

Early Intervention Mediation

A Path to Quicker, Better Dispute Resolution

BY DOUGLAS I. MCQUISTON

This article discusses “early intervention mediation” as a tool to be used throughout the life of a case to facilitate information exchange, build trust, and advance parties toward settlement.

“**Y**ou have to work up every case like it will go to trial.” As trial lawyers, we have heard and given this advice since law school. It is good advice; our professional duty to our clients requires us to fully prepare their cases, and that includes being fully prepared for trial.

But we also need to remember why our clients came to us in the first place: they had a problem they couldn’t solve on their own, so they hired us to help them. That is why they pay us. But in addition to wanting us to be competent in trial, our clients have equally compelling needs for our work to be

- resolution-focused,
- proportional to the issues and dollars at stake, and
- cost-effective.

Clients, and increasingly courts, are looking for results that are better, faster, and cheaper. The recently announced 2018 changes to CRCP 16.1¹ illustrate the judiciary’s ongoing desire to squeeze cost and delay out of the civil justice system. The goal today is to get to the point without breaking the bank.

Leave Out the Parts People Skip

Renowned novelist Elmore Leonard was once asked how he managed to write such concise detective novels. He reportedly said, “I try to leave out the parts readers skip.”² This is not so simple in civil trial law. The gulf between what we want in discovery and what matters at trial is wide. We live with the fear that if we miss anything, it will damage our client’s case, or worse, open us up to a malpractice claim.

Our compulsion to run every fact to the ground, in every case, is a hard beast to tame. But tame it we must, if we are to deliver on the cost-efficiency promise our clients and courts demand of us. Discovery is useful but expensive, and if overused, it can become an obstacle to the effective resolution of a dispute.

The Traditional Way:

“Mountaintop Removal” Discovery

Too often, discovery resembles a form of strip-mining called “mountaintop removal.”³ We’ve all encountered it, and maybe we’ve even done it. Practitioners don’t just investigate a dispute—they blow it up. Then they sift through the rubble, inspecting every rock and pebble. They follow every seam of information, however off-topic, and push every claim or

defense they can think of, as hard and as long as they can. They engage every expert witness their highly trained legal minds can contemplate, daring their opponents to depose them all. They take pride in every discovery battle as evidence of their zealous representation and “tough” approach to litigation. Some even insist that anything less is malpractice.

That discovery style may have once paid off. But times have changed, and adversaries have adjusted. Today, even firms and clients of relatively modest means can take advantage of highly efficient, inexpensive artificial-intelligence supported trial and discovery management tools, e-discovery software, and other litigation support tech tools. Now that both sides have access to these tools, “mountaintop removal” discovery has lost its luster and more resembles mutually assured destruction.

All that strip-mining we may have done in the past came at a huge cost, but most often yielded very little in admissible, persuasive evidence. 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.⁴ The results were stunning: The study showed that 4,980,441 documents were produced in discovery in major cases surveyed 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% yield of useful evidence to useless overburden. Consider how much the clients in these battles spent for that meager return.

Instead, Get to the Point

To reach the goal in today’s litigated case, we first need to accept a simple truth: we don’t need every shred of information pertaining to a dispute to fairly resolve it. It may be uncomfortable to ponder, but sound decisions can still be made, and good outcomes achieved, if we let go of gathering everything and embrace getting just enough.

All of us in the business of civil trial work use mediation. However, in the United States we typically use it only at or near the end of discovery. We’ve always done it this way. We run through our checklist in our client intake meeting, open the new case, file a complaint or answer, and then leap right into the disclosure and discovery stream.

But that stream is rarely a smooth float; logjams are frequent and frustrating. Mired in discovery skirmishes, it becomes easy to lose sight of why we were hired in the first place: to help our clients solve their problems. Mediation becomes almost an afterthought as we scramble to finish discovery. If we manage to agree on a mediation date at all, it comes maybe weeks before trial, after all the money is spent and positions have hardened to stone. Negotiations are often then hampered by a lack of time to adequately prepare.

