Addenda
WSBA Escalating Cost of Civil Litigation Task Force
Subcommittee Report
May 2014

These Addenda to the ECCL Report, in the form of a Survey of Northwest Mediators as well as Field Notes from practicing mediators, describe a host of tips, practical suggestions, and useful/cost saving ways to mediate cases early in the litigation process.

Index of Field Notes by Practice Area

Planning for Early Negotiation

By Jeff Bean

Jeff Bean is former Chair of the WSBA ADR Section.

In his book *Lawyering with Planned Early Negotiation: How You Can Get Good Results for Clients and Make Money* (American Bar Association, 2011), John Lande sets-out what it takes to negotiate and resolve cases early. Professor Lande has spent the academic portion of his career researching how we actually settle our litigated cases and then teaching and writing about what he's learned. His book describes the planning necessary to negotiate to resolution early in a dispute. Early mediation doesn't just happen. It requires planning. We're used to planning, but the planning Professor Lande is talking about is a little different. Here's how.

Litigators are Planners

Planning is what we litigating lawyers normally do. We're good at it. Goal-setting, forming clear intention to reach our objectives, problem-solving, planning and preparation are the hallmarks of what we do. It's nothing new to us. We do it all the time. This is how we prepare our clients and their cases for trial. We know how to do this.

We need to marshal our facts and articulate the applicable legal doctrines, of course. We then need to organize them all together in a theory of the case that explains how those doctrines, when applied to those facts, require a favorable outcome for our clients. We've got to document and research the value our case, maybe with expert opinion and jury verdicts. All that stuff we need to do to prepare for trial anyway. At the end of litigation, before trial, we use it to negotiate. We'll cobble together a mediation brief from our previous work-product. If we're on top of our game, we may prepare a negotiation strategy that outlines how we'll negotiate the way to our preferred outcome; but if we don't, we won't be that different from many lawyers who show-up at mediation without one. When we negotiate late in litigation, we really don't need to do that much more than we have already done to prepare our cases for trial.

We show-up to the mediation – it is usually a mediation – and we're ready to negotiate. We're good to go. The mediator acts as intermediary, shuttling between the parties' separate rooms, carrying offers and counter-offers and messages back and forth. We're testing the mettle of the claims

and arguments and facts as we've prepared them. Eventually, the defendant figures out how much he has to pay to buy a dismissal and the plaintiff comes to terms with how little he'll sell his lawsuit for. The bargain is struck, the CR2A signed, we're all out the door and we're done.

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Preparing for Trial Settles Cases - Doesn't it? Why do we even need to think about negotiating earlier? Why argue with success? By preparing for trial, we get settlements. It works! Doesn't that prove that preparing for trial results in settlements? In a word, no. I settled my case. Yes, it settled after I prepared for trial. That's great. But it doesn't mean my trial preparation was the thing that did it.

Years ago, while working Washington State's Tobacco Litigation, our trial preparation and the threat of an adverse decision certainly got the tobacco industry to the table. It also got Attorney General Christine Gregoire the seat at the head representing the states. We were 10 weeks into trial when she announced the Master Settlement Agreement worth a total of $256 billion and $4.6 billion to Washington. But our trial preparation didn't settle the case. Far from it. The negotiation team did a whole lot of planning that had nothing to do with trial to prepare for the negotiation that resulted in that historic settlement.

Many cases I now mediate are negotiated pre-filing. The parties often don't have representing lawyers. I encourage them to get legal advice and sometimes they do. In any event, even if they do consult with a lawyer, I can assure you, few of these cases are prepared for trial. Yet they reach well-informed agreements all the time.

Preparing for a Trial That Won't Happen to Reach the Agreement that Will

Have you looked at how often we actually try cases? How often we try it all the way to judgment? When you look at the data, the answer is clear and it's pretty amazing. Trial is rare. Trial to judgment is even rarer still. In King County Superior Court, the data have held pretty steady for several years: fewer than 1.5% of filed cases are tried to judgment. Only about 1 in 100 cases will be ended with a trial.

We prepare every case as if it will be tried to judgment, yet that rarely happens. We know most of our cases will end in a settlement agreement, yet we don't plan to reach an agreement. Instead we plan to try our case to an adjudicator. We then fall backwards into an agreement – almost every time.

When the client asks us why they have to pay for a trial that isn't likely to happen, what is our answer? Why are we asking them to pay us to prepare for trials in every case, when we know that only about 1 in 100 will ever get there?

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We used to be able to tell them we have to prepare for trial because it's necessary. But it's not. Not anymore, if it ever was. There are other ways to reach settlement agreements than just preparing for trial. Professor Lande describes his approach to planning for settlement besides just planning for trial. His is just one approach among many – albeit a thought-leading, very well-articulated and well-researched one. Yet we will hear from others.

