and return to mediation thereafter.

Impact Of Regulators: More often than not, complex environmental disputes involve governmental agencies in some degree or another. Indeed, regulators are participating in mediations now more than ever before. The use of an environmental attorney with regulatory experience as part of the panel provides the panel with an understanding and experience of the subtle (and not-so-subtle) influences that the government can bear on a settlement.

Joint Fact Finding: Here is a shocking revelation: litigation costs are high in an environmental dispute, particularly when the remedy is in the tens or hundreds of millions of dollars. Much of this cost is associated with pre-trial discovery and expert work. This work can be combined and shared, under the guidance of the Environmental Team Mediation panel. One neutral environmental firm conducts one set of necessary tests, and the results are used by both parties and the Panel to discuss solutions.

Confidentiality: The process is low risk. The discussions are confidential and inadmissible in Court.

Environmental disputes exist. Somehow, and at some cost, these disputes will also be resolved. What is the most efficient and effective way to go? Trial is certainly one way to a final resolution. However, where the parties would like to control the costs and address the true issues in dispute, and are interested in pursuing creative solutions that all parties can live with, the Environmental Team Mediation model may be the ticket.

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