Checklist for Counsel Preparing to Mediate an Environmental Dispute

Washington University School of Law

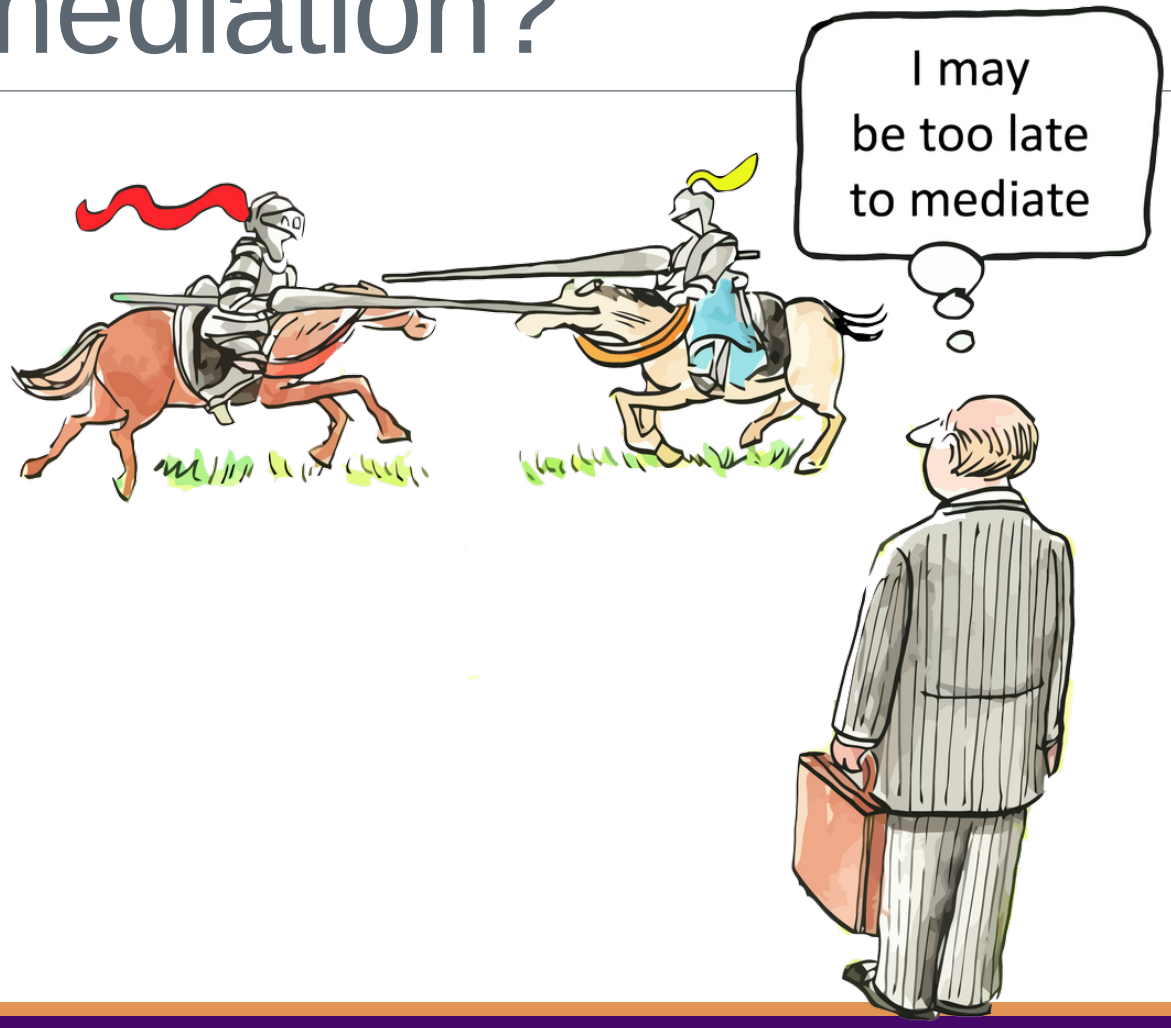
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What is mediation?



