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FASTER, CHEAPER, BETTER: THE NEW STANDARD FOR DISPUTE RESOLUTION

Peter R. Silverman
Shumaker, Loop & Kendrick, LLP
Toledo, Ohio

Anne S. Jordan
Jordan Associates
Chicago, Illinois

Les Wharton
Coverall North America, Inc.
Deerfield Beach, Florida

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We three authors are members of the Early Dispute Resolution ("EDR") Task Force of the ABA Section of Dispute Resolution, and we're EDR evangelists. EDR refers to a series of process improvements and tools -- mediation is simply one of those tools -- that can be selectively combined to resolve disputes in their earliest stages, quickly, inexpensively, and fairly. If EDR becomes as widely used as mediation, it will radically alter the way businesses and their counsel approach disputes, and what they spend to resolve them.

To show EDR's promise and prospects, we've decided to test it at the edge. We use the hypothetical situation of a CEO's demanding that her general counsel implement a policy that all business disputes will be resolved in 30 days, a policy many would consider not only unattainable, but counterproductive. Even among the authors there is disagreement about whether and to what extent this could be realistically implemented, but we can't resist a challenge and hope that this will inspire readers to set big goals.

Our paper is in three parts. The first section, written in the format of a series of memoranda between a CEO demanding a 30-day dispute resolution policy and a resistant general counsel, explores whether it is workable and even wise to radically ramp-up expectations for the speed and cost of dispute resolution. The second section describes the processes to consider incorporating into a 30-day resolution policy, and the third makes recommendations as to what an actual policy could be.

I. A 30-DAY DISPUTE RESOLUTION POLICY: WORKABLE AND WISE?

For purposes of our paper's hypothetical, assume we're dealing with a large franchisor with company-owned stores as well as franchisees, where disputes can arise with franchisees, suppliers, employees, customers, builders, and so on. The CEO and her general counsel have the following exchange.

M E M O R A N D U M

From: Susan Jones, CEO
To: Charles Smith, General Counsel
Re: Early Dispute Resolution- *time for disruptive change*

Charlie,

I held your job for a number of years before being promoted to President. One of the biggest things I've had to adjust to in my new role is the dizzying speed of change. We and our competitors are constantly at each other's throats to see who can take market share away from the others by doing faster, cheaper, and better.

Over the last several decades, corporate America has refined its use of commercial arbitration as a cost-effective means of resolving disputes, and has also fully embraced mediation. Nonetheless, resolving disputes still takes too long, costs too much, and is too disruptive to our business. I know firsthand how resistant most litigators are to early settlement. They first want to engage in motion practice and discovery to try to increase their client's leverage. When they finally feel the time is right to talk settlement, months or even years have passed and the money that's been spent could have gone toward settlement instead. Since settlement is all but inevitable -- statistically less than 5% of cases ever go to trial -- it's time to acknowledge that major change is needed.

Here's my challenge to you: I want to try to resolve every dispute in 30 days from when we first learn about it. I'm open to using every tool we have at our disposal to get this done, so tell me the benefits that we'll see and how we can minimize any downside.

I also want to know if any of our disputes stem from business practices that, if changed (and by change I mean doing something differently without increasing our costs or putting us at a competitive disadvantage), would reduce disagreements or potential liabilities before they escalate into litigation. I'll consider an early dispute resolution process even more successful if it involves ways to avoid disputes before they arise.

M E M O R A N D U M

From: Charles Smith, General Counsel
To: Susan Jones, CEO
Re: Early Dispute Resolution- *practicalities – change needs to be sensible*

Susan,

I'm with you: I'd like to improve speed of our dispute resolution and find cost savings across the legal department. But it's unproductive to set an unattainable goal of resolving disputes in 30 days (really 22 business days). Here's why it just won't work:

First, we have only one staff lawyer who manages litigation. To compress the process into 30 days, rather than spread it out over the case's life cycle, will mean that we'll need to increase staffing levels.

Second, our employees will need to search for and provide us with information as soon as we learn of a dispute. Based on our experience, there's no way they'll prioritize our requests just to meet a legal department-mandated deadline. It'll be even more challenging if we need information from our suppliers or service providers.

Third, our outside litigation counsel is from a top firm and handles many complex cases at a time. If we need a TRO or preliminary injunction, they drop everything to handle it, but that's the exception, not the rule. The best outside litigation counsel are simply not set up for an expedited 30-day dispute resolution process.

Fourth, a lot of disputes are complex and take time to resolve. You can't straightjacket them into a 30-day dispute resolution procedure.

Fifth, we have no control over the opposing parties or their counsel. They could exploit a 30-day policy to gain leverage, or just be suspicious of it and refuse to participate.

For all these reasons, it just won't work. But I'm more than happy to get you recommendations on how to tweak our policies and set metrics to resolve disputes quicker and cheaper.

M E M O R A N D U M

From: Susan Jones, CEO
To: Charles Smith, General Counsel
Re: Early Dispute Resolution- *directive for disruptive change*

Charlie,

I'll be blunt: If you can't make it work, I'll find someone who can.

First, the total hours the law department spends on litigation should drop significantly once the backlog of pending cases is cleared. My guess is that we could free up over half the time of your current staff attorney and cut our litigation costs by half in the process.

Second, you're not asking our employees to do anything more than they would otherwise have to do, so at most, it's just that the time frame is compressed. Given the benefits I'm expecting, that's a reasonable concession for them to make. And since they'll generally have had some culpability in causing the dispute, they have to help the law department resolve it, not just make it your problem.

Third, if our current counsel can't handle an expedited process, there's a long line of excellent attorneys who would love to represent us.

Fourth and fifth, while you're right that we can't control the type of disputes that arise, or who the opposing parties or their counsel are, we're not powerless in trying to drive our direction and goals. I need you to tell me how to make our approach most effective over the full range of disputes and regardless of who may be the opposing parties or the counsel representing them.

