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Early Dispute Resolution and Our Business Cases

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When I visited our local ice cream shop recently with my two children, looking for some respite from the heat, I scrolled down the long list of flavors: everything from the classics, like rum raisin and chocolate mint, to new swirls and combinations. Quite a few choices more than the 31 flavors I remember--and that is not to even counting the options in custard, as I recently discovered on another dessert outing!

Similar to ice cream flavors, we also have choices when it comes to mediation. If we choose to mediate, when and where we mediate, with whom we choose to mediate – we have options in every case. As with our ice cream, it sometimes pays to go beyond the familiar, to something that will surprise and even delight us.

In that spirit, one new "flavor" I will recommend to you – really a completely new modality – is early dispute resolution (EDR). In its simplest form, EDR means the very early use of Alternative Dispute Resolution (ADR). In its more structured form, and philosophically, EDR treats mediation not as a discrete event, but as a guided process, starting with the first communications between mediator and counsel, and moving through specific phases.

None of these process steps necessarily occur at, or even require, the traditional

"in-person" mediation, though they would precede and complement it. Take a look at them in summary, and then consider how they might be handled in the context of a specific case.

1. Necessary Conditions/Requirements

For EDR to be successful, counsel for all parties must be on board, willing to engage in some early-information sharing, and then to conduct "principled negotiation," a good-faith discussion based on open-minded and sound assessment of the parties' respective claims. As you can imagine, accomplishing this information exchange smoothly requires a hands-on mediator, using many of the traditional tools of good mediation.

2. Opening Assessment of Case Issues

Working with counsel, the EDR mediator then helps the parties crystallize what the key disputes are as to liability and damages, as well as to begin thinking early about some of the "intangible" and business/industry/decisionmaker interests that need to be addressed.

3. Information Exchange

In helping the parties define the case issues, the EDR neutral will also work with them to identify the most critical questions and "unknowns" necessary for good case evaluation. One of the objections we hear sometimes to mediation is that "it is too early" and that discovery is needed first. EDR does not look to deploy early discovery, but it does look to surface for the benefit of the parties "sufficient information," meaning the answers to questions each side has that will help them make good decisions and engage in principled negotiation.

4. Objective Analysis and Valuation

EDR uses excellent techniques of decision analysis to help both sides better understand their own and their counterpart's risks and importantly, expected case value. Among many fascinating studies on cognitive bias, a famous one from Harvard Business School shows that negotiators with the same set of facts consistently overvalue their own positions as compared to others, with collective estimates of success landing in mathematically impossible ranges. EDR tools like decision trees, and probability analysis, combat these biases.

5. Final Resolution

With the proper case valuation in hand, and intangibles and interests surfaced, the mediator then helps move forward a principled negotiation. That could mean resolution before the formal mediation session, but at a minimum, with an early dispute resolution process in place beforehand, the parties can bypass much of the positional bargaining and start a mediation session already well on the way to a deal.

To understand how EDR might work in a commercial dispute, we will take a case study in which you represent Ready to Grow LLC (RTG), a prospective franchisee for Tasty Ice, Inc. Your client loves the Tasty Ice recipe and process, a combination of shaved ice and ice cream, viewing it as the next big thing and a huge business opportunity. After several in-person meetings at Tasty Ice headquarters, and numerous emails about terms, your client has signed an agreement with Tasty Ice to open one unit. Your client borrows funds to start operations and is even ready to sign an amendment to open an additional four units, for which he tells you he had verbal approval from Tasty Ice.

Unfortunately, after finding what he views as a better business partner, the CEO of Tasty Ice tells your client's owner the deal is off, leaving him high and dry. You get the call.

In a complaint carefully researched and prepared by you, RTG claims breach of contract, seeking $5,000,000 in damages: $500,000 per year, per unit, for two-year terms. You have solid financials, you think your client is likable, and you like the emails as collective evidence of an agreement, including on attaching a specific draft amendment that your client says was supposed to be signed.

How might this case play out? On one hand, the parties could conduct extensive discoveries over an extended discovery period of eight months, and get well into pretrial preparations, with nearly$400,000 in legal fees per side, each owner telling their lawyers they do not see an end in sight. Both owners are angry, each wants their fees, and each could not think less of the other side's case. When mediation is scheduled, either ordered by the court, or because one lawyer or the other reticently mentions the subject of mediation, the mediator has their work cut out for them.

The parties then show up, spending four hours of the day laying out their best-case arguments. Tasty Ice's counsel assures the mediator that it will be adding a counterclaim soon. Both lawyers complain that the other side has not provided enough information, and after all of the rhetoric, start exchanging numbers that are initially millions of dollars apart. A skilled mediator, assuming there is time after this positional bargaining, may start to get to a realistic range near the end of the day. The client in one room then starts rumbling about walking out.

Perhaps this case gets settled late in the day, but not without additional difficulty and not without some residual mistrust by each client, along with the feeling that stones were left unturned to their detriment.

On the other hand, an EDR approach, the work could begin much earlier in the case. Since contracts with mediation requirements are still relatively uncommon, much less ones specifying the use of EDR procedures, as the lawyer in the case, you are familiar with EDR. You call your opposing counsel, suggesting and getting buy-in from him to bring EDR neutral. The incentive for both lawyers, and for their clients, is that they know they could save costs, and they know, if they work through the process in good faith, they will both immediately begin to get information to help better understand the key issues.

