

Environmental Law NEWS

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Editor's Note...

by *Alexander "Sandy" Crockett*

This jumbo issue of *Environmental Law News* is packed full of interesting articles from across a wide spectrum of environmental law. The issue opens with an article presenting a series of four commentaries on how California will need to adjust its approach to water management in order to adapt to the realities of climate change, which include major changes in the supply and timing of water flowing through the state's rivers and reservoirs. The second article provides an introduction to renewable energy development projects in Indian country, along with some observations on what needs to be done to promote worthy projects while protecting important Indian cultural resources. We then move on to a discussion of California's Low Carbon Fuel Standard and the legal challenges that have been brought against it, which are now pending before the Ninth Circuit and raise important constitutional issues that could have major ramifications for how California and other states approach greenhouse gas regulation. Next up is a retrospective on the highly successful Marine Life Protection Act Initiative, which was a groundbreaking collaborative planning process that brought together diverse stakeholders from throughout California's coastal regions to develop a new set of rules for the state's Marine Protected Areas. This is followed by a discussion of the recent emergence of complex multi-party toxic tort and property damage cases as a major area of litigation in California, with some practical insights into the issues that arise when litigating these cases. The final article discusses how to successfully use negotiation as a means of resolving environmental litigation, presenting the perspectives of four environmental practitioners with a great deal of negotiating experience representing diverse interests in environmental disputes, as well as those of an experienced mediation neutral.

The articles featured in this issue were developed primarily out of presentations from last fall's Environmental Law Conference at Yosemite®, and they showcase the wide range of the interesting and insightful topics that the Environmental Law Section presents at the conference each year.

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The Art of the Deal: Strategies for Successful Negotiation in Environmental Cases

by Danielle Teeters,^{*} Thomas M. Donnelly,[†] Letitia Moore,[‡]

Robert “Perl” Perlmutter,[§] and Don Person^{**}

[Editor’s Note: This article examines negotiation as a means of resolving environmental litigation. Four practicing attorneys in the field of environmental litigation, Danielle Teeters with Kronick Moskovitz Tiedemann & Girard, Thomas M. Donnelly with Jones Day, Letitia Moore with EPA, and Robert “Perl” Perlmutter with Shute Mihaly & Weinberger, offer their thoughts on the successful negotiation of environmental cases and provide insight into how they approach difficult issues that inevitably pop up during the negotiation process. The four represent business, governmental agency, and private and non-profit community organization clients, and their perspectives span a broad spectrum.¹ To round out the discussion, Don Person, a neutral from JAMS in Sacramento, adds some thoughts of his own from his years of conducting environmental mediations. The article is based on a presentation by four of the authors at the 2012 Environmental Law Conference at Yosemite[®].]

NEGOTIATION: WHAT IS IT AND WHO DOES IT?

By Danielle Teeters



Danielle Teeters

A quick survey of online dictionaries shows that there are many definitions for the word negotiation:² the reaching of agreement through discussion and compromise; a give-and-take discussion or conference in an attempt to reach an agreement or settle a dispute; a deliberation, discussion or conference upon the terms of a proposed agreement. Quite obviously,

all include the end goal of reaching an agreement. But what does the act of negotiating look like?

Negotiations are not just lawyerly tools used to reach complex agreements—ask any parent in the midst of negotiating with a four-year-old to eat broccoli in exchange for extra dessert. Hopefully most lawyers are more adept negotiators than a vegetable-fearing toddler. Here we focus on negotiations used to resolve cases in lieu of judicial determination. Whether you are just out of law

school or your bar number has only five digits, you know that the key to a successful negotiation is preparation.

Preparation for Negotiation

Preparation for negotiation is imperative. It means examining and analyzing the facts and law of the case, consulting with and preparing the client, and approaching the opposing party to assess their willingness to participate in negotiations. The complex nature of environmental litigation requires those practicing in the field to go beyond the usual preparation that takes a detailed look at the facts and law. In environmental litigation, preparation for substantive negotiations often entails the use of scientific experts, field studies and subsequent reports—all which can cause delays by months if not years.

