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**MEDIATING LOCAL
INTERGOVERNMENTAL
DISPUTES—REFLECTIONS
ON THE PROCESS**

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& Lessons Learned by the Mediators:
Daniel G. DeSantis, James F. Thaxter, and Richard M. Cartier

“A historic agreement on growth and taxes . . . between Fresno city and county stretches beyond those issues to regional challenges including, perhaps most importantly, water.”¹ This agreement is the product of a mediation conducted by Richard M. Cartier—Professor of Law at San

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¹ Jim Davis and John Ellis, Water Key to Accord, THE FRESNO BEE, January 7, 2003, at B1.

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INTRODUCTION

This article elaborates on a successful mediation of a complex inter-governmental dispute growing out of a land use and tax-sharing feud between the City of Fresno and the County of Fresno. This dispute provided an opportunity to mediate a high profile case to advance the acceptance of mediation by local governmental officials and by the community. The successful result, however, does not assure an enhanced awareness of mediation.³ While a successful outcome of a high stakes, high visibility mediation may be reported in the press, the written account typically emphasizes the agreement and readers are unlikely to understand how the mediation process affected the outcome.⁴

Mediation is generally understood as an informal process in which a neutral or impartial third party helps people negotiate a mutually acceptable solution to resolve a dispute.⁵ While it is possible for people to negotiate without the assistance of a mediator, if the parties are unable to open lines of communication or if they reach impasse, a skilled mediator can help the parties begin dialogue to find common ground and to find mutually acceptable solutions to resolve conflict.⁶ A successful mediation can help parties avoid the acrimony associated with litigation.

Part I of this article describes the process of mediation and explains how it works. Part II explores the appropriateness of mediation to resolve intergovernmental disputes, summarizes the background of the dispute and discusses particular problems presented by this type of mediation. Part III shares lessons learned by the mediators in the course of completing this mediation between the City of Fresno and

² The mediators were selected by the City of Fresno and County of Fresno from a list of local practitioners.

³ Alana Knaster and Gregory L. Ogden, *Public Sector Dispute Resolution in Local Governments: Lessons from the SCAG Project*, 1 PEPPERDINE DISPUTE RESOLUTION. L.J. 177 (2001).

⁴ *Id.*, at 212.

⁵ ROBERT A. BARUCH BUSH AND JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION*, 2 (Jossey-Bass, 1994).

⁶ Mary Shannon Place, *Municipal Annexation in Ohio: Putting an End to the Battle*, 41 CLEV. ST. L. REV. 345, at 369.

the County of Fresno.⁷

PART I. THE PROCESS OF MEDIATION

California recently enacted *Rules of Conduct for Mediators in Court-Connected Mediation Programs for Civil Cases*.⁸ Mediation is defined as “a process in which a neutral person or persons facilitate communication between disputants to assist them in reaching a mutually acceptable agreement.”⁹ This process rests on principles of voluntary participation and self-determination.¹⁰ Underlying the new rules is the belief that court-based mediation can only be effective where there is “broad public confidence in the integrity and fairness of the process.”¹¹

Because mediation is highly flexible, the specific strategies and techniques employed by a mediator vary depending on the mediator’s style and the nature of the dispute.¹² The format of the “classical” mediation model, used in most, if not all, mediations includes six steps or stages: 1) Introductory Remarks by Mediator(s), 2) Statement of the Problem by the Parties, 3) Information Gathering, 4) Problem Identification, 5) Problem Solving: Generating Options and Bargaining, and 6) Writing of Agreement.¹³ This format sets forth the framework used by most mediators in helping parties resolve disputes by letting the parties talk, allowing them to vent feelings and emotions and encouraging them to engage in joint problem-solving.¹⁴

Stage 1): Introductory Remarks by Mediator(s).

Introductory remarks explain the process, establish ground rules, explore any conflict of interest, and help the parties establish realistic expectations.¹⁵ The role of the mediator as a neutral or impartial third-

⁷ This mediation is governed by a confidentiality agreement providing all communications during the mediation and all position papers of the parties shall not be disclosed, therefore, the facts discussed in this article are based on public records and documents. A copy of the confidentiality agreement is on file with the author.

⁸ California Rules of Court, Rules 1620, 1620.1, 1620.2, 1620.3, 1620.4, 1620.5, 1620.6, 1620.7, 1620.8, 1620.9 and 1622, adopted effective January 1, 2003. (Deering 2003).

⁹ California Rules of Court, Rule 1620.2. (Deering 2003).

¹⁰ California Rules of Court, Rule 1620.3. (Deering 2003).

¹¹ California Rules of Court, Rule 1620. (Deering 2003).

¹² JOHN S. MURRAY, ALAN S. RAU, AND EDWARD F. SHERMAN, *Processes of Dispute Resolution: The Role of Lawyers*, Second Edition, 301, (Foundation Press, 1996).

¹³ *Id.* at 301-302.

¹⁴ *Id.* at 301.

¹⁵ *Id.*

party may need to be clarified for the parties, who often expect the mediator to act as a fact-finder or judge. While mediators control the process of mediation by creating a safe, constructive environment for negotiating, the parties are ultimately responsible for the outcome.