I realize that to make this work, our franchisees will need to buy into the approach. I have to believe that I can persuade the franchisees to embrace our procedures to resolve disputes quickly and economically, so long as they view the process as fair. They have a long history of supporting changes that reduce their costs and this should be no different. It should also help improve our relationships with franchisees after the dispute is resolved.

I want our litigation team to be as skilled at EDR as we now are in standard litigation. So lay out for me the EDR processes and the best practices in using them as a party and an advocate.

One last point. I intend to sell the whole franchising industry on this approach. So write your report like a formal paper and I'll slap my name on it and publish it and present it at an IFA conference. You should also find speaking and other opportunities to promote the approach. Just make sure I always get credit for the vision.

M E M O R A N D U M

From: Charles Smith, General Counsel
To: Susan Jones, CEO
Re: Early Dispute Resolution- *a proposal for disruptive change*

Susan,

The more I considered your idea, the more excited I became about making it a reality. To implement our initiative, we should formally adopt the 30-day dispute resolution process as a policy; clearly communicate it internally and externally, and include an alternative dispute resolution ("ADR") clause in our franchise agreements and other contracts. We'll also have to identify the best EDR processes to use in the 30 days, and find neutrals and counsel skilled in those EDR techniques.

Section II below reviews different approaches to early dispute resolution. Section III presents the recommended policy.

II. APPROACHES TO EARLY DISPUTE RESOLUTION

Early dispute resolution (EDR) encompasses a number of different processes and tools that, when used in combination, can be more effective than traditional mediation. These are intended to result in the resolution of disputes before parties have spent significant time and money on discovery, motions, and trial. The formal presentation with citations below is ready for you to take public.

A. Early dispute resolution generally

The rationale for EDR is that only a small fraction of cases ever go to trial, making settlement not only desirable but inevitable. Given that reality, parties should approach disputes not with a litigation mindset, but by identifying and using clearly-defined steps at the earliest possible stages of the dispute that will lead to resolution. There's no one-size-fits-all approach, but as a threshold matter, most disputes should be able to be resolved quickly and economically when both parties:

(1) are reasonable;

(2) have skilled, ethical counsel; and

(3) have enough information to:

(a) understand the merits of each side's position and leverage, and

(b) make an informed judgment as to the value of each side's case.

I call these the "Driving Principles." Steps one and two of the Driving Principles are entirely dependent on the parties and the counsel they choose. I call step three of

the Driving Principles "Sufficient Knowledge." EDR works by applying the processes both sides need to gain Sufficient Knowledge.

There is no generally-accepted procedure for EDR as there is for mediation. The principles have been written about in a number of different contexts and under a number of different names. The ABA's Dispute Resolution Section has published a brochure on one approach called Planned Early Dispute Resolution,[1] and the Section has an EDR Task Force that continues to focus on the area. Others have written on more specific approaches under the names Planned Early Negotiation,[2] Guided Choice,[3] Early Active Intervention,[4] Collaborative Law,[5] Settlement Counsel,[6] and Med-Arb.[7] I

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[1] John Lande, Kurt L. Dettman & Catherine E. Shanks, *Planned Early Dispute Resolution*, A.B.A. Sec. Disp. Resol., http://www.americanbar.org/groups/dispute_resolution/resources/planned_early_dispute_resolution_pedr.html (2015). *See also* John Lande and Peter W. Benner, *Why and How Businesses Use Planned early Dispute Resolution,* 13 Univ. of St. Thomas Law Journal (2017), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2722664.

[2] *See* John Lande, Lawyering *with Planned Early Negotiation: How You Can Get Good Results for Clients and Make Money* (ABA 2nd ed. 2015); *see also* John Lande, "A Framework for Advancing Negotiation Theory: Implications from a Study of How Lawyers Reach Agreement in Pretrial Litigation," 16 Cardozo Journal of Conflict Resolution.1 (2014).

[3] For a comprehensive description of and bibliography on Guided Choice, see www.gcdisputeresolution.com

[4] *See e.g.,* Peter Silverman, *Mediation 2.0.,* 15:4 Franchise Lawyer (2012); Steven Fedder, John Lande, & Peter Silverman, *Can We Resolve Franchise Disputes Faster, Cheaper, Better*, Franchising Business and Law Alert 16:10 LJN (2010);

[5] *See, e.g.,* David A. Hoffman, *Collaborative Law in the World of Business*, 6:3 Collaborative Review (2003); Diana Fitzpatrick, Using Collaborative Law to Resolve Commercial Business Disputes, http://www.nolo.com/legal-encyclopedia/collaborative-law-business-commercial-disputes-30152.html; *Civil and Commercial Application of Collaborative Practice* (International Academy of Collaborative Professionals), https://www.collaborativepractice.com/public/about/about-collaborative-practice/civil-commercial-application-of-collaborative-practice.aspx; R. Paul Faxon & Michael Zeytoonian, *Prescription for Sanity in Resolving Business Disputes: Civil Collaborative Practice in a Business Restructuring Case*, 5:2 Collaborative Law Journal (2007); Michael Zeytoonian, *Three Misconceptions About Using Collaborative Law in Employment Disputes;* http://www.mediate.com/articles/ZeytoonianMbl20140228.cfm

[6] *See, e.g.,* Kathy Brian, *Why Should Businesses Hire Settlement Counsel?,* 2008 J. Disp. Resol. 195; Dan Chray, Frank M. Bedell, Eric O. English & J. Patrick O'Malley, *Case Studies in Settlement Counsel: Best Practices for Litigation Exit Strategies,* 33 No. 8 ADD Docket 50 (Oc.t 2015); James E. McGuire, *Settlement Counsel: Answer to the* FAQs, 3:2 NYSBA Disp. Resol. Law (Fall, 2010); William F. Coyne, Jr. *The Case for Settlement Counsel*, 14 Ohio St. J. on Disp. Resol. 367 (1999); Roger Fisher, *What About Negotiation as a Specialty*, 69 A.B.A. J. 1221, 1221-1224 (1983); James E. McGuire, *Why Litigators Should Use Settlement Counsel,* 18 Alternatives to High Cost Litig. 107, 120-23 (2000)

