Timing Is Everything

Next-Level Mediation and ADR

By Douglas I. McQuiston

Our clients, and their insurers, are asking us to find new, more intelligent, and *less costly*, ways of getting to the heart of matters *sooner*. "Early Intervention" is one way.

"You have to work up every case like it will go to trial." We have heard, and given, this advice since law school. Without question, it is good advice. Our professional duty to our client requires us to prepare their case *fully*, and that includes being fully prepared to *try* it. The best prepared advocate more often wins, whether the win comes from a jury verdict, court ruling, or favorable settlement.

But we also need to remember why they came to us in the first place—they had a *problem*. They were unable to solve this problem on their own. So, they hired us to help them *solve* it.

As trial lawyers, we spend much of our time (and a great deal of our client's money) exhaustively discovering and developing the facts, identifying the pertinent law, and shaping our arguments to our client's best advantage. That is why they pay us. But our clients (and, in the insurance defense setting, their insurers) have *equally* compelling needs for our efforts to be:

- *resolution-focused*,
- *proportional to the issues and dollars at stake,* (and maybe most of all),
- *cost-effective.*

After all, it does our clients no good to win at trial if the "win" either bankrupts them or exponentially exceeds the amount at stake. Now, more than ever, our clients are looking to us to deliver results that are "better, faster, *and* cheaper."

So, there's the question—is our duty to prepare every case as though it will go to trial *irreconcilably* in conflict with our clients' and their insurers' need to close out their disputes in a *reasonable time*, and at a *cost-efficient* price point?

Short answer? Not necessarily.

The longer answer? Read on.

"Try to Leave out the Parts That People Skip"

World renowned novelist Elmore Leonard was once asked how he managed to write such taut, concise detective novels. He said that he "tried to leave out the parts people skip." That simple secret, hard to achieve in literature, is even harder to achieve in trial law. The gulf between what we all *want* in discovery and what *matters at trial* is wide. Our compulsion to run every fact, (no matter how tangential), all the way to ground, in every case, is a hard beast to tame.

It also explains why litigation is so expensive these days. Often, the discovery process itself becomes the impediment to an effective resolution of a dispute.

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The Old Way: "Mountaintop Removal" Discovery

Some of us seem comfortable only with a type of litigation best compared to the form of strip-mining called "mountaintop removal. *See, e.g.,* Basic Information about Surface Coal Mining in Appalachia, *available at* https://www.epa.gov." We've all encountered "mountaintop removal" advocates. Maybe we've even *been* one, (if we're honest with ourselves). They don't *investigate* a dispute as much as they *explode* it, then pore through the rubble inspecting every rock and pebble. They cannot be satisfied until they get down to sifting through every grain of sand that overburdens a dispute. They strip-mine every possible seam of information, however off-topic, until it plays out. They depose everyone within a mile of the issues in dispute, often interminably. They push every claim or defense they can think of well past their "sell-by" dates. They engage every expert witness their highly trained legal minds can conceive of, daring their opponents to depose them all.

Then, when they face the inevitable return fire, they fight every discovery and deposition question, and seek every opportunity to avoid disclosure. They take pride in endless discovery disputes as evidence of their "zealous" representation and "tough" approach to litigation. Many believe that anything less is "malpractice."

Who knows? Maybe that war-of-attrition discovery style may have once pushed some adversaries to the point of surrender. That could be one of the reasons the approach is still being used—because it may once have worked. But times have changed.

Today, even firms and clients of relatively modest means can take advantage of highly efficient, (and relatively inexpensive), Artificial-Intelligence supported litigation management tools, e-discovery software, and other litigation support tech tools. These tools have leveled the playing field against even the biggest of BigLaw adversaries. Using these tools, for every "mountain-top" our adversaries tear off in discovery, we can just rip the top off one of theirs. All that mining, though, comes at an ever-greater cost for our clients, with vanishingly small returns.