The preparation process also includes determining what information you will share with the other side. In the book *Getting to Yes: Negotiating Agreement Without Giving In*, the authors describe effective negotiation as a process of mutual education.³ This presents a strategic conundrum inherent in all negotiations—how much education is sufficient to get the best settlement for your client, while not giving away the house if trial becomes necessary? What, if any, information should you hold back? Not surprisingly, making this determination becomes harder in cases involving layers of scientific data and reports.

Other Factors in Environmental Cases

What other factors make negotiations in an environmental case different from other litigation? One factor is the seemingly polarizing views of the parties. Corporations, environmental and community groups, and governmental agencies often have different and competing interests. They also often have different perspectives regarding what is in the best interest of the public and the environment when it comes to policies and/or specific projects, as well as who should represent those interests. Some take on the role of advocating for the environment or resources. Regardless of the views of each faction, it is easy to see how negotiating a complex environmental case with these polarizing positions is difficult at best.

Moreover, environmental litigation can involve more than two or three parties—often a lot more. By way of one example, the CERCLA litigation involving the alleged groundwater contamination in the area of the City of Rialto involves more than 40 separately named parties. Lawsuits were filed in federal and state court and petitions were filed with the Regional Water Quality Control Board—all regarding the same alleged contamination. Settlement negotiations between the parties in the litigation have taken years to come to fruition.

Another factor that must be considered is that almost all environmental litigation involves a governmental agency of some type. Dealing with a governmental agency in negotiations can be frustrating to someone who has never had that experience. Negotiations with environmental agencies at the local, state and federal level can get bogged down due to the various layers of bureaucracy that must be cleared when an agreement is reached. Letitia Moore, an attorney with EPA, offers further insight into these and other issues below.

Environmental negotiations are markedly different than negotiations conducted in other areas of practice. The discussions provided in this article offer ideas and advice regarding how to deal with the differences.

SUCCESS IN ENVIRONMENTAL NEGOTIATIONS: THE GOVERNMENT ATTORNEY PERSPECTIVE

By Letitia D. Moore



Letitia Moore

Environmental negotiations can involve a variety of topics, including permitting, cleanup, mitigation, compliance, and penalties. These negotiations can arise in real estate, bankruptcy, mergers and acquisitions, and regulatory transactions. They are factually rich and oftentimes involve multiple parties with disparate interests. Such negotiations can include statutory and regulatory

imperatives, and complex jurisdictional, technical and financial issues. Success requires a command of the laws, facts, issues, and the many competing interests. A negotiation is more than a single meeting; it is a series of conversations between multiple parties trying to acquire a benefit, avoid some hardship, or both.

The most difficult negotiations are with parties who want something you cannot provide. Whether the issue is payment terms, releases, confidentiality, permit conditions, or compliance schedules, if the item is not negotiable then agreement will be difficult. Every

party, every client, has non-negotiable items. Gather the information necessary to identify real options and viable alternatives. That information may also give you the tools to manage the other party's expectations. Thorough preparation and careful listening can help you find the path through difficult negotiations.

Preparation is Essential. Never start a negotiation until you are prepared. You should know the issues from all perspectives. A strong working knowledge of the law, facts, and circumstances associated with your negotiation will make you a more effective negotiator. Master the law, including statutory and regulatory requirements. Familiarize yourself with the process and the players. Carefully and objectively assess the strengths and weaknesses of your client's position. Discuss all the options and alternatives with your client, including both the best- and worst-case scenarios.

Listen Strategically. Use active listening skills during negotiations to acquire information on the parties' interests, goals and concerns. Look at the speaker, write down key words used by the speaker, and ask questions of the speaker (especially questions that prompt the speaker to share more information). Allow the speaker to finish the statement, the thought and the presentation. Focus on the message being sent rather than the message you were anticipating, and pay attention to verbal and non-verbal clues. What you learn from listening to a party will help you communicate more effectively with that party. Understanding the other parties' interests, goals and concerns will help you find the common ground and pressure points that can drive agreement.

Success for the Client. Understanding your client's goals, interests and concerns is essential for a successful negotiation. The same information-gathering and communication skills necessary for negotiating on behalf of your client are needed for working with your client to prepare for negotiations. Know what your client needs and what your client will not accept. Educate your client about what can be accomplished and what cannot. Keep the lines of communication with your client open and up-to-date. Negotiations, particularly environmental negotiations, can take time. Interests and concerns can change over time. Check in regularly with your client; your negotiation is not successful if your client will not agree to what you negotiated.

