

METROPOLITAN WATER DISTRICT V. CITY OF RIVERPORT

A SIMULATED MEDIATION EXERCISE

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Submission Description: This simulation is designed to challenge the mediator in aiding the parties to move from adversarial position-based bargaining over distributive issues, to cooperative interest-based bargaining over broader issues of importance to both parties. It would be particularly appropriate for courses in public policy dispute resolution, but the issue presented is in fact rather generic, and thus appropriate for a dispute resolution survey course or a general course in mediation.

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METROPOLITAN WATER DISTRICT V. CITY OF RIVERPORT

I. TEACHING NOTES

a. Introduction

This simulation exercise involves the mediation of a legal dispute between two local government agencies with different functions but overlapping geographic jurisdictions. In this respect, it is perhaps not typical of the disputes most frequently encountered by mediators. However, the fact that they have a significant ongoing relationship with each other is common to many types of disputes. Moreover, the focus of this simulation—getting the parties to move from their adversarial rights-oriented positions to consider cooperative deal-making—is an important issue in many court-connected mediations, and perhaps most other disputes as well. Much of the prescriptive literature on dispute resolution recommends that the mediator make such an effort, but the difficulty of the task remains.

Of course, an actual dispute of the kind described here may raise a host of other issues that are not the focus in this exercise. Some examples include the absence of the decision-makers from the mediation, or the possibility of applying systems design principles to develop a way to resolve future disputes between the parties. The simulation could easily be modified to explore these issues and others.

b. Summary of the Facts

The dispute involves two local government agencies, the City of Riverport and the Metropolitan Water District. The District owns and operates a water transportation, storage and distribution system supplying fresh drinking water to customers in Riverport, as well to much of the surrounding metropolitan area. Riverport is in the midst of a

multi-year effort to reconstruct its aging municipal sewer system. Work on the sewer project at a busy intersection required the relocation of a District water main located underground in the street right-of-way. Riverport at first agreed to pay the costs of relocation. However, after the work was completed by the District, the City refused to pay, arguing that the District was legally responsible for the costs. The District then filed a lawsuit to recover its costs. Subsequently, the City and the District agreed to try mediation.

c. Analysis: Moving Parties From Positions to Interests

This simulation is designed to challenge the mediator in aiding the parties to move from adversarial position-based bargaining over distributive issues, to cooperative interest-based bargaining over broader issues of importance to both parties. Disputing parties typically commit themselves to desired outcomes at the outset of mediation, and they justify these commitments on the basis of their respective versions of the events comprising the dispute. After a position is staked out, the usual strategy is to offer incremental concessions until a resolution, if any, is reached.¹ While a principal advantage of this approach is that it does not require a high degree of trust between the parties, position-based bargaining can easily devolve into gamesmanship and lead to stalemate.²

Parties' positions are the product of their underlying interests, and such interests, often, may be satisfied in alternative ways.³ In theory, if the parties turn their attention

¹ Edwin H. Greenebaum, *On Teaching Mediation*, 1999 J. Disp. Resol. 115, 126 (1999). Parties will frequently determine in advance just how far they will go with such concessions, i.e. their "bottom line," and if no agreement is reached before this point an impasse may result.

² *Id.*

³ *Id.* As used here, a position is the specific means settled on (at least tentatively) by a party intended to satisfy underlying interests in the context of resolving a particular dispute. In the civil litigation context,

away from positions towards their respective underlying interests, they may find a better solution to the dispute at less cost and with the possibility of preserving or enhancing their relationship.⁴ Such interest-oriented negotiations require a higher degree of trust between the parties, creating a risk of exploitation or manipulation, and critics believe the approach is not realistic in the adversarial climate of litigation.⁵

Professor Mnookin and his colleagues identify the tension between the desire for distributive gain and the opportunity for joint gains as “inherent” in negotiations aimed at resolving disputes.⁶ Depending on the character of the dispute there may be little other than distributive issues involved, but too often the parties are transfixed by legal claims and the distributive aspects of a dispute, and overlook opportunities to achieve a more satisfactory result for both parties.⁷ The more complex the dispute, the more likely the mediator will have to work fluidly to resolve issues that are primarily distributive, then have to switch to issues that present opportunities for joint gains and relationship building.⁸

The reasons that parties in mediation hold rigidly to a positional approach are often complex, presenting a tremendous challenge to the mediator even when opportunities for joint gains are manifest. Some factors suggested by the above discussion—mistrust, strategic concerns, and differing perspectives—are present in most

positions are frequently reduced to monetary claims, as money damages are the predominant form of remedy provided by the law.

⁴ *Id.*

⁵ *Id.*

⁶ ROBERT H. MNOOKIN, SCOTT R. PEPPET & ANDREW S. TULUMELLO, *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* 9 (2000).

⁷ *Id.* at 108, 224-225 (“Lawyers and clients may be so focused on demonstrating their advantage in litigation that they ignore trades—potentially outside the scope of the original dispute—that might make the parties better off.”); Greenebaum, *supra* note 1, at 126 (stating that one cost of positional bargaining is that “concealment of interests and information may lead to missed opportunities”).

⁸ MNOOKIN ET AL., *supra* note 6, at 9; *see also* Greenebaum, *supra* note 1, at 128, 130-131 (noting that complex negotiations rarely conform to a single model, and that the best mediators shift imperceptibly along a continuum of problem-solving approaches and techniques).

disputes, and much effort in mediation is directed towards dealing with them. Other factors, such as personality,⁹ or the influence of cultural and organizational interests,¹⁰ are subtler and more likely to escape the attention of the mediator and the parties.