Courts resolve disputes after considering the legal rights and responsibilities of parties based on their past conduct. Courts ascertain the facts, determine liability, and provide an appropriate remedy. Mediation encourages the disputants to consider perceptions of facts and the feeling generated by those perceptions. Mediation does not have to fix the blame for the past. Instead, mediation seeks to help people find common ground solutions to help manage conflict, to resolve a dispute, and to set the course for future cooperation. Goals of the process include improving communication, providing for a better understanding of the other's needs, and fashioning an agreement that makes sense to all the parties. Mediation encourages disputants to engage in creative problem solving in an environment that favors cooperation over competition. If mediation fails to resolve a dispute, litigation is still an option.

Many of us have experienced the frustration of programming a videocassette recorder or VCR. After we get a new machine, the way we record our favorite show changes and it is time to learn to program the VCR. "Programming the VCR" is an analogous model describing how disputants with a continuing relationship can work together to find common ground solutions to their conflict. When past methods for resolving conflicts fail, it is time to learn to program the VCR. In this model, "VCR" stands for *vision, cooperation, and resources*. If disputants have a shared vision or common goal, they can cooperate to use their available resources to achieve their goals. Instead of fighting each other, they work together to achieve an amicable resolution. By finding common ground, the dynamic of the conflict is shifted from competition to cooperation and collaboration.

A skilled mediator helps the parties develop a mutual vision, stated as shared goals or individual goals that are not mutually exclusive or incompatible. The mediator then assists the parties to define the vision in specific, measurable terms. Cooperation, the willingness to work together to attain the vision, results from communication and trust. If there is a breakdown in communication or a lack of trust, cooperation suffers. While the mediation environment can facilitate communication, trust must be developed over time by making small agreements and keeping them.

The mediator can help disputants develop realistic expectations by asking them to reflect on some basic questions. What do we hope to

achieve? What are we willing to do to attain the goal? What is the worst that can happen? By coming to grips with their hopes and fears and by focusing on the future, the parties are empowered to make agreements today that can positively shape tomorrow.

Stage 2): Statement of the Problem by the Parties.

After the mediator completes the opening statement, it is time for the parties to talk. One at a time, each is given the opportunity to tell his or her side of the story. Attorneys usually want to talk about what is in the pleadings. Disputants prefer to talk about themselves and how this dispute has affected them. Attorneys and disputants often believe this is the opportunity to convince the other side and the mediator. While it is important that each side tell its story, the true benefit is realized when one side's story is understood by the other. The goal is to keep them talking.

While the parties express their positions, or what they want, the mediator tries to figure out their interest, or why they have taken a particular position. Underlying most disputes are the hopes and fears the people bring to the table and the injustice that each is feeling. The mediator may summarize statements made by the parties and ask for further clarification. Some mediators prefer that one disputant summarize back what the other party has said. Whichever technique is employed, when each side understands the other's story, the process is ready to proceed.

In a large-group mediation, it might not be feasible to methodically give each person the opportunity to tell his or her story. Sometimes the mediator will ask the various groups to select spokespersons to speak for the group. Another approach, particularly well suited for large-group mediations, is for the mediator to summarize from mediation briefs prepared by the parties a historical summary of the factual basis for the dispute. Individual participants are then allowed to expand on important information the mediator might have slighted or omitted. Even when the mediator summarizes the problem, much can be gained from letting everyone be heard. Each participant has a unique understanding of the conflict and how it affects him or her. Sometimes it is possible to divide the group into smaller groups, such as elected officials, staff, and attorneys. Small-group sessions provide an additional opportunity for each participant to have a say. This approach can also help engage participants who might not speak up in the large group setting. Comments from the small-group sessions can then be reported back to the whole group.

Getting to the problem by letting the parties talk in a large-group mediation is like listening to a string orchestra warm up before a concert. Different instruments and techniques produce a necessary cacophony.

Stage 3): Information Gathering.

After the initial statements are completed and all sides have heard and been heard, attention turns to identifying the information the parties need to better understand the problem and possible solutions. Information sharing is critical to leveling the playing field when there is unequal bargaining power. In large mediations, the group may include the individuals with specialized knowledge. In some cases, the parties need to get answers outside of the room. Deciding what information is needed and how to obtain it can provide a positive cooperative experience to help set the tone for future negotiations.

When the parties begin thinking about what information will be helpful to them to resolve the dispute, they begin thinking about possible solutions. The mediator may need to slow the process down if the parties start moving too quickly to a settlement. Negotiations occurring at this stage of the proceeding are often based on positional bargaining. If the negotiations break down, the parties, entrenched in their positions, reach impasse, and may choose to stop the mediation.

Stage 4): Problem Identification.

A mediator should help the parties identify the problem underlying the dispute. It's not what the parties want, but why they want it, that is important. Consider the three girls who tell their dad they want to go to the movie this afternoon:

Dad asks, "How about if we all go tomorrow?"

The 12 year old says, "Okay."

The 13 year old says, "But I'm hungry now!"

And the 15 year old says, "You never let us do anything."

While each of the girls wanted to go to the movie, it seems they each have their own reason for wanting to go. Upon further questioning of the 13 year old, it all becomes clear:

"If you are hungry, why don't you make a sandwich?"

"My older sister promised to buy me some popcorn and a soda."

"Why?"

"I was supposed to sit with my little sister at the movie so the older one could be with her boyfriend."