Only time will tell whether the recent Colorado civil rule changes favoring “simplified” procedure and restricting formal discovery will help. But we need not wait; we can take a different approach now. In fact, the approach discussed below is well suited to not only large, complex disputes, but also to cases covered by recently revised CRCP 16.1’s “limited discovery.”

Early Intervention Mediation

Let’s change our entire view of what mediation can accomplish and use it throughout the life of a case to

- keep information flowing informally;
- keep the parties moving toward agreed milestones;
- build trust; and
- get the parties to the table months earlier, with just enough information to fairly resolve problems.

This process is called early intervention mediation (EIM).

Several mediation firms in the United Kingdom use EIM in litigated financial and business disputes. It is being used here too, but infrequently and mostly for non-litigation mediation programs in places such as school districts and mental health and community associations. The time has come to widen its application to litigated civil matters.

The idea is simple: engage the mediator early, and use her or him throughout the life of the case to keep the parties moving toward a quicker resolution. In this model, the mediator guides the parties through an efficient discovery and information disclosure plan (whether formal or informal) designed to get just enough

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information at the earliest possible right time. The mediator

- intervenes quickly and efficiently whenever needed to break discovery logjams;
- helps parties whittle disputes down to what really matters; and
- works with the parties to resolve the case through a substantive mediation phase well before any scheduled trial or arbitration, sometimes just a few months into the case.

Put another way, the early intervention mediator helps parties “leave out the parts people skip.”

How EIM Works

EIM can work for many types of litigated disputes, from personal injury and professional negligence claims to construction, product liability, and class actions. In commercial

disputes, the parties can avoid the exposure of proprietary or embarrassing information in public court records. They can preserve business relationships between the disputants and avoid escalation of the dispute that could drag in other customers, suppliers, or competitors in the broader marketplace. EIM is especially useful in complex, multi-party, or highly contentious cases, regardless of the amount at stake. It works even where the litigants or their lawyers do not trust each other. In fact, it is in those cases that the technique can yield the biggest returns.

Done right, EIM builds trust through little mutual victories along the way. As the plan is worked, the parties see the benefits of sticking with it. Rather than squaring up and fighting when they hit a logjam, they can quickly and discreetly call the mediator to help them untangle it. At any step of the process, the mediator can also offer his or her evaluative and litigation expertise to keep the parties and lawyers focused only on what matters to the outcome.

The process helps the parties narrow the case to the key elements in dispute. The mediator can stress-test claims confidentially with each party, asking probing questions and offering suggestions, to help the parties gain the courage to let go of claims too weak to waste effort on. The mediator helps counsel shape their information gathering. This liberates parties from the confines and delays of formal discovery rules by facilitating informal exchange of key pieces of information sooner, well before court rules could compel it.

Getting Started

The process starts with an agreement to participate in EIM and meet milestones. Each EIM agreement and “milestones agreement” is customized to each case, which is one of the key attributes of the process. A sample milestones agreement appears at the end of this article. Keep in mind that the terms of any agreement in an actual case are up to the parties to work out, with the mediator’s active assistance.

Parties can jointly approach the mediator to start the process, or it can start with one party unilaterally engaging the mediator *ex parte*, to begin what is referred to as the “initial exploration” phase. The mediator then approaches

the other parties to invite them to participate, explains the process, and answers questions about it. If the contacted parties agree to explore the process (and at this stage they need to do nothing more), the initial joint discussions then take place by phone or videoconference, or by in-person “chaired” meetings with the mediator. During this phase, the mediator and parties structure the EIM agreement and plan, to which they will all then agree in writing. The milestones agreement can be formalized at this time or worked out in subsequent discussions.

The process can be stopped by any party at any time. In most applications of the model, the mediator may also terminate the process if he or she sees it is no longer helping the parties move forward. Otherwise, the path continues as milestones are reached (or changed along the way) all the way to a complete substantive settlement. Even where the case cannot be resolved and heads to trial, EIM pays dividends well beyond its cost as cases come together better and sooner and the ultimate issues tried are reduced to only those worth fighting about.