Public Agencies and Negotiations. Public agencies present particular challenges in negotiations. Every government attorney walks into a negotiation with the weight and the power, and the obligations and limitations, of their agency. The government attorney in your environmental negotiation may represent a city, county, special-district, state, federal or tribal agency,

acting as a property owner, regulator, or permitting or enforcement body. For the government attorney, the client's interests that define a successful negotiation are complicated and multi-faceted.

Every public agency has obligations to the public that must be met and an ultimate decisionmaker. That ultimate decisionmaker may be an elected or appointed board, a political appointee, or a career public servant. The task of identifying the government attorney's client's interests, goals and concerns can be gargantuan. Government clients have public interests, agency mission, and organizational policies and procedures to take into consideration. These can translate into open-meeting and public disclosure and comment obligations, as well as all manner of requirements on how and when activities and agreements can be completed. For every public agency, there will be more than one person or layer of management to satisfy for final agency action. To be effective in negotiating with a public agency, you need to understand the structure and goals of the agency.

The Role of the Government Attorney. In representing a public agency, the government attorney must identify the agency's public obligations, interests and goals, as well as the organizational policies and procedures that set the parameters for the negotiation. There will be legal requirements, constituent and elected-official concerns, and short-term and long-term goals. For the public agency client, long-term goals, specific public interests, concerns about precedent, or broader policy preferences may be more important in defining success than the specific transaction in your negotiation. Environmental issues can often present a variety of solutions, but the many obligations and limitations on the public agency may constrain the viable options. The lawyer negotiating with a government attorney should understand the complex public client matrix. Failing to appreciate those complexities can make for difficult negotiations—negotiations that seek unattainable goals.

When negotiating with a government attorney, ask questions about the agency's public obligations, interests, goals, and concerns. Knowing these constraints will help inform your strategy for a successful negotiation. Ask about the public agency's specific concerns. Is the greater concern the impact of the proposed action, the nature of the mitigation, or the process for identifying impacts or mitigation? In a permitting activity, is the greater concern whether to issue the permit, the conditions that will be imposed in the permit, community acceptance of the project, or environmental compliance once the project commences operation? In an enforcement matter, is the dominant interest industry behavior, specific compliance (injunctive relief), penalties (deterrence), or

community relations? One interest may be dominant, but usually there are multiple interests at play. You need to know those interests in order to determine how to accommodate them and move your negotiation to closure. You need to know what is possible and what is not. Also, ask questions about process and timing, including what will be necessary procedurally to conclude and document what is negotiated. Ask about the time needed to close the deal once agreement is reached, including complying with any public comment requirements. Ask about the process or options if no agreement is reached.

Knowledge Is Key. In every case, with private parties or public agencies, appreciating the other party's interests, goals and concerns will help you identify both the opportunities for agreement and any potential obstacles. Concentrate on the parties' respective interests and avoid focusing narrowly on parties' negotiating positions. Negotiating with the government is not impossible, nor any more uncertain than negotiating with a corporation. Like any organization, both public agencies and corporations have multiple layers of management, short-term and long-term interests, and internal structural mandates. Take the time to know the players, the interests, and the process in order to give yourself the keys to a successful negotiation.

PRIVATE ENVIRONMENTAL ENFORCERS: THE NGO'S PERSPECTIVE

By Robert "Perl" Perlmutter



*Robert "Perl"
Perlmutter*

Private "environmental enforcers" include a broad array of nongovernmental organizations ("NGOs"), ranging from well-established national environmental groups with far-reaching environmental mandates to informal and unincorporated community associations formed in response to a particular development project, issue, or cause. Whether their focus is broad or narrow, these groups often have tremendous passion for their causes. Both their own attorneys, and attorneys representing the negotiating partners of such groups, need to respect that passion and recognize the constraints and opportunities it creates for a negotiated resolution.