Below, I discuss some suggestions and techniques found in the prescriptive literature as they relate to moving parties from positional bargaining to problem-solving. First, though, I should say that the simulation is structured to foster this transition. In the party instructions, each side is provided with opening positions and bottom-line positions of a monetary nature, and the lawyers on both sides believe that they have a good chance of prevailing on the ultimate legal issues.¹¹ However, the bottom lines of the parties do not overlap, and positional bargaining will eventually result in stalemate if the participants stick to their roles. At this point, they will be forced to either abandon the mediation effort, or begin to look more broadly at their underlying interests—the beginnings of a search for solutions that may involve issues beyond the strict confines of the legal dispute. As discussed in more detail below, the parties are given information suggesting a broader basis for resolving the dispute.

In sum, given the significant and ongoing relationship between the two parties in this simulation, this simulation is an example of a situation where the “truly asymmetrical interests may be less significant than the parties’ shared, interdependent, and symmetrical

⁹ With respect to the personality of lawyers, see Susan Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 Am. U. L. Rev. 1337 (1997) (summarizing research on lawyer personality traits, finding that lawyers tend to be more aggressive, adversarial, and more inclined towards the logical application of legal rules to resolve disputes and less interested in interpersonal relations, compared to the general population); see also MNOOKIN ET AL., *supra* note 6, at 167-171 (describing “mindsets” typically found among both lawyers and clients involved in disputes as “zero-sum,” “adversarial,” and “hired-gun”).

¹⁰ See, e.g., Greenebaum, *supra* note 1, at 121 (discussing the influence, on participants in mediation, of membership in various types of groups).

¹¹ Litigants tend to see disputes as distributive in nature, and to be overconfident about their chances of winning. See, e.g., MNOOKIN ET AL., *supra* note 6, at 159.

interests, if these factors are recognized.”¹² The challenge for the mediator, then, is to foster cooperative behaviors and tease out underlying interests when faced with parties entrenched in the litigation mode. But how? The first and most obvious suggestion is to anticipate that the parties may be adversarial, that they may approach the mediation as a zero-sum game, and to avoid falling into the trap of seeing the dispute the same way. In other words, the mediator should adopt a problem-solving mindset and assume (at least tentatively) that the dispute may offer opportunities for joint-gains.¹³

This problem-solving mindset also suggests a certain presence of mind during the mediation—a heightened awareness, or perhaps equanimity—that helps prevent the mediator from being caught off-guard when adversarial behavior occurs, and thus less likely to resort to reflexive beliefs and actions that essentially play-into the adversarial mindset.¹⁴ Particularly in the case of lawyer/mediators, there is the temptation to fall into the routine of traditional “hard” or positional bargaining, indicated by “a patterned give and take in which parties’ moves do not disappoint others’ expectations.”¹⁵

Unfortunately for the novice mediator, this quality of presence is more a capacity or competency, rather than merely a technique. As such, it requires education, training and discipline to develop in practice, as well as substantial mediation experience to establish it firmly in the habits of the mediator. Fully developed over time, it is implicit

¹² Greenebaum, *supra* note 1, at 128.

¹³ *See, e.g.*, MNOOKIN ET AL., *supra* note 6, at 204-206 (recommending that negotiators get their “head[s] straight” by committing themselves in advance to actively looking for problem-solving opportunities, and to resisting the temptation of responding in-kind to adversarial tactics while still taking measures to protect against exploitation).

¹⁴ *See* Greenebaum, *supra* note 1, at 122-123 (“When one is confronted with an unfamiliar problem, one is likely to look for processes to imitate, and routinized models may make problem solving feel safer.”).

¹⁵ *Id.*; *Cf.* Chris Guthrie, *The Lawyer’s Philosophical Map and the Disputant’s Perceptual Map: Impediments to Facilitative Mediation and Lawyering*, 6 Harv. Negot. L. Rev. 145 (2001) (arguing that lawyers are not likely to function effectively as “facilitative” mediators, due to their training, personality traits, and mindsets with respect to disputing).

in what Professor Greenebaum calls “artistic problem solving,” where the mediator’s interventions are “fluid” and unpremeditated.¹⁶ Development of a similar capacity may occur in the course of other training or activities, thus some students will evince this quality more readily, while others may have to grapple with it for the first time.

However, even novice mediators can greatly help their cause in dealing with adversarial mindsets by consciously anticipating them in advance, and planning strategies to disrupt the seemingly inevitable flow towards hardened positions. It will also be helpful for the mediator to be at his or her best beforehand—if, for example, he or she is stressed out and distracted by personal problems, or is sick or otherwise not feeling well—the novice mediator (and probably any mediator, for that matter) will find it more difficult to meet the challenge of adversarial behavior.

In any case, when the default routine of positional bargaining kicks in—and the mediator, having the presence of mind to see the initial thrusts and parries of the parties for what they are, sees that they have proven unfruitful—what then? Professor Mnookin and his colleagues suggest negotiators in this position begin the search for value-creating trades.¹⁷ To facilitate this transition, they recommend addressing the matter explicitly by explaining that: 1) such trades may strengthen the parties relationship; 2) looking for trades that do not require or imply a halt to the litigation; and 3) such discussions do not

¹⁶ See Greenebaum, *supra* note 1, at 122-126.

¹⁷ MNOOKIN ET AL., *supra* note 6, at 240-242. Professor Mnookin and his colleagues define trades as bargaining by the parties to avoid the transaction costs of litigation and take advantage of the differences of the parties regarding time or risk preferences (in the case of distributive issues), and bargaining to create value based on the parties’ symmetrical or complementary interests, resources, and priorities. *Id.* at 225-226 (with regard to the latter they state: “These trades may have little to do with the parties’ formal legal dispute [and] the settlement may be of a sort that a court could never consider imposing.”). As discussed, below, the present simulation is designed to present opportunities for creating value, which are often present when the parties have a past, or as in this case, a continuing relationship.

signal a strategic weakness, but instead can be a sign of strength and confidence.¹⁸

Following this suggestion, a mediator might try stating the matter directly to the parties, as in the following example:

I'm sensing that this might be a good time to put aside for the moment the strictly legal arguments in this case. In my experience, parties with a significant relationship like yours often benefit from discussing mutual interests and concerns beyond the dollar amount of damages at issue in the dispute, and this can be done without jeopardizing or conceding the legal arguments involved. Would you be willing to investigate that possibility?