Milestones

EIM uses a milestones process to guide the parties in itemizing the precise information each side needs to make meaningful decisions. The object of milestones is to get just what is needed to support a go/no-go decision on settlement (even if the ultimate quantum of information needed for trial is much broader). The process uses aggressive target dates to achieve its purpose. If additional discovery is needed for trial preparation, it can be staged later or pursued along with the EIM plan.

One or more substantive mediation sessions can be built in as part of the milestones process, even as the information exchange continues, to allow parties to safely test the waters to see if settlement can be jump-started. If settlement is simply not possible at any stage of the process, the mediator can help the parties shape the final pretrial steps to narrow issues, complete discovery, and get to trial with lower preparation costs and fewer last minute detonations.

Because the information exchange and milestones need not initially be comprehensive (and are expected to change as each stage is

reached), the parties are not precluded from pursuing information they did not identify up front. They can follow a “first things first” approach to exchange information quickly. This approach also offers an easy way to change the plan on the fly if needed.

The Benefits of EIM

You may wonder, why use EIM? Don’t scheduling orders and rules of procedure serve the same function?

Not really. Could you confide in the trial judge about your key concerns with your case? Could you candidly and privately explore with the trial judge the weaknesses of one or more of your claims, to discuss whether they should be abandoned? Would you lay out to your trial judge your true position on settlement and what you need to get there? Can you call the trial judge ex parte to discuss your case?

None of the above is possible in the formal court or adjudicative process. That is where EIM pays off; it is not an “adjudicative” model at all. It aims for and thrives on cooperation. 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, with confidentiality and flexibility.

Confidentiality is Key

All ex parte communications with the mediator are 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. The EIM agreement makes clear that no party will ever call the mediator to testify or to produce any documents or notes in any proceeding. This frees counsel to be more forthcoming about perceived gaps in information or potentially weak claims that can be jettisoned early.

The Power of Flexibility

The flexibility of the process, including the mediator’s freedom to talk with parties and counsel separately, is critical to the model. The mediator can untangle logjams and shape issues far more quickly than even the most streamlined court procedure can. The parties maintain complete power over the process

and outcome at every stage. The mediator does not wield the power of the court and cannot compel a result. Instead, mediators apply their expertise in the subject matter of the dispute or the litigation process generally to help the parties reach their own resolutions of both procedural matters and the ultimate issues in controversy.

Guided Trust, Quicker Results

EIM is not intended only for parties or counsel who are getting along famously. After all, it is a process used to assist people or entities in disputes, where the already low level of mutual trust can frequently collapse altogether once the parties and their lawyers get to court.

That is where EIM works most effectively. Because of the sheer volume of issues that trial judges face, the formal discovery enforcement process, no matter how streamlined, really cannot achieve speedy, informal information exchange or help build mutual trust. Judges decide disputes, and one side goes away happy while the other side just goes away. This is not a critique of the judicial system, but simply an acknowledgement of the immensity of the decision-making that courts are saddled with. It leaves no time for anything else.

In contrast, the early intervention mediator uses the EIM process to guide the parties to develop their own roadmap and get where they need to go cooperatively. EIM mediators can offer evaluative or facilitative input along the way. While the rules of civil procedure may inform the EIM information-gathering process, they do not restrict it, and parties are free to step away from formal court rules and deadlines if that is what will work best.

And because counsel develop the milestones agreement with the mediator, they inherently commit to it. The mediator reminds the parties and their lawyers that the process is reciprocal and readily adjustable. By hitting specified targets along the way, parties and their counsel gain trust.

In time, this trust builds on itself. As parties provide what they have committed to provide, these little successes show the parties the benefit of cooperation and that fears of being outmaneuvered are unwarranted.