Listen To and Understand Key Decisionmakers. Other contributors to this article have emphasized the need for attorneys representing business and governmental organizations to understand their own client's goals,

interests, and motivations. They have also emphasized the need for careful preparation prior to any negotiations. Both of these admonitions are, of course, equally true for attorneys representing private enforcers. Particularly with ad hoc groups formed around a specific project or cause—who may never have retained counsel before—the attorney also needs to take steps to educate his or her client about the limitations of litigation, the strengths and weaknesses of their case, and the possibility that their attorney may recommend that the group settle for something well short of their goals. Otherwise, an attorney's candid advice about the merits of a case and the benefits of settlement may be perceived, at least by some members of the group, as the attorney's lack of support for their cause.

It is also important for the attorneys representing the business and governmental stakeholders at the table to recognize the goals, interests, and motivations of the decisionmakers for NGO parties. Some of these individuals may have strong doubts about the biases and trustworthiness of their business and government counterparts. They may also be skeptical about explanations that a proposed settlement is simply too expensive or otherwise infeasible. Recognizing these doubts and concerns, and being open to truly probe what is feasible and to demonstrate what is not, can often go a long way to building the trust necessary to resolve a dispute through negotiation.

Relationship With Governmental Entities. Some private environmental enforcers act because they believe that governmental regulators are not doing their jobs properly. Others view their role as supplementing or supporting governmental regulators who may not have sufficient resources or political support to bring enforcement actions. Correspondingly, some governmental regulators and officials may resent private enforcement by NGOs, while others may welcome it, whether explicitly when they are acting as co-enforcers or tacitly in other circumstances. A nuanced understanding of the relationship between private enforcers and governmental agencies can be critical to effective environmental negotiation. In addition, as Letitia Moore discusses in her portion of the article, many governmental agencies are subject to open-meeting and public-disclosure obligations. The negotiating parties will need to take into account the various ways in which private enforcers may wish to participate in these processes.

Timing of Negotiations. Obviously, there can be no fixed rule for when to commence negotiations. That said, I typically counsel clients to begin the process as soon as possible. In the land use context, that may sometimes be well before a specific project is approved. Perhaps the most well-known example of this approach is the 2008 Tejon Ranch agreement. This

settlement—which resulted in preservation of nearly 90 percent of the 270,000-acre Tejon Ranch—has been described as one of the most significant conservation achievements in California history. The two-plus year negotiation process was commenced and completed before a specific development project was approved, and it resulted in an agreement by five prominent environmental groups not to oppose subsequent project proposals. This approach will not work in every case, but the Tejon Ranch model has been cited or used in a number of contexts.⁴

Another important factor in determining the timing of negotiations is the payment of attorneys fees under the private attorney general doctrine or other fee-shifting statutes.⁵ In most private enforcement cases, the payment of the private enforcer's attorneys fees and expenses will be a non-negotiable item. If a case settles early on, those fees may be minimal. But if it does not settle until after extensive litigation, those fees may add significantly to the cost of a settlement.

Support For or Non-Opposition To Project. A recurring issue that often arises in environmental disputes, particularly in the land use context, is whether the NGO will agree to support, or at least not to oppose, a specific project proposal requiring further governmental approvals. Some groups are far more willing to consider such terms than others. If this is truly a non-starter for one side or the other, it may be necessary to make that known from the outset. I have also been involved in negotiations where counsel for a defendant or real party in interest will request, as a condition of settlement, that the NGO's attorney agree not to represent any *other* party in challenging future approvals related to the dispute. Such requests appear to run afoul of Rule 1-500 of the California Rules of Professional Conduct.

Resources and Funding. Private environmental enforcers generally rely on donations and endowments to provide the financial resources necessary to pursue their causes. Sources can include 501(c)(3) charitable contributions, grants and bequests from interested parties, contributions of labor and time, and general and specific fund-raising. As noted above, recovery of attorneys' fees and costs pursuant to fee-shifting statutes is often an essential component to any negotiated resolution. Where private mediation is involved, and the case also involves a business defendant or real party in interest, the private enforcer may insist that this party pay the full cost of the mediator's fee.⁶ Otherwise, the group may refuse to participate in private mediation out of concern that the opposing party, with its disproportionate financial resources, may simply be engaging in mediation as a ruse to drain the group's resources. For similar reasons, some NGOs may insist that the opposing private party pay for the

costs of the NGO's attorney to participate in settlement discussions, regardless of the outcome. While this practice is relatively rare, it may be in the interests of both sides in appropriate circumstances.

