We have all heard the statistic — less than five percent of all cases go to trial. While many cases do settle on the proverbial courthouse steps, studies have repeatedly shown that mediating cases early in the litigation process (in many cases even before a complaint is filed) increases the likelihood of reaching a settlement. This article reviews the latest study regarding improved outcomes in early mediation, reasons why early mediation is more likely to be successful than mediating later in a case, how to assess whether a case is appropriate for early mediation and strategies for successful early mediation.

The earlier you mediate, the more likely you are to be successful.
A study published in the Spring 2018 issue of the *Harvard Negotiation Law Review*, "How Should Courts Know Whether a Dispute is Ready and Suitable for Mediation," concluded that early mediation resulted in higher settlement rates. The study applied a rigorous statistical analysis to mediation outcomes for a broad range of cases in the Singapore court system. The study's findings echoed earlier studies involving mediation in Ohio and Illinois.

The study had a number of illuminating findings, including: 1) Cases mediated at the close of pleadings had a greater likelihood of settling than cases mediated during or after

Early Mediation

Pros, Cons and Strategies for Improved Outcomes

By Robert H. Barron

the interlocutory motion or discovery stages of litigation; 2) Cases involving significant interlocutory motions were less likely to settle even after the motions were resolved and; 3) The higher the case's value, the less likely it was to settle.

The study's findings should not be surprising to experienced litigators or to psychologists. First, early mediation conditions the parties to the reality that settlement is the most likely litigation outcome. Even if the case does not settle at the first attempt, the parties will have built rapport with the mediator and developed an understanding that mediation and settlement are part of the litigation process. As the litigation moves forward, the work done during early mediation will increase the likelihood that later mediation will be successful.

Second, the economic and emotional toll that comes with any legal dispute can harden the parties' positions. Early mediation avoids those impediments. This not only facilitates settlement but also results in a more positive client experience when compared to settling a case after years of fighting.

Sunk-cost bias makes it harder for parties to settle.
It is certainly the case that emotional and economic exhaustion is sometimes a motivating factor in successful late case mediations. However, as the study illustrates, early mediation is

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more likely to be successful. Moreover, the fact that litigation sometimes bludgeons one or both parties into settling is not a compelling argument for subjecting your client to potentially unnecessary bludgeoning. It may be your client who is the more emotionally exhausted party, weakening your client's resolve and your bargaining position.

Early mediation not only avoids exhausting clients with the travails of litigation, it also avoids sunk-cost bias. Sunk-cost bias is the tendency to continue investing in a proposition, even a losing proposition, because of the time, money and emotion that have already been invested in the outcome. Sunk-cost bias can play a significant role in making late case mediation more difficult.

For clients, litigation is the perfect storm for creating sunk-cost bias. A lawsuit is inherently emotional and time consuming. Two or more parties fight over opposing views of the facts and/or legal rights, and each party is likely to take offense at the positions taken by the other parties.

The longer the litigation continues, the more the parties' negative emotions will harden their positions, often to the point that they feel they have wasted their time if they are not fully vindicated in court. One of my favorite comments from an attorney to a client explaining the time and emotion required to litigate was that at a certain point, when the client saw the attorney's number on the phone, the client would heave the phone out the nearest window. These nonmonetary expenditures are real investments in the outcome of the case, and many clients will expect an unrealistic return on those investments.

For clients billed hourly, late case mediation increases the client's monetary sunk-cost. Attorneys are intimately familiar with clients who take the position that the more money spent, the less willing the client is to move off the amount required to settle. Assuming your client is not deploying a negotiation tactic, this economic position for

not moving reflects sunk-cost bias and poor strategy.

The correct strategic question regarding whether to settle is not how much have I invested. The correct strategic question is does it makes more sense to invest further in an uncertain outcome rather than settling the case for a tolerable amount and eliminating the uncertainty. By continuing litigation rather than attempting to settle, parties are investing more in an outcome that remains uncertain.

In fact, late case mediation often results in worse economic settlements when the money spent on discovery and interlocutory motions are factored into the settlement amount. Moreover, early mediation offers the parties an opportunity to shift some of the saved litigation costs into a settlement and resolve the case for an entire economic package (including saved legal fees) that is less than the parties would have spent if the case settled late in the litigation.

Attorneys are also susceptible to sunk-cost bias. Attorneys working under a contingent fee arrangement who have put substantial time into a case may need to consider a settlement that does not fully compensate them for their time. Attorneys sometimes tell me, off-the-record, that they have too much time in a case to settle for the figure offered by the other side. That statement often comes when an offer is otherwise within a tolerable settlement range and the attorney is explaining why he or she will not accept the offer. Similarly, attorneys billing hourly who have invoiced significant hours will often have difficulty explaining to a client that the case should settle for an amount short of the client's expectations and so will continue the litigation as an avoidance mechanism.

Is your case right for early mediation?
There are few cases where early mediation should not be considered. Early mediation is sometimes more difficult to pursue in cases requiring substantial discovery or expert testimony, but there are strategies

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to address discovery issues that lead to successful early mediation outcomes. Cases involving legal positions and clarification of rights that require "all or nothing" outcomes with no middle ground will not be good candidates for early mediation — although those cases are not generally good candidates for mediation at any stage of the litigation.