If the mediator can persuade the parties in the simulation to enter on this path, he or she may quickly discover that there is a broader conflict between the two agencies that needs to be addressed. If the mediator asks about the history of their relations, or whether there are any other matters of dispute aside from those involved in the lawsuit that might be discussed, the parties might then raise the dispute involving the new standards adopted by the City for repairing streets. Is this a purely distributional issue? The City needs to have well-maintained and functioning streets, while the District seeks to perform maintenance and construction of its facilities in a cost-efficient manner. The mediator might ask whether the City has the proper equipment for repairing streets to the higher standards, and whether the City could contract with the District to do the repair work? Even if it is primarily distributive, could the City waive or rescind its new standards for the District, or perhaps delay enforcement to allow the District a reasonable amount of time to upgrade its equipment? Perhaps more importantly, could both agencies benefit by establishing a system or better method of communications concerning their respective projects, thus minimizing costly surprises and problems in scheduling and resource allocation for both the City and the District?

¹⁸ *Id.* at 240.

Likewise, if the mediator asks each party about the concerns that are driving their dispute, he or she may discover that both agencies risk political consequences if the problems in their relationships continue. The City Council wants to look like it is standing up to the District, and the District does not want to appear aggressive or unresponsive. Thus, either or both could lose if the matter is litigated. Likewise, continuing conflict between the two agencies might result in added inconvenience or worse for the users of the City's streets, and will likely add unnecessary costs to both their operations—resulting in higher fees and taxes for residents. Indeed, given the many ways in which the interests and concerns of the two agencies overlap and impact one another, and given that they cannot escape their ongoing relationship, the opportunities (and perhaps, the necessity) for a value-creating deal is manifest.

Another suggestion Professor Mnookin and his colleagues proffer to negotiators—equally useful for mediators—is to encourage greater participation of the clients at this stage.¹⁹ Clients often better understand their own interests, and may even be better negotiators than their lawyers. Likewise, the clients may be better equipped and in a better position to assess the relative value of any trades proposed at this stage. Thus, both the clients in this exercise are told they are able negotiators, and each has been given somewhat more information about their respective agency's overall needs and interests than their lawyers. In short, the clients' outlook on the dispute, and their participation in the mediation, could make a difference in this simulation.

Obtaining greater participation of clients may not be easy, since lawyers are typically accustomed to dominating negotiations in legal disputes. Furthermore, lawyers might be reluctant—either by habit, or due to strategic concerns—to have the client play

¹⁹ *Id.* at 242-243.

a larger role. If the mediator in the simulation senses that one or both lawyers are dominating the conversations, or may have even instructed the client to play a minimal role, what can be done? The best thing is probably for the mediator to address the matter directly, by explaining why client participation could be helpful, and making an explicit request for that participation. If it appears the lawyer is resisting this suggestion, it may be best to caucus and investigate the lawyer's concerns or the client's reticence in private, where sensitive matters can be frankly discussed.

Another way of thinking about the task of moving parties from positions to interests is to consider the initial lack of progress by the parties to be one of problem-definition. What Professor Mnookin calls "turning a dispute into a deal,"²⁰ can also be thought of by the mediator as broadening the definition of the dispute, which is the first step in Professor Greenebaum's model of "disciplined"²¹ problem-solving. Re-framing an impasse in adversarial negotiations in terms of problem-definition may offer the less-experienced mediator an easy-to-remember aid in the task of moving parties to exploring their underlying needs and interests.

Professor Greenebaum breaks "disciplined" problem-solving into four elements, providing a useful shorthand for structuring the overall task of the mediator: 1) defining the problem; 2) searching for possible solutions; 3) evaluating options; and 4) choosing a resolution. The act of defining the problem is crucial, as it "establishes criteria for relevance and directions for the search for solutions."²² If the parties in this simulation define their problem as adversarial or legal in nature—either because the mediation

²⁰ *Id.* at 240.

²¹ Greenebaum, *supra* note 1, at 122 (describing models for problem-solving along a continuum from "routine (by the book)," to "disciplined (exploration and evaluation of an extended array of choices)," to "artistic (fluid action and reflection)").

²² *Id.* at 123.

occurs in the context of a legal action or because the parties have a rights-oriented view of the dispute—they are likely to focus on legal norms and remedies as the solution to the problem thus conceived. Effectively, this means the parties will stake out legal positions and argue over how much money, if any, will exchange hands if the dispute is to be resolved. If, however, the mediator can get the parties to step back from this routine²³ form of engagement, and undertake a deeper exploration of their problem, there are opportunities built into the simulation that may lead them to consider a broader range of solutions, and thus avoid a stalemate over the narrower legal issues.

Whether the challenge facing the mediator is conceived of as seeking turning disputes into deals, or as broadening the definition of the problem, the task of moving the parties from adversarial to cooperative problem-solving is essentially the same. Along the lines of the language I have suggested above, the mediator should seek to persuade the parties that the broader aspects of their ongoing relationship may hold the key to resolving what looks like an all-or-nothing legal dispute, and may lead to mutual gains and improvements in their relationship going forward.

Once the discussion of needs and interests begins, perhaps the most helpful advice for the mediator is to maintain an attitude of “genuine curiosity” towards the parties.²⁴ The mindset of the mediator can be every bit as important to reaching a solution as the mindsets of the parties. Every dispute tends to have its own unique logic; if the mediator brings strong habits or preconceptions to the dispute, he or she may be in for a difficult time. A fundamental openness to the dynamics of *this particular dispute*, especially in

²³ See *supra* notes 14-15, and accompanying text.

