Early Returns on Early Dispute Resolution

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Summary

- While mediation has proven to be successful, the timing of mediation can cost tens or hundreds of thousands of dollars and affect the court's ability to administer justice.
- The EDR process is flexible, and the EDR neutral helps parties tailor the process appropriately to their disputes.

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Courts aim to provide litigants with a just process for the resolution of disputes guided by the rules of civil procedure and evidence. Beginning in the late 1980's, courts also began

to offer litigants a process of resolution before trial through mediation, which has proved to be very successful and has been adopted in state and federal courts nationwide.

Mediation, however, has limitations in terms of offering litigants a path to a broader sense of fairness and justice. One such limitation that is often overlooked is the timing of mediation. Courts routinely ask parties when a case is ripe for mediation, and the reflexive answer is usually at the end of discovery or when the case is ready for trial. That means that after filing of a complaint, cases proceed for usually 6-8 months before mediation is set and means that parties have to invest enormous amounts of time and spend many tens or hundreds of thousands of dollars on interrogatories, document exchange, depositions, and motions. While a very small percentage of cases proceed through trial, an overwhelming percentage of litigation costs are spent on preparing for trial. Too often, the value of a settlement (for both plaintiffs and defendants) can be overwhelmed by the cost of the litigation.

The 6-8 months before mediation also affect the courts' ability to administer justice. Dockets are clogged and available trial dates are pushed farther and farther into the future. Judges and court staffs dedicate many scarce hours and resources to managing the case and resolving discovery, procedural and substantive disputes.

Wouldn't it be great if there were a procedure available for litigants to resolve their disputes early, economically, and fairly? I believe there is. I recently attended a two-day training in early dispute resolution ("EDR") put on by the American Arbitration Association and the Early Dispute Resolution Institute. (The conference was attended by at least one federal judge who happened to be from my home district.) I came away realizing that the process set forth in the Early Dispute Resolution Protocols [1] provides a fair and economical method for resolving many, if not most, disputes at their inception.

In my experience, the primary reason litigants and their counsel hesitate to engage in early settlement discussions is the perception that they lack sufficient knowledge to make an informed judgment about settlement prior to discovery and motion practice. The key underlying premise of the EDR process is that counsel knows enough about a case early in the dispute to recommend reasonable settlement ranges. And in cases where there are

information gaps, EDR allows litigants and counsel to obtain sufficient knowledge of the dispute quickly and economically to confidently value it.

The process requires the cooperation of counsel and can be greatly facilitated by a trained EDR neutral. Importantly, EDR is flexible and the EDR Neutral will help parties tailor the process appropriately to their disputes. It essentially involves three steps:

- Limited document and information exchange, if needed, to provide each counsel with sufficient information to assess the value of his or her case;
- Using formal tools to do a risk assessment of the case based on each each counsel's forecast of future costs, the likelihood of prevailing, and the likely range of damages; and
- Principled bargaining based on risk-assessment factors.

In recent months, I have engaged with parties and counsel as an EDR Neutral in several cases, some through a private engagement, and some on Court referrals. I must say, the early returns have been overwhelmingly positive. The only case that we were unable to get to a successful early resolution was one that turns on a question of law that is presently before the Sixth Circuit (and I'm hopeful we can get to a resolution promptly after the Sixth Circuit issues its decision). Each of the other engagements have yielded successful settlements, have been economical (somewhat surprisingly, the cost has been lower than an average "normal" mediation), and have yielded highly positive feedback from the parties, counsel and courts involved.

In short, I strongly recommend the EDR Institute's training and certification for ADR professionals, and I strongly encourage attorneys, litigants, and judges to learn more about the EDR Protocols and consider their potential for resolving disputes quickly, economically, and fairly.

Endnotes

1. The Early Dispute Resolution Protocols are available at Latest Protocols – EDRinstitute.org.

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