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Two-Track Model for Attorney Representation in Dispute Resolution

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Two-Track Model

For

Attorney Representation in Dispute Resolution

By

Karl A. Slaikeu, Ph.D., and Diane W. Slaikeu, J.D.

Stories From the Trenches

- In mediation of a domestic case several years ago, the parties informed the mediator that they had each hired an attorney to represent them in the mediation, and further, they made this stipulation to their attorneys: "If we don't reach agreement in mediation, then you are both fired, and we will hire new attorneys to litigate this matter."

  They removed any possible conflict of interest on the attorneys' part (more billable hours if the mediation failed than if it succeeded) by hiring one set of attorneys for mediation, and using another for litigation, only if needed.

- A general counsel in a large company, who had previously served as outside defense counsel for the same company, told one of the authors that when he had represented the company in mediations, he quite honestly would rather see them "fail" than succeed, since his billable hours would be more for the litigation than for the mediation.

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- Another party reported that the attorney representing his company in a mediation seemed to "quit too soon." Halfway through the afternoon of the first day, the attorney declared to his client, "It's just like I expected, we're going to court." The corporate client began to wonder: have we exhausted all options for settlement, or is our litigator more interested in the process that will follow the failed mediation than in what we might do in the next three hours?

Each of these stories reflects a view of parties and attorneys that there may be a conflict of interest when a litigator represents a party in mediation. Experience documents that there are far more billable hours in litigation than in mediation. Furthermore, the processes for communication and resolution of issues is far different in a collaborative process such as mediation, where the objective is to help parties to willingly walk down a common path, as opposed to litigation or arbitration, where the objective is to prove before an arbitrator, judge or a jury that one side is right and the other is wrong as the facts relate to a particular point of law.

Based on these and other cases, we began to make notes on how to help parties by separating the two-tracks, with a settlement attorney representing a party in Track 1(which would include negotiation and mediation, two processes that require a prior consensus to begin them), and a second attorney to represent the parties in Track 2 litigation (the only process where one party can be coerced into participation) or arbitration.

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In explicating the two-track model presented in this paper, we were inspired by Roger Fisher's article "He Who Pays the Piper" (*Harvard Business Review*, March-April 1985, 156-157). Building on Fisher's excellent presentation of the obstacles to settlement that are present in traditional litigation, including his suggestion of various ways to separate the tracks, the model presented in this paper includes features that we believe will increase the opportunities for cost control and satisfaction of the clients.

Our conversations over the years with attorneys indicate that many have been practicing the two-track model for some time, even though they do not call it by this name. Many take on cases only for the "settlement" phase (negotiation or mediation), and referring a case to a litigators if, and only if, settlement is not achieved through their own initial efforts. What our original two clients had imposed on their respective attorneys is in fact what many attorneys have chosen for their own practice: specialists in settlement, alongside, from other firms, specialists in arbitration and litigation.

To check our logic, we consulted an ethics attorney about the legality and ethics of an attorney representing a party in only one aspect of the case. He informed us that as long as the attorney gave the client "unrestricted legal advice on options for resolution" there was ample precedent for an attorney to take only one part of the case, and have a different attorney take on another part of the case if needed. We also talked to many clients who had gone through mediation, domestic disputes, as well as malpractice and corporate matters, and we heard of a number of dissatisfactions with mediation as currently practiced. Mediation

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after lawsuits were filed had come to mean only “giving up or getting some money,” and was viewed as more of a delay than a help in resolving all the issues in a case.

These events, combined with our own experience in representing clients (Diane Slaikeu), and in designing systems for resolving disputes out of court (Karl Slaikeu) prompted us to define further the features and tools of a two-track model that can be used by parties, their attorneys, and neutrals to reduce legal expenses and increase the satisfaction of parties with the outcomes of the dispute resolution processes. These include:

1. Identifying different attorneys for Track 1 and Track 2 as a procedural guideline for all cases.

2. Separating the settlement track from the arbitration/litigation track by law firm, so that there is no financial conflict of interest if the case is not resolved in Track 1, and is not handed to a colleague with whom the attorney has a business relationship for Track 2 work.

3. Treating Track 1 settlement as the main event, with arbitration and litigation in the backup role. In the beginning, the role of the Track 2 attorney will be to consult with the Track 1 counsel and party regarding aspects of the case that must be protected should the case eventually go to arbitration or litigation. The overall approach, however, is to exhaust options for resolution in Track 1, before exercising the

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adversarial, win/lose arbitration/litigation track. This "arbitration/litigation can wait" feature can be changed at any time if the party and Track 1 attorney believe the case should go to Track 2 because of non-cooperation by the other side.

4. To increase the chances of success in Track 1, guidelines for the parties to use four "standard solutions" for resolution, instead of the single solution of money, which is the only one that can be honored in Track 2 (see Slaikeu, 1996).

We begin with a section on the failure of the alternative dispute resolution (ADR) movement to achieve its promise, followed by a closer look at the problem in terms of litigation expenses. We then present the two-track solution, followed by sections on who can initiate the model, who will provide two-track services, financial incentives, a step-by-step list of how the process works, an action plan, and summary.

The Failure of ADR

The alternative dispute resolution (ADR) movement in the United States was intended to control the costs of conflict and to achieve more satisfying results for the parties than would be available through expensive and unpredictable litigation. Numerous vendors now offer mediation and arbitration through national networks, and the yellow pages in most communities list many practitioners, some from the practice of law, others from the

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behavioral sciences or other disciplines, who offer mediation or arbitration to help parties resolve disputes.

These facts notwithstanding, the experience of ADR in America is still far from satisfying for most parties. For example:

- Mediation often occurs too late in the process—after lawsuits are well underway—to achieve the benefits that would be available if it were used immediately after direct negotiations between the parties have broken down.

