

Are You Missing Opportunities? Mediators as Early Case Managers

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Purpose of Today's Discussion

- **Suggest early case management services mediators might provide to help lawyers and their clients**
- **. . . in addition to resolving disputes at the end of a case**

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 wouldn't use such services but some might, especially in complex and/or contentious cases

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?**

Litigation Context

- Litigators handle cases from the beginning, not just when they are ready to settle
- 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

Have You Provided or Used Early Case Management?

- **As I list services that mediators can provide, please let us know if you have provided or used these services**
- **We will discuss services early in a case – not primarily to prepare for a mediation session**

Exchanging Information

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”**

Confidential Conversations

Parties can confidentially provide information, assured it will be used only for negotiation, eg:

- **parties' key interests**
- **settlement priorities**
- **business plans**
- **expectations about the future**

Technical Issues

- **“Battles of experts” are expensive and risky**
- **You can elicit expert opinions**
 - **from joint neutral experts**
 - **in joint or separate meetings with each side’s experts**
 - **producing report**
 - **with agreement about (in)admissibility**
 - **retaining additional experts if desired**

Preparing for Mediation - 1

When parties are ready to mediate, you can:

- **Draft agreement to mediate, including custom provisions**
- **Manage logistics (eg, space, video-conference, refreshments)**
- **Orchestrate exchange of information and documents**
- **Plan attendance (and, possibly, non-attendance) of particular individuals, including experts**

Preparing for Mediation - 2

- Suggest preparation of parties to have realistic expectations
- Identify potential “land mines”
- Encourage pre-drafting of boilerplate for agreement
- Develop agenda
- Oh yeah: then help resolve ultimate issues

If Parties Don't Settle

You can help:

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

Litigation Issues

Manage 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**

De-Escalate Conflict

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**
- Arranging 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 ultimate disputes and many help to plan mediation**
- **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**

How Much Will This Cost?

Who's Gonna Pay?

- **Mediators might charge hourly fees or perhaps flat fees for packages of services**
- **Parties pay for these services and share costs**
- **If process is efficient, it may reduce costs (and possibly increase lawyers' effective hourly rates under an alternative fee arrangement)**

These Ideas Will Never Work

Why are these ideas naïve, 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 need help with difficult cases**
- **Lawyers get clients' good will (and referrals)**
- **Lawyers rewarded with non-hourly fee arrangement**
- **Parties are frustrated with litigation-as-usual**
- **Why else?**

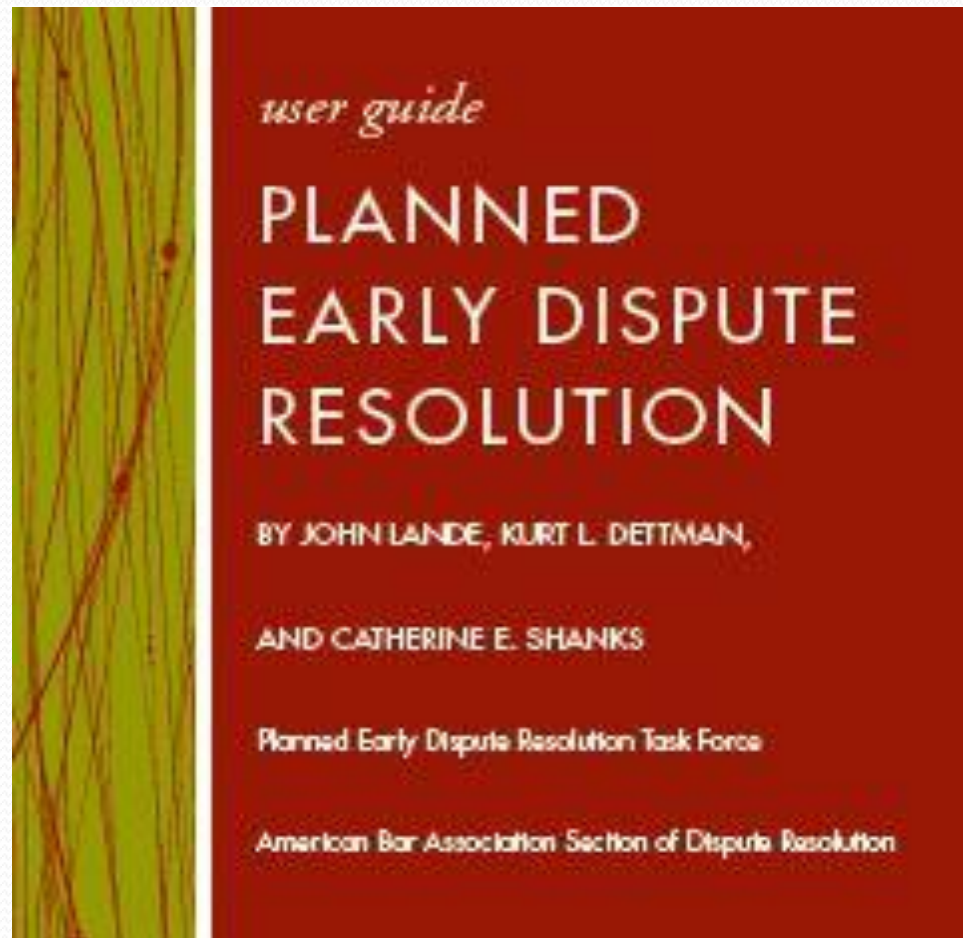
Mediation Resources

- **ABA Section of Dispute Resolution Task Force on Improving Mediation Quality Report**
- **My article, “Doing the Best Mediation You Can,” summarizing the Task Force Report**

ABA Section of Dispute Resolution Mediation Preparation Guide



ABA Section of Dispute Resolution PEDR User Guide





Thank You Very Much