When we are freed from the bias that trial preparation is necessary to settle lawsuits, we're free to explore approaches that still do what our clients need and may even be more effective and less expensive. They may help create more satisfied clients which may result in more referrals to us.

Early negotiation requires planning. You still need to plan enough for trial to know your BATNA – your Best Alternative to a Negotiated Agreement – which is your best leverage in any negotiation. Yet that may not require a full trial strategy. And something else is needed. You need a plan to replace discovery with an agreed information exchange. You need a plan to assure responses are complete and admissible. You need a plan to create an iterative exchange of information, ideas and offers that will get to the agreement that is possible. When you're planning to negotiate early, instead of planning for a trial that is unlikely to happen, you're planning to reach the settlement agreement that is.

I was Sued and I Didn't Like it.

By Sherman Knight

Sherman Knight's legal practice for the last two and a half decades focused on complex litigation found in construction defect matters. Prior to the law, Mr. Knight was a licensed architect, a surveyor and general contractor. Mr. Knight has retired from the practice of law to use his unique set of skills to actively resolve construction disputes without litigation. He is a long term member of the Construction and ADR Sections of the WSBA.

Litigation is a culture defined by law school and reinforced throughout a career by a thick set of Court Rules and Rules of Ethics. This culture reinforces the concept that forensic thinking is key to success, there is no second place and to leave no stone unturned. The Cost of Litigation is something not discussed in Law School, the Court Rules or the Rules of Professional Conduct.

To reduce the cost of litigation the culture must accept there may not be a clear winner, that turning every stone may not be cost effective and your clients are much more interested in solving a problem than winning a war.

But what are the Costs of Litigation?

Have you ever stopped to ponder what you get if you win at trial? You get bragging rights, a piece of paper from the court stating that you win so you can put it in a frame and hang it on your wall, you get the right to collect money, but now you have to go find it and by the time you get there, it has all dried up, you get to look forward to an appeal (maybe multiple appeals), you get relief from any further attorney's bills (unless there is an appeal or you are trying to collect what the court said you should get), and you finally get a full night's sleep. (the appeal won't be filed for several weeks so you can get some rest)

Most would answer that question by pointing to the cash from your personal piggy bank. But there are costs to the litigants that can be far greater than money.

Anger is an emotion that creeps up over time and most keep it internalized. Family members may not even recognize the level of anger boiling up in the person next to them at the dinner table. Some never recover from that anger and often the ones that care the most, suffer the most.

Misery is another emotion that creeps up on you over time. Depression is such a big problem in medical malpractice suits (74% are dismissed for lack of evidence) that the medical community has given it its own medical name, and have websites to help those in a lawsuit. The misery of a lawsuit cannot be explained. You have to live it.

There are costs of lost time, lost friendship, lost family, failed relationships, crushing stress, and a drained bank account.

It Happened to Me

When people would ask me what I do for a living, I would respond with, "I make people's lives miserable." They would immediately respond with "you must be an attorney." And I thought I was being funny.

As a practicing trial attorney for 2 ½ decades, I never understood just how accurate my description was. I didn't try to make lives miserable, it's just the result of a process they taught us in law school known as litigation.

Then it happened. A person I have never met walks up to me and says, "you've been served." I was about to learn what misery really meant.

During construction, I was too busy to inspect the work. I was not too concerned because I had hired someone that was highly recommended. Near the end of my remodel, there were some things that bothered me so I hired a different builder to come in and inspect the home. The list of defects he found left me dazed.

I provided the list to my builder and withheld further payment. Two weeks later the builder left the job, filed a mechanics lien and sued my wife and me.

Initially, I knew we were going to cream this guy, so I shrugged it off. After all, I am an attorney and an architect and have represented both contractors

and homeowners in hundreds of construction defect cases over the years. Nevertheless, as time passed, doubt began to creep in.

My wife did not like the idea of being sued, especially after she was served at her office. She was not happy. Although I tried to convince her that the contractor did not stand a chance, I was surprised how the lawsuit affected our relationship. If we lost, the total bill could be over $150,000 (his claim, his attorney's fees and my attorney's fees) and I would still have to repair the defective work out of my pocket. When I explained the cost if we lost to my wife, our relationship further soured. Over the next two years, doubt continued to build as the builder went through three different attorneys; each one seemingly starting over with new and different demands.

Although I was sure of the outcome, the possibility of losing $150,000 and how that might affect my wife, my kids college education accounts and countless other possibilities never left my mind. I was surprised how much I thought about the matter. I was distracted at work and my stress level climbed as trial approached. When I had free time, the lawsuit was the only thing on my mind. Dreams about the dispute woke me up in the middle of the night. I had concerns with the judge appointed to the case and wondered if the judge would see through the other sides lies. I remember thinking, why is this lawsuit affecting me like this? I do this for a living. For the first time I understood what my response "I make people's lives miserable" really meant.