- Arbitration, though viewed as an ADR process, has more in common with adversarial litigation than with mediation, and is far more costly than mediation.

- On the defense side, there is a built-in financial conflict of interest when a litigator represents a party in pre-litigation mediation, and then, if mediation fails, takes a retainer to represent the party in litigation, which usually produces far more billable hours for the attorney and the law firm than does mediation. Anecdotal evidence from attorneys and mediators indicates that this financial disparity, and conflict of interest, between the mediation process and litigation is a contributing factor to the failure of many mediations.

- On the plaintiff's side, contingency fee arrangements, while they have the benefit of allowing clients with no money to secure legal representation, skew the negotiation

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toward large monetary solutions in order to pay both plaintiff and attorney. Of the four standard solutions to disputes—(1) apology/acknowledgement of wrongdoing, (2) restitution/punishment for injury, (3) agreed upon and measurable corrective changes in future behavior of a defendant, and (4) restoration of a new future relationship between the parties (often requiring forgiveness as a capstone to the first three solutions)—only restitution/punishment involves the exchange of money from defendant to plaintiff (see Slaikeu, 1996). **The contingency fee model, with its focus on monetary solutions, neglects the other three standard solutions.**

The parties therefore may see few of the promised financial and other benefits of ADR.

Kovach (2001) has described these difficulties under the title: "New Wine Requires New Wineskins: Transforming Lawyer Ethics for Effective Representation in a Non-Adversarial Approach to Problem Solving: Mediation." She argues that collaborative problem solving as represented in mediation requires a different mindset and a different set of ethical standards for attorneys. Referring to the work of Riskin (1996), Bush (1994), and Coyne (1999), the author identifies several ethical standards that might further define the rules for collaborative/cooperative problem solving, as opposed to the adversary approach represented in litigation.

From a cultural point of view, this phenomenon relates to the negative view of lawyers in America. Instead of being seen as counselors at law who serve parties' multiple interests—

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both financial and personal—the lay image of lawyers is often one of professionals who needlessly complicate business situations by building in provision upon provision to protect the party if arbitration or litigation occurs, or, even worse, who bring an adversarial stance to business matters that creates problems where none had existed before. The reality is that most lawyer jokes are actually misdirected litigator jokes, which means that the discontent of parties lies not in the practice of law, but rather in the inappropriate use of litigation. It is the rare American citizen who does not value the contribution a competent litigator can make when such an approach is required in order to "win" in court. The problem lies in the misuse of litigation and the adversary model for the early resolution of problems where a collaborative approach that might preserve—even rebuild and thereby strengthen—business relationships that have gotten off track.

Parties, whether plaintiffs or defendants, need a model of attorney representation that gives the benefits of early resolution, without the parties giving up their legal rights in court. This paper delineates the "two-track" model for attorney representation as one way to serve parties in honoring their interests for (a) early resolution via collaborative methods, while (b) preserving the arbitration or litigation option, and (c) not letting the latter confound the former.

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A Closer Look at the Problem

It is useful to distinguish between the processes that require the cooperation of the parties (negotiation and mediation), processes that do not require their cooperation. (See Tables 1 and 2 for more detail on the concepts in this paragraph.) Negotiation involves direct talks between parties and/or their attorneys to reach a mutually agreeable solution to a conflict. Mediation is an assisted negotiation, whereby a third party helps the parties to achieve a resolution, using joint and private meetings. In arbitration the decision is given to an arbitrator, with attorneys arguing the matter in a streamlined adjudicative process, under limited rules of discovery. The decision to enter arbitration, however, is a voluntary one. Parties agree to abide by the decision of the arbitrator. In some organizations, the employees and managers agree at the beginning of the employment relationship that they will achieve dispute resolution through collaborative methods such as negotiation or mediation, as the way to resolve anything that cannot be worked out through direct negotiation (see programs at Shell and Halliburton, described in Slaikeu and Hasson, 1998).

Litigation is distinguished from these other processes by the fact that one party can initiate it and force the other side to participate in the process. It is ideally suited to situations where the other side will not cooperate in discovery or other aspects of resolution of the problem, for whatever reason, or where an important public precedent needs to be set.

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Figure 1 describes the arbitration and litigation model as currently experienced by plaintiffs and defendants. For the plaintiff, note that the flow of the case begins with an incident, followed by investigation, notice to a defendant (in this case, a hospital), proceeding on through to claim, notice of lawsuit, mediation, negotiated settlement, trial, and appeal. From the point of view of the defense, the events are the same, though the "notice" to the defendant is referred to as a "file opened for a potentially compensable event (PCE)." From the plaintiff's point of view, one attorney, a litigator, working for a contingency fee of approximately 30-40%, handles the case from beginning to end. From the defense point of view, negotiations occur through the claims manager or in-house attorney of the defendant, though the case is often transferred to an outside litigator when a lawsuit is filed.

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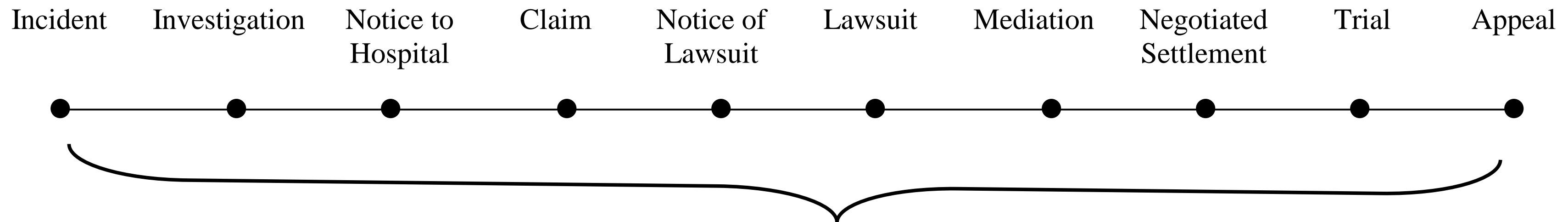
Figure 1
Litigation for Plaintiffs and Defendants in Health Care Disputes