[7] The literature on med-arb is vast, and often critical. *See*, e.g., Brian A. Pappas, *Med-Arb and the Legalization of Alternative Dispute Resolution*, 2015 Harv. Negot. L. Rev. 157 (2015)(critical); Thomas J. Brewer and Lawrence R. Mills, *Combining Mediation & Arbitration*, 54 Nov. Disp. Resol. J. 32 (1999) (pros and cons); Barry Bartel, *Med-Arb as a Distinct Method of Dispute Resolution: History, Analysis, and Potential*, 27 Willamette L. Rev. 661 (991) (early article identifying, defining, and analyzing process).

review each of these below, and then in Section III, discuss the principles that I think we should be using.

1. Specific approaches

Three of the EDR approaches use similar tools, each with a slightly different twist. These are Planned Early Negotiation, Guided Choice, and Early Active Intervention. I'll describe those, and then discuss Collaborative Law, Settlement Counsel, and Med-Arb, each of which require more explanation

a. Planned Early Negotiation

Planned Early Negotiation (sometimes referred to as Planned Early Dispute Resolution or PEDR) anticipates that at the beginning of the dispute, the parties will meet to negotiate an exchange of information and take any other steps needed to resolve the dispute quickly and economically. It then counsels the use of interest-based-bargaining and similar negotiation principles to look for business opportunities to ultimately reach settlement.

b. Guided Choice

Guided Choice starts with the selection of a mediator who "guides" the settlement negotiations both substantively and procedurally. If the parties reach impasse, the mediator helps find a way to get past it. This could include, for example, using an independent expert or a streamlined arbitration process to resolve a key factual or legal issue that can't be reconciled consensually. The mediator also ensures that the parties have gone through the steps necessary to gain Sufficient Knowledge.

c. Early Active Intervention

Early Active Intervention also prescribes bringing in a neutral early, but is tightly structured. It sets steps with tight deadlines for negotiation, information exchange, and mediation, all of which can be set out in an ADR clause.

2. Alternatives Already In Use Generally

a. Collaborative and cooperative law

The fourth approach, collaborative law, takes more explaining. Collaborative law, while widely practiced, is used primary in family law. Its applicability to business disputes has been limited for the reasons I describe below, but it is similar to the use of settlement counsel, attorneys who work exclusively to settle a case and won't be involved if there is litigation. Before I get to that, though, let's start with an explanation of what collaborative law is.[8]

[8] This section is expanded from an earlier version written by Peter Silverman in Peter Klarfeld, Michael Lewis & Peter Silverman, *Mediating Franchise Disputes,* ABA Franchising Forum (Oct. 2009) at 35-38.

The starting point is that parties hire lawyers who subscribe to the collaborative law process and are trained in cooperative negotiating.[9] For example, the parties' counsel helps them "communicate with each other, identify issues, collect and help interpret data, locate experts, ask questions, make observations, suggest options, help… express [their] needs, goals, interests, and feelings, check the workability of proposed solutions, and prepare and file all required documents for the court."[10] Attorneys aren't supposed to take advantage of points the other attorney missed or amounts miscalculated. If experts are needed, they're hired jointly. The parties are supposed to make full and honest disclosure.[11]

The parties and the lawyers agree in writing in advance that if the parties don't resolve their dispute and either party then wants to proceed to litigation, the lawyers must resign and the parties retain new counsel.

A variation on this is cooperative law. The difference is that while the parties initially pursue settlement using the same cooperative negotiation principles, the lawyers don't need to resign if the parties later choose to litigate.[12] For our purposes, cooperative law in the business context has evolved into planned early negotiation and includes the notion of hiring settlement counsel (discussed in more detail below).[13]

Because these approaches significantly depart from the attorney's traditional role in dispute resolution, they raise a host of issues. One is ethical.[14] Does counsel's agreement to resolve the dispute without resort to litigation contradict his/her professional obligation to zealously advocate for the client's interests? As a general matter, the American Bar Association and state bar associations and legislatures have

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[9] *See generally* Uniform Collaborative Law Rules and Uniform Collaborative Law Act at 1 (as Amended 2010), which also states that there are roughly 22,000 lawyers trained worldwide in collaborative law. *See also generally,* John Lande, *Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering*, 64 Ohio St. L.J. 1315 (2003) *("Possibilities").*

[10] Collaborative Law Institute of Illinois Principles and Guidelines, §4, http://collablawil.org/about-collaborative-law-institute-of-illinois/collaborative-law-principles-and-guidelines/

[11] *Id.*, § 6.

[12] *Id.*; *See, e.g.,* John Lande, *The Movement Toward Early Case Handling in Courts and Private Dispute Resolution,* 24 Ohio St. J. Disp. Resol. 81, 121-126 (2008).

[13] There are advocates for using collaborative law to resolve commercial disputes. *See, e.g.,* R. Paul Faxon & Michael Zeytoonian, *Prescription for Sanity in Resolving Business Disputes: Civil Collaborative Practice in a Business Restructuring Case,* 5 Collab. L. J. (Fall 2007); Sherri R. Abney, *Avoiding Litigation: A Guide to Civil Collaborative Law* (2005). *See also* the website for the Global Collaborative Law Council, whose mission is "advancing the use of collaborative process for resolving civil disputes around the world." http://www.collaborativelaw.us/about.html

[14] *See generally Possibilities*, *supra* note 71, at 1330-1372.

taken the position that practicing collaborative law in the family law area with a client's informed consent doesn't violate the rules or obligations of professional responsibility.[15] There is no reason that that analysis would change when applied to commercial disputes. If anything, businesses are more sophisticated than are spouses going through a divorce, and are more capable of giving informed consent.