²⁴ Cf. MNOOKIN ET AL., *supra* note 6, at 180 (describing as “critical” the need for a lawyer to hold a “stance of genuine curiosity” when meeting with the client prior to negotiations in order to discover that client’s “special needs and interests”).

the quality of one's listening,²⁵ not only enhances the mediator's ability to understand what is being said, but perhaps also to "hear" what is *not* being said, such as an expression of understanding of one party by the other. This openness can aid the mediator in discerning what is being communicated in other, more subtle ways as well: through tone of voice, body language, or facial expressions, all of which can be important information for the mediator. In fact, if the mediator is effective in demonstrating to both parties that he or she has heard and understands what they have to say, it may increase the willingness and ability of the parties to listen to each other.²⁶

If the mediator in this simulation succeeds in surfacing the parties' broader needs and interests, the road to resolution should open up. Conceivably, the \$30,000 at stake in the litigation may be seen as insubstantial in view of the broader interests at stake—both fiscal and political—which arise in part due to the fact that the parties cannot avoid their relationship. Even a completely nonmonetary resolution might make sense, with the District absorbing the relocation costs in exchange for concessions by the City on road repair standards, or simply as a "down payment" on the benefits and efficiencies that might be gained from improved relations and communications in the future. With or without a nominal face-saving exchange of monies, then, it should be possible to avoid the stalemate built into the simulation with respect to the purely distributive issue of the relocation costs.

The next element in Professor Greenebaum's "disciplined" problem-solving model is the search for possible solutions, and he advises the mediator at this point to

²⁵ Cf. DOUGLAS STONE, ET AL, *DIFFICULT CONVERSATIONS: HOW TO DISCUSS WHAT MATTERS MOST* 167-168 (1999) (discussing the beneficial impacts of being "genuinely curious" in one's listening during difficult conversations).

²⁶ See *id.* at 166 (arguing that until a person in a dispute feels understood, they are not likely to open up and listen to the other person or person).

consider “the greatest available number and diversity of possible solutions,” and separating, at least initially, the task of evaluating these suggestions.²⁷ Professor Guthrie concurs,²⁸ but suggests that lawyers serving as mediators—as in this simulation, as written—face a significant disability at this stage: the habit of evaluating information and possible solutions primarily in terms of their legal significance, along with the parties’ expectation that they will do so.²⁹ As with the task of defining the dispute, if the mediator evaluates options generated in terms of their legal significance, then he or she is likely to emphasize those that correspond more closely to the result a court might reach, which would pose a limitation on the creative possibilities this case presents.

However, if the mediator has managed to help the parties’ move beyond their initial adversarial positioning to the point of searching cooperatively for solutions, he or she has met the primary challenge presented in this simulation. Re-orienting the parties’ adversarial view of a conflict to one of joint problem-solving is a major step towards resolving the conflict, and after this achievement even a mediator with an habitually narrow focus towards solutions might not impede the parties from reaching a broader solution.

²⁷ Greenebaum, *supra* note 1, at 123.

²⁸ See also Guthrie, *supra* note 15, at 177-179 (“To aid the parties in generating options, the mediator must engage the parties in a period of ‘divergent’ thinking, ‘during which a variety of potential solutions are generated before any are critically evaluated, let alone adopted.’”) (quoting Paul Brest & Linda Krieger, *On Teaching Professional Judgment*, 69 Wash. L. Rev. 527, 541 (1994)).

²⁹ While it is beyond the scope of this analysis, I note that Professor Guthrie has recently criticized this widely-recommended approach to option generation, citing research in cognitive psychology demonstrating that parties are likely to make less than optimal choices when evaluating a large number or broad spectrum of options. However (and almost paradoxically, in light of is doubts about lawyers as option-generators), he argues that the involvement of lawyers can mitigate their client’s deficiencies in this regard: the very qualities of lawyers which make the generation of creative options unlikely—their legalistic, detached, rational, and analytic approach to problem-solving—he argues makes them less likely than their clients to fall prey to such cognitive biases. See Chris Guthrie, *Panacea or Pandora’s Box?: The Costs of Options in Negotiation*, 88 Iowa Law Review 601 (2003).

II. INSTRUCTIONS AND ROLES

This simulation should begin in the manner of a typical mediation, with the mediator's introductory statement. All role players should be provided copies of the general information for all participants, along with the information for their specific roles. Role players should be instructed to:

- Review and become familiar with general information and the specific information for their roles prior to the simulation;
- Stay in role and act in accordance with the spirit of the roles as given;
- Improvise facts in a realistic way as necessary, and not rely too much on the written materials during the actual exercise; and
- Use their own names

UNTIL THE SIMULATION ENDS, PLEASE DO NOT DISCUSS THIS CASE WITH STUDENTS PLAYING ROLES OTHER THAN YOURS

Metropolitan v. Riverport

Information for all Participants

This dispute involves two local government agencies, the City of Riverport and the Metropolitan Water District. The District owns and operates a water transportation, storage, and distribution system supplying fresh drinking water to customers in Riverport, as well to much of the surrounding metropolitan area. Riverport is in the midst of a multi-year effort to reconstruct its aging municipal sewer system. Work on the sewer project at a busy intersection required the relocation of a District water main located underground in the street right-of-way. The District performed the work, and has brought suit against Riverport contending that the City must reimburse it for the costs involved.

Ownership of public right-of-ways—the area within which public streets are constructed—is legally vested in the City of Riverport. Street right-of-ways are typically used for many other purposes as well, especially for facilities providing utility services such as sewer, water, gas, electric power, and communications. Some of these utilities are operated by the City itself, while many are provided by other public or private utility providers. Sometimes there are conflicts among these uses.