Plaintiff



Plaintiff's Attorney (Litigator) Enters Via: Client Direct Contact, or Referral From Another Attorney

Defendant

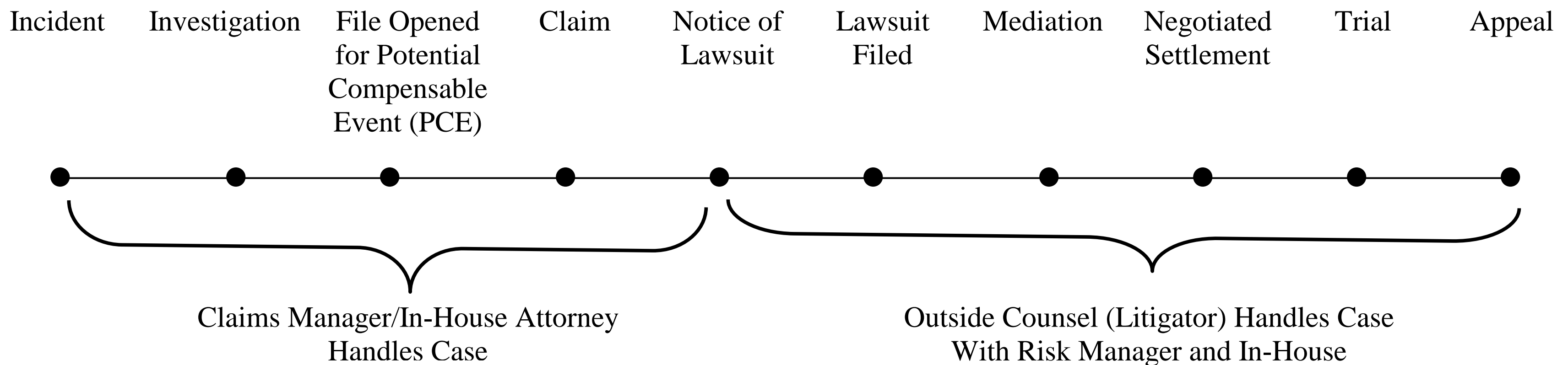


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Table 1

Differences Between Track 2 and Track 1 Processes

1. Decision Making. In arbitration and litigation, the final decision is reached by an arbitrator, judge, or jury. In negotiation and mediation, the parties make the final decision on what to do to resolve their conflict. In mediation, each party has veto over any proposal under consideration.

2. Forum. Negotiation involves direct talks, face-to-face or over the telephone, or written communication between the parties (e-mail, letters). Mediation is by definition an "assisted" negotiation and involves the same direct talks as negotiation, with the addition of a third party to facilitate the process, and the use of both private and joint meetings to assist the parties in exploring interests, values and other facts, and fashioning mutually agreeable solutions. Litigation occurs in a court of law, presided over by a judge. Arbitration is an alternative form of third party decision-making, with streamlined rules of discovery.

3. Communication. The communication strategies of negotiation and mediation rely heavily on inquiry and listening with a view to understanding each other's interests and requirements for resolution. The ultimate goal is for the parties to fashion an agreement or settlement that both/all sides will support.

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In litigation, the aim is to convince a judge and/or jury that one side is right or wrong in light of specific laws and facts. The litigation communication process aims to discover data that helps one's own side, and protect against revelation of information that might hurt one's side. There is little interest or need to focus on the other side's willingness to accept a solution, since the final decision on acceptability of the solution resides with a third party. The use of a litigation communication style in mediation may lead to defensiveness and counter-attack by the other side. This runs counter to the cooperative communication style where the parties assist one another in gathering and exploring factual data and interests with a view to creating a mutually acceptable solution, often a "third" way, as distinguished from an argument that sways a judge or jury to a win/lose outcome.

The communication process for arbitration is more like litigation than negotiation or mediation.

4. Outcomes available. Negotiation and mediation allow the parties to draw freely from one or all of four "standard solutions" in dispute resolution (Slaikeu, 1996):

   a. ACKNOWLEDGEMENT of wrongdoing and/or apology for harm done to another (inadvertent or not).

   b. RESTITUTION for harm done/punishment.

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c. Voluntary implementation of an agreed upon PLAN FOR THE FUTURE, as in an institution agreeing to correct an organizational policy that caused injury, in order to prevent such occurrences in the future.

d. Offering and receiving of FORGIVENESS, which involves a wronged party agreeing to "no longer hold this matter over our heads," often a critical variable in continuing (improving) a business or personal relationship after a "dispute" is resolved.

Litigation and arbitration focus primarily on the second set of outcomes (restitution and money for punishment).

5. Time required. Track 2 and Track 1 differ in the amount of time required to complete the process. Litigation, including appeals, typically takes longer to complete, and hence requires more billable hours from attorneys than does Track 1.

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Table 2

Definitions

Arbitration: An adjudicative process through which parties or their attorneys present the case to an arbitrator, who hears the matter and renders an award. Arbitration is typically binding unless specified otherwise by the parties at the start; an arbitration decision can be appealed on narrow grounds only, such as a conflict of interest on the part of the arbitrator. Arbitration shares one important characteristic with litigation: the decision is made by a third party, an arbitrator or judge.

Litigation: Filing of a lawsuit by one party against another, seeking resolution of the matter through a decision by a judge or jury in a particular jurisdiction, such as federal or state court.

Litigation Counsel: An attorney chosen by the client to provide representation for dispute resolution through the courts.

Mediation: A process whereby a mutually agreeable third party assists two or more other parties in reaching resolution of a conflict or dispute; any settlement outcome must be agreed to by all parties. Note: Mediation is not the same as "settlement," since parties

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may terminate mediation with no agreement/settlement, and either live with the problem as it is, or proceed to other methods, such as arbitration or litigation.