Other issues are practical. The processes that have worked in family law disputes likely won't work in in business disputes unless modified.

- With both parties fully and honestly disclosing their assets, family law is fairly well settled as to division of property and monetary settlement. In business disputes, the facts and law are usually contested.

- Divorcing parents have a common goal in seeking the best interests of their children. Businesses also have relationship concerns when they're in disputes with parties with whom they will ongoing dealings (like franchisees), but both sides also have a strong self-interest that their positions are intended to protect.

- The collaborative law's disqualification requirement if a case proceeds to arbitration or litigation may disrupt the way businesses traditionally use their litigation counsel.[16] For example, in disputes between franchisors and franchisees, each side often uses counsel who knows their business, values, and approach to disputes. So each side may resist using a process where its long-time counsel couldn't continue to represent them if the dispute proceeded to litigation.

- In family law, there is a nationally-recognized set of principles and associated training with certified collaborative law practitioners. In the commercial context, there is none of this, though many lawyers may be aware of the principles.[17]

While the pure approach doesn't translate well, parties can still cooperate on a stepped process of voluntary information and document exchange (with safeguards) and

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[15] See generally discussion in Scott R. Peppet, *The (New) Ethics of Collaborative Law*, 14 Disp. Resol. Mag. 23 (Winter 2008). The ABA Standing Committee on Ethics and Professional Responsibility in Formal Opinion 447 found that the practice doesn't violate any ethical requirements. A number of states have enacted statutes that recognize and authorize collaborative law. *See. e.g.,* Cal. Fam. Code § 2013; N.C. Gen. Stat. §§ 50-79; and Tex. Fam. Code Ann. § 6.603.

[16] *See* John Lande, *Evading Evasion: How Protocols Can Improve Civil Case Results*, 21 Alternatives to High Cost Lit. 149, 163-65 (2003); Robert W. Rack, Jr., S*ettle or Withdraw: Collaborative Lawyering Provides Incentive to Avoid Costly Litigation,* Disp. Res'n. Mag., Summer 1998, at 8.

[17] *See generally* David A. Hoffman, *Collaborative Law in the World of Business*, *Collaborative Rev.*, Vol. 6, No. 3, Winter 2003, at 1, http://www.*motsayandlay.com/articles/CL_in_the_World_of_Business.pdf.*

good faith negotiation or mediation (albeit with each side looking to rationally reach the best result for itself based on Sufficient Knowledge).

Last, if business parties are unable to resolve a dispute early, they can apply the general notion of cooperation beyond the dispute resolution process to the conduct of litigation itself. Organizations like the Sedona Conference, for example, have developed principles of cooperation in discovery generally,[18] with a significant amount of judicial acceptance. Clients looking for speed and efficiency in resolving disputes will likely demand that their counsel be skilled in applying these new approaches to trial and arbitration if EDR efforts aren't successful.

b. Settlement counsel

A variant on cooperative procedure is the use of settlement counsel who would be used only for early resolution phase of a dispute. If unsuccessful, he or she would hand the matter off to litigation counsel.

If we decide to use settlement counsel in our EDR process, we will need to find an attorney who is interested in this limited representation and is good at it – being able to both cooperate procedurally while vigorously seeking our best interest based on Sufficient Knowledge. I think that's very achievable and over time settlement counsel would deeply learn our business, values and approaches to dispute resolution.

Ideally, both sides would use settlement counsel, but it's not necessary. Franchisees that don't have disputes with the regularity that we do might be less inclined to hire separate settlement counsel, but our settlement counsel should be skilled enough to work with traditional litigation counsel that is willing to engage in the process in good faith.

Another potential concern is that settlement counsel may be biased toward settlement and not assert our position as strongly as it should be. It's at best a minor concern (and is simply the reverse of litigators being biased toward litigation because it is more lucrative) in light of the benefits that can be realized from early resolution of a dispute. I'm confident we could hire ethical, highly skilled lawyers who would handle the process objectively, and be able to advocate our position strongly while still seeking settlement at fair terms based on Sufficient Knowledge.

c. Med-Arb

Med-Arb is, as suggested by the name, the joining of mediation and arbitration in a sequential dispute resolution process. At its most general level, if mediation fails, then arbitration follows with the mediator becoming the arbitrator.

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[18] The Sedona Conference Cooperation Proclamation (July, 2008), http://www.thesedonaconference.org/content/ tsc_cooperation_proclamation/proclamation.pdf.

The advantage to the process is that the neutral has the full set of tools needed to bring the matter to conclusion, whether by consensual settlement or an arbitration award. The neutral has flexibility, and builds familiarity with the parties and the facts of the dispute throughout the process. For example, he or she could arbitrate one vexing issue, then turn back to mediation or fashion a settlement on a number of issues, but leave one issue for arbitration. Finally, if mediation fails, the parties don't need to incur the time and expense and finding a new neutral.

The process has two downsides that have led most parties to avoid it. One, if parties know the neutral will become the arbitrator, the parties may be reluctant to share openly with the mediator out of a concern that information could later be used against them if the matter is contested. Two, if the neutral has the ultimate power to rule on the matter as an arbitrator, that gives the neutral coercive control.

The most useful insight for our purposes from Med-Arb is that the mediator, regardless of whether he or she serves as the arbitrator, can help develop an economical, streamlined arbitration to resolve outstanding issues if we're unable to resolve a dispute cooperatively. This can include any number of options, ranging from structured litigation or arbitration to variants on standard arbitration such as baseball,[19] night baseball,[20] and high-low.[21]

** ** **

That ends the overview. None of the EDR processes or existing approaches, applied alone, will get us to a 30-day dispute resolution policy, but they each offer ideas and tools that I borrow in describing my recommended policy.