It's not WHAT they want but WHY they want it that is important. If disputants engage in positional bargaining, the result tends to be win-

lose. If the dispute can be framed around shared interests or interests that are not mutually exclusive, the door is open for a win-win outcome. The legal arena provides a competitive environment to resolve conflict on legal grounds. Mediation rejects competition in favor of cooperation and seeks a resolution on common grounds. If the mediator successfully helps the disputants find common ground, or areas of common interest, the parties are more likely to cooperate to achieve their common goals. In most cases, the mediated agreement will address concerns and issues beyond those raised in the legal proceeding.

Stage 5): Problem Solving.

The problem solving stage is truly when mediation begins. This is the stage when the parties actually begin negotiating an agreement to address shared interests. Typically, the mediator will ask the parties to suggest multiple solutions to address the problem. Creativity in considering possible solutions is highly prized. After eliciting various solutions that address the interests of each party, value judgments can be made to determine which provides the greatest benefit to each at the least cost to either. Occasionally the parties may be unable to reach consensus on a solution. In these cases, the parties may be able to agree on a process they will use to resolve the conflict.

It is Friday night and husband and wife are trying to figure out how they will spend the evening. Husband wants to go to the movie but wife wants to go dancing. There are a number of possible solutions. They could do both. They could do neither. Or they could agree to do one now and the other later. The goal of mediation is to help the parties find a win-win solution that will address this conflict while setting the course for future cooperation.

In legal proceedings, decisions are based on legal precedent. Mediation encourages people to negotiate agreements that make sense to them. The mediated agreement does not have to mirror probable court results. If someone dies without a will, the state has laws of intestacy to prescribe how property will be distributed upon death. People may avoid the rules of intestate succession by making a will or by creating an appropriate estate plan. Mediation empowers individuals to craft their own solutions to resolve disputes.

In the problem solving stage of the mediation process, each individual's sense of justice or fairness is manifest. Examples of various types of justice include the following:¹⁶

¹⁶ JOHN LEMMON, *Family Mediation Practice*, 40-42 (Free Press, 1985), referring to ZARTMAN, I. AND BERMAN, M., *The Practical Negotiator*, (New Haven: Yale University

1. *Let's use my rules.* If we use the rule I am suggesting, I win.
2. *Might makes right.* I am most powerful. I have the resources to win.
3. *The meek will inherit.* Just do what you are going to do and I'll have to get by. While this makes the person appear weak, some individuals use this strategy as an offensive weapon.
4. *Then neither one of us will have it.* You want the Mercedes and I want it. If I smash it with a sledgehammer, neither of us will have it.
5. *Let's split the difference.* In some cases, the appropriate resolution is a compromise. This resolution, however, lets the biggest liar win.

Rather than use static rules to resolve the conflict, the mediator will encourage the parties to test any proposed solution to determine how well it satisfies the interests of the parties. As roadblocks are encountered in the problem-solving phase, the mediator can assist the parties by clarifying the problem and eliciting pertinent information needed to solve it.

Stage 6): Writing of Agreement.

Once the agreement is reached, the focus shifts to formalizing the terms of the agreement in a written document. Some mediators draft agreements. Others provide a memorandum of understanding setting forth the general provisions of the agreement. In either case, the devil is in the details. When counsel represents parties, most mediators want the attorneys to be involved in the drafting of the final agreement. If significant disagreements arise over the language to be incorporated in the agreement, the mediator can help the attorneys work out the differences. In some instances, it may be necessary to reconvene the disputants for clarification and to assure the agreement as written sets forth the agreement of the parties.

PART II: MEDIATING INTERGOVERNMENTAL CONFLICTS

A. *The Appropriateness of the Process*

The use of mediation in resolving public disputes is growing,¹⁷ as local governments seek to resolve public and intergovernmental conflicts in a less costly and less adversarial manner.¹⁸ Mediation affords public officials the opportunity to directly shape the outcome on important public policy matters, rather than having a solution imposed by the courts.¹⁹ While court rulings and judgments address specific legal

Press, 1982).

¹⁷ Robert Zeinemann, *The Characterization of Public Sector Mediation*, 24 ENVIRONMENTAL L. & POL'Y J. 49.

¹⁸ Place, *supra* note 6, at 367.

¹⁹ Zeinemann, *supra* note 17, at 51.

issues, the mediated agreement is not limited to these legal issues. The parties in mediation negotiate a comprehensive agreement to resolve the legal controversy while satisfying the underlying interests of the parties.²⁰

B. *The Background of the Local Conflict*

Within our local community, a conflict between the City of Fresno and the County of Fresno afforded the opportunity to mediate a public dispute. By Summer 2002, the parties were deeply involved in litigation of a land-use and tax-sharing dispute reaching back many years. Carefully crafted documents defined the legal relationship of the parties. Over time, these documents failed to address the underlying interests of the parties. A brief recap of the history of the dispute follows.

