

Are You Missing Opportunities? Mediators as Early Case Managers

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**Advanced Alternative Dispute Resolution
Texas Bar CLE
January 26, 2018**

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

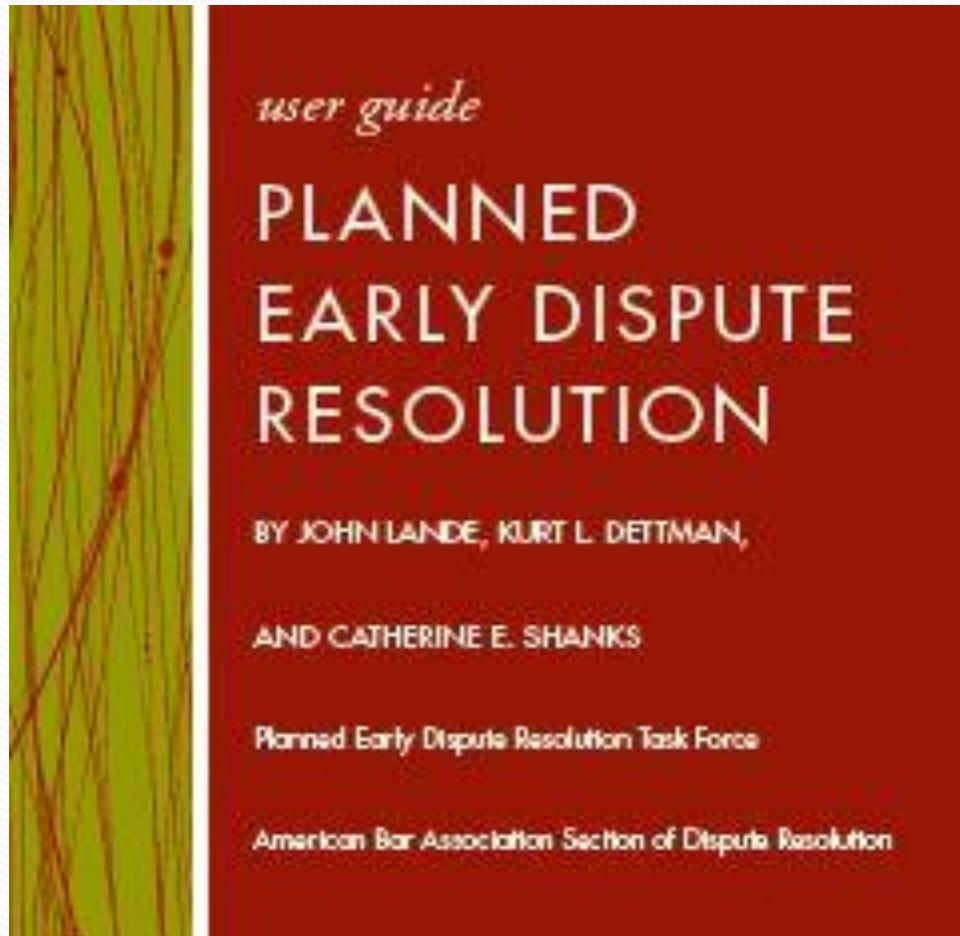
- ABA Section of Dispute Resolution Task Force on Improving Mediation Quality Report
- My article, “Doing the Best Mediation You Can,” summarizing the Task Force Report

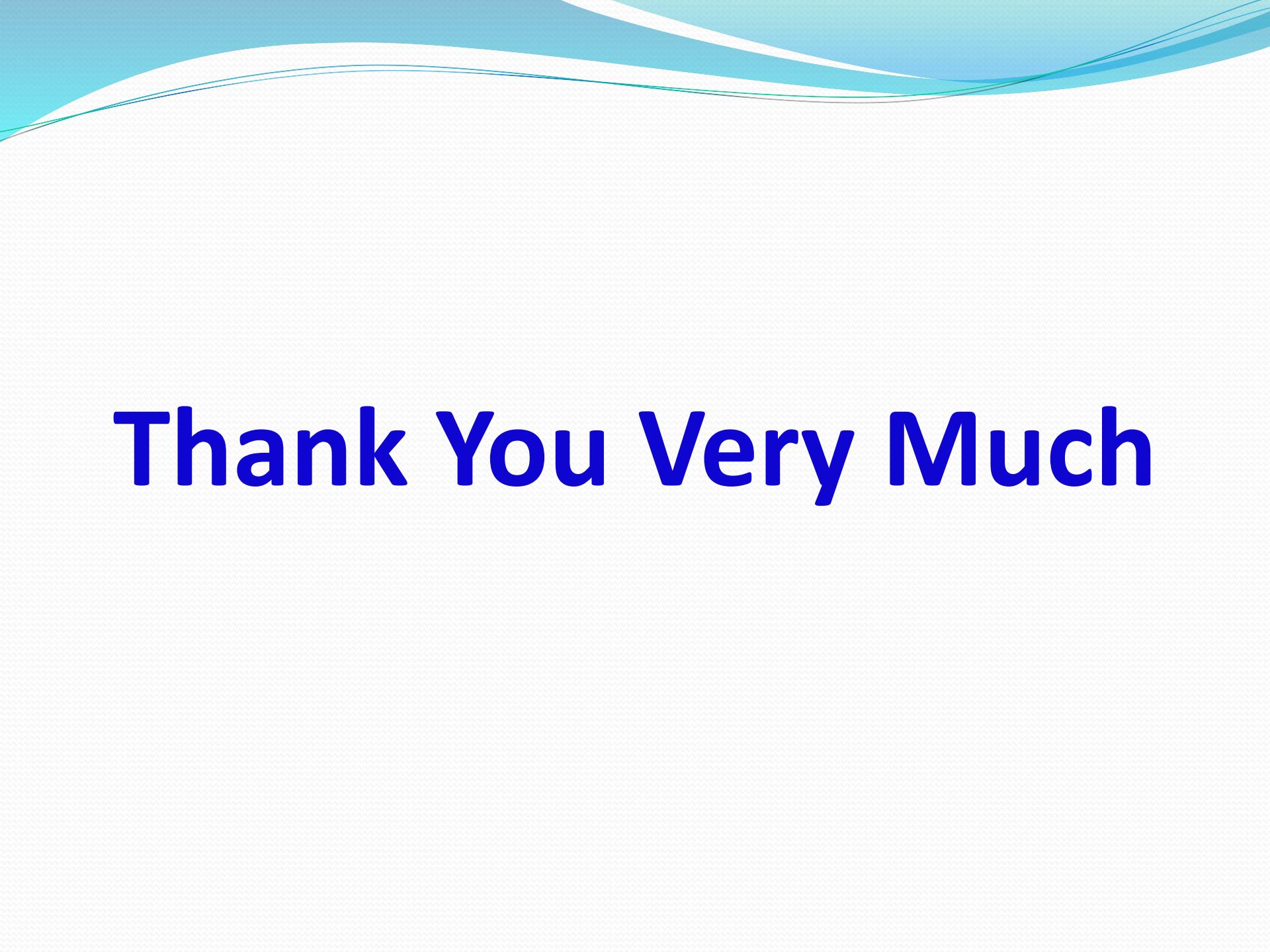
ABA Section of Dispute Resolution Mediation Preparation Guide



ABA Section of Dispute Resolution

PEDR User Guide





Thank You Very Much