A week before trial, a mediation resolved the dispute when the builders insurance company wrote a check. Although the lawsuit was over, the stress on the relationship between me and my wife was not. It took a while before things returned to normal. The emotional turmoil for two years was not worth the impact on my family. The lost time and costs will never be recovered. Given the amount of personal stress I went through, I can't begin to imagine the stress and emotional turmoil that a non-attorney would suffer through. There must be other options.

In hindsight, I saw that before the lawsuit was filed, I had everything I needed to mediate. My second builder provided a report and an estimate for repair. I took some pictures. The builder was there every day. He knew what transpired and what it would cost to fix it. Two years of discovery, motions and trial preparation did not change the outcome that early mediation may have obtained.

Early mediation would have alleviated most of my misery.

There are costs of litigation, that may not be apparent at first, but can have a much greater impact that money.

It Takes Too Long

When I was practicing law. I always did an exit interview at the conclusion of each case. When asked what they liked the least, the number one answer was, without fail, "it took too long."

It goes without saying, "Time is Money." The longer something takes, the more it costs.

To save money, reduce the cost of misery and emotional distress, reduce the cost of damaged relationships all have a common resolution. Solve the problem earlier in the litigation time line. The concept is really quite simple.

Early resolution requires a change in the culture of the law, a different way of thinking.

Cases Ripe for Early Mediation

Early mediation is less expensive, but in every case there still needs enough discovery to make a good presentation. While early mediation may leave some stones unturned, the risk is acceptable when missing something is outweighed by the saved time, reduced emotional distress and expense.

This is most obvious when the value of the dispute is too large to ignore but so small that any recovery will disappear in cost and legal fees. In these cases the forensic training received by attorneys, which forces them the leave no stone unturned, is simply not cost effective

Early mediation is natural fit if there is a desire to preserve a relationship before the parties become so polarized that resolution is difficult and the parties become combative. When two neighbors are longtime friends, their friendship may be saved when early mediation resolves disputes over something shared such as a fence or property line. Employee / Employer relationships can be saved where the employer wants to retain the employee

or the employee wants to keep their job.

There are also relationships that might not be so obvious to attorneys. Contractors have special relationships with subcontractors that always finish on schedule and with little fuss. Contractors want to maintain a relationship with owners that might have repeat business. If continuing the relationship is important, early mediation will foster an atmosphere of working together rather than fighting over and defending your position. The tone of early mediation is very different, often looking for creative solutions that are never available in late mediation.

Other natural early mediation cases include:

- When a party just wants it over with. No more discovery, No trial, No appeals. This is usually someone that has been to trial before.
- When a party cannot afford the lost time of litigation.
- When a party does not have the emotional or physical strength to handle several years of litigation.
- When the parties cannot afford litigation.
- When neither party has the ability to recover attorney's fees.
- When a party has skeletons they wish to remain hidden.
- Commercial leasing – Landlord/tenant disputes.
- When one of the parties is looking for an apology.
- When one of the parties seeks something different than just money.
- Warranty issues on new construction. If the roof leaks, solve it now!

Even when early mediation is unsuccessful, it still provides a reality check of the strengths and weaknesses in your case early in the litigation, which will allow the parties to make better, less emotional decisions, before they become financially and emotionally vested in continuing the case.

In addition, early mediation provides benefits that normally do not occur in litigation. Counsel has a unique opportunity to learn about the case. By spending an entire mediation with their client, talking to them about the case and listening to argument and evidence provided by the opponent, provides insights in the case that typical discovery does not provide. Mediation is not a discovery tool, since doing so would violate the letter and the spirit of the "good faith" rule. Yet, it cannot be denied that the information learned in a single day of mediation will benefit the parties in the form of refined discovery, early witness evaluation and streamlined trial preparation.

Unique Options Only Available in Early Mediation

Early mediation provides more options for settlement than would be available later in the litigation process. This is best demonstrated through example.

A couple had lived in the same house for 25 years surrounded by 9 neighbors living there for nearly as long. Their kids attended the same schools, played on the same teams and all the adults had become good friends.

The couple, in the spirit of green energy, decided to erect a 40 foot mast with a wind generator on top. Unfortunately, if constructed it would block the amazing view of the 9 neighbors. The 9 neighbors hired an attorney, whom discovered there was not much the 9 could do and success at trial was difficult to predict.

(At this point, if the case proceeds forward to court, the court is limited. The limited jurisdiction of the court has just two options, let the tower stand or tear it down.)