In 1983, the City of Fresno²¹ (“Fresno”), the County of Fresno²² (“County”), and the City of Clovis²³ (“Clovis”) each adopted a Joint Resolution on Metropolitan Planning (“Joint Resolution”) providing for cooperation concerning land use and other matters.²⁴ This document provided that all three entities would agree to any new boundary changes.²⁵ Eight years later, the County and Fresno, along with the Fresno Redevelopment Agency²⁶ (“Agency”), adopted a Memorandum of Understanding dated February 26, 1991 (“1991 MOU”).²⁷ This document incorporated the 1983 Joint Resolution by reference and set forth the terms of a comprehensive agreement on land use, tax sharing

²⁰ *Id.*

²¹ Fresno [“ALL AMERICA CITY 2000”], with a population of 420,600, is the largest city in Fresno County. Fresno Economic Development Corporation web site: www.fresnoedc.com.

²² Fresno County, with population of 823,900 (as of 1/1/2001), is one of the largest, fastest growing counties in the State of California. Over 60 percent of County’s population resides in the neighboring cities of Fresno and Clovis. Fresno County web site: www.fresno.ca.gov.

²³ Clovis, with a population of 72,808, has seen its population double in size since 1975. City of Clovis web site: www.Clovis.ci.ca.

²⁴ Master Settlement Agreement, Fresno County Superior Court Case No. 01 CE CG 03337, at 1.

²⁵ Pablo Lopez, *Ruling Favors County in Tax-sharing*, THE FRESNO BEE. August 8, 2002, at A1.

²⁶ Redevelopment and housing legislation in California establishes redevelopment agencies in each community as an administrative arm of the state. See: CAL. HEALTH AND SAFETY CODE § 33000 *et seq.* The Fresno Redevelopment Agency was a party to the Master Settlement Agreement and Revised Memorandum of Understanding resolving the 1998 litigation. Although a signatory to the Master Settlement Agreement in the current litigation, Agency was not a participant in this mediation.

²⁷ Master Settlement Agreement, *supra* note 24.

and other matters.²⁸

In 1998, as part of a Master Settlement resolving litigation concerning the 1983 Joint Resolution and 1991 MOU, the 1991 MOU was amended on September 22, 1998 (“1998 Amended MOU”).²⁹ The 1998 Amended MOU envisioned that Fresno and Clovis would expand boundaries but County would receive an increased shared of property tax in new growth areas.³⁰ The 1998 Amended MOU, in effect at the time Fresno filed the suit presented in this mediation, provided specific penalties if Fresno or County breached its provisions.³¹

After Clovis entered into an agreement with County permitting Clovis to increase its sphere of influence without Fresno’s consent, Fresno found itself at odds with County and Clovis. Fresno claimed any approval of Clovis boundary changes without the consent of Fresno, Clovis, and County violated the provisions of the Joint Resolution and the 1998 Amended MOU. In an attempt to address the growing conflict, leaders from Fresno, Clovis and County met and announced a conceptual agreement covering tax-sharing and land use.³² The conceptual deal fell apart over the tax-sharing provisions. When negotiations broke down, litigation began. Fresno filed suit against County, Clovis and the Local Agency Formation Commission (“LAFCO”).³³ Fresno sent a letter to the County, dated December 12, 2001, claiming the County was in breach of the 1998 Amended MOU and stating Fresno was terminating its tax-sharing agreement with the County.³⁴

This litigation, including the complaint and related cross-actions, is

²⁸ *Id.*

²⁹ *Id.*

³⁰ Pablo Lopez, *supra* note 25.

³¹ First Amendment to 1991 Memorandum of Understanding Between the County of Fresno, the City of Fresno, and the Fresno Redevelopment Agency, dated September 22, 1998, provides the county will be entitled to a one-half of one percent (.005) increase in its sales tax sharing with the city in the event of city’s breach; Section 8.4 provides the county will reduce its tax share to one percent (.01) in the event of county’s breach.

³² Pablo Lopez and Jim Davis, *Fresno City, County Draft 15-Year Pact*, THE FRESNO BEE, January 3, 2003, at A1.

³³ LAFCOs are state agencies within each county to encourage “planned, well-ordered, and efficient urban development patterns.” CAL.GOV’T CODE § 56300. There is a LAFCO in each of California’s Counties. Most are comprised of two representatives from county government, two from city governments, and one representative from the public at large. See: Brian P. Janiskee, *The Problem of Local Government in California*, 6 NEXUS, J. OP. 219, 224 (Spring 2001).

³⁴ Master Settlement Agreement, *supra* note 24, at 6.

referred to as the “Sphere of Influence case.”³⁵ The principal legal question concerned whether the provisions of the Joint Resolution requiring mutual consent of Fresno, Clovis and County constituted a binding contract or an unlawful delegation of authority. On May 14, 2002, the Superior Court ruled against Fresno, declaring the Joint Resolution is not an enforceable contract;³⁶ that the entire Joint Resolution is a policy document;³⁷ and that even if the Joint Resolution were a contract that would require Clovis to obtain Fresno’s consent before applying for an expanded sphere of influence, that contract would be an unlawful delegation of governmental powers.³⁸ Additionally, the court declared the incorporation of the Joint Resolution into the 1998 Amended MOU did not convert the Joint Resolution into a binding contract.³⁹ Further, the court declared County did not breach the 1998 Amended MOU by permitting Clovis to apply for an expanded sphere of influence without Fresno’s prior approval.⁴⁰

On June 18, 2002, the Court held that the Joint Resolution was merely a statement of a policy objective and that incorporation of the Joint Resolution into the Clovis General Plan did not render the Joint Resolution binding against any of the parties.⁴¹