While each dispute raises its own unique issues and challenges, advance preparation, carefully listening to your negotiating partners, and attention to the observations raised by the other contributors to this article should enhance the prospects for a successful negotiated resolution.

SUCCESS IN ENVIRONMENTAL NEGOTIATIONS— THE BUSINESS ATTORNEY PERSPECTIVE

By Thomas M. Donnelly



Thomas M. Donnelly

My comments will focus on what business attorneys—who typically represent defendants/respondents in environmental litigation and regulatory proceedings—should keep in mind as they attempt to settle an environmental matter.

Deciding When and How to Initiate Negotiations.

The substantial fees and costs of litigation, and the risks of an adverse outcome at trial, demand an early evaluation—and regular re-evaluation—of likely litigation outcomes and settlement options. The business attorney should objectively assess the claim at the outset. This means that the attorney must gather and evaluate the relevant facts, understand the applicable law, and consult with technical experts, ideally within the first couple of weeks of being retained, so the attorney can then advise his/her client as to whether the claim is worth litigating or should be settled. The answer is not always clear, especially in environmental matters, where there often are complex scientific issues (such as determining the source(s) and extent of the contamination, what remedial actions are necessary, and how much they will cost). But that just means the attorney must continually gather and evaluate the facts and law and revisit the settlement evaluation with his/her client.

Once the attorney has a good handle on the facts and law, and has completed at least the initial litigation and settlement evaluation, he/she can—and should (with the client's consent)—initiate settlement discussions. It should not matter whether the business attorney believes his/her client has a strong or weak case; the attorney should still explore settlement options with opposing

counsel. The stronger the case, the more the attorney can demand in settlement, and vice versa. These discussions can begin at any stage of the litigation (and even pre-litigation), so long as the attorney has completed at least the initial litigation and settlement evaluation.

As for how to initiate settlement negotiations, in my experience, a negotiation should begin with a phone call to opposing counsel to discuss and agree upon a process. The attorneys should agree and confirm in writing that their discussions and exchange of information are settlement-confidential under all applicable laws. The attorneys (usually without their clients) should meet face-to-face to discuss the key facts and law, see where there is potential agreement, and then try to narrow the issues in dispute. If the attorneys are making good progress, they can continue the bilateral negotiations through a combination of letter exchanges and meetings (which, at this point, typically would include client representatives). If they reach an impasse, they can seek assistance from a third-party neutral. It may also be necessary to conduct formal discovery and bring dispositive motions before the parties can narrow the issues in dispute and reach a settlement. But it is important that the attorneys continue to look for ways to resolve the claims short of full-blown litigation and trial.

Identifying and Pursuing Insurance for Defense and Indemnity.

Another critical early task for the business attorney is to collect and evaluate his/her client's insurance policies. Typically, pre-1986 comprehensive general liability ("CGL") policies provide at least limited coverage for pollution claims. Many businesses also have purchased policies that specifically cover environmental claims. The business attorney should tender the claim to all insurers who potentially may owe a duty to defend and/or indemnify. The insurer's duty to defend under standard CGL policies is quite broad in California. Once an insurer has to defend a claim, it is more likely to want to settle the claim (and thus participate in funding the settlement).

Preparing for Substantive Negotiations, and Understanding Client's Interests and Needs.

In preparation for substantive settlement negotiations, the business attorney must do more than master the key facts and law. The attorney must also prepare his/her client for the negotiations by revisiting the litigation and settlement assessment, noting what fees and costs have already been incurred and likely will be incurred absent a settlement, and presenting a range of potential settlement scenarios. The attorney should identify the critical decisionmakers and decision-influencers on each side (including those of each side's insurers), and ensure that those persons either attend the negotiation sessions or send a delegate with complete settlement authority.

The attorney should also identify and understand his/her client's interests and needs, as well as the other side's interests and needs. For example, the business defendant may be reluctant to settle, even if litigation will be much more costly, if the settlement creates the perception that the business is a deep pocket willing to settle even marginal claims. If the business has faced many similar claims, it may want to pursue a favorable court ruling on a dispositive issue that it can use in defense of this and future claims. On the other hand, it may be important to the business defendant to maintain good relations with a government plaintiff, especially when that government plaintiff is a permitting authority. Understanding the client's special needs and interests will guide the attorney in deciding which battles to fight and where (and how far) to compromise.