But That Mining Comes With a Cost

Experienced trial lawyers have always known this. But now, our clients and their insurers know it, too: all that strip-mining we may have done in the past comes at a huge cost, but yields very little in *admissible*, *persuasive,* evidence. Our clients, and their insurers, are asking us to find new, more intelligent, and *less costly*, ways of getting to the heart of the matter *sooner.* They need to know what matters and what doesn't, and they need to know that *sooner,* at much less cost. Our clients want us to help them make informed decisions on whether to try a matter or try to settle it, well *before* exhausting their litigation budgets.

Not to beat the mining analogy to death, but there is a good statistic on it that translates to our line of work pretty well: Most environmental studies indicate that for every ton of useful ore extracted in mountain-top removal mining, *sixteen tons* of "overburden" has to be scraped off. In other words, they spend sixteen times more effort and money removing useless rock (along with other more useful things like hardwood forests, wildlife, riverbeds, etc.) to get at the marketable ore. *See, e.g.*, John McQuaid, "Mining the Mountains," *available at* https://www.smithsonianmag.com.

Believe it or not, the "yield" for those old "spare no expense" discovery tactics is every bit as low. In 2010, a group of civil justice interest groups conducted a detailed survey of Fortune 200 corporations. Among the questions was a series designed to tease out the actual ratio of documents *marked as exhibits for trial* to the volume of documents *produced in discovery. Litigation Cost Survey of Major Companies,* Duke Law School, 2010 Conference on Civil Litigation, *available at* http://www.uscourts.gov. The results were staggering, but not surprising to those of us who try cases.

In 2008, on average, the survey showed that 4,980,441 documents were produced in discovery in major cases that went to trial (with "major" defined as cases that generated $250,000 or more in litigation costs). Of those, just *4,772* were ever *marked as exhibits*. That works out to about a *.09 percent* "yield" of useful evidence to useless overburden.

If the only consequence of this waste of discovery resources was the cost, it would be bad enough. But like mountaintop removal mining, the consequences go *way* beyond just the expense. Removing a mountaintop to find coal causes a whole range of harmful consequences, from fouling (and in some cases destroying) springs and other water resources, to soil erosion and contamination, impacts on fish and wildlife, fragmentation and loss of forests, and many other undesirable consequences. In litigation, the "mountain-top removal" approach to discovery causes similarly harsh consequences for our clients. Return fire is often withering. Our clients' operating methods, proprietary business processes, client lists, and other business-critical data are exposed to existential damage or loss. Employee and business productivity are disrupted by weeks of unnecessary depositions or other litigation related activities. Business relationships, (even between the disputants), are damaged beyond salvage. Business focus is lost. In many cases, these secondary and tertiary costs (that we never include in our "litigation budgets") vastly exceed the *direct* cost of the litigation.

Often, the discovery process itself becomes the impediment to an effective resolution of a dispute.

Our clients, and their insurers, are asking us to find a *better* way. That is where *Early Intervention Mediation* comes in.

"Get to the Y"

Most statistics currently available for civil litigation tell us that *well over 95 percent* of all lawsuits filed are resolved without trial. While as trial lawyers we recognize that some cases just *have* to be tried, (for one reason or another), we also know that achieving a sound, reasonable, and *cost-efficient* result for our clients, and their insurers, often requires mediation. But *when* we choose to mediate can have a dramatic impact on our clients. Too soon, and we cannot reach a deal because we lack information; too late, and our clients' positions may be too hardened by the cruci-

ble of litigation to compromise. The issues we choose to mediate can also have a big impact, as we will discuss below.

Some time ago, I delivered a series of talks about dispute resolution short of trial. The theme involved getting the audience (a combination of insurance claim people and lawyers) comfortable with the notion that they don't need *all of the information that can be learned* about a dispute to come to a reasonable decision about whether to settle or try it, or even how much to settle for. My message was that *sound* decisions can be made, even in a world of only partial factual knowledge, if we could get *just enough* information to get there.

Parties approach discovery cagily, unwilling to part with information without a fight lest they appear less than "zealous."