On July 30, 2002, the court declared that, by its letter dated December 12, 2001, Fresno impermissibly terminated the 1998 Amended MOU and that County was entitled to increase its sales tax rate by .5% as a remedy for Fresno’s termination of the 1998 Amended MOU.⁴²

As matters stood in early August 2002, court rulings suggested County was entitled to increase the share of sales tax it received from Fresno.⁴³ For its part, Fresno would not be allowed to annex new land without a tax-sharing agreement with County.⁴⁴

³⁵ Request for Entry of Order Approving Master Settlement Agreement, Release, Stipulation for Dismissal, and Order; Master Settlement Agreement and Order Thereon. Fresno County Superior Court Case No. 01 CE CG 03337, at 1.

³⁶ Master Settlement Agreement, *supra* note 24, at 4.

³⁷ *Id.* at 5.

³⁸ *Id.* See also: Alameda County Land Use Ass’n v. City of Hayward, 38 Cal. App. 4th 1716 (1995)..

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 6.

⁴³ Pablo Lopez, *supra* note 25.

⁴⁴ *Id.*

Another legal action filed by Fresno questioned whether Clovis could amend its general plan to alter traffic flow on Herndon Avenue. This litigation, referred to as the "Herndon Access case,"⁴⁵ asked the court to determine whether the Joint Resolution and 1998 Amended MOU constituted a binding contract that would require Clovis to consult with Fresno prior to making a general plan amendment. On July 3, 2002, the court reaffirmed that the Joint Resolution was a policy statement and added that the Joint Resolution did not create contractual rights that would permit Fresno to set aside a Clovis general plan amendment.⁴⁶

C. *The Mediation of the Local Conflict*

Mediators met with representatives of Fresno, Clovis and County for more than 45 hours during twelve sessions. The initial mediation sessions involved only County and Fresno. After a framework for resolving the dispute between these parties was reached, Clovis participated in negotiations to dismiss the litigation and to formalize the agreement. The process used in this mediation incorporated the six steps of the classical mediation model.

Introductory remarks by the mediators explained the process and stressed that our task was not to fix the blame for the past but rather to set the course for future cooperation. As the parties told their stories, it became apparent that communication between the elected officials was lacking. Neither side fully understood the other's positions. As they began to understand each other, they wanted to talk about possible solutions. In fact, they wanted to engage in positional bargaining. This development required redirecting the parties to examine their respective interests to avoid a potential breakdown in negotiations that tends to result when parties bargain from mutually inconsistent adversarial positions.

Instead of focusing on what each side wanted, the mediators asked the participants to consider what this region should look like in 20 years and what they might do today to help make it happen. In a time of limited resources, more can be achieved by working together than by expending resources fighting each other.

⁴⁵ Request for Entry of Order Approving Master Settlement Agreement, Release, Stipulation for Dismissal, and Order; Master Settlement Agreement and Order Thereon. *supra* note 35. *See also* Fresno County Superior Court Case No. 01 CE CG 002949. Fresno objected to Clovis permitting vehicle traffic access to and from Herndon Avenue that Fresno asserted was an arterial expressway.

⁴⁶ Master Settlement Agreement, *supra* note 24, at 5-6.

While the pleadings focused on the meaning of the Joint Resolution and the Memorandum of Understanding, the real dispute concerned land use and tax sharing and was fueled by a breakdown in communications and a lack of trust. The mediation forum provided a safe, constructive environment for dialogue. While the basic framework for the agreement was set at the end of the third session, several meetings were needed to finalize an agreement. Along the way, small agreements helped develop the trust necessary to reach a comprehensive agreement.

The elected officials, during the mediation process, decided to resolve the dispute as a policy matter, rather than as a legal one. As a practical matter, this was essential because the resolution of the legal case would not afford either party what it wanted concerning land use or tax sharing. In order to set the course for future cooperation, the decision was made to dismiss the pending litigation as a signal of a new beginning and to commence dialogue among Fresno, Clovis and County regarding future cooperation covering a broad range of regional concerns.

While the parties reached a tentative agreement on the issues of land use and tax sharing and were willing to explore avenues for future cooperation, something was missing. Fresno and County had reached similar agreements in the past, specifically in the Memorandum of Understanding of 1991 and in the Amended Memorandum of Understanding of 1998. Both times disagreements arose over the meaning of terms in the operative agreement. These prior agreements provided for legal remedies in the event a party failed to comply with the provisions of the Memorandum of Understanding. One side would be rewarded if the other failed. These agreements provided no incentive for mutual cooperation. Our goal was to create an agreement that would be cheaper to keep than it would be to break and that would provide incentives for mutual cooperation.