The attorney, aware of the existing relationships recommended a mediation. At the mediation, the mediator discovered that the couple was unaware of the visual impact on their 9 neighbors and when they discovered the impact were unsure how to proceed. Unfortunately, the couple had already purchased the mast and generator and it was sitting in their driveway.

The mediator called the wind generator concerning a possible refund but was told it was custom built and they best they could offer was a 50% refund. The couple would be out $90,000 after the return.

In caucus with the 9 neighbors, it was determined blocking the view would result in them banding together and proceeding to trial. Each would be out 1/9th of litigation costs. Still, the 9 neighbors were just as concerned about the neighborhood relationships.

The conflict was resolved by returning the mast and generator 50 cents on the dollar. The 9 neighbors split equally the remaining cost and refund the couple. In exchange for the $10,000 dollars from each neighbor, they would

each receive a view easement so this would never be an issue again. A local real estate agent indicated that the increased value because of the view easement would more than offset the $10,000 cost.

The solution occurred because all the parties felt there was a relationship worth saving. If this had gone to a late or summit conference type of mediation, time would have passed, the wind generator company would not have refunded any of the costs, out of pocket funds would have been spent on attorneys rather than the cost of a view easement, anger would have set in, positions polarized, the neighborhood relationships destroyed.

The limited reach of the court would not have found a solution where the parties could remain friends.

The increased options available at early mediation should be investigated in every case. So why does early mediation rarely happen? There are several reasons that float to the top.

When Early Mediation does not Work

First, not every case should be resolved in early mediation. But past court rules ignore this and mandates every case go to mediation, even if its chances of success are way south of remote. In other words, a much higher percentage of mandated mediations fail and over time, the success of mediation is tarnished and its use is reduced.

The second, third, fourth, and fifth reasons are simple barriers to entry.

- Lack of respect – When this occurs there is a general lack of trust about sharing of information,
- Who blinks first – Too many attorneys do not know how to approach the other side about early mediation.
- Appearing weak – Too many attorneys believe the first one to pick up the phone will appear weak.
- Law school teaches and the courts demand "follow the rules" which can really get in the way of creative thinking.
- Graduates from law school are smart, but not very wise. (Wise = Smart plus experience) As you become an older and wiser attorney, your view of the culture of the practice of law changes. You become less interested in the Rules of Court and more interested in solving

a problem. Two wise attorneys seem to have little difficulty in initiating early mediation. Two smart attorney or one smart and one wise seem to have difficulty starting the mediation process.

The sixth is a past history of failed mediations. It is common to hear an attorney state that he would rather pay $5,000 for a successful mediation than $2,500 for an unsuccessful mediation. A history of unsuccessful mediations leads to a reluctance to use this tool in the future.

The seventh is a lack of preparation. Sounds like a conflict with the term "early mediation." But without a clearly stated claim and counter claim and supporting damage and methods of calculation it is nearly impossible. The court rules only require notice pleading to file a lawsuit which does not contain nearly enough information to go to mediation.

In this sense, early mediation really means both parties target the discovery they NEED with full recognition not every stone will be turned and their clients are willing to take that chance in exchange of less misery, less money spent and less anger.

There are several things that would greatly enhance the possibilities of success in early mediation.

Things to Consider

Targeted Discovery.

The court rules may provide a "schedule" that sets the current slow pace of litigation. The court schedule is a one size fits all affair where the courts look at current backlog of cases and predict the anticipated time required to turn every stone during discovery. Rather that passively following a schedule provided by the courts, early mediation requires the parties to proactively substitute one of their own. The proactive nature of early mediation may be enough to stall early mediation.

Targeted discovery is determining the minimum amount of discovery necessary before early mediation can be successful. Agreeing to limited discovery is a simple process for two "wise" attorneys, but such an agreement is elusive if one or both of the attorneys is just smart. This is a good time to use an experienced mediator. This type of discovery planning

would include not just limited discovery for early mediation, but a complete discovery schedule if the case goes to trial. It is important for the parties to see how much money and misery can be avoided if the case does not resolve at early mediation.

Letter to the Judge

Within a short period of time after the suit is filed, both attorneys write a letter to the judge stating why early mediation is not advisable (and share it with opposing counsel). The true purpose here is to force both attorneys to review their case (hopefully with their client in attendance) and take a hard look at the reasons for early mediation and demonstrate to a judge they really did look into it. This "thinking" about the case in terms of early mediation may be the beginning of the change of the culture of the practice of law.

A letter like this would also eliminate the concern with blinking first or appearing weak. Both parties must move forward in a thoughtful manner.

In addition, the letter acts as a backstop to promote the attorneys to engage in a discussion concerning targeted discovery.