Negotiation: Direct talks involving counsel for the parties and/or the parties themselves, aimed at achieving a mutually agreeable resolution of a dispute.

Settlement: A resolution of a dispute that occurs voluntarily, and by agreement between the parties, typically as the result of negotiation, mediation, or other voluntary processes. Settlement removes the need for litigation of the case, and may draw from a menu of standard solutions that include: apology/acknowledgement of wrongdoing, restitution/punishment for injury, agreed upon and measurable corrective changes in future behavior of a defendant, and restoration of a new future relationship between the parties (often requiring forgiveness as a capstone to the first three solutions). Only restitution/punishment involves the exchange of money from defendant to plaintiff.

Settlement Counsel: An attorney chosen by a party to provide legal advice and/or representation for the client in a negotiation **or** mediation process.

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Litigation has these other features:

- From the plaintiff's point of view, the award must be high enough (almost double what the plaintiff will get) in order to pay the plaintiff's attorney. As the plaintiff's attorney spends money on expenses in developing the case, this money must be recovered through a higher indemnity (total paid to plaintiff) at the end. This higher number must pay for (1) plaintiff's attorney's direct expenses, (2) plaintiff's attorney's time, (3) appropriate payment to injured patient, and (4) the risk to the plaintiff's attorney of getting no payment at all (if the plaintiff does not prevail at trial, or does not secure a negotiated financial settlement in lieu of trial).

- Data from the defense side indicate that at least 25% of the amount paid by the defense will go toward defense attorney's fees alone (Slaikeu, 1988).

- When the attorney's fees for both sides are added together, the result is that 50% or more of the total award goes to attorneys' fees alone (Slaikeu, 1988). Considering a claim dollar paid by a defendant, here is what the numbers look like:

Total Paid Out by Defendant	100%
Less Defense Expenses	-25%
Total to Injured Patient	75%
Less Plaintiff's Attorney's Fees (± 35%)	-26%

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Total to Injured Patient 49%

This is likely a conservative analysis. Anecdotal evidence from insurers indicates that the figure may be as high as 60% of the total claim devoted to attorneys' fees alone.

How to Reduce Legal Expenses

Evidence from a number of projects has indicated that it is possible to reduce attorney expenses by 50% or more through the use of mediation or some other form of ADR (see Galen, Cuneo, and Greising, 1992, for report of 75% reduction in legal expenses in Motorola program; see Aronson, 2002, for 70% reduction at Toro; and see Slaikeu and Hasson, 1998, for results of 50% reduction at Halliburton). In each of these cases there was a systemic use of early negotiation mediation, or arbitrationto resolve the case.

Two-Track Solution

A way to achieve early resolution and reduce attorneys' fees is to structure the process to use a settlement (Track 1) attorney first, and arbitration or litigation (Track 2) only as backup. To prevent the adversarial nature of arbitration or litigation from driving, or destroying, the settlement process, each party uses a different attorney (firm) in each phase, with a seamless handoff from the Track 1 attorney to the Track 2 attorney, if that is needed.

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The Two-Track model uses a settlement attorney for negotiation or mediation (Track 1), with a Track 2 attorney available (from a different law firm) to take the case if cooperation is not forthcoming and litigation or arbitration is required (Track 2). The settlement attorney signs an agreement at the beginning to represent the parties only in the collaborative resolutions, refusing billable work on arbitration or litigation, and offering to transfer the case to a Track 2 attorney should that become necessary. The party, along with settlement counsel, may invite the Track 2 attorney to meet with him or her in a private caucus during any of the collaboration processes to do a cost benefit analysis for the client comparing a negotiated settlement with one that might be achieved through litigation or arbitration. Furthermore, if at any point the settlement attorney and party determine that the other side is not cooperating, then the process can be terminated and the matter handed to a Track 2 attorney. In some cases, the subsequent experience of arbitration or litigation may motivate the parties to return to the collaborative process.[1]

Track 1 Legal Fees Fund

A defendant such as a hospital also has the option of creating incentives for a patient or plaintiff to use a Track 1 approach in the beginning, saving the Track 2 option until the early

[1] "The last nice person you will talk to on this matter." Someone once asked how a Track 1 settlement attorney could ever create pressure on a defendant to settle a case. A practicing attorney reports that in conducting Track 1 negotiations she often says, "I may be the last nice person you will talk to on this matter," . This suggests that if Track 1 negotiations fail, then the matter will be sent to a Track 2 litigator who will play hardball to the full extent that the law and the adversary model allow. The Track 1 model brings strength to the negotiation, and the ability to hold out the reality of what the consequences will be if Track 1 fails to achieve a result agreeable to both sides.

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resolution avenues of negotiation and/or mediation, have been fully exhausted. Building on the precedent of Halliburton, Shell and others where employees can receive payment to hire an attorney from a Legal Consultation Plan (Slaikeu and Hasson, 1998), any defendant can do the same for a professional liability or commercial case. For example, the hospital representative might say to a patient:

> "We are a 'two-track hospital,' which means we use one attorney to handle unresolved cases without litigation, and we transfer the case to a litigator only if Track 1 fails to achieve a resolution. You can learn about this approach through an independent web site that serves plaintiffs and defendants (www.two-tracklawyers.com). If you [plaintiff or plaintiff's attorney] use the two-track approach on this case, we will pay for your attorney's fees up to a certain amount, depending upon the case. You may, of course, use any attorney you choose, though we will pay attorney's fees only if your attorney agrees to take the case as Track 1, disqualifying him or herself from Track 2, just as our defense attorney will do. Either of us may hand the case to a Track 2 litigator at any time, though our goal is to give every advantage to early resolution through cooperative methods (negotiation or mediation). Here is the statement our attorneys (yours and ours) can use to finalize this agreement." (See Form 2, Procedures Manual, www.two-tracklawyers.com)

