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Early Dispute Resolution – The Basics

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Since the 1980's, the dominant method of non-binding alternative dispute resolution has been mediation. But mediation, even if successful, can be costly and time-consuming: parties often engage in pre-mediation discovery and motion practice, then hire a mediator, prepare mediation statements, and spend a day or more mediating. It's time to move to a more expeditious and cost-effective form of non-binding ADR: Early Dispute Resolution (EDR).

Thought experiments

Consider the following five thought experiments about a standard commercial dispute:

1. Assume that a trusted colleague or client takes ten minutes to summarize for you a dispute that recently started, giving you the pros and cons, and showing you the contract at issue. How confident would you be that you could predict the outcome of the dispute within a reasonable range? My experience is that most lawyers would be reasonably confident. I'd peg it at a 55% confidence level.

2. Now assume that your colleague or client gives you key pieces of information – maybe a few material documents or the recollection of a key participant in the dispute. How much more confident would you be in your ability to predict the reasonable range for the outcome? My experience is that most lawyers' confidence would significantly increase. I'd peg it as going up to 75%.

3. Now assume that the dispute goes into litigation and you take discovery and engage in motion practice. How much higher would your confidence level be in predicting the reasonable range of the outcome? My experience is that despite the significant increase in effort, the increase in confidence level wouldn't be proportional to the effort involved. I'd peg it as going up to no more than 85%.

4. Now a comparison: Assume that you (i) had tried to resolve the dispute after receiving the core information in assumptions 1 and 2, as opposed to (ii) trying to resolve the dispute only after discovery and motion practice. How much difference would there be in your ability to resolve the suit on a reasonably objective basis?

My sense is that, notwithstanding the massive amount of information learned from discovery and motion practice, there's very little actual difference in the results in the two scenarios. Many lawyers, though, are so risk averse (or in some cases may want higher fees) that doing discovery and motion practice becomes an absolute prerequisite before attempting to settle.

5. And the last thought experiment: Assume that you compare for your client the *cost* versus the *value* of six months of discovery and motion practice in obtaining a fair settlement. Then you ask your client when the best time is to try to resolve the dispute. My sense is your client will tell you, without hesitation, to try to resolve the dispute not just early, but as early as possible.

If you accept with the notion that, early on, you generally gain enough knowledge to resolve a dispute within an objectively reasonable range, I'm hoping you'll also agree that most disputes should be able to be resolved within 30 days of their inception. Here are the basics:

What is EDR?

At the first sign of a dispute, each side:

- agrees to try to resolve the dispute voluntarily, cooperatively, quickly, and cost-effectively (or follow an EDR clause in their contract that requires this);
- internally gathers and analyzes the material facts and law;

- exchanges the information (if any) the other side needs to make a reasoned judgment on the merits of the dispute;
- evaluates its case and places a value on the reasonable range of likely outcomes; and
- negotiates or mediates to resolution.

EDR reduces the costs of litigation, and frees management's and employees' time from the ongoing distraction of lawsuits. The goal should be to resolve all disputes in 30, but no longer than 90, days. Even with a complex dispute, this is achievable. Companies and trial counsel regularly put in that intensive level of work on a complex matter when they need to obtain a preliminary injunction. There's no reason they can't do the same to resolve disputes early.

What *isn't* EDR?

- EDR isn't mediation. Mediation is one tool that may help resolve disputes early as part of EDR. But EDR is much more -- a rigorous, disciplined process that focuses management and outside counsel on taking the steps needed to resolve disputes early and cost-effectively.

- EDR isn't holding up a neon sign saying *I'm a pushover*. If you can resolve the dispute early and fairly, you do so. If not, all options are open.

- EDR isn't a guarantee that you'll resolve every dispute early. For the process to work, the other side needs to act in good faith and be represented by ethical (not looking to run up fees), skilled counsel. Even then, there may be good reasons (e.g., precedent, principle, or commercial reasons) why both parties can't agree on terms. Business reasons can trump speed and cost-efficiency. But at a minimum, EDR puts you in the position, before significant litigation expense, to make an informed decision as to what's best for your client or company.

How do you implement EDR?

1. Adopt internal policies so that everyone in the organization knows that the goal is to resolve disputes early and cost-effectively by rapidly gathering all the key facts (especially the potentially harmful ones) and analyzing what would be a fair resolution of the dispute. This includes a hard look at issues like what sort of leverage each side has, and whether the case has commercial ramifications or the potential to set a good or bad precedent.

2. Involve your outside counsel in planning the process. Have them committed to mastering the rapid gathering of facts; analyzing the dispute; figuring out what information, if any, you need to make a reasoned judgment on the case; and negotiating or mediating toward resolution. Consider whether there's a role for settlement counsel.

3. If you don't resolve the dispute, you can still benefit from negotiating how you and your opposing counsel will structure arbitration or litigation so the case can be tried quickly and cost-effectively. Or you may want to try just one key issue, and then try to mediate or negotiate resolution. Or you may choose to aggressively litigate. The benefit is being given the opportunity to make a reasoned decision based on how the EDR negotiations or mediation proceeded, and on the information learned in the process. Regardless, you have created options to make the best choice for your client or company to move forward.

4. Early on, involve a neutral skilled in EDR. Bringing on a neutral at the beginning of the thirty-day process is inexpensive, and keeps both parties on track in moving the process along quickly and cost-effectively.

5. State on your web site that you're committed to engaging in EDR in good faith. That way, when you propose it, the other side will know that it's part of your culture and not a signal that you perceive your case as weak.

6. Think through how you may want to modify your dispute resolution clause to implement EDR.

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Mediation was a new idea 35 years ago; it's now commonplace. EDR is a new idea now. It allows businesses to quickly put disputes behind them, avoid the cost, distraction, and uncertainty of discovery and motion practice, and preserves business relationships where that's an issue. My prediction is that EDR will soon become as commonplace as mediation is today.

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