Quality of Mediators

Frankly, there are too many mediators that are poorly trained or just don't have the personality for it. Too many that still think inside the box. Those that just want to tell what the law says.

One of the first keys to successfully mediate a case, is to let the parties think the solution is their idea. Even if it means they are on the losing side. Once you reach that point the mediation is successful.

Very few mediators are comfortable evaluating a case because it means the mediator is going to have to deliver some bad news. Again, not something they teach in Law School. Instead a prior career where one of the responsibilities was to fire fellow employees is a much better way to prepare a mediator. The reason is simple. Delivering bad news, face to face is just a small step down from having to fire someone.

You don't have to be mean in your presentation, but you do have to realize it is part of the job description. I believe there are too many mediators that cannot deliver bad news or they deliver it in a way that forces the mediation to take a step backwards.

Understanding and utilizing different personality types is also critical. Many mediators today are ex trial attorneys. They think on their feet, talk through their problems and are quick to pull the trigger. But over half (57%) of the US population is introverted. The introvert's method of processing information is to think about it, internalize it and the amount they can process may be very different from the extraverted mediator. Not a problem as long as the extraverted mediator recognizes the distinction and knows how to work with different personality types.

Unfortunately, every profession contains individuals that rise to the top and those that sink to the bottom. Because early mediation is a voluntary process, a "few" mediations perceived as a "waste of time" have a large negative impact on this method of resolution.

Conclusion

The phrase "early mediation" means more than show up and hope for the best. There are techniques that could change the culture, the preparation and the success rate of early mediation.

A System for Early Case Evaluation and Resolution of Employment Claims

By Sevilla Rhoads and Anne Preston

Anne Preston and Sevilla Rhoads practice employment law with Garvey, Schubert and Barer, Seattle.

Over the past several years our firm developed and has been applying a system for negotiating settlement early in the litigation process. This approach is based on a collaborative discussion model, and fits into the rubric of what is now called "cooperative law". Designed to cut through much of the formal legal process, it allows parties to collect the information necessary to evaluate and, when appropriate, resolve disputes amicably and cost-effectively soon after a claim is made (normally within the first two months). We have found that not only does it effectively help our clients control legal fees and related costs, but it also minimizes the emotional and administrative toll of traditional litigation.

Our process differs from traditional mediation. Mediation usually does not take place until substantial discovery has been undertaken. By that time, the parties are often polarized and have spent significant sums on attorneys' fees and related costs. In addition, mediation is can be a one-day event with no true opportunity for dialogue and only limited information exchange.

Our process occurs at the early stage of litigation — when productive dialogue may still be possible. It provides for a structured framework of respectful, professional communication to take place over a period of time. This allows a prompt evaluation of a claim's strengths and weaknesses before too much attorney and client time is devoted to a dispute. Also, it often does not require the involvement of a third-party neutral (mediator), so less cost is incurred.

Our experience is that this more flexible process can provide more satisfying outcomes than traditional litigation. Often the outcomes plaintiffs seek — an apology, institutional reforms, having their position truly heard and respected — are not the outcomes the adversarial process produces. Early ADR, such as our process, encourages creative and more meaningful solutions. Similarly, more cooperative exchange can provide

defendants useful information and the ability to correct mistakes before they become more costly, and plaintiff's insight into the more complete picture surrounding a claim.

We have applied our process in employment cases of every type and size. Our experience is that the following are the components important to success:

- There should be an agreed upon structured framework for the exchange of information
- There should be agreed upon "rules" of conduct for the process
- The parties must commit to being responsive, providing full disclosure of requested information and meeting agreed-upon deadlines
- The exchange of information must be tailored to each unique situation and normally happens over a period of time
- The parties must accept that this process is different from traditional litigation

MOVING TOWARD EFFECTIVE USE OF EARLY STAGE MEDIATION IN DIVORCE

By Anne Lucas

Anne Lucas is a coach, mediator, therapist and is Past President of King County Collaborative Law.

While all attorneys talk about how they *settle* their cases, few talk about having helped families design *durable agreements* that will follow clients post-conflict as they reconfigure to meet the new patterns of their lives. An early mediation process that focuses on providing families with a strong, well thought out foundation for that future simply makes sense.

In a more traditional legal setting when a client presents to an attorney, the attorney is only getting one piece of a much larger picture. Like the blind men and the elephant, one attorney may only get a leg while the other has the trunk. That's because people aren't just individuals – they are always a part of a complex interconnected system. This is never more apparent than in a divorce. It isn't just an action between two parties – there are the children, pets, extended family and in-laws, friends, family rituals, heirlooms, histories and memories all of which influence and color every divorce. All of this doesn't disappear at the end of a marriage. It changes shape and adapts to new circumstances all of which requires time to sort out, sort through and reconfigure what all this will look like through time.