Documenting the Settlement. Once a settlement in principle is reached, it is very important that the business attorney evaluate and discuss with his/her client what form the settlement agreement should take. While a private agreement can be kept confidential, it will only bind the parties to the agreement. A consent decree or judgment, on the other hand, entered by a court following a noticed motion, may bind third parties (such as other potential plaintiffs), either by statute (e.g., CERCLA's contribution protection provision⁷) or under the doctrines of *res judicata* and collateral estoppel.

SUCCESS IN ENVIRONMENTAL NEGOTIATIONS—THE NEUTRAL'S PERSPECTIVE.

By Don Person



Don Person

Governmental regulators, private environmental enforcers, property owners, businesspeople, and developers. These are groups with widely divergent interests and objectives: governmental enforcement of environmental law and policy; private enforcement when the government is perceived as failing to act or as acting improperly; and enforcement of individual property, development and other rights. Environmental negotiation among these groups presents a challenge not faced in other negotiations. There is much more involved than simply pushing money back and forth across the table. Yet environmental disputes can be settled. What skills and tactics can be effectively employed in these negotiations?

The Negotiating System Needs to Respect the Parties. We expect parties to respect our legal system and its controls. But in negotiations, even if court ordered, the parties remain in control of the outcomes. Therefore, the parties generally need a negotiating process that respects them and their value systems. Often this can be achieved with relatively few rules of engagement other than confidentiality. This is especially important in environmental negotiation.

Adjudication and Negotiation. Resolution by trial and resolution by negotiation have some similarities. In both contexts, your intent is to influence a decision in the manner most favorable to your client. You present evidence and argument in support of your cause, and you try to mitigate evidence and argument presented by the other side—formally at trial and informally in negotiation. But there is a huge difference. At trial, you receive (hopefully) an unbiased decision from a neutral perspective. In negotiation, the other side's decision to settle, and on what terms, will be made by people who should be expected to be biased against you and your cause. Therefore, the same tactics and procedures generally will not work.

Moreover, in the negotiating process, your clients will be biased in favor of your presentation. So it is also important is to ensure that your clients are not swayed by the eloquence of your negotiating effort. As each of my colleagues has emphasized, preparation is a vital component of negotiation. Understanding and managing your clients' expectations, and their familiarity and comfort with the negotiating process, are critical.

Listen Early and Listen a Lot. Listening and learning are important aspects of any negotiating process. Listening and learning are how we acquire information so we can optimize our efforts. Effective negotiation involves studying our negotiating partners and learning what arguments will be persuasive to them and how best to make those arguments. Objective persuasion is more suited to presentation to a neutral decisionmaker in a trial setting. Subjective persuasion is the name of the game in negotiation. Listening and learning are especially critical in environmental negotiation due to the widely divergent interests of the parties.

My colleagues are all skilled attorneys and negotiators and have shared their negotiating insights and advice in their contributions to this article. Common threads include the need for thorough preparation and to listen carefully and attentively. Additional comments applicable to all sides in any environmental negotiation include the detailed discussions by Tom Donnelly and Perl Perlmutter of knowing when and how to effectively commence negotiation, Letitia Moore's advice on

understanding client goals and objectives, and Danielle Teeters' discussion of the difficulties inherent in deciding what information to share and what information to withhold in the process.

But differences among the respective interests these attorneys represent are also apparent in their comments. Danielle Teeters has discussed the unique problems that arise when dealing with large numbers of parties and multi-layered governmental agencies. Letitia Moore has explained the frustration and futility in dealing with a side that does not understand the framework of law and policies that govern the conduct of governmental entities, and thus asks for outcomes that are not possible under that framework. Perl Perlmutter has highlighted the need to understand the passion, motivation and financial constraints of private enforcers, as well as their potential distrust of governmental and business interests. Tom Donnelly has discussed review and engagement of available insurance coverage, and concerns about possible precedent-setting deep-pocket perceptions and relations with governmental entities.

Appreciating and respecting my colleagues' valuable comments and advice should help make negotiating with the respective interests they represent more productive and meaningful. To do so requires paying careful attention to what they have to say. My colleagues will be fully prepared for their environmental negotiations. Anyone negotiating with them should be equally well prepared.