A Look at EIM in Action

Assume a typical case, a personal injury suit involving an accident at a business. The business owner wants the case resolved as quickly as possible with minimal disruption to her business. The insurer that retains counsel to defend that business wants information needed to make decisions on settlement and value as soon as possible. Delays inherent in the court process are a source of endless frustration to them.

Plaintiff, on the other hand, has been living with the physical and emotional consequences of this accident since it happened. She would also like to get the case resolved quickly and fairly without having to go through the difficulties and expense of trial. She and her lawyer need certain information from the business and its insurer to get their case into a position to resolve fairly or to try, if necessary. Plaintiff's counsel knows they will have to share a great deal of medical and other information, but is concerned about controlling the depth of this probe. Counsel wants to avoid opening the client's entire 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.

The common approach to this case is to file written interrogatories, take depositions, and file various motions. But in this case, you pick up the phone and call your early intervention mediator.

Typically, during that first contact you let the mediator know the case type, give a little background, and discuss some of your concerns. The mediator then contacts the adverse parties. Before disclosing any information (other than that one party has made contact about the dispute), the mediator explains the process and its benefits, answering any questions. During the mutual discussion phase, the mediator asks the parties to agree to the terms of the process, which they are free to reject. But in this example all parties realize they need information and are tired of the frustrations, delays, expense, and angst of the conventional approach, and they agree to EIM.

Then the real work starts. The parties connect with the mediator, either face to face or by video or teleconference, to jointly begin outlining

their mutual information needs. Negotiation ensues on such issues as scope, depth, and timing, timelines for identification of witnesses and experts, limitations on discovery, and preliminary mediation "try-out" dates. The mediator offers evaluative and tactical input to shape the discussion. The parties commit to adhere to their plan in good faith because they seek the best way to get to full reciprocity and a quicker, fairer resolution.

The mediator guides the parties past their initial wariness, helping them get the best outcome at every step. This process can take place parallel to any formal discovery or disclosure

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procedure in a litigated case, or the parties can agree to hold formal discovery in abeyance while the EIM process works (subject to the court's approval, if the case has been filed). If any party desires an ex parte discussion with the mediator at any stage, whether to discuss a concern, weak spot, or any other issue, they simply need to ask, confidentially.

In this example, there appears to be one central medical claim: that the fall has caused a significant back injury that will require surgery and leave plaintiff at least partially disabled. The defense urgently needs key past records about

plaintiff's pre-fall status, and current records to see what her providers say about her condition and how that squares with any prior treatment and diagnostic images. They also need to have plaintiff examined by a neurosurgeon (among others) and evaluate plaintiff as a witness. Defendant wants to get to the decision point fast to save potential trial preparation costs.

Plaintiff wants to avoid making her entire medical past an open book and would rather not disclose past medical conditions she believes are unrelated. She needs business records about witnesses, maintenance at the business, and previous accidents, and wants to examine the insurance claim file for witness statements or other liability information. She understands the need for examinations, but does not want the process to be overly invasive or adversarial. Plaintiff also wants to try to get the case to a settlement posture early, before she is forced to spend thousands of dollars on experts and trial preparation. But she does not want to telegraph this desire to the other side, concerned they may take it as a sign of weakness or unwillingness to go to trial.

First, the mediator guides the parties to pare down their information requests and limitations on sharing information. Information gathering can be phased, which frees the parties to design a plan that gets them what they need to make resolution decisions first. If a piece of information is needed more for trial preparation than to answer the settlement question, it can be saved for a later stage.

The defense opens with a request to have three separate medical examinations, and plaintiff objects. They call the mediator, who sets up a quick, half-hour Zoom⁵ conference right then and there. All counsel log in. Following a short discussion, the mediator asks counsel to divide into separate "rooms" on the videoconference. She parks defense counsel and herself in one room, outside the presence of opposing counsel, and asks some probing questions. For example, does the defense really need three separate examinations, or will one suffice for now, followed by an attempt at resolution? The remaining two can be considered later if the case has to proceed to trial. Counsel agrees, and the mediator joins the parties again to discuss

the change to the milestones agreement, a single exam for now. The mediator revises the milestones agreement with everyone on the conference, sends it via email, and counsel sign it electronically. The issue has been resolved in about a half hour.

