

# Checklist for Counsel Preparing to Mediate an Environmental Dispute

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Law

By

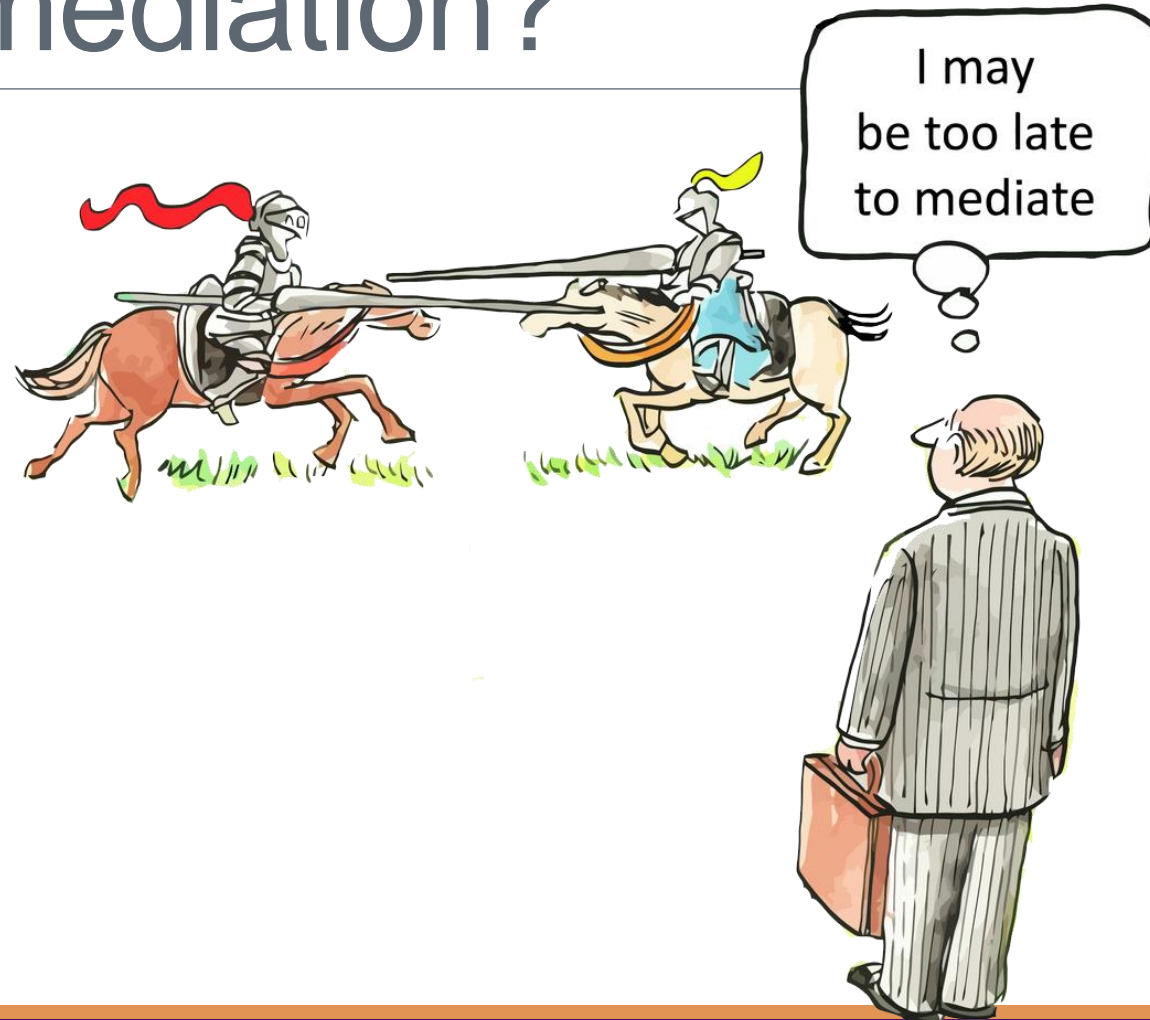
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# What is mediation?

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# Purpose of this Checklist

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- Help prepare counsel for an environmental mediation
- Serve as a “double check” for considering likely issues



# Environmental Mediations: Same or Different than Others?

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# Key issues that are often front and center

