Early Mediator Engagement: Lessons from Master Mediators

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Most construction disputes settle. Settlement of sometimes contentious, always costly disputes greatly benefits clients. An even greater value emerges if the process facilitates a rational, well-informed settlement as early as possible. Quickly resolving disputes reduces the time-related expense of the adversarial process, preserves opportunities for maintaining valuable business relationships, and allows for innovative business ideas to facilitate settlement.[1] The question becomes how to best achieve that beneficial result; this article explores whether engaging a mediator early in the dispute resolution process advances that goal.

Early mediator engagement is often called "Guided Choice," a process whereby a selected mediator guides the parties' selection of the best structure to mediate or otherwise achieve better, quicker, and cheaper results.[2] Whether labelled early mediator engagement or Guided Choice,[3] it differs from a "normal" mediation in which the parties in an arbitration or litigation decide (or are ordered by court rule[4]) to mediate before their hearing or trial. Under the normal process, the parties select the mediator, pick a date for the mediation conference, and then promise to exchange position papers a few days before their meeting. While often successful, the usual mediation does not maximize chances for early dispute resolution. Before parties mediate, they often have engaged in protracted and expensive discovery and motion practice, which may not be necessary as the information needed to settle a case is often less than that needed to litigate or arbitrate it. Even if parties decide to mediate before engaging in formal discovery, the normal process is not designed to answer important questions the parties may have, which if not addressed can lead to a settlement impasse. In theory, the early engage-

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[1]Thomson and Lurie, *The Guided Choice Process for Early Dispute Resolution*, 1 The American Journal of Construction Arbitration & ADR, 23 (2017).

[2]Thomson and Lurie.

[3]This article uses the terms early mediator engagement and Guided Choice interchangeably.

[4]*E.g.* Minn. Gen. R. Prac. 114.

ment of a mediator can help design a means to avoid these problems. To obtain insight about whether Guided Choice adds the value it promises, the author interviewed several experienced mediators who were also Fellows in the American College of Construction Lawyers and had experience using Guided Choice principles.[5] I summarize those discussions of various issues related to Guided Choice techniques.

Direct Negotiations vs. Early Mediator Engagement. Often parties try early direct negotiation, which frequently fails, as evidenced by the amount of construction litigation and arbitration that exists. Stepped negotiations offer some structure to direct negotiations, but they often disappoint because those most knowledgeable about the dispute usually are closest to it and caught up in the emotions of the conflict. If not resolved at the field level, the claim is "kicked upstairs" to a senior manager, who may be less passionate, but also much less knowledgeable about it. The process continues until the party executives with the least knowledge are asked to make a decision without the information good businesspeople usually need. To avoid this problem, the parties can enlist a mediator early in their negotiations to help craft a collaborative information exchange (well short of full discovery) and to keep the parties in discussions through a structured process so they do not become intransigent before a meaningful and informed mediation session.

When to use Guided Choice. There are several times during or after a project when early mediator engagement can be productive.

- During the project. On a runway expansion, a nationally known mediator established a targeted exchange of specific documents and then had the parties make their presentations on the first day, followed by negotiations on the second. The working relationships were vital as it was an ongoing project. The successful procedure resembled that of a standing project neutral, except the mediator did not announce a ruling, but rather worked with the parties to create an acceptable settlement. Mediating during the job offered more business options, rather than just legal solutions.
- At the end of the project. Disputes often increase in size once the job ends, so it is a good practice to mediate any open claims before final completion. It is critically important to deal with the scope of the release concurrently with the

[5]As the contents of this article are based on these interviews, the author wishes to thank those interviewed for generously sharing their time and insights. To encourage candor, all who were interviewed were promised their comments would not be attributed individually to them, so although their comments deserve attribution, their identities will have to remain anonymous.

negotiation of the disputes. Identify both the controversies you are mediating and any categories of unknown claims being reserved. Avoid insurance policy releases, as currently unknown claims can arise in the future.

