

Early Intervention Program

Premise and process of early private neutral intervention:

- Active and adept case management is critical to reducing litigation costs, avoiding unnecessary delays, and producing favorable outcomes.
- Courts and current state and federal rules recognize the importance of case management and require litigants to collaborate to streamline cases and alleviate the burden on the court.
- Courts usually do not have the resources to supervise and enforce active case management plans or provide intervention and evaluation sufficiently early or regularly in a case to avoid substantial expense.
- Business clients in particular—more than ever as costs escalate and budgets tighten—are looking for means to manage litigation expense and expedite positive outcomes. Clients are insisting that counsel find ways to accomplish those goals most effectively.
- Private mediation is well accepted by the courts and litigants, and is a voluntary process offering the choice of highly capable and experienced professional neutrals of the parties' choosing. "Self-determination" is the cardinal principal of mediation, meaning that nothing can occur without all parties' agreement.
- Despite the success and clear advantages of private mediation, counsel and parties customarily do not retain a neutral early in a case to assist in evaluation and management, leaving that role, by default, to the courts, which generally do not provide the attention, value and ultimately flexibility available through private intervention.
- Mediation, or even early evaluation, within the court system is not tailored to the needs of a particular case, and litigation counsel have not nearly the degree of control in shaping the process as they do with a private neutral.
- Private early intervention by a skilled mediator with a breadth of experience in complex cases, both as litigator and neutral, can create substantial value through balanced streamlining and realistic assessment of a case that has complex issues.
- A case often can "take on a life of its own" and become increasingly difficult to resolve, as the expenditure of financial resources and time causes clients, and even counsel, to get dug in and become overly emotionally invested in the case. Settlement then occurs only upon the eve of trial, when options are not a broad and resources that could have been invested in a resolution have been wasted in the posturing leading up to the 11th hour settlement. Early private intervention can avoid this result unfavorable to all parties and damaging to counsels' relationships with their clients.

- Creativity pays, in terms of all the important goals of cost saving, prompt and positive resolution, and client satisfaction through a settlement that can directly serve business objectives--as opposed to getting to the point in a protracted case when a client demands settlement, thus weakening counsel's bargaining position and diminishing the likelihood of a favorable resolution.
- Contested discovery disputes can be submitted to the retained neutral for expedited resolution. Courts don't take well to discovery impasses and can sit on motions for months, delaying progress in the case until the discovery motion is resolved. Resolution of discovery disputes through a private neutral—either by assistance with negotiations or by submission to the neutral for binding resolution--is simply faster, more flexible, and less expensive than such a process in court.
- The cost of the neutral's services can be recovered many times over by virtue of achieving a more well-managed case for which the parties develop realistic expectations and can obtain a more efficient and satisfactory outcome than would have been possible by relying solely on judicial oversight or self-management.
- Early private intervention is therefore a great opportunity to retain a seasoned professional to save ultimate litigation expense, to more effectively develop and pursue litigation strategy, and to find a better resolution.

Why Early Intervention Works:

- Clients are demanding that litigation counsel, working closely with in-house counsel, develop a case assessment and strategy (and budget) designed to minimize costs and evaluate the prospects of the case fairly and realistically, and steer toward an outcome that will maximize business objectives. Bringing about the most cost-effective result is higher on a business client's list of goals than ever before.
- This private process can be molded by the parties to address the specific needs of a case, rather than being imposed under a wooden set of rules. Counsel have a greater opportunity than is available through the courts to make sure the interests of their clients are protected.
- Case management assistance also promotes an environment of constructive relationships between litigation counsel that reduces the incidence of needless and costly skirmishes—and provide an outlet for resolving them quickly when they develop.
- Deciding to take this approach does not require concessions. Rather, counsel together agree upon a structure within which they can operate most effectively to accomplish all of the demands that are imposed by clients: cost-saving, including minimizing the cost of

discovery; realistic case evaluation; a more cost-effective means of developing and implementing case strategy; regularly revisiting whether there is an opportunity to resolve the case without further cost or delay; and a resolution that optimizes business objectives.

- Counsel and the parties can most effectively address the substantial challenges and risks of electronic discovery in much greater detail and with more control than available in the court. The management of contested electronic discovery, by itself, can be a sufficient purpose to engage a neutral to assist with discovery, saving thousands, or tens of thousands of dollars in out of pocket cost and staff time, while complying with discovery obligations.

How Early Private Intervention Works

- As part of the process of developing a strategy for a case, counsel can suggest to the other party(ies) retention of a skilled and experienced neutral to assist in case management for whatever issues are necessary and which the parties agree to submit to the neutral.
- Counsel together can contact Litigation Alternatives to indicate their interest in early intervention.
- Counsel work with Litigation Alternatives to select a neutral from the panel who is acceptable to all parties. Parties retain the neutral through Litigation Alternatives, which assists in administration.
- Counsel have a preliminary conversation with the neutral to discuss their respective objectives and how best to make the process work.
- The neutral and the parties, with counsel, meet at an appropriate time to finalize a schedule and goals in the case, possibly including setting a later meeting to address a settlement at a time when there is sufficient information upon which to base an informed decision and yet avoid unnecessary cost and discovery or motions.
- To the extent all agree, counsel and the neutral establish a written case plan that operates in parallel to any plan developed in the court.
- Discovery disputes can be submitted to the neutral as they occur and can either be resolved over the phone, or if more complex, in writing, investing the neutral with the authority to establish a resolution if the parties cannot agree. By whatever method, the result is much more quickly reached than in the court.
- The process is flexible and dynamic and can be adjusted at any time by agreement. It promotes constructive engagement and work toward a resolution that serves the client's interest rather than strains resources and the relationship with opposing counsel.

- An experienced neutral can assist in the negotiation and crafting of a workable protective order that can expedite discovery and protect information against abuse of the litigation process.
- The parties can expressly limit by agreement the limits of the neutral's authority, so as to protect against, for example, non-appealable decisions on issues of privilege or production of highly proprietary information without an adequate protective order. Specifically, at the outset of the neutral's retention, the parties can reach agreement, with the assistance of the neutral even at that point to give the neutral binding authority on certain issues so as to avoid impasse in the discovery process without the delay of involving the court, while carving out issues for which the parties can be bound only by agreement.