And then there is the understanding that husbands and wives divorce –

When I talk about early mediation I mean a process whereby once a couple has made the decision to divorce the focus doesn't start from a rights based positions but as I said above – from a family-centric systemic lens with a focus on interests and concerns that encompass the family first and then the individuals. Early mediation is an ideal process to accomplish this goal when it is not about attorneys advocating for the individual or negotiating settlement decisions but actively *assisting* parties over time to address and build a plan for their emotional, financial and familial futures.

With early mediation there is time to allow for the inclusion, if necessary, of other professionals such as child specialists, mental health professionals/divorce coaches, financials or even mortgage brokers specializing in divorce who can help with specific issues or questions. These are resources that attorneys do their best to provide but typically at a much higher costs and often with time delays as decisions move back and forth from attorneys to parties and then back again. Early mediation as a collaborative process allows everyone to work together again with the goal of building a durable agreement that will, to the best of everyone's ability, meet their needs.

Early Mediation -- A Multi-Faceted Tool

By Paul McVicker

Paul McVicker is chair of the legislative committee of the WSBA ADR Section.

In the context of the escalating cost of litigation and ways to reduce that burden on the litigants, and the courts, mediation is a valuable tool for the courts, the litigants and the attorneys. It is a multifaceted tool that can be used in a variety of ways. Thought needs to be given to the use and purpose as well as to by whom and how the tool is wielded. Perhaps that requires too much knowledge of the distinctions between facilitative, evaluative, shuttle and other forms or the diverse techniques, methods, approaches, and nuances to mediation practices. Early mediation vs. summit conference or settlement conference mediation is a constructed dichotomy of different purposes in the use of mediation. It is useful however.

Early mediation encompasses a broad use and purpose to the mediation – management of conflict, discovery, and process, improving communication and understanding between the parties, self-determination, and durable agreements. Summit or settlement conference mediation evokes a more limited use and purpose to the mediation – resolution of a dispute, settlement of an issue or a case in litigation. This characterization is shown in the WSBA ADR survey by Andre Chevalier. It is the broader use of mediation that results in a settlement at a significantly lower cost to that of a more limited, and later, use.

It is not a one-size-fits-all use of mediation as a tool of attorneys or the courts, however, nor that of the disputants themselves. It's important to note that the purpose of the mediation process itself, whether in a single session or multiple sessions, whether early or late, whether used broadly or narrowly, is primarily, if not singularly, to achieve a self-determined resolution of the conflict by the disputants themselves. It requires a degree of good faith, willingness, knowledge of relevant facts, and ability.

Early mediation in the context of a tort, contract, business or other such conflict may better be used, and defined, in the litigation context after the discovery process is completed, or at least after completion of party depositions, before trial preparation. The ECCL survey shows the highest degree of support for lowering litigation costs for the idea of mandating good faith mediation within 60 days of party depositions. The second highest degree of support is for the idea of mandatory early disclosure through standard interrogatories.

In other conflicts, including business-related, probate or estate matters, and particular family law matters, especially those involving children, early mediation is better used and defined in the broadest use and purpose of the mediation. Some conflicts may better be suited to discover relevant facts outside of the mediation process; others however are better suited for that discovery to be a part of the mediation process.

Recognizing the differences in the nature of the dispute is important in determining what use to make of mediation options. In those areas of the law in which a narrower use of mediation is more useful, a model for early resolution in litigation emerges from the ideas of early mandatory discovery through standard interrogatories, party depositions as may be appropriate or necessary and mediation within 60 days thereafter. Think of how short a case schedule could be with such a plan should settlement then occur.

In those areas of the law in which a broader use of mediation is more useful, developing a model for early resolution must look different. The broader sense of mediation is better used in situations where the parties are not strangers and have an ongoing relationship. Some small or family-owned business disputes, estate and probate, labor or employment, and family law disputes may fit those categories. A model might look different in such a case. Of those areas of law in which the dispute is categorized, family law issues especially concerning children stands out. It stands out for all the reasons that others have so eloquently elaborated upon – Debra, Joanna, Anne and others. Disputing parents need no to little discovery about family issues concerning their children, although financial family issues may be different. It also stands out for the reasons best illustrated by the findings of the Centers for Disease Control and Prevention that the divorce experience in childhood is one of the adverse childhood experiences that can significantly contribute to a multitude of physical and mental health problems. For info on ACE study see: www.cdc.gov/ace/findings.htm and www.cdc.gov/ace/prevalence.htm#ACED. It might be noted that several models for mediation at an early stage in the dispute have been developed and successfully implemented in both family law courts and juvenile or dependency courts in jurisdictions throughout the country.