- Before a lawsuit is filed. This is a good time to design a process that transforms raw allegations into a settled dispute. Designing a settlement process early pays dividends. Most parties and counsel acknowledge that they do not need full discovery to settle a case. Perhaps 70% of the information needed can be exchanged relatively cheaply, and the remaining 30% (the most expensive to obtain) can wait.
- After impasse is reached in a "normal" mediation. Because parties and insurers often are unprepared when they arrive at a normal mediation session, their dispute does not get resolved. At the end of the session, however, the mediator now knows what the impediments were to settlement, and he or she can guide the case toward settlement. In a sense, the mediator's continued efforts become an after-the-fact Guided Choice process, where informational or other needs are addressed and negotiations continue, often resulting in a second mediation session and a settlement.
- Any time before trial, as long as time allows. As the parties move through their dispute resolution continuum, they lose options to settle, incur legal and other fees, and injure working relationships. The closer one gets to trial, the fewer Guided Choice techniques may be relevant, but motions in limine and last minute developments can change the complexion of a case, so keeping the mediator informed and engaged as trial approaches has value as he or she can broker last minute settlements.

Employing Guided Choice in Virtual or Zoom Mediations. The Covid-19 crisis has driven many mediations to virtual platforms, like Zoom, in which parties, insurers, and attorneys participate in the mediation session remotely. Mediators employing Guided Choice techniques schedule Zoom conferences with parties and counsel well before any scheduled mediation session, not only to explain how the virtual mediation will work, but also to explore that party's perspective and begin to create a rapport and basic level of trust, which are vital to an effective mediator. These Zoom conversations should occur with every party before the session to identify all obstacles to settlement and to prepare the parties to address them at the actual mediation session. While it is often difficult to engage insurance adjusters before the mediation session or require them to travel to attend it, inviting them to a pre-mediation conference and the actual mediation via Zoom more easily and fully involves them as they are "present in the (virtual)

room." With parties and counsel getting more comfortable with Zoom mediations, great local or regional mediators do not need to travel and can develop a national reach.

Examples of Effective Early Mediator Engagement. Getting involved early and helping the parties design a successful settlement process are common themes of Guided Choice. With a broad array of process designs available, every mediator interviewed unsurprisingly stated that one size does not fit all. What follows are some examples of successful approaches and techniques.

- On a massive delay claim, the parties disagreed over the facts, technical issues, costs, and the actual critical path of the schedule. Each side had retained experts, who issued competing reports. In short, it was a typical multi-issue, high value construction dispute. The mediator spent a day with each party and its experts well before the scheduled session and then arranged for a meeting among the scheduling experts to agree on the actual critical path, without discussing the individual delays. The plan worked and allowed the parties to negotiate the delays separately and to agree on the number of compensable delays. Next, the parties agreed to drop many minor claims or settle undisputed ones, which helped build momentum. To address factual disputes, the parties agreed to present their version of events and be asked questions by other side, under the watchful eye of the mediator to make sure the discussion was productive. Cost issues were addressed with limited audits and third party bids. Carpet bombing document requests were shelved in favor of a small number of critical documents that cost little to produce. After a joint presentation of the experts on the remaining issues, the mediator dealt with the larger ones first. Once they were resolved, the mediator turned to the lesser ones, which were easier to settle based on the momentum created by the resolution of the larger ones. In hindsight, it was clear the parties did not initially understand the motivations, interests, and identities of the real decision makers. Without the extended pre-mediation phase and the mediator's guidance, the case would not have settled and would have headed toward a massively complex trial.
- A dispute arose between a mega construction company, with a hardboiled VP who thought he would grind the owner up in litigation, and a university with intellectuals for leaders (they had never mediated before, thought the issues were black and white, and believed they should not compromise when they were right on everything). Two in-house counsel knew nothing about the case, but at least were more

reasonable. By contrast, the two outside counsel were fighters, but had agreed to defer litigation activity during mediation. The outside consultants were antagonistic and defended their divergent reports regarding contract interpretation, differing factual narratives, costs, and scheduling. After preliminary discussion, the mediator and counsel concluded that it was better to keep the parties completely apart. The animosity and differences in decision making between the principals made it likely that a joint meeting would be a disaster. In addition, the two outside counsel wanted to flame the fire when together in a public setting. Through several, separate, and all day meetings with each party, the mediator built rapport with both sides and used his earned goodwill to chip away at individual issues until the parties were within striking distance of settlement. At that point, a limited audit (arranged at the mediator's suggestion) solved some cost issues. The parties provided photos and daily reports to address fact issues. When the parties were close, the mediator put the two in-house counsel together, and through a series of phone calls they closed the settlement.

