

An Opportunity Missed? The Mediator as Case Manager

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Purposes of Today's Discussion

- Suggest potential additional services you might provide in some of your mediation cases
- Get your analysis of this potential

Feel free to ask questions as we go along

“Guided Choice” Model

- By show of hands, how many of you have heard of Paul Lurie’s “Guided Choice” (GC) model?
- How many of you have used the GC model?
 - How well did it work?
- I ask because GC is one variation of my general idea, which has been publicized in the last few years.
- I will describe my ideas and then describe how GC fits in.

Basic Premises

- **Mediators usually are used only at the dispute resolution phase of a case.**
- **Parties and lawyers could benefit from neutral case management services throughout a case.**
- **Most probably would not use such services but a significant number might, especially in complex and/or contentious cases.**

Litigation Context

- By show of hands, have you litigated civil cases?
- Litigators handle cases from the beginning, not just at the end, when they are ready to settle
- There may be numerous conflicts during litigation, especially about discovery
- Potential conflicts increase with multiple parties, multiple claims and counterclaims, and complex technical issues
- Conflicts can fester and accumulate over time

Prison of Fear

Lawyers know that their cases will probably settle but are afraid to suggest early negotiation or mediation because they fear that:

- Other side will think they don't have good case
- Other side will take advantage of them
- Other side will not disclose "smoking gun"
- Their client will lose confidence in them
- They will risk malpractice
- They will lose income

Escaping the Prison of Fear

Lawyers can escape if they:

- Tell other side they routinely consider negotiation
- Proceed only if potential benefits outweigh risks
- Use mechanisms to assure accurate information
- Assert client's legitimate interests
- Don't "give away" too much – are willing to "walk"
- Keep client informed and get consent
- Use fee arrangements rewarding early negotiation

Mediators Can Help

You can help parties exchange information, starting early in a case, by:

- Focusing on information initially needed for negotiation (not everything needed for trial)
- Identifying additional information as needed
- Mediating discovery disputes
- Serving as discovery “escrow agent”
- Conducting neutral investigation to diagnose problems

Mediators Can Help, Part 2

- You can learn some helpful information that isn't discoverable, eg,
 - parties' key interests
 - settlement priorities
 - business plans
 - expectations about the future
- Parties can confidentially provide you such information, assured it will be used to promote settlement

Mediators Can Help, Part 3

- “Battles of the experts” are very expensive and risky
- To identify and resolve technical issues, you can elicit expert opinions
 - from joint neutral experts
 - in joint or separate meetings with each side’s experts
 - producing information or report as requested
 - with agreement about (in)admissibility
 - retaining additional experts if desired

Mediators Can Help, Part 4

You can help manage procedural issues like those in FRCP 16, eg:

- Clarify legal and/or factual issues
- Elicit stipulations
- Schedule, specify, and limit discovery, especially e-discovery
- Resolve issues re privilege etc.
- Help analyze potential for summary judgment

Mediators Can Help, Part 5

When parties are ready to mediate, you can:

- Draft agreement to mediate, including custom provisions
- Schedule mediation
- Manage logistics (eg, space, AV technology, video-conference, refreshments)
- Orchestrate exchange of needed information and documents
- Plan attendance (and, possibly, non-attendance) of particular individuals, including experts
- Suggest preparation of parties to have realistic expectations
- Identify potential “land mines”
- Encourage pre-drafting of boilerplate for agreement
- Develop agenda
- Oh yeah: help resolve ultimate issues

Mediators Can Help, Part 6

If parties don't reach agreement and parties will arbitrate or try the case, you can help lawyers:

- narrow the issues to be argued
- identify expert witnesses to be called
- share exhibits
- generally inform each other of their plans
- agree to focus arguments on merits and avoid tactics that unnecessarily aggravate conflict

Mediators Can Help, Part 7

If you work on a case for an extended time, you can help de-escalate conflict by:

- Helping people see the world thru other side's eyes
- Orchestrating interactions to promote good relationships between lawyers and/or parties
 - This might include a meal early in the process where people get to know each other (better) and not focus on the case much, if at all

Bundling Mediation Services

- Most mediators try to resolve the ultimate disputes and many help to plan the mediation process
- Probably few mediators do the other functions
 - Have you done any of these others? Which ones? How often?
- Mediators can offer range of services, à la carte or in somewhat standard packages
 - Eg, standard 1-course, 3-course, 7-course meals
- If enough mediators offer such services, parties and lawyers may see them as normal – and buy them

Guided Choice Model

Elements of GC Model:

- commitment to mediate
- confidential diagnostic discussions with “facilitator” (mediator)
- process design and option generation based on diagnosis
- information exchange based on agreed process
- overcoming impasses (aka mediation)
- ongoing facilitator role even if parties don’t settle
- handling impasses requiring expertise

How Much Will This Cost? Who's Gonna Pay?

- Of course, parties need to pay mediators for these services
- Mediators might charge hourly fees or, perhaps substantial flat fees for packages of services
- The parties would share the costs
- If the process is efficient, it may reduce litigation costs (and possibly increase lawyers' effective hourly rates under an alternative fee arrangement)

These Ideas Will Never Work

Why are these ideas naïve, foolish, unrealistic etc.?

- It will cost parties more money
- Lawyers will lose some control of the process
- Lawyers may lose some advantage in litigation
- Lawyers will lose revenue
- Parties won't want to engage more professionals
- It's new and untested
- What else?

Why Might These Ideas Work (in some cases)?

- **Lawyers feel they need help with difficult and/or complex cases**
- **Lawyers think they can get client's good will (and future cases and referrals)**
- **Lawyers are rewarded with non-hourly fee arrangement**
- **Parties are frustrated with litigation-as-usual**
- **Why else?**

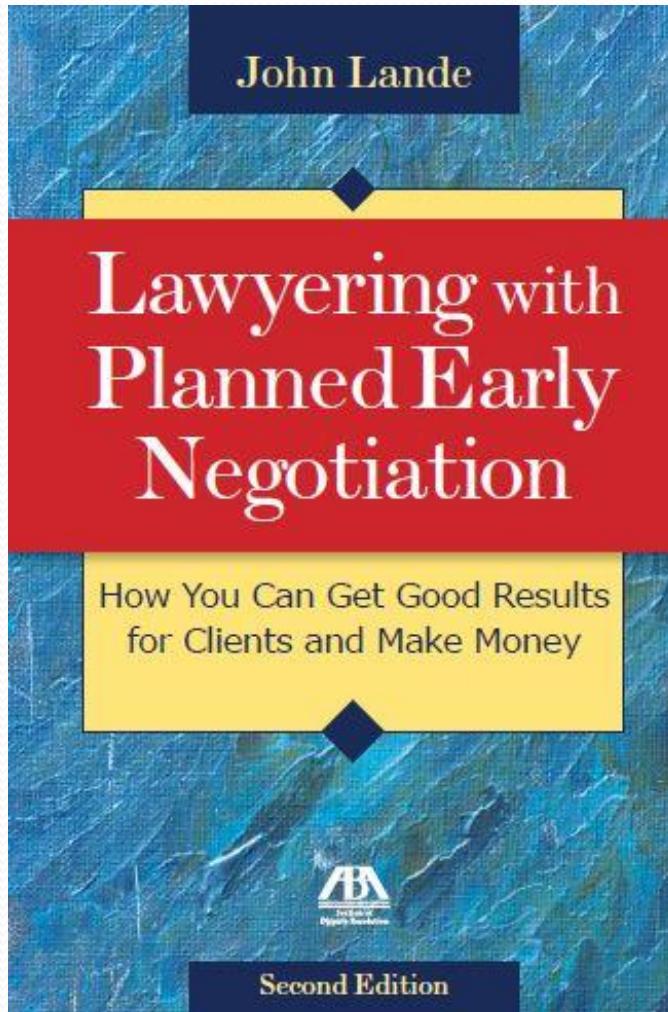
Why Do Lawyers and Parties Negotiate or Mediate Early?