Riverport operates its own system for the collection and treatment of sewage, and the intricate system of pipelines transporting sewage from the point of origin to the municipal treatment plant on the outskirts of the city is aging. A couple of years ago, Riverport began a complicated and very expensive multi-year effort to upgrade these pipelines, most of which are located underneath its streets. In some places, especially at busy intersections, reconstruction of the sewer pipelines requires that other utilities be

relocated or realigned, either temporarily or permanently. In this particular instance, Riverport's project required relocation of a District water main. After receiving from the City a request to undertake this work, the District asked for and received, in advance of commencing the relocation work, a written promise signed by the City Engineer that the Riverport would reimburse the District for the costs of relocation. However, when the District invoiced Riverport for the cost of the relocation work—which the District valued at about \$30,000—the City refused to pay. Riverport explained its decision by asserting that the District was, by law, responsible for such costs. The District thereafter filed suit, alleging causes of action for breach of contract, fraud, estoppel, and declaratory relief. The parties agreed to try mediation in an effort to avoid costly litigation, and retained a well-known attorney to serve as the mediator.

Riverport has an elected City Council consisting of five council members, which proposes and adopts legislation, enacts budgets, and sets the policies for Riverport, among other duties. However, most of the responsibility for the day to day administration of Riverport's affairs is vested in a City Manager, who is appointed and serves at the pleasure of the Council pursuant to the personal services contract. Likewise, the Water District is governed by an elected board of nine directors, and its day to day affairs are administered by a District Manager.

By law, both the City Council and the District Board must make any final decision, on behalf of their respective agencies, whether to accept any agreement that may be reached in mediation. That may be a mere formality if settlement of the case within a certain parameters has been discussed with their attorneys.

Both agencies are subject to the State's "open meeting" laws, which require that virtually all of their meetings, deliberations, and actions must occur in public meetings which are noticed and agendized in advance, and open for anybody to attend. However, one of the few exceptions to the open meeting requirement allows the City Council and the District Board to meet in "closed session" with their legal counsel to discuss litigation in which they are a party, and make decisions about how to proceed or whether to settle a lawsuit.

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Metropolitan v. Riverport

Information for Mediator

You are a successful litigation attorney who has developed a thriving practice serving as a third-party neutral in disputes. Several weeks ago you received an inquiry about serving as a mediator in a recently-filed lawsuit involving a nearby city and the water district which serves the metropolitan region where you live and work. You agreed to discuss the matter more fully with the City Attorney and the District Counsel in a conference call a few days later. After discussing the nature of the dispute, checking for any potential conflicts of interest, and explaining your fees, you agreed to mediate the case. The parties know that you are not an expert in the law of local governments, but they assured you that, based upon the recommendation of colleagues and your reputation, you are their first choice.

When you inquired about who would be attending the mediation, both attorneys agreed that the “open meeting” laws applicable to elected legislative bodies such as the District Board and the City Council—their clients’ respective governing bodies, who are responsible for making any final decision to settle litigation—made it impractical to include them in the mediation. You accepted their assurances that “this is done all the time,” and that any agreements reached will be contingent on obtaining formal approval from the governing bodies. Finally, you asked them to submit to you and exchange with each other short “letter briefs” setting forth a summary of the pertinent facts and highlighting the legal authorities supporting their respective positions. With this, you scheduled the mediation for a half-day.

You have now read the letter briefs, which were indeed mercifully brief. The facts are rather straightforward. The law as it applies to this situation is not so clear, however, and does not particularly favor one party over the other, at least as far as you can tell from the briefs. Since you are not charging for research, you will simply ask the attorneys to explain as necessary any points of law relevant to the dispute. One thing strikes you, though: there is the amount in dispute does not seem to justify litigating this case fully. Your plan going into the mediation is simply to let the parties present their opening statements, questioning them to clarify matters and seeking elaboration on key points, then see if you can persuade them to compromise.

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Metropolitan v. Riverport

Information for City Manager

You are the City Manager of Riverport, its chief executive, and responsible for the day-to-day operations of this sizeable suburb. You make all key personnel decisions with the exception of the City Attorney, who is appointed directly by the City Council and has full authority within his/her own department. You are an experienced negotiator, and resolving problems and conflicts is how you spend much of your time.

You are a long-time employee of Riverport, and have worked your way up to the top position. You are respected and well-liked. You have good relations with the Mayor and most of the City Council members, but you understand the quixotic nature of local politics and politicians, and you work hard to keep the Council happy and informed of your successes. You serve at the pleasure of the City Council, and they can terminate your contract at any time for any lawful reason or no reason at all. However, you have a buy-out clause which provides six months of full-salary and benefits if your contract is terminated prematurely.

About a month and a half ago, Riverport was served with a lawsuit by the Metropolitan Water District, which provides water to all institutional, industrial, commercial, and residential users in Riverport—including the City itself. The lawsuit came as a surprise to you, since you hadn't heard of any problems. The dispute is over who must pay the cost (about \$30,000) of relocating a District water main; the relocation was required in connection with the City's ongoing sewer modernization project.

When you spoke with the City Attorney about the lawsuit, you asked him/her for a memo outlining the dispute, including the claims asserted by the District, along with the City Attorney's legal analysis regarding those claims. You also asked for a background memo from the City Engineer, who oversees the construction project. From the memos and your conversations with the City Attorney, it appears that Riverport is not legally responsible for the relocation costs, and you have no intention of giving in to them on this issue. It is not a lot of money, really, but the principle is very important: the street right-of-ways are owned and controlled by the City—the District must abide by Riverport's rules if they are to use them.

You are already unhappy with the District since it is constantly doing maintenance and construction in the City's streets, which degrades the streets and causes traffic problems. It irks you that the District can even *afford* to do this work, since it is not dependent on dwindling tax revenues like the City. The District's long history of tearing up Riverport's streets—sometimes right it has been repaved, and which leaves them in worse shape than before, reduces their lifespan, and increasing maintenance costs for the City—has long been a sore subject among the City Councilmembers and your staff.