- Mediations sometimes founder on the parties' firm, but divergent, legal positions. When negotiations cannot bridge the difference, resort to a third party opinion, other than the mediator's, can help. For example, if a party thinks it is definitely going to prevail on a statute of limitations defense, receive a complete indemnity and defense from another, or avoid a large damage claim because it is covered by a mutual waiver of consequential damages clause, then it may help to suggest bringing a summary judgment motion or seeking a review from a recommended third party neutral before returning to the mediation. The suggestion alone may cause the party to recognize the risk in its rigidly-held position, or it may lead to a more objective, outside opinion. Either way, an impasse will have been avoided by a new attitude or new information.
- When the parties deadlocked over several contract interpretation issues, the mediator suggested that they hold a mock hearing on a motion for summary judgment on the contract issues, which took an afternoon. Although the mediator presided over the motions, he issued no opinion. After hearing each other, the lawyers learned a lot, especially about the risks in their firmly-held positions. When the settlement negotiating meeting took place several weeks later, the mediator never heard again about the contract issues. The case also concerned the extent of repairs necessary to fix a large, on-premises public garage. The parties held a pre-

mediation meeting among the structural experts where the lawyers were present, but did not talk. The several experts reduced their differences and agreed on a repair process acceptable to all. The parties then chose one of the structural engineers to approve the final repair work and authorize contractor payment as part of their final settlement.

- Expert summits, without lawyers, to resolve disagreements over damages can effectively narrow disputes. Rules can be developed so the discussions are not discoverable - e.g. notes taken cannot be used in later litigation. This "hot tubbing" worked to narrow the difference in claimed damages from double digit millions apart to one million apart; the plaintiff's number dropped, and the defendants' rose. The carriers and defendants could not argue that their exposure was less than their experts' analysis. And now with more mediation communication occurring over Zoom, the parties should be comfortable with these hot tubbing summits occurring remotely and less expensively.
- As mentioned earlier, mediating while the work continues offers business solutions not present when the job is finished. A half-finished highway project had huge incentive and disincentive charges for the completion of an intermediate bridge that turned out to be unimportant and not needed until the end of the job. By the time of the mediation, the liquidated disincentive charges for not meeting the interim bridge milestone were over $10 million and climbing, although there was no actual damage. If the claim had been pressed by the owner, it was surely headed to the state's highest court. On the other side of the table, the contractor had a couple of million dollars in claims. After long conversations with both parties prior to the mediation session, the issue became how to stop the incentive charges. The mediator proposed a choice: the contractor could stop more important work and finish the intermediate bridge, or the owner could toll the disincentives until the bridge actually was needed for the greater benefit of the overall project schedule. While the parties were considering that suggestion, further pre-mediation discussions revealed that the department's biggest heartburn was that, in accordance with the contract, all trucks had to exit the interstate highway, the busiest highway on the east coast, and go through the state capitol, which was a huge political issue, but something allowed by the contract. After that revelation, the solution became apparent: The contractor would keep its trucks on the interstate highway for a small amount of money if some changes were made, and they did not have to finish the interim bridge on which disincentives were accruing until later.

Thus, mediating in the middle of the job when there were more options available resulted in a win-win business solution.

- On a major, design-build airport project, a contractor claimed the designer cost the team millions by failing to meet its professional standard of care. Before litigation, the parties engaged their mediator, who helped them establish a process with limited discovery, limited expert commentary on the design standard of care, and limited damage and schedule analysis. Briefing was requested and followed by three days of oral presentations; the experts spoke, but without cross-examination. Insurance carriers attended. Money discussions followed a month later, allowing the participants to absorb and reflect on what they had heard. Having presented their positions and felt understood, the parties settled.
- On a metropolitan transit authority project, a design build team had major claims among the contractor, designer, subcontractors, and subconsultants. The claims involved 11 contracts, with many line items at issue. After a normal mediation, the positions remained radically divergent and at an impasse. The parties then went to another mediator known for his Guided Choice approach. The solution the parties devised, with the mediator's help, was to reduce the scores of issues down to 20. They held a non-binding mini-trial on each claim, after which the issues were risk evaluated in discussions with the mediator, with each party assigning likely percentage outcomes to the discrete dispute. The process gave the participants sufficient information for self-examination of their risks and the case eventually settled, but it took seven sessions and 13 months.
- The owner of a prime contractor and the owner of electrical subcontractor formed a LLC to buy a building, renovate it, and sell its units, which remained occupied during construction. Not surprisingly, the owners hired their own companies as prime contractor and electrical subcontractor, along with many other trades. The building leaked and damaged many of the units' interior furnishings, requiring a major repair and rebuild. Defects were found in 10 subcontractors' work; fortunately, the owner, prime, and all subcontractors had insurance, even though several subcontractors did not understand insurance and kept trying to prevent the insurance company from paying money to settle. The relationship among the parties was toxic; all the subcontractors suspected the owners and the prime and electrical subcontractor of self-dealing and believed nothing they said. To makes matters worse, the electrical subcontrac-