The title was "Getting to the Y." What's the "Y," you ask? It's the fork in the road we hit in every case—Kenny Rogers described it in his anthemic country tune, "*The Gambler*:" that point when you must decide *"when to hold 'em, and when to fold 'em,"* and even, *"when to walk away, and when to run."*

Our clients, and their insurers, know that in litigation, time is money. The longer a case stays open, the more it costs to close. They want us to find a way to get to the "Y" *sooner.* But how? How do we get *enough* information, *soon enough,* (especially when our adversaries don't want to cooperate) to give our clients what they need to make a sound decision?

The Solution: "Early Intervention" Mediation

Most of us use mediation to resolve lawsuits. Sometimes, we do it because the court orders us to. Sometimes, we do it voluntarily, because mediators are very effective at getting and keeping the talks going and helping guide parties toward a resolution that they can live with.

But *when* do we use mediation? Maybe you've frequently tried to put it off until you were done with pretrial discovery. *After all,* (you remind yourself), *how do I know a reasonable settlement amount until I know everything about the case?*

But Discovery Logjams Abound

Often, our efforts to gather information are frustrated by delay tactics, "hide the ball" discovery dances, and other misbehavior on the other side. We know what we need to fill in the information gaps, but for whatever reason, our adversaries choose to fight us on the discovery or disclosures needed, rather than to work *with* us to get to the point quicker.

So, what do we do when we face this recalcitrance in discovery? We do our "due diligence," of course. We send out strongly worded demands for the information. Maybe we call and cajole (or threaten) our adversary. When that fails, we square up and file motions to compel.

Then, we wait. If we're lucky, in a month or six weeks, our clogged court systems might even find a few minutes to hear and rule on our squabble. Meanwhile, discovery grinds to a halt.

Finally, our hearing arrives. More often than not, the court chastises *both* sides for "not working together" and orders the information provided. *Months* have elapsed in the meantime. We are that much closer to trial, still with a seemingly endless "to-do" list to complete. Mediation becomes almost an afterthought as we scramble to finish discovery before the deadline.

What if, instead, we changed our *entire view* of mediation and what it can accomplish? What if, instead of just a last stop on the way to trial, we used it *throughout the life of a case*? What if instead of just trading numbers in settlement talks, we could use *mediation* to keep the information flowing, keep the parties moving toward identified (and agreed to) milestones, and then get the parties to the table *months* earlier, before most of the costlier forms of discovery are needed?

It can be done. It *is* being done, already. It is called "Early Intervention" mediation.

"Early Intervention" Mediation: The UK Model

Several mediation firms use the "Early Intervention" model in litigated financial disputes in the UK. It is being used here in the states, but mostly for non-litigated mediation programs in school districts, mental health associations, etc.

One of the most highly developed versions of the model as used in litigated disputes was developed by Sea Mediation Chambers, a UK-based team of mediators working primarily in maritime disputes, but who also mediate a broad range of business and other litigated matters. http://seamediation.com/ (Note: the author has no affiliation with *Sea Mediation Chambers*). The idea is simple: use the mediator *early,* and as needed throughout the life of the case, to guide the parties to an efficient discovery and information disclosure plan, help identify and hit milestones along the way, break discovery logjams when they arise, and whittle disputes down to their key elements.

Remember Elmore Leonard's advice? The "Early Intervention" mediator helps you "leave out the parts people skip."

How Does "Early Intervention" Work?

The idea has broad applicability to the resolution of many types of insured disputes. While it may not be the right tool in every case, it can be very useful, especially in complex, multi-party, and highly contentious cases. It works best when the litigants and parties consciously decide to employ it professionally, but it can be used successfully even where the litigants or their lawyers do not trust each other. That's where the *mediator* comes in.

Trust between litigants is often in short supply in the early stages of any court process. In most business disputes, (as well as personal injury or other tort matters), trust between the parties is at low levels well before the parties even end up in court. Too often, it goes downhill from there. Parties approach discovery cagily, unwilling to part with information without a fight lest they appear less than "zealous." Because they may lack confidence yet in their *own* case, they fight discovery efforts, fearing that to do otherwise might somehow damage their case. Offensively, they approach discovery like our "Mountaintop Removal" specialists we discussed earlier.