- They are ordered by courts
- Parties insist
- Parties can't afford economic or non-economic cost of litigation
- Lawyers believe it is the right thing to do
- Lawyers believe it is in their interest to do so
- Why else?

Brainstorm Time

- Have you had a case where the parties and lawyers might have wanted you do “extra” services?
 - Why? What services?
 - What might you have said to persuade them?
- What “extra” services might be most attractive in the market?
- What *packages of services* might be most attractive in the market?

For More Information



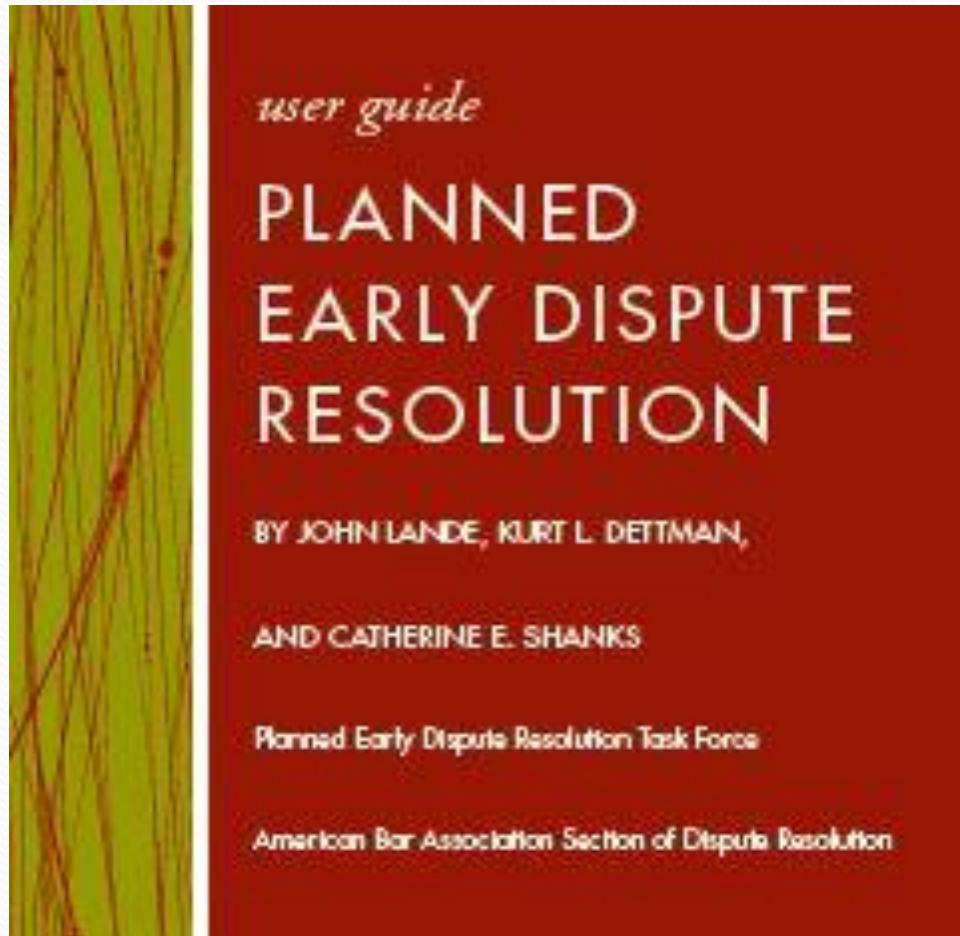
law.missouri.edu/lande

**My article: “How Neutrals
Can Provide Early Case
Management of
Construction Disputes”**

www.indisputably.com

ABA Section of Dispute Resolution

PEDR User Guide





Thank You Very Much