[19] In baseball arbitration, each party chooses and discloses to the arbitrator a damages number. The arbitrator's sole decision is which of the two numbers to choose for the award.

[20] Like baseball arbitration, each party chooses a damages number but doesn't reveal it to the arbitrator. The arbitrator then rules on how she values damages. The actual award will be the number closest to the arbitrator's damages finding.

[21] In high-low arbitration, the parties bracket damages between an agreed high and low number. If the award is lower than the low number, the respondent pays the agreed-upon low figure. If the award is higher than the high number, the claimant accepts the high number. If the award is in between, the parties are bound by the arbitrator's figure. The parties choose whether to disclose the high and low numbers to the arbitrator before the arbitration.

III. MY RECOMMENDATIONS FOR OUR 30 DAY EARLY DISPUTE RESOLUTION POLICY

A. Executive Summary

I'm recommending a five-step process to resolve disputes in no more than 22 business days (30 calendar days). As I'll discuss in more detail below, we'll use a truncated process for smaller or less significant disputes. Also, if experts are required, more time would likely be needed.

The five steps and the business days allowed to accomplish them are:

1. In no more than three days, we internally gather all necessary information on the case and what we need to know from the other side for Sufficient Knowledge.

2. In no more than the following three days, and if called for, outside counsel assesses the case and presents us with an initial analysis.

3. In no more than the following seven days, the parties exchange documents and information in a process with safeguards.

4. In no more than the following three days, the parties value the case based on Sufficient Knowledge.

5. In no more than the following six days, the parties negotiate or mediate the dispute to resolution.

Here's a chart setting out the steps and the number of days:

Process	Number of days
Internal early case assessment (the EDR Package)	3
Outside counsel early case assessment (the Initial Assessment)	3
Document and information exchange – no experts	7
Case valuation	3
Negotiation or mediation	6

The use of experts could be integrated into the five steps or may require additional time.

B. A cautionary note on 30 days.

As Boswell so eloquently put it, *"Depend upon it, Sir, when a man knows he is to be hanged in a fortnight, it concentrates his mind wonderfully."* [22] Your 30-day deadline does concentrate the mind, and I've laid out what I think could be a workable 30-day dispute resolution policy. But we shouldn't be surprised when we can't meet the 30-day deadline.

If some disputes take 60 or 90 days or even longer to resolve, that doesn't mean that our goal hasn't been realized. It will depend on the circumstances. As a result, to keep our focus on what we really want to accomplish, I'd tweak our policy to be one of *trying* to resolve disputes within 30 days. It shouldn't change our aim to resolve disputes in 30 days, but will avoid the policy's being deemed a failure simply because we set an aggressive deadline that may prove hard to achieve in every case.

Likewise, if after reviewing my report, you conclude that 30 days is too compressed to be effective, we can easily change the process to 60 or 90 days by adjusting the time allowed for each step of the process. Whatever time frame you set, I expect that we'll continue to work to make the process more streamlined. We simply need some experience with EDR to have a better sense of what we should strive for.

C. The Implementation plan

1. Not All Disputes Are Created Equally

While our 30-day goal should apply to all disputes, a dispute should meet a threshold before we take all steps in the process. Routine disagreements can and should be resolved through a phone call or meeting on the business side or dialogue between counsel. We may also want to have a more streamlined process for certain types of disputes rather than use the negotiation-centric process I've discussed so far. For example, we might look to an ombudsman program for franchisee concerns. Or accounting disputes may be better resolved through referral to an accountant who can make a binding determination of what amounts are at issue or how something should be calculated.

Even with disputes that will be subject to the five-step process, we don't need to follow the policy mechanically. We need to use the right tools at the right time and in the right way. These tools could, but don't need to, include investigation, early case assessment, document exchange, information exchange, negotiation, mediation, use of experts, early neutral evaluation, selective issue arbitration and others. Like wanting to play with every toy in the toy box, there can be a temptation to want to use every tool in the EDR toolbox. The law department will need to analyze each dispute so that the selection and use of tools is guided solely by economy, speed, and advantage. We should become sophisticated pretty quickly as to which tools will be the most workable for us,

[22] Boswell, *Life of Johnson,* quoting Dr. Samuel Johnson, on September 19, 1777, explaining how an uneducated convict might have come to quickly write an eloquent plea for mercy (which was actually written by Johnson).

when to use them, and how to keep their cost proportional and economical to the size of the dispute

2. Announcing the policy

To ensure success, we need to clearly explain the rationale for EDR and set expectations internally and externally.

a. Internal communication

Internally, we have to educate management on the nature of, and rationale for, the process. If they understand how this can significantly lower costs and reduce the demands on them and their staff in the longer term, I'm optimistic they'll embrace the proposed changes. (Of course, your mandating compliance with the process and the associated time frames will also help.)

Management also needs to understand that the process can't be tainted by emotional factors like a desire to avoid embarrassment, prove that we're right, or even the score. That boomerangs quickly in a compressed process like this and needs to be avoided from the outset.

b. External communication

Outside parties, especially our franchisees, need to understand what the process is and why we're committed to it as a matter of policy. That helps eliminate suspicion that it's some veiled way to gain an advantage. At the same time, we need to communicate the policy in way that makes clear that we're not simply going to roll over and settle quickly at any cost or that we're risk-averse. This is primarily an economic decision that works to both parties' benefit. I also think it's a good sales tool as it shows we have high integrity in the way we deal with disputes.