"Early Intervention" mediation has the potential to change that entire approach. Done right, it can produce a *better,* and more *durable*, result for the parties. The

mediator in the "Early Intervention" model explains to even the most recalcitrant parties, during the "consent" phase, that the model can work for them. He or she works with the parties very early on (once the parties consent), to generate trust through little victories right from the outset. Then, as the plan is worked, the parties can quickly and inexpensively involve the mediator to punch through the logjams, and offer his or her evaluative and litigation expertise to the parties at every stage.

The idea at the early stages is to help the parties distil the case down to the key elements in *real* dispute. The mediator can stress-test the claims *in confidence* with each party, asking probing questions designed to help the parties gain the courage to let go of claims too weak to waste effort on. The mediator can also help the parties *shape* their information gathering. One of the best aspects of "Early Intervention" mediation, in fact, is the ability of the mediator to facilitate *informal* and speedier exchange of key pieces of information, well before court rules could compel it.

How Does the Process Start?

Each Early Mediation Agreement is "bespoke" or tailored to each case. The parties can, and often do, *jointly* approach the mediator. But many "Early Intervention" mediations start with one party *unilaterally* engaging the mediator to begin what is referred to as the "Initial Exploration" phase.

The mediator then approaches the other side to *invite* them to participate. The mediator explains the process in detail, and offers the adverse party the opportunity to flex or tailor the agreement if interested. The contact in this "Initial Exploration" phase is usually *ex parte*. If the party agrees to explore (and at this stage they need to do nothing more), the initial joint discussions then take place by phone or videoconference, or by more formal "chaired" meetings with the mediator working with the parties to structure the agreement, to which they will then all agree in writing.

One of the most powerful attributes of "Early Intervention" mediation is this level of flexibility throughout. The parties maintain complete power over the process, and outcome, at every stage. Mediators do not wield the power of the court, and thus cannot *compel* a result. Instead, they apply their expertise in the subject matter of the dispute, (or the litigation process in general), to help the parties reach *their own* resolutions, both of the logjam or "staging" issues, and the ultimate issues in controversy.

Confidentiality Is Key

All communications with the mediator are deemed confidential (subject, of course, to the usual exceptions in most dispute resolution statutes for legally required disclosures, or disclosures made with the consent of the party). This allows a party's counsel to be more forthcoming about perceived gaps in information, or potentially weak claims than can be jettisoned early, so the mediator can assist in formulating a means to get the gaps filled or the claims whittled down.

The mediator who conducts an "Early Intervention" mediation makes clear to the parties that he or she will not accept *any* role as an *arbiter* or *decision maker* in the case. The mediator also affirms (via the mediation agreement) that *no* party will *ever* call the mediator to testify or produce any documents or notes in the court proceedings.

The confidentiality of the process, and the freedom to talk with the parties *separately,* are critical aspects of the model. It is that freedom that courts lack—to talk with one party outside the presence of the other, to guide them through logjams or issues more efficiently. Only by preserving their status as a neutral, with no power to dictate a result, can the mediator maximize his or her *influence* to guide the parties through the process. The confidentiality frees the parties to be forthright with the mediator (and *vice versa*), without concern that their confidential discussions might someday be forced out in court or estop them from making claims or arguments in court.

The process is terminable by any party at any time. In most applications of the model, the *mediator* may also terminate the process if they see that the process is no longer assisting the parties. Otherwise, the process continues, as milestones are reached, all the way to a substantive settlement, or the case is not resolved and heads to trial. Even if ultimate mediation cannot *settle* the case, the "Early Intervention" mediation model pays dividends well beyond its modest cost. The parties will find that their case has come together better, sooner, and that the ultimate issues tried will have been reduced to only those still worth fighting about.