County wanted a stable tax-sharing agreement. Fresno wanted to add residential and industrial land to its sphere of influence to support its general plan. Both sides wanted to encourage Fresno to grow in and up, using existing land, instead of out to new land. Both sides were concerned about many issues including air quality, preservation of agricultural lands, and water. The final agreement calls for County and Fresno to work together on these types of issues. Specifically, County and Fresno will work cooperatively to maintain availability of water under a federal contract. Fresno receives 60,000 acre-feet of water a year from the San Joaquin River under a contract with the

United States Bureau of Reclamation.⁴⁷ Fresno and County agree to “aggressively pursue renewal” of this contract by Fresno.⁴⁸ Renewal may require that Fresno amend its charter to permit water meters.⁴⁹ If Fresno is unable to renew its federal contract, the rights to the federal water may be assigned, subject to the approval of the bureau of Reclamation, to County or to another entity that will keep the water in the local area.⁵⁰ Water is the glue that holds this agreement together and provides a significant incentive for County and Fresno to work together. If the federal water contract is lost, the parties agree that the Amended and Restated Memorandum of Understanding will expire on February 26, 2006.⁵¹ The common interest in preserving the federal water contract significantly improves the likelihood the entire agreement will not be violated by the parties.

D. Reflections on the Process

High-stakes public policy questions can be resolved by the courts or by the public officials who were elected to make those decisions. While the court is able to make decisions on legal grounds, the specific interests of the parties and the concerns driving the conflict may not be addressed within the legal proceeding. Court decisions typically produce winners and losers. Judgments resolving legal disputes sometimes promote hostility, hurt feelings, and the desire for revenge. When the parties have an on-going relationship, they benefit by working out a mutually acceptable solution.⁵²

The intergovernmental mediation is highly complex and presents significant problems. In most mediations, decision-makers are present at the mediation sessions and real-time decisions can be made. Under California law, elected officials’ ability to meet outside of a public session is restricted.⁵³ Specifically, a majority of the members of a board or council are not permitted to participate in a mediation session. Representatives of the governing bodies attend the mediation sessions but the respective governing bodies must ratify the ultimate decision in a public session. On the positive side, decision-makers usually adopt “consensus accords” in well-mediated agreements.⁵⁴ On the neg-

⁴⁷ Davis and Ellis, *supra* note 1.

⁴⁸ Amended and Restated Memorandum of Understanding, at 29.

⁴⁹ Davis and Ellis, *supra* note 1.

⁵⁰ Amended and Restated Memorandum of Understanding, *supra* note 48, at 29-30.

⁵¹ *Id.*, at 30.

⁵² Place, *supra* note 6, at 372.

⁵³ Ralph M. Brown Act. See: CAL.GOV'T CODE §§ 54950-54963.

⁵⁴ Zeinemann, *supra* note 17, at 53.

ative side, some suggest that mediation allows for backroom dealing.⁵⁵ Prior to adoption by the governing board, time is afforded for discussion. In most cases, experience suggests that a consensus agreement, because of its scope and coherence, is highly likely to obtain legislative approval.⁵⁶

In our local dispute, the Master Settlement Agreement and the Amended and Restated Memorandum of Understanding were unanimously approved.⁵⁷ The Master Settlement Agreement disposed of the existing litigation and committed County, Fresno, and Clovis to work together to achieve regional solutions to regional planning issues in areas such as transportation, air quality, land use, water, public safety, and health and human services.⁵⁸ The Amended and Restated Memorandum of Understanding set forth the terms of a new working relationship for County and Fresno while resolving the dispute concerning land use and tax sharing. Significantly, this new working relationship specifically provides that Fresno and County will mediate any disputes that arise regarding the interpretation or implementation of the Amended and Restated Memorandum of Understanding prior to commencing litigation.⁵⁹

PART III. LESSONS LEARNED

Reflections of Daniel G. DeSantis:

Nearly four years ago the Fresno Superior Court created its Alternative Dispute Resolution (ADR) Department for the purpose of eliminating the court's backlog of cases. As the first ADR administrator, I was charged with the responsibilities of introducing ADR into the court, to the local bar association, and to the public-at-large to heighten awareness of the advantages of ADR generally and mediation specifically. We hoped to modify the local culture about how civil lawsuits and public disputes might be better managed.

In addition to developing a mediation program and engaging in extensive public awareness programs, I was constantly on the lookout for a high profile public dispute where mediation services could be offered. In the spring of 2001 an article appeared in the Fresno Bee about the problems with a major renovation project at the Fresno Air-

⁵⁵ *Id.* at 54.

⁵⁶ *Id.*

⁵⁷ Davis and Ellis, *supra* note 1.

⁵⁸ Master Settlement Agreement, *supra* note 24, at 9.

⁵⁹ Amended and Restated Memorandum of Understanding, *supra* note 48, at 40-41.

port. The article said that the situation would most likely wind up in litigation. With the approval of the court's ADR oversight committee, I approached the city manager to suggest mediation. Not atypical, his response was, "I know all about mediation. It's great, but not for this case". Surprisingly though, he added, "However, we are involved in another dispute that might be appropriate for mediation." He went on to describe the growth and tax lawsuit between the city and the county that had been in the court for more than a year. Litigation was costing all parties lots of time and money and was creating a great deal of ill will with no end in sight.

The ADR oversight committee agreed that this would be a good case. Judges on the committee pointed out how challenging it is for them when they were asked to rule on public policy issues. After all, didn't the public elect representatives to deal with these matters? Don't the representatives have professional staff to do all the research and analysis? Aren't the representatives responsible for forging policy to guide the community's destiny? So how can they expect the court to listen to a few hours of argument in a trial and then make the call? Judges and the courts will deal with these matters if they must, but surely the courts should be the forums of last resort.