Purpose of this Checklist

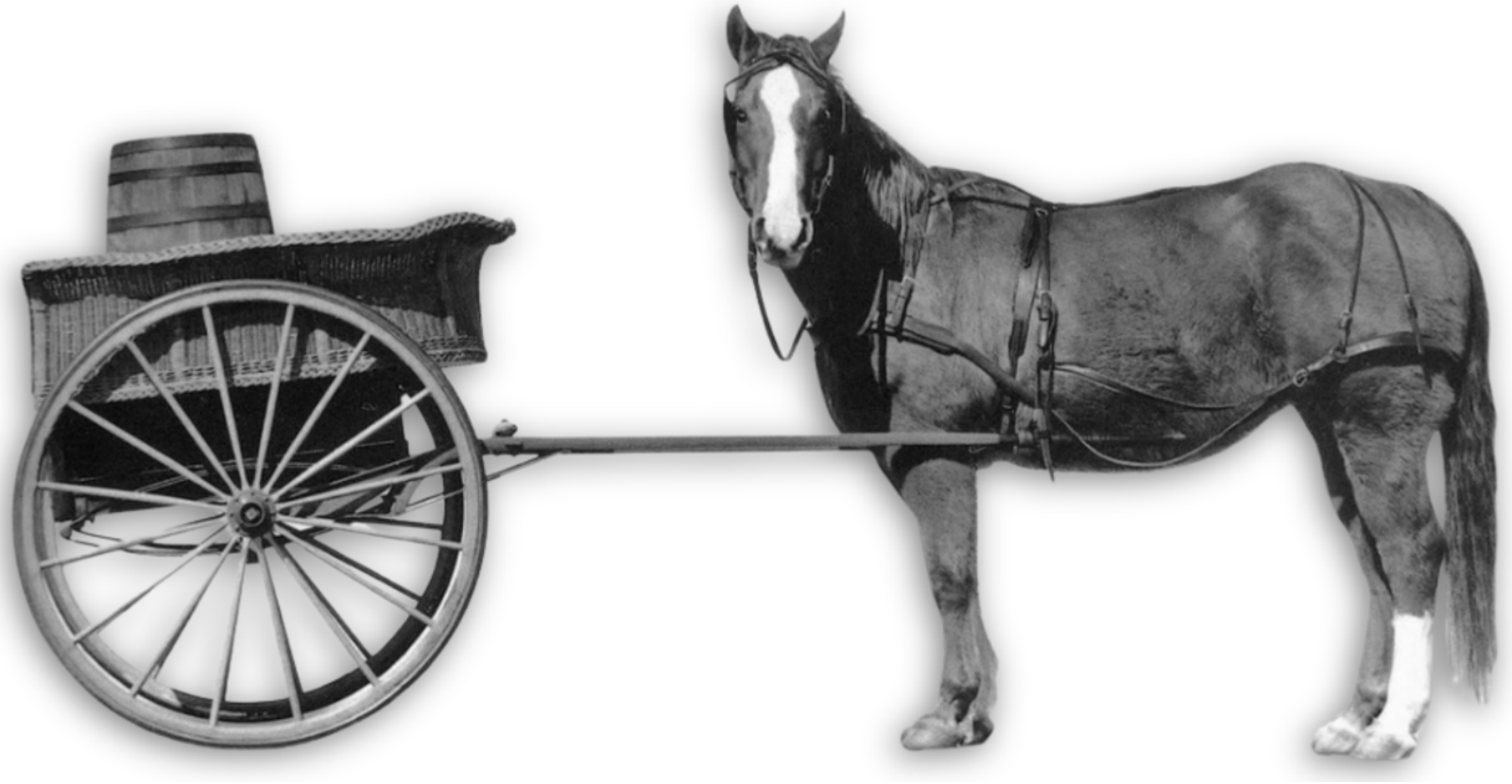
- Help prepare counsel for an environmental mediation
- Serve as a “double check” for considering likely issues



Environmental Mediations: Same or Different than Others?



Why May Environmental Mediations Occur *Before* Discovery?



Why May Environmental Mediations Occur Before Discovery?