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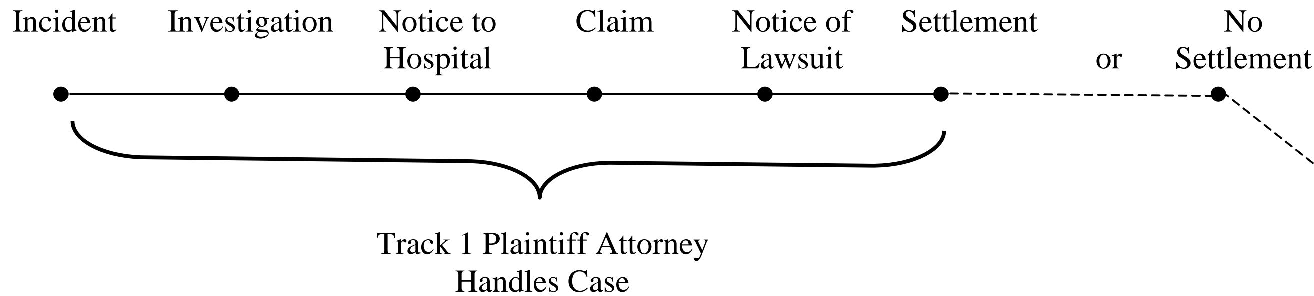
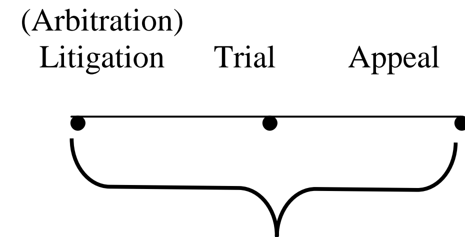
Figure 2
Two-Track for Plaintiffs and Defendants

Plaintiff





Track 1 attorney works for hourly fee, and therefore full range of solutions (monetary, acknowledgement/apology, systems changes, forgiveness) are available. Track 2 litigator works for contingency fee (plaintiffs) or more billable work (defendant) if case is not resolved in Track 1.

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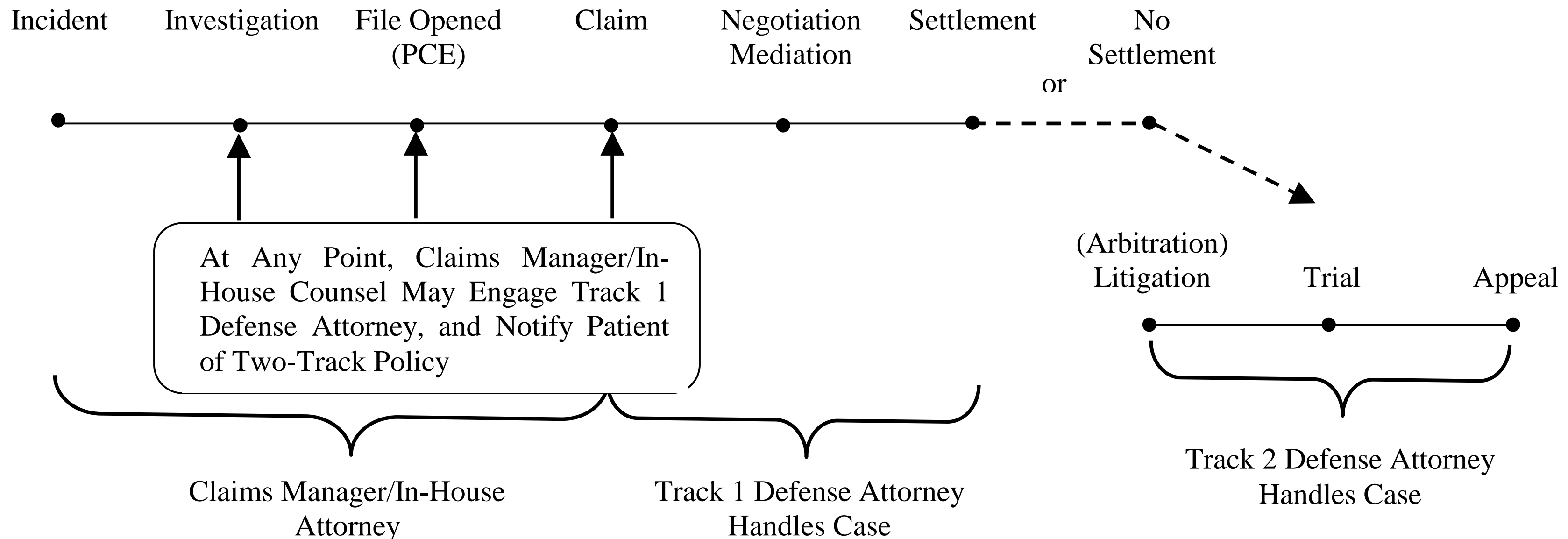
Figure 2
Two-Track for Plaintiffs and Defendants
(continued)

Defendant



Notes:

1. Statement from Hospital to Patient: "We are a 'two-track hospital.' If you (plaintiff or plaintiff's attorney) use the two-track approach as well, we will pay for your attorney's fees up to $X, depending upon the case.
2. At any point, Track 1 attorney for plaintiff or defendant can engage Track 2 attorney for purpose of filing legal papers with the courts, respond to a lawsuit, or in any other way protect the litigation option; however, case is not transferred to Track 2 litigator until either side's Track 1 attorney declares impasse, i.e., failure of negotiation or mediation to settle the matter.

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Who Initiates the Two-Track Model?