tor and part-owner of the project declared bankruptcy halfway through the mediation process. Before designing the settlement procedures, the mediator met with all parties to assess their personalities and perspectives. The preliminary meeting also caused two carriers to throw in their policy limits to escape the developing financial black hole this case promised to become. At the end of the meeting, the mediator met with the prime to help plan the process toward settlement: how to determine who had greatest liability; in what order the subcontractors should be addressed; appropriate offers for each; which subcontractors needed the prime for future work; and what the owners and their carrier would contribute. Finally, the prime needed to be convinced to retain coverage counsel to assist the mediator in dealing with the insurers for the all the subcontractors, the prime, and the owner. One by one settlements were reached with each subcontractor. There was no special treatment afforded the prime as it, too, contributed substantially to the settlement.

- Advocates, not only mediators, can use Guided Choice techniques. Construction defect disputes typically involve claims by owners against the general contractor and multiple subcontractors. In these situations, the general contractor's counsel needs to meet well ahead of the mediation session with the subcontractors' counsel to plan how to present, to the extent possible, a united front against the owner, while at the same time devising a procedural process to separately resolve liability and causation disputes with and among the subcontractors. If the mediator chosen is not familiar with Guided Choice techniques, the advocate still can infuse them into the process by refusing to schedule the mediation until he or she gets what is needed, such as actual job costs and native schedules. While this process can be driven somewhat by the general contractor's counsel, it usually is more effective to engage the mediator early in these process discussions to help organize and direct the eventual mediation session.
- A chemical plant had to be replaced in the middle east, so the dollars involved were substantial. Just scheduling a normal mediation and having the parties show up could have led to an impasse. Through in-person discussions and telephone conversations, the mediator separately met with each party so they could fully tell him all they wanted and could learn to trust the process he was creating. The problem with one day mediations is that there is not time for the information download necessary for complicated cases. Early mediator engagement may inform the mediator fully so he

or she can be more effective, and it may allow the parties to get their positions off their chest and know they have been heard. During this process, the causes of impasse, areas of disagreement, and the parties' information needs should emerge. In this case, outside counsel began to push back about how much information was being shared, but it was worth the effort as the case settled.

- Tag team mediators can divide and conquer complicated disputes, especially when insurance coverage and liability issues both arise. One mediator with insurance expertise can work with the adjusters ahead of time, while the other mediator conducts liability discussions. For this to succeed, communication between the team must be seamless.
- Working on the terms of a potential settlement before the session can get the parties in the right state of mind. Questions such as when payment can be made, the scope of any expected releases, and any desired non-disparagement clauses are useful to address before the session so that a potential settlement is not upended by last minute demands regarding the scope or terms of the agreement.
- Disputes are not always about the money. For example, in the design community, lead design firms and subconsultants have formed and want to maintain long terms relationships. Structuring a process that just gets to a monetary settlement may miss the goals of the parties. First, figure out what needs to be done to right the relationship. Ask whether they want to settle. Do they want to work together again? If so, then what trade-offs do they want to consider? Ask what each would do differently on the next project for it to be successful. In this type of discussion, it is useful to encourage the use of "I" statements, such as, "I would do X and not Y." Once perspectives are shared, relationships normalized, and future expectations set, then the parties should discuss what money needs to change hands. In these types of disputes, people need to be heard and know they are being heard. The mediator needs to elicit information from the parties, react to what is being said, and not just push a settlement. Instead, pose questions for the parties to consider about their relationship. After one such mediation, one party commented, "I don't know why you think she is a good mediator because she just asked questions; we had to figure out how to rebuild the relationship". Of course, that was the reason the process was successful. In this type of mediation, the old bromide that the best settlement is one in which every party is unhappy is not true; if a mutually important relationship has been restored, then everyone should leave the mediation thrilled.