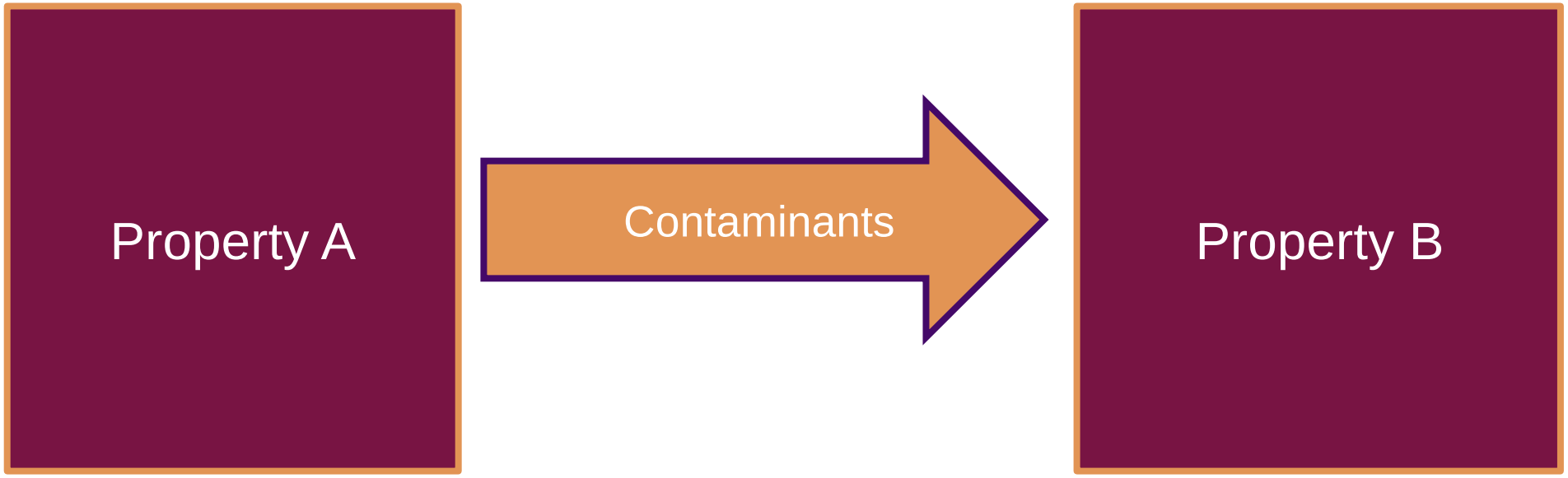
- Cost of litigating environmental disputes
- Time devoted to litigation vs time devoted to addressing the issue
- Creation of evidence that may not be helpful or necessary in the long run (the “playing chicken” approach)
- Cost of litigating environmental disputes (repeated on purpose!)

Key issues that are often front and center

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

- 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?



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?



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?

- 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?



WILL OR DOES THE SETTLEMENT INCLUDE A “REOPENER”



WILL THE SETTLEMENT YIELD CONTRIBUTION PROTECTION



CAN THERE BE FURTHER LITIGATION

Can there be further litigation

Natural Resource Damage claims	Private property owner claims separate from government claims	Citizen suit claims
	• Property damage • Bodily injury	

A good place to manage client expectations!

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

These issues have one point:

Can you get someone else to pay?



The concepts are complex.

Insurance

- 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

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

- Other policy exclusions

Insurance

- 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

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

CERCLA (Superfund) contribution addressed by statute

Common law contribution

Can be very complex!

Further considerations *in preparing for* a mediation

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

Further considerations in preparing for a mediation

- Need to know whether to settle or walk away from the offer at mediation.
- Need to know your client's BATNA (best alternative to a negotiated agreement) and
  - Helpful to know your WATNA (worst alternative to a negotiated agreement)

Remember: These take time to assess for complex matters!

LAW 360 Article on this Topic (Links)



Key Questions When Mediating Environmental Disputes - Law360



Ed Cohen Explores Key Questions for Environmental Dispute Mediation | Thompson Coburn LLP



The Strategic Use of Settlement Counsel: When is the Juice Worth the Squeeze?

QUESTIONS





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