Back on track, the matter continues. It turns out that neither side wanted the other to know that they preferred settlement to trial, and they brought this up in their ex parte conversations with the mediator. The mediator used this information to safely weave into the agreement dates to try out mediation. The mediator characterized these dates as “mediator’s proposal,” to protect both parties from being perceived as weak.

In a move that was initially surprising, the mediator suggested that the parties agree to allow defense counsel and their decision-maker to informally talk with plaintiff for a half hour, with counsel present, to hear directly from plaintiff about the impact the accident had on her life and to gauge her presence as a witness. The mediator worked out an agreement that the discussion would not be useable as impeachment either in a subsequent deposition or trial testimony. Plaintiff’s counsel demanded a similar chance to informally speak with a defense representative about the incident and maintenance procedures, with the same proviso. With these parameters safely in place, these short, informal discussions inexpensively cleared away misconceptions, leaving the parties free to conduct formal depositions later, if needed. The mediator sat in on both discussions to be present to resolve any issues.

With the key dispositive issues worked out for the time being, the parties chose to put off the remaining pretrial discovery and moved on to phased mediation, without telegraphing any concern about going to trial. They used this flexible approach to narrow the issues and then to bracket the parties’ financial positions through offer/demand exchanges. Despite an initially big gap in the parties’ positions, the staged approach allowed the parties to get to settlement talks months earlier than they expected, even as they warily circled each other during the early stages.

Discussions progressed. A full settlement was reached just five months after the complaint

was filed. The parties saved thousands of dollars in legal and discovery expenses, as well as the huge emotional and business toll that full pretrial discovery, and a public trial, would have brought.


Key Takeaways from the Process

- EIM helped identify key misunderstandings that were skewing the parties’ evaluations. The staged information gathering process provided the information both sides needed to avoid letting those initial preconceptions harden into settlement roadblocks.
- The mediator talked tactical concerns through with both sides, allowing them to cut through to the real issues in dispute with less time and cost. This also allowed both sides to reset their clients’ expectations and generate a more realistic evaluation that later aided settlement, while giving no real tactical advantage away to the other side.
- Trust was built by numerous small, early successes, like the staging agreement for the information exchange, with specific and aggressive milestone dates that the mediator enforced. The case progressed months faster than it could have using formal discovery and disclosure procedures.
- By keeping the parties focused on the timely execution of their agreed plan and moving toward the information needed at each stage, the mediator kept both parties and counsel aligned toward resolution.
- While the process was terminable at any stage by either party, the mediator was as close as the phone and tenacious in getting the parties to stick to their program. Little

victories in the earliest stages showed that the process could work if the parties remained committed to it.

Conclusion

EIM is not for every case. Because the process typically begins in the earliest stages of a case, it can front-load some of the cost. But that front-loading saves in the long run. Especially in contentious, complex, multi-party, or high-exposure cases, by getting parties to an acceptable resolution sooner, that modest investment reaps more than sufficient returns in time and expense saved. The intangible benefits are equally important. Plaintiffs can retain more actual and emotional control over the results and get litigation behind them sooner. Both sides can reset expectations early on. Privacy and confidentiality can be maintained.

EIM is a concept whose application to personal injury, commercial, construction, professional negligence, product liability, and other civil litigation is readily apparent. There is little to lose and much to gain from deploying this tool in the right case. 