Here's what I propose our announced policy to be:

> *As a company, we're committed to resolving all disputes quickly, economically, and fairly. Our ideal is to resolve even the most serious disputes in their earliest stages, and we will try to do so in 30 days using early dispute resolution principles (EDR). More information on EDR principles is available on our website: www. settlefastercheaper.com*
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> .
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> *We recognize that even with both sides using EDR principles in good faith, we may not settle every dispute. Our further commitment is that if we don't resolve the dispute in 30 days (or a longer time we've agreed on), we'll try to structure a dispute resolution procedure through court or arbitration that allows the process to proceed as quickly and economically as possible to a final resolution.*

c. Using a neutral

Once a matter reaches a certain threshold, a neutral skilled in EDR principles should be involved. Our EDR clause in contracts should require this (I'll discuss the specifics of this later). And in cases not governed by an EDR clause, we should seek the other side's agreement to retain a neutral.

In a simple dispute, we might need the neutral only for a short phone call to initially structure the process. We could then use the neutral beyond that if we need helping getting through any of the steps below. Cost-effectiveness, speed and the extent of the other side's cooperation will drive the decision. In significant cases, I would expect that the neutral would be involved in each step of the process. To avoid delays, I will immediately start identifying neutrals who understand the overall EDR process and are skilled at implementing it.

D. EDR Policy: The five basic steps for each dispute

The EDR approach that I'm recommending draws from the processes I described in Section II that will allow us to expedite resolution of our disputes, but adds a rigor that's needed to compress the process into thirty days. The five basic steps are internal early case assessment; outside counsel assessment; document and information exchange; case valuation; and negotiation or meditation to either settlement or further structured dispute resolution. Experts, if needed would be an additional step that would likely extend the time.

As a threshold matter, as soon as the law department becomes aware of a dispute, we'll determine what level of effort we believe it warrants and tentatively develop the steps and timing needed to resolve the dispute in 30 days. We'll also reach out to the other party and their counsel in an effort to come to agreement on the steps that need to be taken and the timing involved. If it appears that a party won't be cooperative or constructive, we'll consider our options and may need to change course. At a minimum, I'd expect that we'd bring in a neutral to see if we can make the process work.

1. Early case assessment - The EDR Package

The first step is prompt, cost-effective internal review -- what is commonly called early case assessment (ECA). In practical terms, it means that when the law department learns of a dispute, we begin the investigatory process immediately.

We'll start by determining the key internal players (e.g., finance for a royalty issue, the sales group for a misrepresentation issue, or the finance and the supply team if the complaint is about rebates).

We'll then direct the team to gather key documents. This doesn't mean an exhaustive search of files and email, but a tailored collection and review of the information need to obtain Sufficient Knowledge. If, for example, the claim is that our sales representative made a financial performance representation, we should look at all

e-mails between the sales representative and the franchisee, and we should pull the disclosure file to determine whether we have properly executed disclaimers.

The goal is to understand the case fully, which means that we'll be looking for harmful as well as helpful documents. Knowing the weaknesses of our position will enable us to more accurately value our case.

One final caveat on document collection. Under the Federal Rules of Civil Procedure and many state rules, we need to preserve documents once we're on notice of a dispute or litigation is reasonably foreseeable. While that requires identifying potentially relevant documents to preserve, that's a different process from what I've just outlined, though the steps overlap. We'll have to work through that in the department so that both tasks are done consistent with the EDR timelines, and so that we won't have to replicate document collection efforts if we don't settle.

We'll also interview the key players, again, to get out the harmful facts as well as the helpful ones. As a cultural matter, we need everyone to understand that bad news ultimately comes out. We want to learn it right at the beginning.

Another part of the ECA process is to develop an understanding of the respective leverage we and the other side have. Our goal is to reach the most advantageous resolution for the company through a fair process, and exercising leverage is fully consistent with this. We should also assess business objectives and risks. Our objectives and risks should provide the framework within which everything else is considered.

The assessment should give us a good idea of what we *know*. The final step is to come up with a list of what we don't know and what, if anything, we *need to know* to properly assess the facts, law and our or the other side's leverage. It will be hard to avoid the usual approach, which favors a need to know everything about what the other side has done and to see every relevant document. That's nonsense. Given the accepted wisdom that most cases turn on no more than a dozen documents, our goal will be to ask the other side only for information that we need for Sufficient Knowledge.

We'll then put into a memorandum with attachments all the documents, interview summaries, analysis, and information that we need but don't have, which I'll call the *EDR Package*. We're ready to move to the next step and, if appropriate, retain counsel.

For the 30-day process to work, what I've just described should take no more than three business days. That deadline needs to be communicated and followed.

2. Use of outside counsel – legal research and case assessment

The next step is for us to determine whether we need legal analysis. Some disputes will be factual, but others will raise issues of contract law or otherwise require looking into specific case law, such as on encroachment or the effect of a disclaimer.

We could turn to our regular outside counsel for this, but I'd like to begin experimenting with settlement counsel who specializes in franchise litigation. We'd structure fees to keep settlement counsel within budget and to incentivize early settlement.

The next step is to have counsel prepare a case assessment (the "Initial Assessment") based on the EDR Package and any legal research we've requested. I'd like to give counsel three business days to get that to us. To keep the focus on timeliness and cost-effectiveness, I plan to negotiate for a fixed fee for preparation of the Initial Assessment. Depending on the complexity of the matter, I think that the fee should be between $2500 and $10,000. To work within the thirty-day policy, we need to spend the money at this stage to get the Initial Assessment.

The Initial Assessment should be neutral and evaluative; we don't want advocacy. The purpose of the Initial Assessment is to allow us to structure our resolution strategy. The Assessment should be structured as follows:

a. Short factual summary;

b. Short discussion of legal issues and governing law;

c. Leverage – ours and theirs;

d. Desired business outcome – ours and theirs;

e. Range of outcomes (including similar verdicts if we have cases of the type where verdicts are tracked); and

f. What if any additional information and documents we *need* internally and from the other side for Sufficient Knowledge, and why

3. Document and information exchange

There are different ways to obtain information, and our process doesn't require that one particular method always be used. I've identified four methods: (1) simply ask the other side, and counsel would respond, (2) ask for a response in affidavit from either by a corporate representative who has inquired as to the answers, or from one or more people who have personal knowledge, (3) interview the corporate representative or person(s) with knowledge, and (4) take a limited deposition.