In fact, the City Engineer has provided you a list of 75 locations where the District has done maintenance or repair work, but has only partially repaired the streets, failing to complete the repairs in accordance with Riverport's newly-adopted standards. These standards were adopted to minimize degradation to road surfaces caused by such street work, and to avoid the increased cost of more frequent resurfacings. The tearing up of City streets and bad repair jobs results in a lot of complaints from residents, and you

resent the fact that you always have to bite your tongue and respond diplomatically even when the City is not to blame. You're not sure why the District has delayed these repairs, but you know it has caused frustration for your Engineering and your Public Works departments.

Over time, relations between City and the District have devolved into frequent turf battles, of which the current dispute seems to be just another installment. These problems are beginning to find traction in the political arena. During the last City Council election, two candidates made the constant construction and poor condition of city streets the central theme in their campaigns, promising to stand up to the District if they were elected. They won by wide margins. You know it will be important to the City Council to avoid the appearance of giving in to the District's demands, and you are willing to fight this lawsuit if a favorable settlement isn't reached.

On the other hand, spending money to litigate this case does not make a lot of sense, either. The City Attorney has estimated that litigation would cost practically as much as the amount the District is claiming Riverport owes. So you quickly agreed when the City Attorney suggested that this might be a good case to try mediation. You are concerned that if you don't fight this, the District will become even more uncooperative and aggressive in the future. And this issue will come up again—even in the context of the current sewer reconstruction, which is only about half finished and has several more phases to go in other areas of Riverport. Even routine repair and maintenance work in the right-of-ways, whether done by the City or the District, will require better coordination to avoid undue costs and inconvenience for the public.

Thus, even though you are critical of the District and even though Riverport can not afford to pay for the costs of relocation each time that may be required, you can see that down the road it would be beneficial to all to resolve the current problems and develop a better working relationship between your two agencies. Any agreement you reach will have to be brought back to the City Council for approval. The Council has authorized you to offer up to \$5000 to settle this lawsuit—any more than that, they feel, would look like the City gave into the District. You have agreed with the City Attorney to make an opening offer to settle the claim for \$1500.

UNTIL THE SIMULATION ENDS, PLEASE DO NOT DISCUSS THIS CASE WITH STUDENTS PLAYING ROLES OTHER THAN YOURS

Metropolitan v. Riverport

Information for City Attorney

You are a partner in a small law firm that specializes in representing cities and other local government agencies. You were appointed City Attorney of Riverport about five years ago when the former City Attorney retired. She had referred litigation matters to you on occasion, and recommended you to the City Council based on your successful defense of several high profile lawsuits cases. You have a reputation as a tough litigator, which is just what the City Council likes. Riverport is your biggest client and you work hard to maintain good relationships with the City Council and the City Manager. Like any other client, though, Riverport has an absolute right to end the relationship at any time.

About three months ago, you received a call from Riverport's City Engineer asking your advice about an invoice he received from the Metropolitan Water District. According to the City Engineer, he had notified the District that it needed to relocate a water main at a major intersection so that Riverport's could complete a portion of its sewer modernization project. The District performed the work and thereafter sent an invoice for about \$30,000, representing its costs for doing the work. There was no problem with the amount of the invoice, but the City Engineer thought the District was legally responsible for the costs of the relocation. He asked if you had dealt with that issue before. You had not, but you said you would research the issue and get back to him.

You found several cases bearing on the issue. One older case states plainly that a public water district is like any other public or private utility provider, and its right to use public street right-of-ways is subject to the superior right of a city and its residents to use the street “for street purposes,” which the court indicated includes a city-operated sewer system. Thus, a public water agency must relocate its facilities in a city right-of-way at its own expense if required by a city for legitimate “street purposes.” However, the facts of the case involved only construction of a city street, and the language regarding municipal sewer systems appears to be dicta, though that language has been relied on in cases that followed.

The cases following the rule have applied it to analogous situations, including one involving the extension of a city’s sewer system. But these cases involved private utility companies, leaving unresolved whether the rule applies as between a city doing sewer work and a public water agency. Still, this line of authority clearly favors the City.

You found one case where a public water district recovered the cost of relocating its facilities to accommodate installation of new sewer facilities in a street right-of-way. In that case, the operator of the sewer was not a city, but, rather another single-purpose public utility. However, that case criticized and distinguished in broad language the rule of the earlier cases. The court reasoned that the cost of relocating existing water district facilities was really a component of the sewer agency’s project, and so the agency building the project—and reaping its benefits—should pay for relocation.. You can certainly distinguish this case on the facts—neither agency involved owned the right-of-way—but you find the logic of the decision troubling. And, though it is not likely, you could see how a court could be apply this latter rule in the current situation.

After finishing your research, you prepared a legal opinion in which you recommend that the District's invoice not be paid. About six weeks later, a lawsuit filed by the District against Riverport arrived in the mail. You reviewed the complaint immediately and were surprised to find causes of action for breach of contract, fraud, and estoppel, alleging that Riverport had reneged on a written agreement to reimburse the District. You could hardly believe your eyes when you saw, attached as an exhibit to the complaint, a letter signed by the City Engineer agreeing to reimburse the District as a condition of undertaking the relocation. You immediately called the City Engineer and asked about the exhibit. He explained that he was forced into signing the agreement because construction was about to begin on the project, and any delay would have resulted in costly overruns. While he was pretty sure the District wasn't entitled to reimbursement, he figured that issue could be worked out later—that is why he had sought a legal opinion.

After calming down, you thought some more about the case. You can probably get past the written agreement by arguing that the City Engineer had no legal authority to bind the City. But you know this will look bad, and you are not looking forward to making that argument in front of some cranky trial judge. Besides, the amount in question really does not justify spending what it would take to bring the case to trial. On the other hand, it would be worth something to establish a favorable precedent for the City, since this issue will certainly come up again in the future.