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NOTES

1. [www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Rule_Changes/2018/Rule%20Change%202018\(06\).pdf](http://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Rule_Changes/2018/Rule%20Change%202018(06).pdf). See also Holme, “Revised Rule 16.1 Makes Simplified Procedure Mandatory for Most Cases,” 47 *Colorado Lawyer* 20 (Aug./Sept. 2018).
2. www.brainyquote.com/quotes/elmore_leonard_538956.
3. See, e.g., Basic Information about Surface Coal Mining in Appalachia, <https://www.epa.gov/sc-mining>.
4. Litigation Cost Survey of Major Companies, Duke Law School, 2010 Conference on Civil Litigation, http://www.uscourts.gov/sites/default/files/litigation_cost_survey_of_major_companies_0.pdf.
5. Zoom is a videoconference tool. See <https://zoom.us>.

SAMPLE EARLY INTERVENTION MEDIATION “MILESTONES” AGREEMENT

The parties to this Agreement have agreed to participate in an Early Intervention Mediation (EIM) Process as set forth in the attached executed EIM Agreement. Following their initial discussions with the Mediator, the parties agree to the following Milestones and target dates:

Initial Informal Exchange

The parties shall exchange the following documents, by the target dates specified (independent from any duties of pretrial disclosure if this matter is currently in litigation):

Plaintiff shall provide:

Documents/Other	Target Date
<ul style="list-style-type: none"> ▪ Description of all elements of Plaintiff’s claims, with brief reference to the evidence, witnesses, or documents that support those claims. ▪ List of <ul style="list-style-type: none"> ▷ all witnesses who observed the incident at issue, with contact information, and brief description of their anticipated testimony; and ▷ medical professionals and entities that have seen or provided treatment to Plaintiff for the injuries alleged in this matter, as well as any treatment for conditions involving the same area of the body claimed to have been injured in this accident going back five years from the date of the accident. ▪ Medical records maintained or generated by the above medical professionals or entities. ▪ Wage records (consisting of W2, paycheck stubs, or 1099 documents for any self-employment) for the five years prior to the incident and all dates after the incident up to the date of disclosure, supplemented as needed. 	<p>June 29, 2019</p> <p>July 31, 2019</p> <p>August 15, 2019</p> <p>August 15, 2019</p>
<ul style="list-style-type: none"> ▪ Reports of all physician and non-physician experts, along with their CV’s and a list of any prior testimony for Plaintiff’s counsel’s firm, if such are in existence at the target date. 	<p>August 15, 2019</p>
<ul style="list-style-type: none"> ▪ Plaintiff, for purposes of an informal medical examination, by one physician of Defendant’s selection. Plaintiff may be accompanied during the examination by a member of Plaintiff’s family, or staff member of Plaintiff’s law firm, as elected by Plaintiff. The accompanying person may only observe, and will not interrupt, record, or interfere with the examination in any way. 	<p>August 31, 2019</p>
<ul style="list-style-type: none"> ▪ Plaintiff will present for an informal, one-half hour meeting with Defendant’s counsel and a representative of Defendant or Defendant’s insurer, to discuss the incident and its impact on Plaintiff. No record or transcription of this discussion will be made. Nothing in this conversation shall be admissible in any proceeding, and the discussion may not be used against Plaintiff in any subsequent deposition or formal testimony in any proceeding. 	<p>August 31, 2019</p>

Defendant shall provide:

Documents/Other	Target Date
<ul style="list-style-type: none"> ▪ Description of all elements of Defendant’s defenses, with brief reference to the evidence, witnesses, or documents that support those defenses, to the extent then known. 	June 29, 2019
<ul style="list-style-type: none"> ▪ List of all witnesses and employees of Defendant who observed the incident, with contact information, and brief description of their anticipated testimony. 	July 31, 2019
<ul style="list-style-type: none"> ▪ Defendant’s insurer’s claim file materials, including all recorded statements, estimates of damage, photos, videos, and audio recordings. However, the parties agree Defendant may hold back from informal disclosure all elements of the claim file dealing with reserve setting, settlement or verdict value estimates, and mental impressions of the claim representatives or employees. 	August 15, 2019
<ul style="list-style-type: none"> ▪ Medical records obtained by Defendant or its insurer prior to the institution of this litigation by release of Plaintiff. 	August 15, 2019
<ul style="list-style-type: none"> ▪ The premises where the incident occurred, which will be made available for inspection and testing by Plaintiff’s experts or consultants at a time convenient to the parties and their counsel, subject to the ongoing business needs of Defendant. 	August 31, 2019
<ul style="list-style-type: none"> ▪ Report of examining physician concerning the informal medical examination called for above. 	September 29, 2019
<ul style="list-style-type: none"> ▪ Defendant shall present a representative with knowledge of the incident for an informal, one-half hour meeting with Plaintiff and Plaintiff’s counsel to discuss the incident at issue and give an overview of the Defendant’s procedures concerning maintenance of the area where the incident occurred. No record or transcription of this discussion will be made. Nothing in this conversation shall be admissible in any proceeding, and it may not be used against Defendant in any subsequent deposition or formal testimony in any proceeding. 	September 29, 2019

The above described informal exchange of information shall (shall not) be deemed to preclude any formal discovery or disclosure proceedings called for by the Rules of Civil Procedure in any matter currently pending in court while the Milestones Agreement is proceeding.

The parties agree that formal disclosure and discovery shall (shall not) be postponed while this Milestones Agreement is underway, subject to any modification, or order of the court in which the matter is pending.

All formal discovery and disclosure means and proceedings may (may not) take place independently of this informal information exchange process. Information exchanged as part of this Milestones Agreement will satisfy any discovery or disclosure requirement for such information; duplication of effort is to be avoided.

The parties are encouraged to exchange additional information not specified above. If they do, they agree to let the Mediator know and provide copies of the exchanged information to the Mediator.

Modification of Milestones Agreement

The Parties anticipate that this Milestones Agreement will need to be modified as the matter progresses. It is the intention of the Parties that modification shall be readily agreed to if sought. Therefore, this Milestones Agreement may be modified as

the EIM Agreement progresses, at the request of any party to the Agreement, or as deemed necessary by the Mediator, to enable the exchange of additional information, or for any other reason.

In the event of any disagreement as to modifications, the Mediator will meet with counsel by video or audio conference to discuss the modification or acceptable alternatives. Counsel agree to seek reasonable compromise concerning any modifications of the target dates to the extent such compromise does not prejudice their clients' legitimate interests and agree they have a mutual interest in allowing sufficient time to meet the goals of this Agreement.

If there is a disagreement among the parties as to any requested modification of this Agreement, and such disagreement persists despite discussions with the Mediator to resolve them, the Mediator shall have the power, in his or her sole discretion, to terminate both the Milestones Agreement and the EIM Process altogether.

Substantive Mediation Schedule

Following the initial information exchange called for above, the parties agree that formal mediation will be scheduled as follows (subject to modification of the proposed dates as needed based on attainment of target dates):

Event	Scheduled Date
<p><i>Initial Exploration/Issue Narrowing:</i> The parties shall meet with the mediator to discuss any claims and affirmative defenses that will no longer be pursued by the party. In the event of such an agreement, the parties agree they will execute any formal Stipulation necessary to memorialize the removal of such claim or defense. That Stipulation may then be filed in any pending litigation or arbitration as needed to bind the parties. The Parties may use this time as well to explore settlement positions.</p>	<p>October 30, 2019 (4 hours)</p>
<p><i>Discussion and ultimate resolution/settlement of all remaining issues:</i> The Parties will mediate the remaining issues in controversy with a view to full settlement.</p>	<p>November 7, 2019 (all day)</p>

The terms of this Milestones Agreement are subject to change as specified above. They are also subject to the EIM Agreement executed by the parties. If this matter is resolved by mediation at any time in the process, the settlement shall be documented and the document signed by the parties, as specified by the Colorado Dispute Resolution Act.

I have read, understand, and agree to the above provisions of this Milestones Agreement.

Attorney for Plaintiff Date

Attorney for Defendant Date