



Early Dispute Resolution

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Litigation costs too much and takes too long. Through early dispute resolution (EDR), parties should be able to voluntarily resolve almost every dispute in 30 days. Here's how EDR differs from traditional mediation and how the process works.

MEDIATION

In mediation, many months into the litigation process the parties choose a mediator, set a date for the mediation some weeks or months out, submit mediation statements, and then appear for the mediation. Many cases settle at mediation, but at a real cost, as the parties have already incurred substantial expenses in discovery and preparing for a trial that statistically will never occur (almost all cases settle).

One way to avoid this cost is to mediate at the beginning of a lawsuit. This poses many challenges, though. Oftentimes, what led to the lawsuit being filed is that the parties' attempts at settlement broke down. They may then be locked into contrasting views of the dispute and in no mood to restart settlement discussions. Or, even if one or both parties want to restart the discussions, they don't want to appear weak. Another early roadblock is that once a suit is filed, both sides may feel they need discovery to know what a fair settlement would be. And while we'd prefer not to believe so, some attorneys may prefer to continue billing for discovery, motions, and trial rather than settle early, or some may want to be known as the toughest litigator in town regardless of their clients' wishes.

The question we need to ask is: "What serves our clients' interests best?" Most of the time, it's early, economical and fair resolution of their dispute.

THE EDR PROCESS

Parties can engage in EDR before or after a

lawsuit is filed. Both parties need to commit to cooperate in the process ethically and in good faith, and to seek fair resolution based on the merits of the dispute. Without that, there's no reason to engage in the process.

The parties begin by engaging a specially trained EDR neutral. The neutral's goal is to help parties resolve their dispute economically, fairly, and within 30 days of starting the EDR process. Last December, Neema Bell, Cary Cooper, Tom Dillon, Nick Huckaby, Gerry Kowalski and Mark Wagoner along with thirty-five other lawyers from around the country went through the training that I taught.

THE PROCESS PROCEEDS IN FIVE STEPS:

First, the neutral will see if there is enough common ground to work out a prompt resolution without the need for any further steps.

Second, if that doesn't work, the neutral asks the parties to give the neutral their analysis of the case and the limited information and documents, if any, they need from the other side to make an informed decision as to the fair value of a case. This should be only what the parties need - what in EDR is called "sufficient information" - to make that judgment. (This is not the time for traditional discovery that leaves no stone unturned). The neutral will then work with both sides to trim down the requests to only the sufficient information really needed, and will work with the parties to make sure the process is not unduly burdensome. This step should take no longer than five business days.

Third, the parties exchange the documents and information. This requires an ethical commitment from each side that they'll produce the documents and information the other side reasonably requests. If a client doesn't want to produce the

documents or information, the attorney must end the process. If necessary, this step may involve some interviews or short depositions, most likely "off the record." This step should take no longer than seven business days.

Fourth, each party presents its valuation of the case to the neutral and the other side. Each attorney is required to specify numbers and an explanation for: (1) How much does each side expect to spend on fees and expenses to take the case through trial? (2) What would be the best and worst outcome for each side from trial? (3) What is the percentage likelihood of winning on each of the core claims in the suit? (4) If a party prevails on a claim, what are the low, middle and high ranges of damages, as well as the likelihood of winning at each level? This step should take no longer than four business days.

Fifth, the parties try to resolve the dispute. At this stage, with all the information the parties have learned, they may be able to promptly negotiate a settlement. The neutral can aid in this negotiation or, if negotiation isn't successful, conduct a formal mediation. If the parties still can't resolve the dispute, they should try to set an expedited, economical procedure to reach a binding resolution. This step should take no longer than six business days.

If you're interested in learning more, visit the EDR Institute website, <https://edrinate.org/>. The process is explained thoroughly in the EDR Protocols, which you can review on the site. Once travel and gatherings are safe again, the Institute will resume its training program.