Most cases are appropriate for considering early mediation. However, there are significant questions that must be considered before embarking on the early mediation process. First, you need to determine if all parties are willing to engage in early mediation with an open mind. It is a waste of time to mediate when one party has no intention of reasonably considering settlement and is agreeing to mediate solely to see what other parties say.

If all parties are open to genuine discussions, even if some think settlement is unlikely, early mediation can be successful. Most mediations with pessimistic participants result in settlement, so pessimism is not a reason to forego early mediation. A good mediator will speak to each party prior to the mediation and determine whether the parties are genuinely open minded.

Some attorneys attempt to determine if a party is serious about mediating by insisting on a demand or offer that meets a threshold before agreeing to mediate. This strategy's potential trap is that most mediations start with demands and offers that offend the other party. Since most cases end in settlement, a party's opening position is not an accurate way to determine if they are serious about trying to settle. While it is beneficial to the process to exchange proposals prior to mediation, attorneys should not let those exchanges derail the mediation process before it starts.

Cases where the amount in dispute is not large enough to justify full-blown litigation are particularly well suited for early mediation. Some attorneys will assume this dollar threshold only applies to cases that can settle in the five-figure/low six-figure range. However, given the significant expense of litigation, many cases that might settle for six or even seven figures are not large enough to cost-justify significant discovery and motion practice. While larger dollar disputes are more difficult to settle, that greater challenge is not an argument against starting the mediation process early.

Cases involving parties who have an ongoing relationship are also well suited for early mediation. The only thing that erodes a relationship with greater certainty than a lawsuit is a lawsuit that lingers. Early mediation (particularly before a suit is filed) allows the parties and the mediator to

approach the dispute as a disagreement that needs to be constructively resolved. In that context, the parties may still be able to view themselves as working together to solve the problem so they can move forward together. Once litigation proceeds, parties quickly lose the ability to see themselves in any context other than as combatants.

Early mediation can also be useful when trying to satisfy a strong-willed client with unreasonable expectations. Early mediation provides an excellent opportunity for you to give your client a mediator's perspective on the case. As an unbiased third party, the mediator will ask the difficult questions that help your client reexamine the strengths and weaknesses of the case and the potential outcomes. Involving a mediator early is often preferable to you challenging your client's view of the case at the risk of being viewed as not believing in your client's position.

Strategies for improved outcomes in early mediation

While most attorneys do not prepare for mediation as if they are going to court, reviewing the documents in your possession and talking to the available witnesses provide a significant advantage and often speed the process to a more favorable resolution. It is often the case that a single document or discussion with a witness will dramatically change your or the other parties' view of the case. Moreover, from a cost/benefit standpoint, early mediation is the best time to review the available evidence. Early identification of strengths and weaknesses will inform your strategy for mediation as well as litigation if you are unable to settle. You are going to have to dig into the case at some point; dig in early when it will give you the greatest potential benefit.

One problem that often arises when mediating before discovery is the parties' hesitation to share information when it helps

their case. The explanation for withholding is generally that the attorney wants to retain the "surprise factor" by confronting the opposition with the information later. Given the scope of discovery, it is the rare relevant document or email that will not be revealed, eliminating the opportunity for a surprise. Losing the opportunity for an early success in mediation is not worth the hypothetical value of a surprise later in the case.

Lack of discovery is often raised as the major impediment to early mediation, but there are strategies to work through discovery issues. When one side has more relevant information than the other party, the party with the information has an advantage. Obviously, if you have the information advantage and opposing counsel does not raise a concern, you will want to take that advantage into early mediation.

If opposing counsel does raise a concern about the information gap, the parties can agree to informal, streamlined premediation discovery. The operative word here is

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"streamlined." This discovery should be designed to exchange the few key documents and answer the few key questions needed to allow each party to make informed decisions regarding settlement. In some cases, the opportunity to talk informally to the plaintiff or a key witness without the formality of a deposition is also needed to allow the parties to intelligently mediate early. A mediator can help the parties resolve how much and what type of discovery will be undertaken.

In cases involving expert testimony, successful mediation often requires information that will form the basis of expert reports. Here, too, a streamlined approach can lead you to successful early mediation. If you are an attorney who has experience working with expert reports in a given practice area, do you need to see the opposing party's expert report before attempting mediation? In most cases, an exchange of the information that will form the basis of the experts' reports will be sufficient to give you a clear picture of the expert testimony and will allow you to consult with your expert before engaging in early mediation.

Finally, early mediation gives you an opportunity to see your client in a litigation setting. The pressure of a mediation, particularly for parties new to litigation, will tell you a lot about how your client will react when litigation heats up. There is far less pressure in a mediation as compared to being deposed or faced with damaging revelations. A client who has trouble handling mediation is not likely to do well at a deposition or on the stand and will be more likely to wear down as litigation proceeds. Learning that early will help inform your strategy.

In the end, not all cases settle and not all cases settle early. However, a thoughtful litigation strategy should consider early mediation, as it offers the best opportunity for both the client and the attorney to cost-effectively settle a case. ⚖

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