Lesson 1: Just getting them to the table is a monumental task!

I began by meeting with the city attorney who enthusiastically endorsed the idea. Then I met with a city councilman who assured me that the entire city council was for mediation. Next, I spoke with the county counsel who was not inclined toward the idea. His views might have been based on past experiences or perhaps because he felt that the county was prevailing in the courts and would be less advantaged by participating in mediation. Nevertheless, he did not feel he could recommend mediation to the board. Subsequently, I went to a member of the county board of supervisors. The supervisor recognized the potential benefits of mediation, not only for this case, but also for the good of future relationships. I was then invited to meet with the board of supervisors with county counsel present. This was a critical meeting. After an elaborate educational presentation, the supervisors gave their unanimous support for the mediation.

At this point I presented both sides with a list of candidates to serve on the mediation team. Universally it was conceded that a team of mediators would be best. Once they made their selection I contacted Professor Cartier and Justice Thaxter and asked them to donate their time without compensation. I told them it was a complex case that would take at least one, possibly two or three days. Finding open

dates for the mediation was no minor task. By the time settlement was reached it took twelve sessions and over 45 hours of actual mediation. Furthermore, at least an equal amount of time was spent by each of these mediators in preparation, coordinating, and caucusing outside the mediation over the next five months.

Lesson 2: Mediators control the process

Twenty-two people attended the first mediation session. There were council members and supervisors; numerous attorneys from the offices of the city attorney and county counsel; the city manager and the county administrative officer; planners and department heads; plus support staff. We mediators quickly realized that this was not an ordinary group. To get to the level each person in the room had achieved, each one of them had to be highly intelligent and highly motivated. Many mediations involve less sophisticated parties. Here we had high powered, goal-oriented, and very knowledgeable individuals. These achievers were in the habit of controlling the process and getting things done their way. In order to maintain control over the process, as mediators we were going to have to keep on top of the issues and we were going to have to demonstrate enormous strength in order to maintain control over the process.

Early in the process Professor Cartier, with his VCR analogy, talked about the importance of a shared vision. Justice Thaxter was able to crystallize this concept in a unique way with his introductory comments. He pointed out to the group that he was born in Fresno and had spent his whole life there. Thus, for his entire life he had been both a city and county resident. Therefore, he was anxious for both the city and county to prevail in the mediation. After all, if the city got the upper hand he would suffer as a county resident and visa versa. I believe it was a powerful admonition to both sides to abandon their "one-upmanship" bargaining styles in favor of a win-win type of solution. This was a good lesson in how to set the tone for the mediation from the beginning. The tone to be set here was that both sides must emerge from the mediation as winners.

Lesson 3: Open and honest communications are crucial

During a particular mediation session a dramatic exhibition of honesty occurred which I believe was a major turning point in the process. Throughout the mediation each side maneuvered for their own advantage. Clearly, they did not genuinely trust the other side to be completely fair. At one tense point, the implicit lack of trust was explicitly stated, "You know, we get the feeling you don't trust us."

Rather dramatically, as the opposition responded, “That’s right, we don’t!” With that blatant spurt of honesty every person in the room seemed to realize, it’s all right to be totally honest. Within this truly honest environment they then took on the final issues with unusual candor.

Lesson 4: All’s well that ends well? Time will tell.

Yes, the mediation ended successfully. The lawsuit was dismissed, an agreement was reached, and the elected officials promised to participate in mediation to resolve future disputes before going to court. However, as an ADR Administrator whose entire professional career is devoted to advance the cause of ADR, I am not certain that every person who participated in the process emerged with this concept totally ingrained in his or her being. There is still a lot of work to do before all of the participants fully internalize the concept. I am glad they succeeded and have set the course for future cooperation. I am glad that our community has witnessed a good mediation and hope they will take advantage of mediation with their disputes. Still we have a ways to go before all of the traditional methods of dealing with conflict—confrontation, competition, aggression, and litigation—are abandoned in favor of cooperation, communication, understanding and peace.

Reflections of James F. Thaxter:

Certain factors made the mediation of this dispute more challenging than most. Several representatives participated for each agency. They came from different levels within the organization, including elected officials, department heads, subordinate staff, and legal advisors. The sheer number of participants, with their different responsibilities, perspectives, and communication styles, lengthened the process. In addition, the final decision makers (i.e. the elected bodies) did not directly participate in the discussions. Finally, the number and complexity of the various issues that were exposed during the mediation made its resolution more difficult.

Nevertheless, the successful conclusion of an agreement among the parties demonstrated the wisdom of some basic tenets of the mediator’s creed. I recognize at least four lessons learned during this process that may be helpful in future mediations.

Lesson 1: Keep ‘em talking

At times it seemed like this mediation was a “three steps forward, two steps backward” type of movement. As soon as some progress was made, there would be a setback, often reopening wounds suffered in previous battles. Tensions and frustrations threatened to abort the

whole process. The role of the mediators at those times was to help the parties recognize, focus on and renew the forward movement. The lead mediator skillfully injected some nonsubstantive discussions at crucial points. These helped ease tensions so that the parties returned to the substantive issues with a more positive, constructive approach.