I recommend that you incorporate the ideas of "broad" vs. "narrow" in the findings and recommendations to the task force. I think it's well stated in Andre's survey analysis and is compatible with the ECCL survey results. I would also recommend that you carve out family law disputes relative to parenting, excepting financial matters, as a necessary, distinctive and separate model that could benefit, and requires, a broader and even earlier mediation model than the narrower model for other legal areas of disputes. That model requires little to no discovery and can be done at a very early stage, or even before commencement, of litigation. It can also be used as on option in other areas where continuing relationships are important to that of a more tradition litigation model of early mediation.

Additional Benefits of Early Stage Mediation

By Joanna Roth

Joanna Roth is former co-chair of the KCBA Collaborative Law Section

ESM provides a platform for professionals to work with conflict in a low-stress way. Because the professionals are supporting parties to work toward solutions professionals strive to work outside the dynamic of the divorcing couple. This shelters attorneys working with clients in mediation from having to re-enact the marital discord. As a consequence, civility among attorneys is an ordinary consequence of working in ESM. As an attorney who routinely works with clients in ESM, it is now my practice to identify with the mediator and my counterpart attorney a common set of issues to resolve. Rather than using this forum to advocate a client's position, this discussion ensures that professionals' efforts are coordinated.

One way to incorporate a benefit of ESM for clients who are not currently working with a mediator is for an attorney to contact opposing counsel to identify issues to resolve, and perhaps propose avenues of information-gathering and negotiation. If ESM is not possible, perhaps a settlement conference in lieu of temporary orders would be. The early settlement conference can provide a template for final resolution, allow counsel to obtain useful information at a lower cost, and avoid the unpredictable outcome of a court hearing.

Another benefit is that parties can have access to additional professional services within the context of the mediation. If there is a particular question related to finances or parenting, parties can bring in a financial services professional or child psychologist/consultant to assist with creating agreements that are fully informed. Because these services are provided by jointly hired professionals, and outside of litigation, there is room to thoughtfully consider how the professional's input would apply to the problems at hand.

Moving Toward Effective Use of Early Stage Divorce Mediation

By Debra Synovec

Debra Synovec is a mediator and former chair of the WSBA ADR Section.

Mediation can be used at any stage of a divorce but most benefits are derived when the mediation begins as "early stage mediation". Early stage mediation in divorce situations is usually before discovery has started and may even happen before the petition has been filed. Typically the early stage mediation begins before the spouses are enmeshed in legal proceedings. The benefits of mediation for family and divorce situations are largely diminished, if not extinguished, by summit mediation completed right before trial. Yes, summit mediation gets "agreements" but these are normally completed in an adversarial setting and done under a lot of pressure and after the clients are entangled in a bitter dispute. The couple does not realize the cost savings of mediation, but more importantly the other advantages of early stage mediation are lost.

Divorce is not really a legal problem. It is a family problem with legal consequences. A young attorney can prosper and diligently serve clients by understanding how to effectively work as a representative attorney in early stage divorce mediation.

Early stage mediation is a process that enables the divorcing couple to get past their initial rigid positions and to instead focus on their needs and interests. Whether the issues are parenting or financial the parties involved are able, with the help of the mediator, to discuss their futures and options and come up with decisions and agreements that have been negotiated pragmatically, are well thought-out and tend to be more durable. The couple retains control of the outcome and consequently their lives. Additionally, through the process of early stage mediation the couple learns how to communicate with each other in a more business like fashion; this has the additional advantage of greatly improving co-parenting that ultimately is for the benefit of the children (and society). It also is of the benefit of the parties, because they have better thought out parenting plans and they are able to have less stress and fewer challenges co-parenting.

Attorneys typically do not attend the mediation sessions in early stage mediation and oftentimes reject it because they feel they are unable to effectively represent their client in this model. Many attorneys complain that they are afraid of giving up control and they are unable to "protect" their client.

In reality attorneys play a vital role in early stage mediation and have more control than they do in court or in summit mediation. Divorce attorneys who

successfully use early stage mediation are proactive when passive when working with their clients. They advise their client regarding the law, their legal rights, and review various alternatives with their clients.

The process works something like this: After each mediation session the client checks in with the attorney to review the session and prepare for the next session. The attorney continually coaches their client in negotiation, reviews various options that are being considered and helps their client to develop additional options and strategies. Attorneys also educate the client about possible outcomes if agreement is not reached in mediation. The clients and their respective attorneys work together to retain control of the outcome for the benefit of both clients.