At this point in the process – the seventh business day - we should know what information and documents we need to develop Sufficient Knowledge. By proposing a

narrowly-focused, highly-relevant request, we'll show good faith and hopefully encourage the other side to make the same tailored type of request.

If either side thinks the other is requesting information or documents that go beyond what's needed for Sufficient Knowledge, we'll need to negotiate scope. We may need a neutral's help for that. Both sides need to be reasonable and responsive to keep the process within our 30-day deadline.

If we've found a bad document that could hurt our position and the other side doesn't know about it, we may want to try to resolve the dispute before there is any document exchange. If that's not possible or has other downside associated with it, we have to be prepared to turn over things that might be harmful.

We also need to expect that the other side will act ethically and exchange both helpful and harmful documents. Having said that, though, we should generally encourage full disclosure by incorporating sanctions for non-compliance in to our EDR process. That might include asking for verification from counsel for the other side that they've made a reasonably diligent, good-faith search, and produced the reasonably responsive documents (a "Compliant Response"). We could also condition any settlement on a representation that each party made a Compliant Response. That would allow a fraudulent inducement challenge to any settlement if we later learned the other side withheld material information or documents.

Strategically, this will be a revealing stage in the EDR process. A broad, bad-faith request by a party sends the message that it hasn't bought into the process. If that happens, I'd respond directly, saying that the broad request doesn't fit into a good-faith, cost-effective, 30-day resolution process, and I'd ask the party to reconsider what they need for Sufficient Knowledge. As mentioned, we may need a neutral to help work through this. If the other party won't narrow its request, we'd need to decide whether to pivot to an alternative, which I'll discuss later, or try to comply.

Likewise, if the other side stalls in producing documents or information that we need for Sufficient Knowledge, or is only appearing to cooperate without actually engaging in the process in good faith, we may have struck a nerve and learned of a leverage point. If faced with this, we can use the neutral to try to get things back on track.

4. Case Valuation – The Five Questions

At this point, both sides should have Sufficient Knowledge to assess their cases. They should now undertake an analysis to establish a value for the dispute based on defined variables that each party should use, and that should set the basis for meaningful negotiation or mediation. We should allot two business days for this, which takes us through the end of the 15th business day if we're tracking to our 30 day process.

Specifically, each side should now have what it needs to be able to answer these questions, which I'll refer to below as the Five Questions:

- How much do we and the other side expect to spend in attorneys' fees to take the case through arbitration or trial?
- What is our worst outcome after trial or arbitration?
- What is our best outcome after trial or arbitration?
- Recognizing that the worst and best outcomes simply set outer limits, what's the reasonably likely range of damages we stand to win or lose?
- What's the chance of our winning/losing at numbers within that range?

Critics of early settlement efforts often cite the difficulty of valuing their case before they've had a thorough review of their client's and the other side's documents, received responses to written interrogatories, and taken depositions. The reality is that with Sufficient Knowledge, parties should be able to answer the Five Questions without engaging in a process that "leaves no stone unturned."

As the parties go through this process, their differences on the dispute and its value will generally become clear. If we're misguided on the likely cost of the matter, which party is likely to prevail, or the likely damages recoverable, I want to understand that at the earliest stages of the dispute, not after we've gone through months or years of discovery and motions. It should also give the neutral a range of damages to work with in mediation as opposed to basic arm-wrestling as to the number one side will take and the other will pay.

One last point. While the process may seem involved, if we don't do it now, we'll end up doing it in bits and pieces over many months, and when we finally get to settlement negotiations or mediation, our ultimate cost to settle will have increased by the fees and costs we incurred.

5. Negotiating or mediating for resolution

Assuming there have been no delays and no need for experts, we have seven business days remaining in the 22-business day period.

In negotiating, either directly with the other side or using a neutral, we should plan to use all the negotiation strategies we'd use in any business negotiation. Our tactics can be adversarial, or when it's in our interest, we can use interest-based negotiation (IBN) to develop a solution that works for both sides.[23] This involves a discussion of each side's interests as well as creative problem-solving, or put another way, looking for positive-sum solutions where both parties satisfy important interests.

I assume that the negotiations would usually involve the neutral and would occur in a setting very much like traditional mediation. The key, though, will be having a

[23] The literature on interest-based negotiation is vast. The classic statement of the principles is from Bruce Patton, Roger Fisher, and William Ury, Getting to Yes (1981).

skilled and effective neutral willing to be assertive in working through impasses and toward resolution.

If an impasse relates to one or a few major issues, the parties could agree to streamlined binding or advisory arbitration on just those issues. We could use the neutral for making that determination, but I don't recommend doing so (see my discussion of the problems with med-arb above). Instead, we should be able to find a separate neutral reasonably quickly for that.

To make sure the policy serves our goal of faster, cheaper, and better dispute resolution and doesn't become just another step along the way to litigation or arbitration as usual, and to avoid having others try to leverage our policy against us, we should consider some downside for not resolving a dispute within 30 days. That could, for example, include a fee-shifting provision if a party doesn't end up recovering at least what was offered at the point where negotiations or the mediation ended. It would apply to both parties equally.

6. A variable: experts

In some cases, experts may be needed for one or both sides to attain Sufficient Knowledge. Experts could be brought in and integrated into the five steps. To the extent we identify the need for an expert early, we could work with the expert during the first 13 days of the process. If the expert needs the documents and information from the information exchange, then that process can't begin until day 14.

In some cases, we may want to be able to question the other side's expert or even to have the experts discuss the issues together in front of both sides. And in some cases, the parties may want to jointly retain one independent expert.