Lesson 2: Keep their eyes on the ball

At the initial sessions the parties devoted most of their attention to the specific issues involved in the pending litigation. It was important, however, for the mediators to emphasize that the litigation—no matter who “won”—would have only a short-term impact and would not address the need for long-term interagency cooperation in dealings arising from urban growth in this region. Once the parties began talking in terms of shared vision for the region twenty or more years in the future, resolving the litigation became a secondary matter. One of the most important aspects of the final agreement is that it provides a framework for the parties to work cooperatively, rather than at cross-purposes, so that they can avoid similar disputes in the future. If other disputes arise, the parties agreed to mediate rather than litigate.

Lesson 3: Make sure everyone is speaking the same language

Although the parties had reached a prior “handshake” agreement, it broke down and led to litigation simply because they had different understandings of a key provision. The same kind of miscommunication occurred during the mediation process, either among those present at the discussions or in conveying information to the non-participating officials. Miscommunication is always a risk in any mediation, but the risk was exacerbated here by the number of people involved. It is the mediator’s responsibility to make sure that all parties have the same understanding of the meaning and implications of any terms agreed upon.

Lesson 4: Use a “bottoms up” approach when appropriate

The elected officials, of course, are ultimately responsible for setting policy for their respective governmental agencies. However, when the goal is to provide a structure for cooperation among several agencies, it is important to receive input from those staff members who will work on implementing the policies on a day-to-day basis.

In this mediation some of the most valuable contributions came from joint sessions of the agencies’ respective staffs. They were able to agree on what was workable and what was not. The staffs, in turn, helped the elected officials reach the policy decision that made the agreement possible.

Reflections of Richard M. Cartier:

The idea of mediating a long-standing dispute between the City of Fresno and the County of Fresno was intriguing. Prior to the first session, the mediators met. We understood that any agreement would have to be approved by the elected officials of both the city and county. We also believed that agreement approval would have to be unanimous or very close to it. A split vote of either governing body could undermine the agreement's efficacy. With high hopes and great expectations, we met with representatives from the city and county.

Each side had taken certain positions relative to the pending litigation. Neither side could clearly articulate what was driving the dispute. Neither side understood the other. In fact, disagreements were evidenced among participants who were on the same side. While I talked about building agreements on common ground, the initial foundation was like quicksand. During our first two sessions, much of our time and effort was given to clarifying what each side hoped to achieve. With sufficient dialogue, the shared vision, or common ground, began to emerge. Eventually an agreement was reached that met with the unanimous approval of the respective governing bodies. Along the way, some basic beliefs were reaffirmed and some valuable lessons were learned.

Lesson 1: Stakeholders need to be at the table

We began this mediation with representatives of the city and county. This configuration made sense as long as the issue on the table was land use and tax sharing between these entities. When the decision was made to dismiss the pending litigation and to talk about regional cooperation, Clovis' participation was required to finalize the master settlement agreement. We had to integrate Clovis into on-going discussions. At various times, the elected officials and/or staff met without attorneys present. We had to reintegrate the attorneys into the process in subsequent sessions. In retrospect, the mediation would likely have taken less time if all the stakeholders had been present for all the large group mediation sessions. As Justice Thaxter points out, however, a great deal of meaningful work was conducted in side-sessions, which helped move the process along.

Lesson 2: Protect the process

Mediators need to create a safe, constructive environment for negotiations. Mediators need to control the process; keep the disputants talking; find the common ground and build on it; help the disputants move from positions to interests; and encourage them to find solutions that will meet the interest of all the parties.

Sometimes we need to let go of the past before we can embrace the future. The mediator may need to help the parties come to grips with past injustices if they are going to rebuild the trust needed to work cooperatively in the future. The commitment to the process was clearly evidenced by the respect for the confidentiality of the mediation. Over a period of four months, none of the participants said anything that was reported publicly that compromised the confidentiality of the mediation process.

Lesson 3: Mediation is not an escape from power politics

The elected leaders were committed to protecting the interests of their constituents. During the process, they discovered that working together to achieve shared goals offers more promise than fighting one another. True leadership was demonstrated when the elected representatives from each side embraced cooperation over competition.

Between the city and county, litigation would have yielded a winner and a loser. Hostility would likely continue. Once the parties established a shared vision and a willingness to cooperate with each other to find mutually acceptable solutions, the mediation had a high probability of being successful. When the elected officials decided to resolve their conflict as a policy matter, they created the possibility for a win-win outcome. Even when trust was lacking and negotiations were lagging, the participants remained willing to work for an agreement that would benefit each side—*the agreement that is cheaper to keep than it is to break*.

Lesson 4: The successful mediation

Although the city and the county reached an agreement during mediation resolving multiple lawsuits, the agreement should not be the measure of the ultimate success of the process. Mediation success might be measured by improved communication, better understanding of the other's needs and interests, or by finding common ground. The long-term success of a mediation is whether the parties are willing to cooperate in the future to achieve common goals. Time will tell if the mediation process helped the parties set the course for future cooperation. Because of the commitment and hard work of representatives of the City of Fresno, the City of Clovis, and the County of Fresno, a historic agreement was reached ending years of bitter exchanges and numerous resorts to litigation. The true success of this mediation depends on the commitment of the parties to work cooperatively to address important regional planning issues that will affect the quality of life in the local area for years to come. I can only hope this agreement is as significant twenty years from now as it is today.