The two-track model can be initiated by any one of the following:

1. Any party. Plaintiff or defendant can individually choose to use the two-track legal representation model. By exercising the two-track method unilaterally, a plaintiff or defendant protects against escalation of the dispute on his/her side of the resolution process. This allows the party to exhaust the collaborative options fully, and at any consistent sign of lack of cooperation (defined by the party and counsel), transfer the matter to the Track 2 attorney.

2. Mediators. Mediators may well see the merit of this approach as a way to remove adversarial posturing from mediation, and refuse to take cases if the parties are not represented by settlement counsel that are financially removed from any subsequent arbitration or litigation.

3. Businesses and organizations may make the two-track model a part of company policy. This is a variation on the defendant choosing the process unilaterally, though involves a systemic change on the part of the or other type of group to ensure that the greatest cost control is achieved by channeling all disputes through collaborative options first, and reserving arbitration or litigation only for those where cooperative

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resolutions are not forthcoming. (See Form 6, Procedures Manual, www.two-tracklawyers.com for sample Issues Resolution clause).)

4. Plaintiffs' and defense attorneys may elect to specialize in Track 1 work, and build a reputation and referral network based on success in settling cases without arbitration or litigation (see "Financial Incentives" below).

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Who Will Provide The Two-Track Representation?

Kovach (2001) has framed the differences between collaborative problem solving and adversarial litigation, and notes that these differences show up in the skills of practicing attorneys. Table 1 also lists some of the differences between Track 2 and settlement processes. It remains an empirical question as to whether the two-track model will evolve toward one where some attorneys do exclusively Track 1 settlement work, and others do exclusively Track 2 work.

The pool for individuals who will take on the Tracks 1 and 2 roles is vast. One large group of individuals who might be natural candidates for the Track 1 cooperative role would be the attorney mediators who have devoted professional time and expense to learning mediation skills. Mediation skills used to facilitate cooperative negotiation by attorneys can readily be transferred by an attorney/mediator to be used to represent one party in a Track 1 process. The advantage for these attorneys, of course, is that this will allow them to leverage their collaboration skills training and investment; sometimes they will serve in the role of a third party "neutral" mediator, and other times they will use the same collaborative, interest-based communication skills to represent one party in a process where someone else is the mediator, and the "opponent" is another Track 1 attorney.

Another pool of individuals for the Track 1 role, of course, are individuals who want to have both collaborative negotiations and adversarial trial work as a part of their practice. These

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individuals may switch from one role to another on a case-by-case basis, and indeed many may find it to be a refreshing balance in their law practices. Some Track 2 attorneys will devote their services exclusively to this role by virtue of their greater comfort and talent for adversary proceedings.

Financial Incentives

On first glance, it would seem that Track 1 hourly rates for negotiation and mediation, as compared with the Track 2 30-40% contingency fee (plaintiff) or very high billable hours (defense), would mean that no attorneys would be willing to do Track 1 work.

A closer look, however, reveals a different picture:

- Many skilled attorneys prefer negotiation and mediation, and would welcome the opportunity to have a full practice of this work, at top hourly rates. Indeed, the history of the attorney/mediator movement bears this out. Many seasoned litigators became disenchanted with the limitations of the adversary model as applied to business and other disputes, and moved toward mediation as a better way to solve problems while still preserving the business relationships. However, the last 25 years or more of experience reveals that few attorneys/mediators have found enough billable work to build a practice exclusively around this model. For this population of attorneys, the

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two-track model offers a way to do more of what they want to do, and have been trained to do (see "Mediation as Assisted Negotiation," Slaikeu, 1996).

- Many traditional plaintiff's attorneys have the same talent to settle cases, and would love to settle them early, but the adversary model has no way to cover their up front expenses (attorney time, expert witnesses, other aspects of discovery), and hence must use a 30-40% contingency fee to cover their "bet" that the case will result in a future monetary settlement. Many of these attorneys (not all) would be eager to build a practice around billable work paid at the time services are rendered. Under the two-track approach, the Track 1 plaintiff's attorney can be paid for his/her hourly fees in one of two ways:

    - The client pays an hourly fee to settle the case without expensive litigation. The client learns the facts of the case at low cost in hourly fees, hopefully settling the case with the assistance of an experienced attorney negotiator, while preserving the right to put the case in the hands of an adversarial "fighter" if necessary (see Boxed Insert, "Diplomacy and War").

    - Large organizations, such as hospitals and insurance companies, can provide a fund to pay Track 1 attorney's fees to a certain level for an aggrieved party (patient, employee, etc.) if the plaintiff's attorney signs a Track 1 agreement (see Procedures Manual on www.two-tracklawyers.com for sample agreement). At

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very low cost, both sides generate needed information, and settle most cases early, for a fraction of the cost of adversarial litigation. (See Track 1 Legal Fees Fund, p. 22).

Plaintiffs' attorneys who wish to specialize in contingency fee-based large cases, aimed at jury awards, will not be drawn to the two-track model, and indeed are not compelled to use it. They may find, however, as use of the two-track model grows there will be fewer cases that are available for contingency fee-based litigation.

- On the defense side, clients hire the attorney and are in a position to set the terms of employment. "In order to control our costs, and to increase the chance to resolve all disputes in such a way that we preserve the opportunity for a future business relationship, while also ensuring that we will not be taken to the cleaners over frivolous cases, we have decided that we will always begin with a Track 1 attorney who has no financial incentive other than performance (we will re-hire for future work based on the results), and we will save expensive Track 2 litigation for when we have no choice but to play hardball in an adversary process." In sum, the defendants—often large organizations—through their legal departments, will determine the terms for use of outside counsel.