Here, your EDR neutral could get your client to supply not only the key deal-confirming email it will rely on, but the text messages and voicemail it saved from Tasty Ice's CEO. On its side, Tasty Ice can supply financials for comparable units, to permit the parties to realistically understand potential lost profit. Importantly, this information can be shared confidentially,

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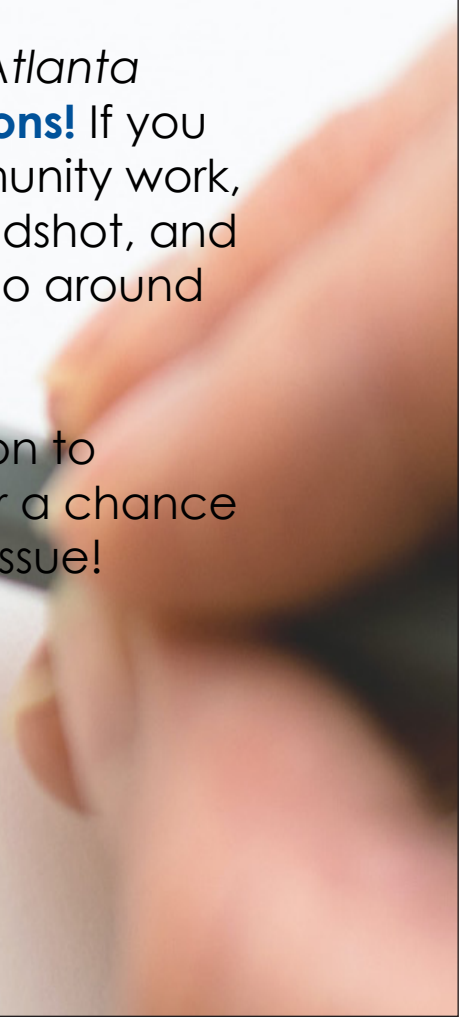

informally, and at a far lower cost and far earlier than through discovery.

Note that this exchange is not a "turn over every stone" discovery, but it is what we refer to in the EDR worlds as what is "sufficient" to address the key questions. With that sufficient information, both your client and Tasty Ice can step back and value the contract claim. Part of a structured expected value calculation in EDR is recognizing that there are a range of outcomes, and that it makes more sense to work not from the home run outcome, but from the most likely reasonable outcome.

The EDR neutral will go further, working with counsel to develop a low end, high end, and middle range of damages, and to assign a percentage likelihood to each. The middle range would essentially be the widest part of our experiential bell curve, what we would expect based on experience would happen at trial or on dispositive motion most of the time.

In the Tasty Ice example, it is possible that was based on a track record of revenue for one nearby location, and not the most optimistic projections, from the hottest summer on record, for all five locations. The EDR neutral will then take both side's values and discount for probability and risk, finally deducting what both sides estimate will be their expected legal cost.

This structured analysis – seeing the risk assessment in print along with calculation of expected value – works a certain magic, giving each party an important grounding in the reality of the situation.

In our case study, after going through this exercise, the EDR neutral shows you and RTG's owner, based on your client's own inputs and estimates, an expected value for the case of anywhere from $550,000 to $750,000, and shows Tasty Ice and its counsel, based on their own inputs and estimate, an expected value of $400,000 to $500,000.

Looking at these ranges, you will notice that a gap still exists; the RTG middle value is higher than the Tasty Ice middle value, but the parties' estimates are far, far closer. There is no longer a $5,000,000 gap – in fact, it is more like $50,000, now also grounded in the parties' own data and own analysis. The stage is set for the mediator to explore intangible interests and ways settlement can add non-monetary benefit to both sides.

Indeed, it turns out that Tasty Ice had some concerns about RTG's experience, and your client has been worried about the effort and expense of getting five locations open all at once. With realistic numbers in view in both rooms, and these interests in mind, a deal is struck: Tasty Ice will credit $400,000 towards franchise buy-in costs for RTG, letting your client open one unit now, and after a full year of profitable financial performance, will consider additional units in good faith. The parties can release their respective claims, dismiss the litigation, and put their money back into the businesses.

Although I wrote the case study, I can tell you from talking to other EDR neutrals that it is very representative; the EDR process is getting results. If you are interested, the EDR Institute (edrinstitute.org), whose protocols I will often suggest and use, has excellent resources available.

Keep in mind they are a starting point for your own thinking and adaptation. You do not need a full-blown EDR agreement to start, or even to use the full EDR process in every case -- just as when you go out for ice cream you do not always need to order the triple-scoop, extra fudge, deluxe banana split. You can try a scoop or two, sampling a new flavor or perhaps trying a different cone.

Perhaps you get your mediator involved early, asking him or her to assist counsel with some informal discovery. Perhaps you draft a stipulation yourself, providing for some early and mutual informal document exchange, and then discuss it with opposing counsel. Or perhaps you simply raise the topic of settlement in a case earlier than you might have otherwise. As with frozen treats, to finish where we started, there are different flavors to suit different palates. Give a new one a try, and you may find it unexpectedly refreshing.