Our use of experts should be consistent with the goal of limiting information to just what's needed to gain Sufficient Knowledge. This means that we'd likely ask the expert to prepare more of an executive summary than a full report.

Even with the request for only an executive summary, however, using an expert would likely require that the 30-day deadline be extended so that the quality of what underpins our (or the other side's) Sufficient Knowledge is maintained. The parties may need longer than a few days to retain an expert on short notice, or the expert may have scheduling issues. Also, if the expert's opinion involves any complexity, testing or surveys, even more time will be needed. If the quality or accuracy of an expert's opinion would be materially affected, we shouldn't sacrifice that simply to meet our self-imposed deadline. To do otherwise could lessen the chances of settlement and undermine the larger goal of lowering our dispute resolution costs and the time it takes to get resolution.

E. When the process doesn't lead to resolution

There will be times when we may not be able to resolve the dispute consistent with our policy. When that happens, consistent with our larger goal of expedited, cost-effective resolution, we should try to negotiate a streamlined process for any ensuing litigation or arbitration. That might include time and scope limits on discovery, motions, and the hearing on the merits. A skilled EDR neutral will be able to provide strong guidance on this.

F. Contracting For EDR

As part of our policy, we should expand the standard arbitration clause in our contracts to require participation in our EDR process. During contract negotiations, I'll have our transactional attorneys work with our litigation counsel to make sure that these clauses are well thought out and carefully drafted. Otherwise, the clauses often fail to accomplish their intended purpose for lower cost, faster dispute resolution.

Part of the problem in drafting a clause is that the principles of EDR are not widely understood. Further, the principles encompass a series of tools, which are not widely understood. The term lacks the precision and common understanding that *mediation* has. Thus our clause will need to talk in terms of steps, and we'll need to educate the other side on how the process works. We may want to put up something in that regard on our web site along with the statement of our policy. (I describe that in § III(C)(2)(b) above.)

Another problem is that the first two of the Driving Principles require that both parties and their counsel should be ethical and proceed in good faith. We can't mandate that by contract. With high-integrity, good faith parties and counsel on the other side, all we'd really need is a commitment to try to resolve the dispute through EDR. Without high-integrity, good faith parties and counsel on the other side, our clause could be as long as a book and it just wouldn't work. So the clause should assume good faith. If it's not there, we'll still give it our best shot for 30 days but will likely not get far.

Finally, I mentioned before that we should have a threshold that some disputes are for a low-enough amount or are clear enough that they should be resolved simply by direct discussion without going through the EDR process. To achieve this, I'd suggest a mandatory meeting requirement before triggering EDR.

Here's my suggested clause:

1. In any dispute between the parties, before commencing arbitration pursuant to § [ ], representatives of each party with the authority to resolve the dispute shall meet in good faith to try to resolve the matter as early as possible, but no later than 14 days after one party gives the other notice of the dispute.

2. If the parties do not resolve the dispute within the 14 days, then before commencing arbitration, the parties shall engage in good faith in a 30-day early dispute resolution process, as follows:

   a. Within three business days of the end of the 14-day period (the "Trigger Date"), with the consent of both parties, the parties shall select a neutral skilled in the EDR process. The parties shall share equally the costs of the neutral.

   b. Within six business days of the Trigger Date, the parties shall each determine in good faith the documents and information, if any, that is in the other's possession and that each party deems essential to evaluating the case. Both parties shall in good faith limit the request for information and documents as much as possible. By the end of the sixth business day, each party shall serve its request, if any, on the other side.

   c. Within the following seven business days, each side shall provide the other the requested documents and information. If either side believes the other side's request seeks more than essential information or documents, the parties shall in good faith discuss limiting the request, and shall involve the neutral if they cannot resolve the issue themselves. Neither party may be compelled to produce information or documents; the process is a good-faith exchange to expedite the settlement process and to try to get out early the information each side needs to make an informed judgment as to settlement.

   d. Within the following three business days, the parties shall each prepare an EDR case analysis to exchange with the other side and, if appropriate, the neutral. Each EDR case analysis shall discuss the party's position on the key issues and damages and equitable relief, and shall estimate the party's' expected attorneys' fees.

   e. Within the following six business days, the parties shall meet in good faith in a mutually-convenient location to negotiate or mediate to try to resolve the dispute.

   f. Every claim of each party is tolled from the date of initial notice of the dispute until seven business days following the termination of the EDR process.

g. Nothing in this section prevents during the 30-day period, (i) either party from seeking preliminary or emergency injunctive relief in court or [with the arbitration administrator], or (ii) on three-business-days' notice, a party from filing for arbitration if the other party does not cooperate in the EDR process.

G. Measuring EDR

We don't have historical data on the average length of our disputes or the costs of litigation and arbitration except in the aggregate. To be able to champion our use of EDR, management will need some sense of whether the process delivers the promised cost-savings. To that end, I plan to track the time to resolution of all disputes handled by the law department and also the costs versus settlement offers made at various points. We'll benchmark ourselves against the value that we or outside counsel, when they're involved, put on the dispute. Like you, I know this will save us money. I'm anxious to learn how big a payback we'll reap.

H. Corresponding change in business processes

As your memo notes, we should also consider changing our business processes to reduce the likelihood of certain disputes even arising. An example might be changing the training or incentives for our franchise sales group to minimize overselling, even adding a disincentive for risk-creating conduct. I'll return to this in a later memo, but first want to focus on implementing our EDR policy.

IV. CONCLUSION

Thanks for pushing me on this. Despite my initial reluctance, I'm excited about the potential that EDR has to save us significant time and legal costs. When you first gave me the challenge, I thought you had read one business book too many and had lost touch with reality. I was wrong. We can do this. I have to believe that within five years this will be the general process most businesses will follow as a matter of course for resolving disputes and we'll be able to say we were there at the start.