Moreover, the client representatives in a negotiation need as much attention as the attorneys—or even more—especially if they are the settlement decisionmakers. Each person brings his or her own particular set of values and skills to the process. The parties need to understand the legal framework of the dispute and their respective strengths and weaknesses, but they should not have to sit through excessive debate among counsel over the legal aspects of the case, which is probably best left to law-and-motion and trial practice. Parties tend to be result- and outcome-oriented. Understanding their legitimate settlement needs is crucial. And this requires paying careful attention to what they have to say.

Take Negotiating Control When Appropriate. Sometimes, parties are so invested in and impassioned about their causes that they do not understand their negotiating goals, or they lose sight of those goals. In addition, parties' attention spans can become diminished and they can lose focus and concentration in tedious and lengthy negotiations. When these things happen, the parties need help. This assistance can and should be provided by a trusted neutral or lead negotiator.

Negotiation theorists spend a lot of time and attention discussing facilitative and evaluative mediator and negotiator styles. In my opinion, that time and attention is largely unproductive. A good mediator or negotiator has to know how and when to employ both styles. Active listening allows one to learn as much as possible about the competing persons, their personalities, and their respective positions. It also gives an opportunity to build trust and confidence. But few parties would settle if that were the extent of the negotiating process. At the appropriate time depending on the negotiating participants and the case, and armed with information gained in the listening and credibility-building phase, the mediator or lead negotiator can and should take charge in a respectful and effective manner. Doing so should not be irreversible, however. Effective negotiators must be able to shift back and forth seamlessly in a manner that minimizes or manages tension, as appropriate.

Developing and Furthering Negotiating Goals and Minimizing Distractions. It is usually not critically important in environmental negotiations for the parties to adjust their personalities and attitudes. Differences between the parties should be respected and accommodated, although they should not be allowed to frustrate the goals of negotiation. The ability to recognize optimal negotiating results, to compare those results to the possible range of outcomes at trial (and to consider the economic and other costs of obtaining a trial outcomes), and to value and accept negotiated results where preferable, are what are important. (And as mentioned by Tom Donnelly, ongoing relationships between parties can sometimes be important as well.) Primary focus should be on these goals. Many parties need venting and validation relief in order to manage their feelings and emotions. This can be an important and valuable part of the negotiating process, but it should usually be done in a secure and private setting.

Settlement Documentation. Settlement documentation should be completed as quickly as possible consistent with board and other approvals. Satisfaction with the agreement, while usually high at the time of settlement, can drop off quickly as feelings and emotions manifest themselves and obscure the negotiating objectives. Moreover, steadfastly supportive friends and associates—well-intentioned but not necessarily well-informed—can have a negative influence as they learn of the settlement. Settlement satisfaction can normally be expected to re-build, but it is quite important to have a durable agreement in place to help the settlement survive any temporary satisfaction dip.

ENDNOTES

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1. Each of the writers expresses his or her own views, and none speaks for the client(s) he or she represents.
 2. In this context the term negotiation will include negotiations that utilize a neutral.
 3. R. Fisher and W. Ury, *Getting to Yes: Negotiating Agreement Without Giving In* (1981).
 4. For a detailed account of the Tejon Ranch Agreement, and the factors contributing to its success, see Joel R. Reynolds & Damon K. Nagami, *Lines in the Sand: Contrasting Advocacy Strategies for Environmental Protection in the Twenty-First Century*, 1 UC IRVINE L. REV. 1125, 1144-56 (2001).
 5. See, e.g., Code Civ. Proc. § 1021.5 (providing for payment of the prevailing party’s attorneys fees by the losing party where the litigation has conferred a significant benefit on the general public (among other requirements)).
 6. Where only the government is on the other side, this may not be an option.
 7. Section 113(f)(2) of the Comprehensive Environmental Response, Contribution, and Liability Act (“CERCLA”, also commonly referred to as the “Superfund” law), provides that “[a] party that has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement.” 42 U.S.C. § 9613(f)(2); see also *id.* §§ 9622(g)(5) & (h)(4) (similar contribution protection provisions for *de minimis* and administrative settlements).