

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?**

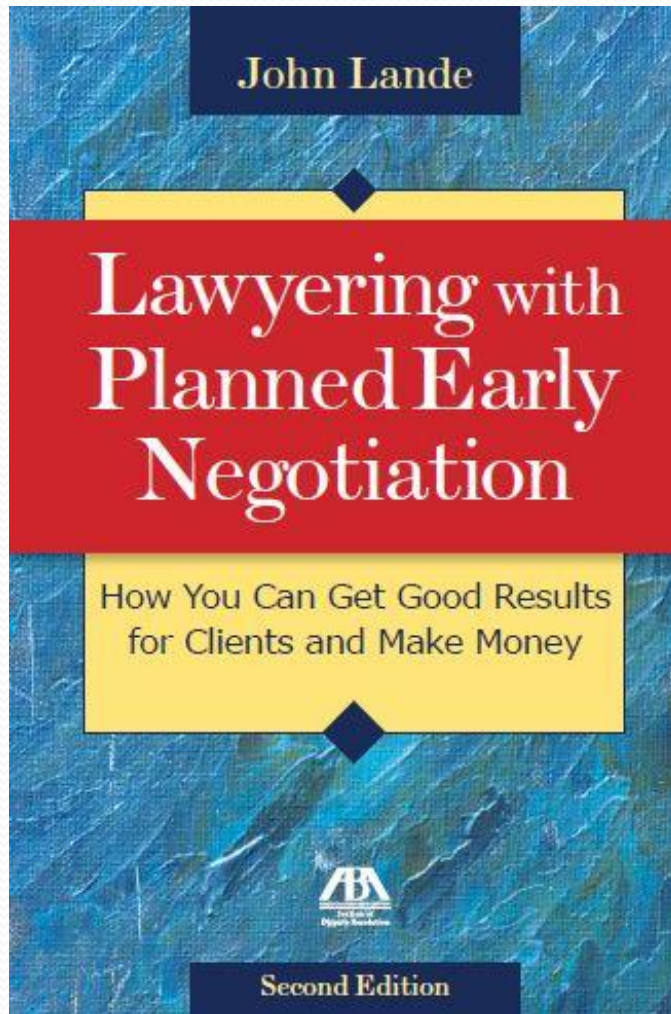
Why Do Lawyers and Parties Negotiate or Mediate Early?

- **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

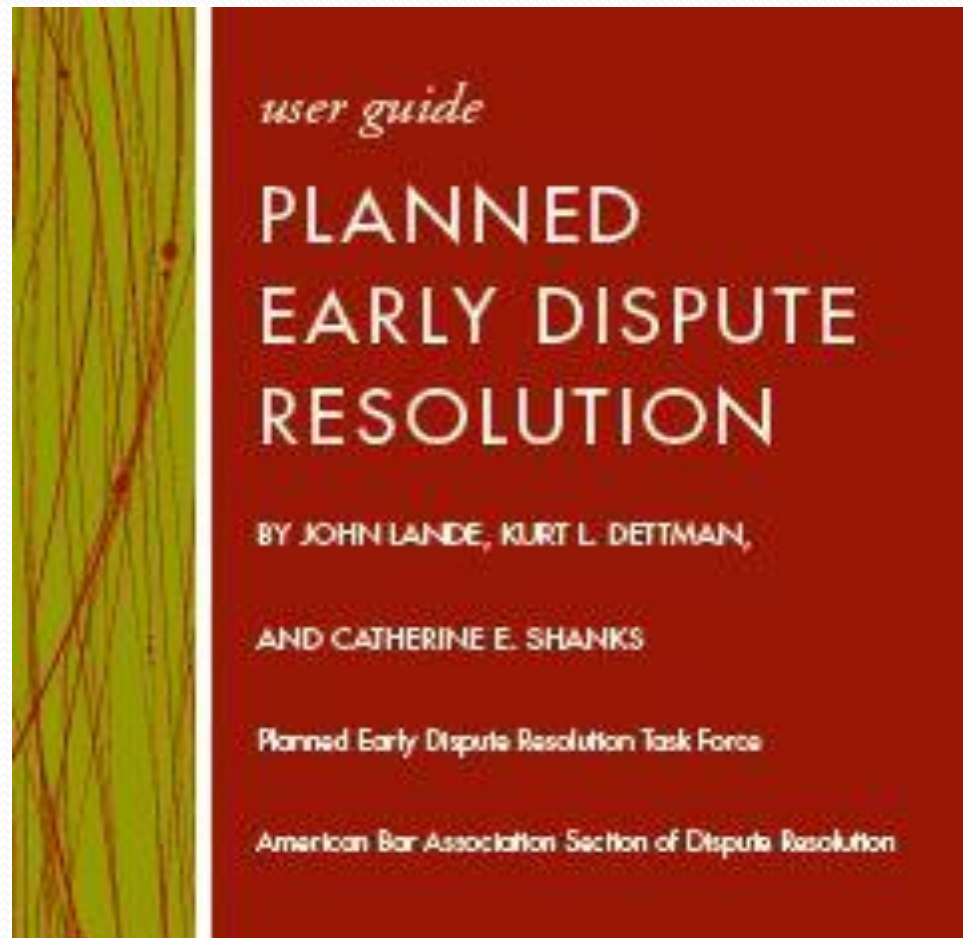


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**My article: “How Neutrals
Can Provide Early Case
Management of
Construction Disputes”**

www.indisputably.com

ABA Section of Dispute Resolution PEDR User Guide





Thank You Very Much