Proponents of Early Stage Mediation talk about the benefits for the clients. Usually these include things such as:

- Cost savings
- Better future relationship for co-parenting
- Less acrimony and stress
- Control of the outcome and self-determination
- More durable agreements
- Greater flexibility in creating a unique tailor made plan
- Faster resolution

These benefits for the clients also spill over and complement early stage mediation usage for attorneys who represent clients using early stage mediation.

- Costs are less and clients pay their attorneys in full
- Clients are satisfied and clients refer friends and family to the attorney in the future
- Attorney does not have the stress of an adversarial case
- Clients are happier with the outcome and the attorney feels better about the result for their client
- Attorney keeps control of the outcome

Land Use Pilot Project Case Studies

By Courtney Kaylor

The Land Use and Environmental Mediation (LUEM) Committee of is a joint standing committee of the WSBA Alternative Dispute Resolution (ADR) and Environmental and Land Use Law (ELUL) Sections. Composed of professionals versed in dispute resolution and land use, natural resource and environmental issues, the LUEM Committee strives to promote more efficient, effective and enduring resolutions in these arenas through the use of mediation and related conflict resolution techniques. The LUEM Committee is conducting a pilot project under which mediation services are provided at no cost in exchange for the parties engaging in pre- and post-mediation interviews, which will be incorporated into a report when the project is complete. This is a discussion of three of these case studies and lessons learned from them.

Case Study #1

Conflict: The developer proposed to replace an existing 28-acre, campus-like, commercial complex with a denser, mixed-use, transit-oriented development. The project would include a 2.5 acre public park, walking trails, and off-site tree replacement in surrounding neighborhoods. The development would require cutting down over 1,000 large trees. An environmental organization and various neighborhood groups opposed the development based on a city zoning code that requires retention of 35% of "significant" trees. The city council granted an exception to the zoning code due to safety issues associated with leaving large trees on site after root systems had been weakened by construction.

Mediated Issues:

- The design and tree retention plans for a 2.5 acre park to be included in the development.
- Use of mitigation funds to transplant old growth trees to other neighboring areas, in addition to planting new trees on site.

Lessons Learned: Land use mediations often require multiple sessions, including a combination of pre-mediation intake, stakeholder caucuses, and post-mediation negotiations. Multiple sessions allow stakeholders to brainstorm internally, gather factual information that is useful in evaluating whether potential solutions can be implemented, consult with technical experts, and respond with options in a more productive open exchange. In this case, the mediated settlement included the creative use of mitigation

funds to transplant old-growth trees, an alternative that better satisfied neighbor and community group concerns about retaining old-growth trees in an increasingly urban area.

Case Study #2

Conflict: A proposed rezone of a large apartment complex adjacent to a Seattle area mall was designed to include a hotel, office buildings, and shops to take advantage of existing transit and a future light rail station. The redevelopment would result in the loss of 207 low-income housing units and was opposed by a low-income housing advocacy group and a neighborhood coalition. Both groups, while supporting urban density and increased transit, have a history of also working to preserve low-income housing in Seattle, which has been adversely effected by rent increases and demolitions of older buildings.

Mediated Issue: The number of affordable housing units (priced at 50% area median income) to be created during property redevelopment in order for low income housing advocates to support the rezoning plan.

Lessons Learned: Land use mediation is a valuable alternative for developers when the settlement allows them to move forward without further delays and to more accurately predict development costs. Developers have an opportunity to improve their community image when the settlement offers a meaningful benefit to neighbors and opposition groups.

“This will provide predictability and certainty if and when it is developed. It is really a win for everybody.” -Owner and Project Developer

"It sends a message to other developers that there is an alternative to just trying to ram development down a community's throat,"

-Low-income Housing Advocate

Case Study #3

Conflict: Neighbors and community members opposed a 143-unit apartment development with lower-level retail space on a 1.2 acre lot facing waterfront residential property, claiming that the number of units was substantially higher than what was allowed under new zoning ordinances. The developer claimed rights under older zoning to build a higher number of units but

desired a compromise in order to have a moratorium lifted and proceed with development. The city council did not approve the settlement agreement that would allow the development to proceed with no more than 100 units and included options for the city to pay the developer to further reduce the size of the project. Litigation is proceeding.

Mediated Issues:

- The number of parking spaces that would be created in an underground structure to accommodate increased traffic.
- The design of an "open space" courtyard that would be used to break up the large scale of the building in the context of other smaller buildings on the street.

Lessons Learned: Mediated settlements in land use cases are often contingent upon government approvals. In this case, although a settlement was achieved, the agreement was not durable because it was rejected by the city council. An optimistic future outcome is that mediation has opened the door for further negotiation and has offered a forum (beyond limited public process requirements) to meet in-person, exchange ideas, and work together to reach a resolution within procedural and substantive parameters.