- Even if the dispute doesn't settle, the Guided Choice mediator still may be of value in guiding the parties to structure the best way to litigate or arbitrate their dispute. After a Guided Choice process, the parties know the impediments to settlement and what issues are truly in dispute. This mutual understanding allows them to negotiate a more streamlined, less expensive trial or arbitration about issues and facts that they can agree ahead of time will be dispositive. The parties can also decide to send certain issues (as opposed to the entire case) to binding dispute resolution and then return to mediation.

How Early Mediator Engagement Can Help With Insurance Coverage Issues. As one mediator stated, it would be "incredibly stupid" to expect substantial contributions from insurers at a mediation session without substantial pre-mediation discussions with them. When counting on insurance dollars to fund significant parts of the settlement, one must lay the foundation for that recovery well before the mediation, which is another reason for early mediator engagement. In cases involving insurance coverage issues, Guided Choice mediators usually start those discussions immediately upon being retained.

To get insurer engagement in a settlement, the mediator and the policy holders must meet the procedural and substantive needs of the adjuster, so he or she can properly analyze its risk and appropriately set the insurer's reserves. If the adjuster has a file less than 1/8″ thick, then the check will not be very large. The mediator should explore basic insurance issues, such as: what is a particular insurer's "time on the risk";[6] which exclusions are at issue; are there one or multiple occurrences; is there excess as well as primary coverage available; are there opportunities for parties to assert claims as Additional Insureds; and what are the self-insured retentions applicable to the policies? In preparing for coverage negotiations before the mediation, Guided Choice mediators often create an insurance matrix identifying all potential carriers, coverage limits, coverage defenses that have been raised, deductibles, and what claims may be covered by which policies. During these preliminary informational and process discussions, all things are discussed - except money, because when money demands are made parties, retreat to their corners.

At the mediation session, the mediator can make standard arguments to insurers about saving the costs of defense if they settle the case, but the contribution will not be significant unless the insurer understands the insured's arguments and appreciates

[6]In other words, the correlation between the date range of the claimed occurrence trigger as compared with the dates covered by the policy.

it has coverage risk before the mediation starts. That type of work should start well before the mediation session is scheduled as the mediation session is not the time for the insurers to start monetizing risk. Avoiding such problems is one of the goals of early mediator engagement; it is a waste of time to discover the mediation session is only the start of the information exchange needed before meaningful negotiations can start. If coverage demands are saved until the mediation, the advocate is hurting its cause because the insurer needs time to process those demands. If these issues are not addressed before the session, the predictable response from insurers is that "we're not ready to address this new demand." As it is difficult for insurers to respond to demands quickly, demands to the insurer should be sent out early, and the demands should be tied to the coverage being sought.

The same approach should be pursued in regard to demands for defense and indemnity among the defendants. The mediator and parties should consider a preliminary mediation on the issues of defense and indemnity as it is not productive to demand complete indemnity and defense without establishing the status of those claims. A plan on how to deal with defense and indemnity issues should be developed before the mediation session begins. Otherwise, the plaintiff gets angry sitting in his room as the mediator tries to resolve defense and indemnity issues that could have been dealt with earlier. One of the goals of a Guided Choice mediator is not to herd cats on mediation day. The issues in contention should be identified and developed before the session so the mediation is organized and efficient. If that does not happen, then the parties are wasting time, and the fault lies with the mediator.

If insurance coverage is an issue, the standard insurance defense counsel response is, "I can't be involved in coverage disputes." That may be true, but then who is? Someone should be advocating for coverage for the policy holder, and someone should be representing the insurer in response. Often, plaintiff's counsel is unfamiliar with coverage arguments and the insurers have not yet retained coverage counsel. Experienced Guided Choice mediators encourage the hiring of knowledgeable coverage counsel for all parties with potential insurance claims and defenses. Good coverage counsel will recognize and pursue other carriers potentially on the risk, which may increase the available amount of insurance dollars available for settlement.