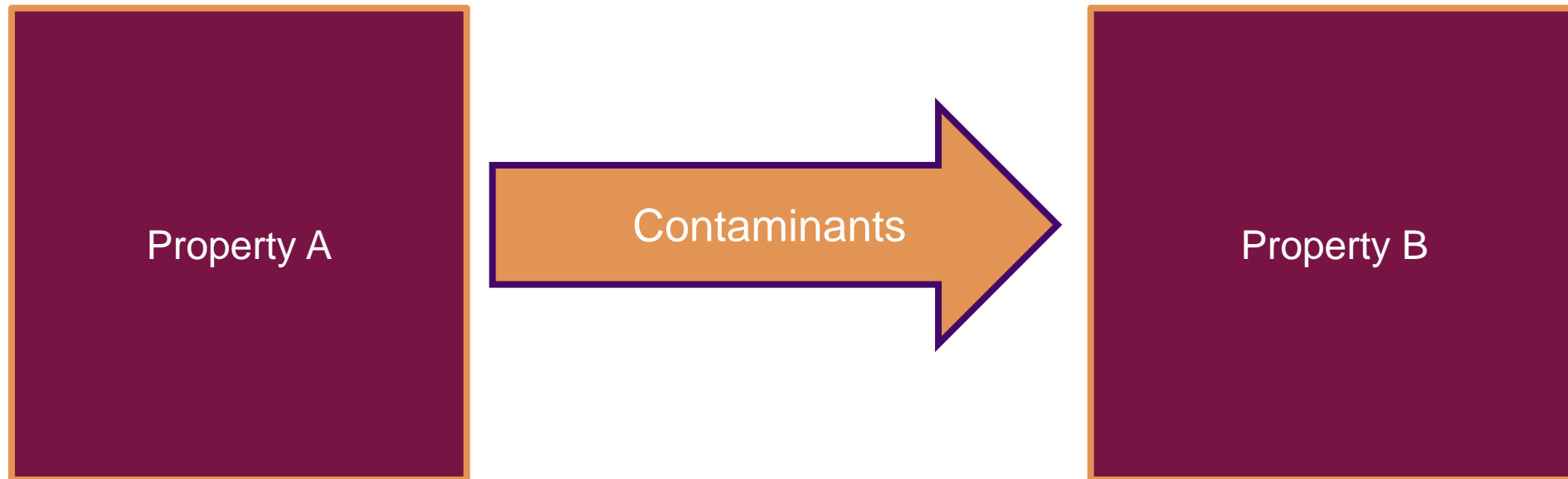
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1. What are the basic facts?
2. What are the claims?
3. What are the anticipated defenses?
4. Can you achieve finality and, if so, how?
5. What is the status of insurance, indemnity, and contribution?

# Hypothetical for illustrative purposes

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- Property A now owned by Newco
- Prior owner of Property A was manufacturer that released chemicals in the 1960s and 1970s



# What are the basic facts?

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**What contaminants of concern (COCs) are at issue**



**Have COCs moved from Property A to Property B**  
*Or are COCs threatening to move there*

# How and Where did the COCs migrate?

## Where are the COCs now

- Nearby residential community
- Water body
- Other

## How did the COCs get there

- air stack emissions
- surface dust blowing
- surface water runoff
- groundwater migration
- storm drains/sewers
- or something else

# Other basic facts to know

## Migration direction

- Which way does groundwater or surface water flow
- What is the prevailing wind direction

## Nature of the chemical at issue

- Does it biodegrade
- Is it a 'forever' chemical or an otherwise persistent chemical

# Other basic facts to know

Are there human exposure routes

- Is drinking water involved
- Is vapor intrusion a concern
- Are people exposed on the ground surface

What is the level of toxicity

# What are the claims?

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WHAT IS  
BEING CLAIMED?



BASIS OF LIABILITY  
(STRICT OR  
FAULT-BASED)



IS CLAIM PURSUED BY  
STATUTE OR COMMON  
LAW OR BOTH

# What can be sought from these claims?

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- Actual damages
- Penalties
- Remediation cost reimbursement
- Punitive damages
- Injunctive relief (cleanup to occur or medical monitoring)
- Attorneys' fees

# What are the anticipated defenses?

- My client only contributed a small quantity
- My client contributed a lot by volume but most of it was not toxic
- My client is not the legal successor of the entity at issue
- Any special CERCLA (Superfund) defenses
  - E.g., bona fide prospective purchaser
- Statute of limitations
- Coming to the nuisance
- Federally permitted release
- Other

***Also consider:***

*Implications of joint and several vs several liability*

# Will a settlement achieve finality?

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WILL OR DOES THE  
SETTLEMENT INCLUDE  
A “REOPENER”



WILL THE SETTLEMENT  
YIELD CONTRIBUTION  
PROTECTION



CAN THERE BE  
FURTHER LITIGATION

# Can there be further litigation

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Natural Resource  
Damage claims

Private property owner  
claims separate from  
government claims

- Property damage
- Bodily injury

Citizen suit claims

***A good place to manage client expectations!***

# What is the status of insurance, indemnity, and contribution?

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These issues have one point:

**Can you get someone else to pay?**

The concepts are complex.



# Insurance

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- Environmental lawsuits involving releases from decades ago:
  - Need to look for old policies
- Are any older policies triggered
  - Incidents, releases or leaks during the policy period

# Insurance

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- Pollution exclusion clause (depends on timeframe)
  - None (older policies)
  - “Sudden and accidental”
  - Absolute pollution exclusion
- Other policy exclusions

# Insurance

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- Duty to defend vs duty to indemnify
  - Why is this important in environmental cases
- Does the policy erode
- Excess policies
- Allocation among policies
  - “All sums” vs pro rata
- Policies *providing* pollution coverage
- Notice to carrier

# Contractual Indemnity

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Not in the insurance context

Was there a prior purchase and sale agreement

Was there a commercial lease with tenant undertaking obligations in the event of a release by tenant

# Contribution

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CERCLA  
(Superfund)  
contribution  
addressed  
by statute

Common law  
contribution

**Can be very complex!**

# Further considerations *in preparing for a mediation*

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## What if a settlement not reached

- Best alternative if litigated
- Worst alternative if litigated
- Costs for both (attorneys' fees and damages/remediation costs ranges)

## Why do these calculations before mediation?

- So you have something in which to compare offers

# LAW 360 Article on this Topic (Links)

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[Ed Cohen Explores Key Questions for Environmental Dispute Mediation | Thompson Coburn LLP](#)



[Key Questions When Mediating Environmental Disputes - Law360](#)

# QUESTIONS

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