The next day you called the City Manager to tell him about the lawsuit, and during that conversation you suggested it might make sense to try mediating the case before substantial litigation expenses are incurred. After hearing your legal analysis, the

City Manager agreed that you should broach the topic with the District's attorney. The City Manager was not optimistic that the dispute would be resolved amicably, given the District's history of uncooperative—even arrogant—behavior in other disputes about work in the City's right-of-ways. Later, you had an agreeable phone conversation with the District Counsel, who thought your suggestion about mediation made a lot of sense. Both your clients went along with idea, and the two of you then agreed on a local attorney to serve as the mediator. Arrangements for the mediation were made in a subsequent conference call with the mediator.

As you head into this mediation, you are confident about your legal position. Both sides have provided “letter briefs” to the mediator, and the District's legal arguments have not changed your opinion. You and the City Manager have now met in closed session with the City Council, which has directed you to make a “nuisance value” offer to settle the case, and given you authority to offer for up to \$5,000 for that purpose. However, the City Council is not happy with the District, and several council members stated that the voters want the City to do something about the problem with the roads. They know that they will have to deal with the District on other issues in the future. But it is important for them to avoid the appearance of giving in to the District. If necessary, nonmonetary concessions would be preferable to paying too much money.

Your goal in the mediation, then, is to appear ready to litigate the matter. The City Manager has agreed to make an opening offer of \$1,500. Beyond that, and despite the current state of relations between the two agencies, you recognize that building a working relationship with the District is probably in the best interest of all concerned.

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Metropolitan v. Riverport

Information for District Manager

You run the Metropolitan Water District, a large public water agency that supplies drinking water to several contiguous cities and counties. The District transports water from distant sources of fresh water to several nearby reservoirs where the water is treated and then delivered to agricultural, institutional, industrial, commercial, residential, and other end users through an extensive system of holding tanks, pumps, and water mains. The District is overseen by a nine-member Board of Directors which is elected by the public to four-year terms. The District's operations are funded primarily by user fees based upon the type of use and the amount of water consumed. The District has also issued several voter-approved long-term bonds to fund major construction and renovation projects.

Overall, the District is in excellent financial condition. However, it has an aging infrastructure that will require substantial investment in the future, and both you and the Board know that fiscal discipline is required now to meet those future needs. In fact, your reputation as an effective labor negotiator and fiscal manager is what convinced the Board to hire you two years. The Board made clear to you then that it has become difficult politically to raise user rates or to obtain voter approval of bond measures. Critics—especially those who are candidates in local city council races—have portrayed the District as a bloated bureaucracy out of touch with its customers. While hotly disputed by the Board, these claims are beginning to resonate with voters. Your mandate

from the Board is to create an agency—and the image of an agency—which is efficient, effective, cutting-edge, and customer-friendly.

About two months ago the District's chief legal officer, the District Counsel, sent you a draft of a lawsuit s/he proposed to bring against the City of Riverport, a city in your service area. A cover memo explained that the dispute involves responsibility for the costs of relocating the District's water main at a major intersection in Riverport. The relocation was necessary to accommodate construction work by the City on its sewer system. Relocation requests from cities or utility companies doing construction in street-right-ways are common, and the District's policy is to seek reimbursement. The District insists on doing the work itself, as it involves highly technical work on the District's own facilities. But because the project benefits the city or utility company, the District asks to be reimbursed. Relocation work is a real thorn in the District's side: it creates scheduling problems if the District has not been notified by the requesting city or agency well in advance about the project schedule, and cities occasionally refuse to pay for the District's work, arguing that it is the price of using the right-of-way.

In this case, the request from Riverport came at the last minute. Still, the District's Engineering Department managed to reschedule other work to accommodate the request. The District asked for a written reimbursement agreement prior to undertaking the work. Only after it was completed, however, Riverport had refused to pay, arguing that the District was legally obligated to bear the cost of relocation if required by for the City's sewer project.

The value of disputed work is only around \$30,000, but a lawsuit seems to be the only way to recover the costs since Riverport has simply walked away from its promise.

The District Counsel believes that the written agreement will stand up in court, notwithstanding the fact that Riverport's argument—in the absence of an agreement—might otherwise have some merit.

In subsequent meetings with the Engineering staff, you have learned that the relations between the District and Riverport have been contentious for a long time. And this is not the first time Riverport has objected to paying to have the District relocate its facilities. Other cities and public agencies have also objected at times, but the District has stood firm in its demands because it would be very expensive to absorb the costs every time some road or utility work had to be done. You feel it is plainly unfair to saddle the District with the relocation costs when it is not the District's project.

Relocating the District's facilities should be viewed as a cost-component of their project. Those who seek the benefits should bear the burdens, in other words.

Another festering issue is the dispute over Riverport's recent adoption of new standards for repairing streets when the District (or other utility providers) has performed repair or maintenance work in the right-of-way. The new standards adopted by Riverport are more stringent—and thus more costly to comply with—than any other city or county served by the District. In order to meet the new standards, the District would have to invest in expensive new equipment and technology, or high expensive contractors. The District maintains that the new standards for street repair are unnecessary and possibly pre-empted (and therefore unenforceable) under state law. This sent a senior engineer to the meeting at which the standards where up for adoption, but the City ignored the District's concerns. The District has refused to comply with the new standards, though they haven't said as much to the City: Under Riverport's procedures, compliance with

the new standards is required at the time a final inspection of the repair work is performed by the City; the District has been repairing the streets at completion of projects as before (calling it a “temporary” repair), and then ignoring the final inspection requirement. In this way, the District has avoided, for now, a confrontation over the new standards. You’ve been waiting for the City to raise the issue, however.