- From the point of view of defense counsel, the two-track model gives more hope for an expanded business than it might first appear. Defense law firms who wish to maintain

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long-term relationships and repeat business from their corporate clients will see the merit of the two-track model as a way to do this over time. They can say to clients: "If there is any way at all for this problem to be worked out collaboratively, we will do it, through negotiation or mediation. If you or we get the indication that the other side will not cooperate, that they are hiding from us, then you as a party will have an opportunity to trigger Track 2. We will play one role, but not both. That makes us honest brokers for you. We believe there will be enough of the arbitration or litigation work alongside the collaboration work in our client base so we can address a broad range of client problems and make a solid living in doing so." Any corporation will be helped by an outside law firm that takes this stance: the very best in settlement, the very best in arbitration and litigation, with the latter not confounding the former.

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Diplomacy and War

The example of diplomacy and war sheds light on the logic of the two-track method. In national defense, the armed forces serve as a deterrent and an enforcer to be used separate from the diplomats' and negotiators' attempts to reach agreement through peaceful means. The military stands ready to act at a moment's notice. Indeed, they consult with the government decision makers about how much it will cost to go to war, by when, and what the requirements for victory will be. The decision makers then compare the information from the warriors with what is available through the diplomats.

The same is true in two-track. A party, whether an injured patient or a corporation, should not send warriors in to make the peace in the early going. Instead, with the "warriors" on hold, but available, they should send a Track 1 negotiator, whose specialty is working things out through negotiation or mediation. . The "decision makers" (such as patient or hospital or insurance company) set the conditions and a timeline for making peace, which means a settlement that achieves all or most of what the decision maker wants right now, in order to say no to "war," or litigation. Once negotiations clarify the situation, the decision maker either says yes to an offer on the table and closes the matter with a legal contract, plus stipulations for follow-up, evaluation, and enforcement, or, within the time frame designated by the decision maker, the decision maker may judge that Track 1 has failed, and send the case to Track 2.

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How Does Track 1 Work?

The process in Track 1 requires cooperation from both sides. If a party determines that the other side is not cooperating, then, after exploring the matter, the party may stop the Track 1 process, and transfer the case to Track 2 (arbitration or litigation).

In achieving settlement through Track 1 in health care, for example, the Track 1 attorneys for each side use steps such as the following:

1. Clarify role with own client (see Form 2, Procedures Manual, www.two-tracklawyers.com)), including discussion of options for inclusion of Track 2 attorney for consultation at the start.

2. Identify the nature of the claim made by a person or entity (e.g., patient states, ”You did a medical procedure, and I came out with these damaging side effects, instead of the remedy I expected”).

3. Identify the parties involved in the case. This might be a patient, a physician, a nurse, the hospital administrator, the insurance company, and others. Also, identify the attorneys who represent them, so one knows with whom one is negotiating. In the Two-Track™ Model, the Track 1 attorney for the patient negotiates with the Track 1 attorney for the hospital and/or for the insurance company. (This assumes that the

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case has been transferred by the claims manager for the hospital insurance company to the attorney; in some cases they will work together on the case in the direct negotiations, or in a mediation process.) This stage also includes discussion of other interested parties, such as third party insurers and other potential plaintiffs.

4. Set up a time and a place for the parties and their representatives to talk with one another. Sometimes this is the attorneys alone, other times the parties are present. (Note: Track 2 attorney may consult with respective Track 1 attorney on his/her side, but will not meet with the other side's client or Track 1 attorney.)

5. In the first meeting, attorneys identify the topic at hand (e.g., liability and damages related to an incident), and execute two-track documents that limit attorney involvement to Track 1, with the right to transfer the case to a Track 2 attorney if needed. Next, they list topics to be addressed in order to resolve differences:

   a. Required court filings to preserve the rights of the parties.

   b. What happened, and who is potentially liable according to standards brought to the table by the attorneys?

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c. What damages, if any, occurred (this can include past/present medical damages, lost wages, and a range of other topics, including pain and suffering, changed processes, plans for the future, etc.)?

d. What remedies might we consider (see Standard Solutions list below)?

6. Having identified the topic and the issues that need to be resolved, the attorneys then determine what information is required in order to answer these questions. This might include statements from key parties, a review (by both sides) of particular records, and in some cases the testimony of experts.

7. Once the list of information is identified, the attorneys negotiate the best way to collect the information, without violating the rights of parties, and honoring standard practices for dispute resolution in the courts (some information that the parties may wish to review at this point would be demanded of the other side in an arbitration orlitigation process, Track 2, though in this case the request is made, and the parties negotiate whether or not they are willing to provide the information to one another). In most cases, the information needed will be offered freely (since it can be compelled for discovery later anyway), and the main negotiations occur over such things as "whose expert" or "which experts" should we listen to in reviewing the information?

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8. Regarding experts, the attorneys can negotiate (or have a mediator help them negotiate) the selection of one or more experts who can provide input to both parties about liability and damages. Sometimes the input may come from someone who has had significant trial experience and knows what judges and courts do in these matters; other times it will come from an expert in the field who knows what standard practice is and whether or not there has been a violation. Other times experts may be called to determine whether or not, for example, an individual who lost use of a right hand did in fact "have plans and the talent to become a concert violinist," with this career opportunity now lost.

9. Once the attorneys have gathered the information, the input of experts, and others, they will negotiate resolution options which typically involve one or all of the following points:

   a. Agreement or no agreement on liability (who did what to whom, and who is responsible). Note that they do not have to agree on this in order to go forward with settling the rest of the case, though they will have some reference to this topic, either to agree or to disagree.