Milestones—Earlier Is Better

The "Early Intervention" mediator meets with the parties early (together, or separately), to itemize *precisely* what information each side needs to make meaningful decisions. This early process is likened by the SeaMediation mediators to a "shopping list": a list of the data points each side needs, to develop its information base broadly enough to support a decision (even if the ultimate quantum of information needed *for trial* is broader). Then, the mediator works up a set of milestones—a "roadmap" of dates and methods by which each segment of information can be exchanged. Multiple *substantive* mediation sessions can also be set as part of the milestone process—giving the parties a chance to safely test the waters to see if settlement can be jump-started earlier than may have been planned.

In some ways, this may resemble a federal court scheduling order, but with more flexibility and less litigiousness. Because the "shopping list" and milestones need not be comprehensive initially (and indeed, are expected to change as each stage is reached), the parties do not need to worry about being precluded from pursuing information they did not identify up front, as can be the risk with scheduling orders. The parties are free to follow a "first things first" approach, to get information in stages that follow the roadmap. This provides a safe and flexible method of getting information exchanged *quickly*, (often well before discovery can be formally undertaken). It also offers an easy way to quickly *change* the plan on the fly if needed to get the parties to the confidence (or at least mutual concern) point sooner.

But Why Should I Use EI?

When you look at this model, you may wonder why you'd use it. *After all,* you might think, *isn't this what the courts are for?* But think about it for a minute. Would you *confide in your trial judge* about your key concerns about your case? Would you explore with your trial judge the weaknesses of one or more of your claims to test them and see if they should be abandoned?

Would you lay out to your trial judge your true position on settlement and what you need to get there? Could you call the trial judge *ex parte* to discuss a piece of information, or a need for information?

Needless to say, none of this is possible for parties who rely solely on the court to adjudicate discovery. That is where EI pays off—it is not an "adjudicative" model at all.

In contrast, "Early Intervention" mediators use the confidential process to transparently guide the parties to develop their own roadmap, then helps the parties reach milestones and exchange targeted information along the way *cooperatively.* In this way, the mediator lights the way.

It builds on little successes along the way to guide the parties to the bigger success of a mediated settlement later on, at far less cost, in far less time.

Guided Trust, Quicker Results

In truth, only a *mediation* model can make this work. Nothing in the formal discovery process is designed to enhance trust between the litigants, or speed the information gathering process. If anything, the already low level of mutual trust can frequently collapse altogether once we go a few rounds in discovery battles. Because of the sheer volume of issues that trial judges face, the *formal* discovery enforcement process, (sound as it is for eventual trial), is not designed for speedy information exchange.

The judges are not there to build mutual trust, after all. They are there to hear arguments and decide disputes. One side goes away happy, the other side just goes away, (if only to keep fighting).

In contrast, "Early Intervention" mediators use the confidential process to transparently guide the parties to develop their own roadmap, then helps the parties reach milestones and exchange targeted information along the way *cooperatively.* In this way, the mediator lights the way. Once the parties see that their "roadmap" works to deliver each side actionable information more quickly, they gain trust—if not in each other, at least in the EI process.

In time, this trust builds on itself. The parties, and their counsel, see that with the "filter" provided by the mediator, they *can* trust the other side, at least enough to know that they will provide what they have *committed* to provide.

An Example

Let's look at the sort of case that many of us work up every day—a personal injury suit involving an accident at an insured business. Your client, the business owner, wants the case resolved as quickly as possible, with minimal disruption to his business, for an amount within their liability insurance limits. The insurer that retained you wants you to get them the information they need to make decisions on settlement and value, *as soon as you can get it*. Delays inherent in the court process are a source of endless frustration to your claim professional.

The plaintiff, on the other hand, has been living with the consequences of this accident since it happened. Her lawyer needs certain information to try to evaluate her chances of winning, and is aware that his client's injuries will be evaluated by a doctor selected by the defense. Plaintiff's counsel knows that they will have to share a great deal of medical and other information, but retains their concern that they not open their client's life to endless or irrelevant exposure. Counsel is keenly aware of his client's emotional overburden, and needs to take that into account throughout the process.