On condominium construction defect cases, it is important to have pre-mediation sessions with the association board to explain the issues in play. Often associations do not understand why they should be concerned about whether insurance or subcontractors

can pay for the claim, as the association's contract is only with the general contractor. They may not appreciate that the general contractor may be thinly capitalized and not able to pay a large judgment and that the only source of a large recovery may be through insurance. In such situations, it is essential for the mediator to explain to the association the insurance coverage issues that need to be resolved for them to get money. If this isn't explained to the association, then they will not be able to understand they may have to take less than what is set forth in their expert report and damage estimates. It is important for the parties to understand the process and become invested in it rather than just be an observer of the mediator running from room to room.

What Discourages Early Mediator Engagement. State court calendars are often so delayed that there is time to explore early mediator engagement and the informal information exchanges often associated with that process. However, federal courts often set firm dates that are difficult to move once ordered by the magistrate. Both federal and state court judges should allow the parties the time to establish a meaningful mediation process, without overlaying it with concurrent and expensive formal discovery requirements and deadlines. One way to address impinging litigation deadlines is to provide reports advising the judge of settlement efforts to justify any needed continuances in the scheduling order.

Early mediator engagement can take more time and money than the normal mediation process where the parties schedule a mediation session, show up, and see if they can settle. The "let's just get it done" approach appeals to clients—until it doesn't work. If the mediation continues beyond the initial impasse, it often takes the form of an after-the-fact Guided Choice process in which the mediator conducts separate ongoing discussions with the parties, encourages needed information to be exchanged, and eventually schedules another mediation session when the parties are better prepared. Had parties designed and engaged in that process initially, it would have cost them less time and money.

Discontent can begin to brew with increasing costs of the Guided Choice process, the longer it takes. In one case, the claim was $5 million, but with expert analysis the spread was reduced to $2 million. Still, it took six months and some mediator and expert bills to get there. While Guided Choice can require more up front work, nothing is wasted in the effort as it is work that would otherwise need to be done if the case were to proceed to trial. The mediator must control expectations, and if he or she can explain the benefits directly to the clients, they seem to understand and more fully accept the process.

Parties sometimes may fear that requesting early mediator involvement could signal weakness and a desire not to try the case as opposed to a rational exploration of alternatives to litigation. What might help overcome this perception is a standardized clause[7] to engage a Guided Choice mediator which is included in contracts or offered by parties at the start of a dispute. Counsel frequently think they must show they are getting ready for trial so that their claim is taken seriously, but if they are required by a contract clause to participate in a thorough mediation process, they and their clients could be saved from a lot of expensive posturing. The more common the clause becomes, the less chance the request to use it will be misconstrued.

Ironically, mediators who are in high demand and able to schedule three to five mediations a week do not have time to use many Guided Choice techniques simply because they are too busy and do not have the time to schedule and conduct many pre-mediation session discussions. More complicated cases, however, demand the preliminary spade work to make the mediation session successful.

Professional Benefits for the Mediator. Of course, helping parties settle their disputes is professionally rewarding for a mediator, but many of those who have become known for using Guided Choice techniques also have found the demand for their service has greatly increased. One mediator is now on the short list of five major carriers as a preferred mediator, and he attracts complicated, high value disputes that can afford his substantial daily rate.

Another attorney was ready to retire from his litigation practice ten years ago when he started getting calls to serve as a mediator. What he developed and became known for delivering was a process for mediation upon which parties and counsel could rely. All who hired him would get calls well before the mediation session would be scheduled asking for information that the parties would need to share for a productive mediation to occur—e.g. insurance tenders and policies, contracts, and cost data. Both the insurance defense and the plaintiffs' bar wanted the consistent Guided Choice process they got from him; they knew what to expect and that he was maximizing their chances of settlement. As a result, he now has a thriving, national mediation practice. Most of his cases involve 30 to 60 participants including insurers and separate coverage counsel. The last ten years have been remarkably satisfying because his work is intellectually interesting and

[7]Of course, the Guided Choice process cannot be standardized as what techniques the mediator chooses to use depend on the unique aspects of the case at issue, but the agreement by which parties agree to retain a Guided Choice mediator could be standardized.

rewarding. He has developed trusted relationships with counsel, and he now brings value to disputes, namely a process by which he can help settle them. He is financially and professionally enjoying his practice so much that he no longer wants to retire—at least in the near future.