      In cases where the matter is complex, the attorneys may even agree on the percentages of liability: is it more the fault of the person who did this particular behavior, or does the other side has some fault because they did not follow

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certain guidelines, as stipulated in the agreement, etc? This sharing of liability may be useful to them later in negotiating the monetary settlement, if any.

b. Once liability has been discussed (not necessarily agreed upon), the parties have several solutions that are available to them in Track 1:

   i. One or more parties may request (and the other side may or may not agree to provide) monetary payment to cover losses in the past, present, and future.

   ii. Acknowledgement of wrongdoing and in some cases apology. There is significant anecdotal evidence from many sectors that quite often injured/wronged parties want more than anything else to have an issue acknowledged, and have an apology. This may become a part of the package settlement (France, 2002).

   iii. A new plan for the future. In addition to money or acknowledgement/apology, a plaintiff is often very concerned (as a defendant might be as well) that a situation be corrected so the incident does not happen again. This might involve instituting new procedures, or a new safety process to protect others. This is clearly the case in many social changes that grow from Track 2. In the case of Track 1, an

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individual party with an attorney can negotiate with a large corporation to secure a commitment, follow-up and documentation to make sure that the change actually occurs. This is often a critical ingredient in whether or not the injured party wishes to accept the total settlement.

iv. Finally, the Track 1 process includes the opportunity for a party who has been wronged to restore or to establish a new relationship for the future, often "forgiving" the side for wrong done, especially when this is accompanied by a monetary payment, acknowledgement/apology, or stated plan for change in future behavior (if these are warranted).

These four "standard solutions" represent a menu from which the attorneys can draw in fashioning solutions that might work for their individual clients (Slaikeu, 1996; see also Galton, 1994). The specifics are the subject of creative negotiation by attorneys and the parties, e.g., public or private apologies.

c. Throughout the whole process there may be many back and forth negotiations between the attorneys, caucuses with their individual clients, and the collection of new information to help inform what the settlement might be. Note that the key consideration here is that the Track 1 attorneys are representing their clients' interests, and allowing clients in some cases to speak for themselves

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about these interests, and there is a focus throughout on addressing the facts of the case (what happened, liability, damages of various sorts past, present, and future), and what are the possible remedies. The Track 1 attorneys use high level negotiating skills to navigate through this process, and reach closure, which results in a signed and enforceable agreement, including in most cases stipulations on what if anything in the process will be held confidential, what will be made public, an agreement to discontinue all subsequent efforts for resolution through the courts, and what will happen if either party perceives that the other is not carrying out agreed upon steps in the future.

d. If at any point during the process a party and his or her attorney determine that the other side is not cooperating with them sufficiently to continue, that party can intentionally stop the Track 1 process, and transfer the entire matter to the Track 2 attorney.

e. At any point in the Track 1 process the parties and their Track 1 attorneys may, by agreement, secure the services of a mediator, or may submit one or more matters to an arbitrator for decision, with the Track 2 attorney representing the party with regard to the arbitration proceedings.

f. Also, at any point in the process, the party and Track 1 attorney may consult with the Track 2 attorney in a private caucus to compare the deal on the table in

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Track 1 with what might be achievable in court. The intent is to give the party the best of both worlds: a solid negotiating attorney to work it out in a cooperative way if at all possible, and a solid backup of litigation in the courts if the other side is uncooperative, without one process contaminating the other.

10. If agreement is reached through direct negotiation or mediation, then the case is closed, and likely memorialized with a written document. If not, the case may be referred to Track 2 attorneys for arbitration or litigation.

An Action Plan for All

As indicated above, the two-track method can be initiated by any party (plaintiff or defendant), any plaintiff's attorney, and/or any defense attorney. It will most likely be initiated by the parties themselves; injured patients, and defendants (hospitals, insurance carriers, corporations). At the heart of the model is the agreement, for any particular case, that the party's attorney (whether plaintiff or defendant) sign an agreement (see Form 2, Procedures Manual, www.two-tracklawyers.com for sample agreement) to take on Track 1 or Track 2, but not both on the same case.

In practice, any party can:

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1. Show the Participation Agreement from the Procedures Manual and other information to his/her attorney, and ask the attorney to use the two-track model.

2. Consult www.two-tracklawyers.com for a list of attorneys who are familiar with the two-track model, and available to use it.[2] The web site also provides much of the information addressed in this paper in a form that can be readily accessed by plaintiffs, defendants, and their respective attorneys.

3. Organizations and businesses can institute the two-track method as a part of corporate policy, for use on all cases, or on a specific population of cases, by using the documents such as the Track 1 Counsel Agreement (Form 2, Procedures Manual, www.two-tracklawyers.com) and Issue Resolution Clause with Two-Track (see Form 6, Procedures Manual, www.two-tracklawyers.com for sample clause).

Summary

Negotiation and mediation are dispute resolution processes that require the cooperation of all parties, and are to be distinguished from litigation, through which one party can unilaterally bring the other(s) into the process, and arbitration which, like litigation, is a higher authority dispute resolution process. Other differences between these two sets of procedures include: different communication processes required by the attorney advocates, differences in time

[2] For information, contact Chorda Two-Track Lawyers, 1717 West 6th Street, Suite 215, Austin, Texas 78703. Telephone: 512/482-0373.

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and revenue associated with the cooperative processes as compared with Track 2, and the broader array of resolution options available through the cooperative methods (apology/acknowledgement, plan for the future, forgiveness, in addition to restitution/punishment, the only resolution available through the courts). Data indicate that 50% or more of claim dollars go to attorney's fees alone (Slaikeu, 1988). Anecdotal evidence from parties and dispute resolution specialists suggests that there may be an economic conflict of interest when an attorney represents a party in both processes at the same time, with the larger number of billable hours through litigation or contingency fee arrangement detracting from the advocate's motivation to help the parties achieve settlement in one of the cooperative processes. The two-track model is proposed as a remedy to this situation. It provides a set of protocols for the parties to hire Track 1 attorneys (for negotiation or mediation) as a first step, with the availability of their own Track 2 attorneys (litigation or arbitration) to be used as a backup, if the parties fail to achieve a resolution in one of the cooperative processes. The model promises to provide monetary savings for plaintiffs and defendants, earlier resolution with the possibility of preserving and strengthening the business relationship, and protection of legal rights for litigation, without the Track 2 option confounding or derailing the early collaborative processes.

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