Instead of approaching this as you always have, with written interrogatories, depositions, expert workups, motions to compel, etc., let's *change* your course at the outset. This time, you pick up the phone and call your "Early Intervention" mediator.

The "Initial Exploration" is where it starts. Typically, the first hour of such "exploration" is at no cost to the initiating (or responding) party. The mediator then contacts the adverse party. Before making *any* disclosure of information other than that one party has contacted them about the dispute, the mediator explains the process and its benefits to both sides, answering any questions. Then, the mediator asks the adverse party if they will agree to the terms of the process. They are free at that point to reject the process altogether. But because they, too, realize they need information, and their client wishes for a quicker resolution with less emotional exposure, they agree.

The next step is to meet, either face to face or by video or teleconference, to begin outlining the information needs of each party. Negotiation can ensue on such issues as scope and timing, expert fields needed, timelines for identification of witnesses and experts (which can later be incorporated into a formal Scheduling Order), limitations on discovery, and even preliminary mediation "try-out" dates. The mediator guides the parties past their initial wariness, helping them get to the best outcome at every step.

Your dispute hinges on one central medical claim: that the fall has caused a catastrophic back injury that will require surgery and leave the plaintiff at least partially disabled. Your information need revolves around getting *past* records about the plaintiff's pre-fall status, and the *current* records to see what her providers say about her condition. You also know you will need the plaintiff examined by a neurosurgeon. Your client's insurer wants to get to the decision point fast, to try to save in eventual trial prep costs.

The plaintiff wants to avoid making her entire medical past an open book. She would rather avoid disclosing unrelated, (maybe potentially embarrassing), past medical conditions. She understands the need for examinations, but does not want the process to be overly invasive or adversarial. In addition, the plaintiff wants to try to get the case to a settlement posture early, before she is forced to spend tens

of thousands of dollars on experts and trial preparation.

The mediator at this stage guides the parties to strip their information requests (and proposed boundaries) down to their essence. Information gathering can be *phased*. If a piece of information is needed more for trial prep than to answer the *settlement* question, it can be saved for a later stage.

With roadmap in hand, you start down the road, much sooner than formal discovery rules would have allowed for.

Our Hypothetical—How'd It Turn Out?

So—how did your experiment with "Early Intervention" mediation work out? During the roadmap stage, the mediator was useful to you for several reasons. First, she identified key *misunderstandings* that may have skewed one party or another's evaluation. In our hypothetical, the defense and their insurer believed that the plaintiff had preexisting back issues that were the key cause of her claimed disability. In reality, the prior back issues that the plaintiff may have had were minor, and long ago resolved.

Plaintiff's counsel was initially resistant to any notion of early or collaborative discovery, fearful that if he "gave an inch, the defense would take a mile." Meeting with plaintiff's counsel confidentially, the mediator talked this tactical concern through with plaintiff's counsel. Patiently, the mediator helped them understand that earlier disclosure, far from a sign of weakness, would put them in a position of greater *strength* by giving the defense the real background evidence, which favored plaintiff's case. This allowed them to generate a more realistic evaluation (which aided settlement later), while giving no real *tactical* advantage to the defense.

With mutual trust enhanced by this early success, your mediator then worked with both parties to fashion a disclosure staging agreement for the rest of the information needed early, with specific date milestones. She helped the parties allow for a "first things first" approach, saving time later for discovery that was more for trial preparation than case evaluation. This got those key medical records into your insurer's hands months *sooner.* They adjusted their reserves accordingly, and moved on to the next stage.

The parties inexpensively avoided calcifying their earlier misunderstandings into a settlement logjam. As it happened, this led to an earlier than usual independent medical exam series, and prompt exchange of reports from those exams. In a move that still seems utterly surprising, plaintiff's counsel even agreed (with the mediator's guidance) to allow you, your client, and insurer, to *informally* talk with the plaintiff with counsel present, to hear directly from the plaintiff about the impact that the accident had on her life, and to gauge her presence as a witness. Because the mediator worked out an agreement that the discussion would not be useable as impeachment, the plaintiff opened up. Your insurer's claim professional saw, first-hand, that she would be a credible witness, and you reserved your right to conduct a full deposition later if you needed to.