Going into this mediation, your goal is to achieve a resolution that makes financial sense. You agree with the District Counsel that taking the case to trial doesn’t make sense financially. And you want to avoid providing further ammunition to City Council members who portray the District as working against the interests of Riverport’s voters—after all, these are your customers, too. Still, you don’t think your customers should subsidize Riverport’s public works programs—that could be financially draining in the long-term.

You’ve discussed this lawsuit in closed session with the Board—who will have to approve any agreement you may reach in mediation—and they, too, are concerned about the financial drain of relocation requests. The Board has authorized you to accept as little as \$20,000 to settle the lawsuit quickly and quietly, and in the interest of encouraging an improvement in the relationship between the District and Riverport. You have tentatively determined, in consultation with the District Counsel, that your initial response to an offer by the City will be to accept \$25,000 to settle the matter.

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Metropolitan v. Riverport

Information for District Counsel

Last year you were selected by the District Board of the Metropolitan Water District to head the Office of the District Counsel when the former District Counsel took early retirement. Previously, you were the Chief Trial Attorney in the office, overseeing a busy staff of ten attorneys representing the District in litigation ranging from slip and falls on District property to challenging proposed water quality standards in the Federal courts. Now you run the entire operation, including a total of twenty-five attorneys. Among other things, the Board has expressed its concern about the time and resources spent on litigation, and they would like to see your office be more “proactive” in resolving problems early on before litigation expenses get too high.

A little more than two months ago, you received a call from the District’s Assistant Finance Director, regarding an invoice sent to the City of Riverport for work the District performed on the City’s behalf. Riverport was refusing to pay. The work involved relocating a District water main to accommodate reconstruction of Riverport’s sewer facilities at a major intersection. Attached to the returned invoice was a legal opinion from the City Attorney claiming that the District, and not Riverport, was responsible for the cost of relocating the water main. The Assistant Finance Director wanted your advice because the file also contained a written agreement in which Riverport had promised to reimburse the District.

When you spoke with staff in the Engineering Department about the situation, you were told that they received from Riverport a request for relocation of the water

main, and had sent out their standard reimbursement agreement. The District's policy, they said, was to require reimbursement when it performs work in connection with another agency's project. After Riverport returned the executed agreement, staff scheduled and completed the work.

You reviewed the legal authorities cited in the City Attorney's opinion, did some research of your own, and have concluded that—despite some unfortunate dicta in earlier cases—the question of who is responsible for the costs of relocation in this instance remains undecided. While the courts have mostly ruled against water districts and other single-purpose agencies, and in favor of cities, a more recent case has criticized that line of authority. In that case, a public sewer district constructing a sewer line in a street right-of-way refused to reimburse a public water agency for the cost of relocating a water main. The sewer district argued that it was in the same position as a city providing sewer service, but the court rejected that analogy and held that, at least as between two single-purpose agencies, the proponent of the project must pay for the costs of relocation. The rule of the older cases was grounded simply in a determination of who “owns” the street right-of-way, but this court reasoned that it was more equitable to view relocations as a component of the sewer project's costs.

While this more recent decision is not directly on point, it is very close. It pointedly criticizes the prevailing view that public agencies providing utility service should be considered “mere franchisees” of cities, subject to the absolute right of the city to displace them from right-of-ways, and to require the utility to bear the expense involved. You would like to see a court adopt this rule in deciding the dispute with Riverport, but the record for water agencies against cities is not very good, and an

adverse precedent would be worse. At least with the present ambiguity, you can justify the current policy on reimbursement, even if you need to negotiate or even concede the demand on occasion when it is vigorously resisted. Besides, you can rely on the written agreement., which the City Attorney's opinion had simply ignored.

You recommended to the Board of Directors and the District Manager that your office be authorized to file a lawsuit seeking reimbursement from Riverport. The District Manager concurred, and when you both met with the Board in closed session the Board authorized you to file the action. In doing so, they emphasizing that the District couldn't afford to pick up the costs of relocation every time another agency needed to do some work in a shared right-of-way. The Board also expressed some concern, however, to avoid appearing "too aggressive," since that wouldn't play well with voters in Riverport, and would provide political ammunition to certain City Council members who had been very critical of the District in the last election.

You then turned the file over to the litigation division. A complaint alleging breach of contract, estoppel, fraud, and declaratory relief who prepared, filed, and then served. A few days after the complaint was served, you received a phone call from the City Attorney expressing an interest in submitting the case for mediation. When you asked the City Attorney about the reimbursement agreement, s/he explained that s/he did not know of its existence until s/he had seen the complaint. In any case, s/he argued, this would not change the result since the City Engineer did not have the legal authority to execute the agreement in the first place. After further discussion, you agreed to discuss mediation with your client, and tossed out a few names of possible mediators who might be acceptable to both the District and to Riverport.

The Board was receptive to the idea of mediation, since it was eager to avoid a costly and public legal battle. After you and the City Attorney settled on a mediator, you prepared a “letter brief” stating your legal arguments to send to the mediator and to the City. You have also have reviewed a brief written by the City Attorney. While challenging, the City’s legal arguments have not diminished your belief in the strength of your argument. You believe it is likely that the District will prevail on the issue of the reimbursement agreement. You are concerned, however, that if the agreement stands up at trial and the City appeals, you risk an adverse published opinion on the other issue, and could end up with a bad (and perhaps more costly) precedent going forward. You could win the battle and lose the war, in other words.

You have met with the Board one more time, and they authorized you to accept as little as \$20,000 to settle the case quickly. You and the District Manager agreed that you will initially offer \$25,000 in response to any offer made by Riverport, then work your way down if you have to in order to settle the matter. You are very motivated to find a way to settle this case. You need to keep litigation costs down, for one thing. Also, the District and Riverport are effectively “stuck” with each other, so it would be good to start down the path towards improved relations.