With the key dispositive medical issue resolved, the parties chose to put off the remaining "pretrial" discovery, and set a series of three mediations to narrow the issues; bracket the parties' financial positions; and, finally, close the gap. You reached a full settlement in six months, and saved your clients tens of thousands in legal and discovery expense. Your client's insurer was so impressed with the speed and quality of the resolution that they are now talking about using you for all of their litigation in your state.

O.K., maybe that last sentence might be a slight exaggeration, but you get the drift. If you use "Early Intervention" professionally, it can open the door to a possible earlier, and far more resilient, resolution that both sides can embrace.

The best aspect of this approach was that it built trust by keeping the parties *focused* on the timely execution of their agreed plan. By focusing the parties on what each stage needed, the mediator kept you both aligned toward *resolution*, and away from becoming bogged down in needless and emotionally costly discovery battles. When snags arose along the way, the mediator quickly intervened by phone. In one particular instance, faced with a refusal to answer in the midst of a contentious witness deposition, the parties burned a time-out and called the mediator. She talked the parties through the snag, suggested acceptable ways to rephrase the question to allow for an answer, and guided the parties back into the stream. Fifteen minutes later, you concluded the deposition without further incident, glad that you didn't have to waste weeks (months?) on motions for protective orders or motions to compel.

As milestones were reached, the mediator took the parties' "temperature" on how they felt about attempting the ultimate mediation. When she encountered hesitance, she explored *why*—confidentially working out what is missing, and what new steps might be needed to get there. This allowed the parties the freedom to agree to the staged mediation process, free from a sense that it is "now or never," since the parties started the process soon enough to allow time for these stages to be reached naturally.

During the roadmap stage, the mediator was useful to you for several reasons. First, she identified key *misunderstandings* that may have skewed one party or another's evaluation.

Looking back, it feels like the settlement simply rolled out inevitably. But there was nothing inevitable about it. It resulted from the hard work of the parties' counsel, guided skilfully by a mediator who understood the elements of "Early Intervention" mediation, and how best to keep the parties on the right road throughout.

More than anything, your success required *perseverance.* Because the process was terminable at any stage by either party, it would have been easy to "call it" at the first logjam, declare the process a failure, and just climb back into the familiar scorched-earth litigation you knew and loved. But your mediator was as close as the

phone, and tenacious in getting you both to stick to the program you had negotiated. By helping you both gain some little victories in the earliest stages, she proved the process could work if the parties remained committed to it. She could talk both of you off every ledge, tirelessly and calmly steering you back onto the path.

Conclusion

"Early Intervention" is not for every case. Because the process begins in the earliest stages of a case (typically), it can cost a little more than the traditional "mediate at the last minute" approach. But in contentious, complex, multi-party, or high-exposure cases, that modest investment reaps more than sufficient returns in time and expense saved, and in the ability to reach an acceptable resolution far sooner. The intangible benefits are equally important. Plaintiffs can avoid unnecessary emotional exposure. Both sides can reset expectations sooner. By investing in this process, the parties can retain more actual and emotional control over the results.

In commercial disputes, the parties can avoid disclosure of proprietary or embarrassing information in public court records. They can distill disputes down to their essence, and avoid disruptive fishing expeditions. They can preserve business relationships, both as between the disputants and by avoiding unnecessary escalation of the dispute to drag in other customers, suppliers, or competitors.

The "Early Intervention" model is a concept whose application to personal injury, professional negligence, product liability and other tort litigation is readily apparent. If mediators in your area are not already offering it, ask for it. Feel free to show them a copy of this article (or have them get in touch with the author) if you'd like. You may find yourself pleasantly surprised with the results.

You have nothing to lose, and potentially everything to gain. FD