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Features

Early dispute resolution: Practices and principles for early settlement

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Early dispute resolution (EDR) is a form of alternative dispute resolution that, as the name implies, occurs early on in a claim, dispute, or case or even prior to litigation. Unlike a typical facilitative mediation that may span several hours, EDR is a longer process – over the course of several days, a trained neutral walks parties through stages that include case assessment, discovery, and risk analysis with the potential of a complete settlement within 30 days.

EDR fosters cost effectiveness by minimizing expenses associated with formal litigation such as attorney fees, court costs, and expert witness fees. Parties often retain greater control over the outcome of the dispute, making EDR particularly appealing to individuals and businesses seeking to manage their legal expenses efficiently.

There are a few mediation models with an early resolution theme. One process offered by the American Arbitration Association (AAA), early neutral evaluation (ENE),¹ is used in several federal district courts² to identify and clarify issues in disputes and provide a road map for discovery. However, the ENE model is limited in that while settlement is a possibility, it is not the primary goal.

Another EDR process is planned early dispute resolution (PEDR), which came out of the American Bar Association Section of Dispute Resolution.³ The section appointed a task force to promote PEDR as a method for parties to utilize the services of neutral dispute resolution professionals at the earliest practical point.⁴ Unlike ENE, PEDR contemplates settlement as an outcome. Some practitioners think so highly of PEDR that they are encouraging it to be incorporated as a standard term in contract clauses – if a dispute arises, PEDR is automatically one of the processes used to try to arrive at a resolution.

This article focuses on EDR as provided for under the auspices of the EDR Institute and as outlined in its protocols.⁵ The author attended a two-day EDR training session last year co-sponsored by the AAA and the EDR Institute. Framed as a way to analyze risk, value cases, and settle early, attendees learned that EDR process has four steps: initial dispute assessment; information and document exchange; risk analysis; and principled resolution.

EDR Institute protocols assert that, as in facilitative mediation, the process works best when parties retain a neutral trained in its protocols.⁶ Other key elements of EDR include a signed agreement that allows for permissive withdrawal of parties at any point; permissive and mandatory withdrawal guidelines for the neutral; and ethical cornerstones of the process, including confidentiality.⁷

INITIAL DISPUTE ASSESSMENT

Initial dispute assessment requires the neutral to assist the parties in clarifying their core claims, defenses, and issues. To keep the process on a 30-day track, it is suggested that the initial dispute assessment occur within six days of the agreement to participate in EDR. The process involves each party gathering all necessary information on the case internally, researching the basic applicable legal principles, interviewing witnesses, and determining which information and documents are needed from the other side to analyze the case. This stage lays the foundation for the ensuing information and document exchange.

INFORMATION AND DOCUMENT EXCHANGE

Michigan litigators rely heavily on protracted discovery, which leads to filing numerous discovery motions. Because of this, some hesitate to try EDR because it is specifically timed to take place prior to extensive discovery. This reluctance to relinquish extensive discovery is not new. Although it may be counterintuitive, EDR success often rests on the fact that many claims are ripe for resolution without engaging in extensive discovery.

EDR is based on a model that capitalizes on limited litigation expenses at the early stage of the dispute. The goal of information and document exchange in EDR is not the broad swath of discovery allowed in Michigan jurisprudence; it requires the neutral to help the parties decide what constitutes sufficient information to make an informed valuation of the case.⁸ In determining sufficient information, the neutral will ask counsel to take a narrowly tailored focus that considers both the scope and expense of litigation to move the dispute to resolution in the 30-day window.

The EDR Institute offers a guideline for informal information exchange with the following:

There are different ways to obtain information, and the process doesn't require that one particular method be used. There are four basic methods: (1) simply ask the other side for the information and documents, and their counsel responds; (2) along with requesting the information and documents, ask for a response by affidavit from a corporate representative who has inquired as to the answers and searched for the documents; (3) interview the other party's corporate representative or person(s) with knowledge; and (4) take limited depositions.⁹

For example, rather than having each party's expert write a full report and be subject to a lengthy deposition, EDR could shorten the process by compelling one attorney to meet or talk with opposing counsel and ask for the general nature of their expert's opinion. Once that question is answered, attorneys might hold another session to discuss verifying the expert's summary opinion by affidavit or otherwise. The neutral's role is to continue holding or encouraging mini-sessions to keep them on track to reach a facilitated settlement.

RISK ANALYSIS

One of most powerful EDR tools is using formulae to view dispute resolution through the lens of risk analysis. For example, mediators have long used the bracketing method to move parties in bargaining; the simplest form of bracketing "follows a mathematical formula, with each side moving by the same percentage of its previous number, or by the same absolute number of dollars."¹⁰ In his book "Formulas for Calculating Damages". Mark S. Guralnick suggests a more nuanced approach to using formulae to resolve conflict, writing that a formulaic assessment of the case can help reach presuit or early-suit settlement by asking the following questions:

- the cost of litigation substantially erode the value of the case?
- the evidence necessary to prove a particular formula admissible in this particular court or should we apply our formulas outside of court as a negotiating device only?
- long will litigation take? Will the time value of money reduce the ultimate benefit to be achieved?¹¹

EDR risk analysis contemplates reviewing factors such as collectability/risk tolerance; reasonable settlement range(s); and expected value of the case. The neutral utilizes software, decision trees, and other tools to project settlement outcomes based on factors the parties have identified as relevant in the dispute. There is a transformative power when parties and counsel see a visual presentation of settlement ranges and where those ranges may differ or intersect based on select variables. A risk analysis presentation makes a stronger case for bargaining than any fixed or formulaic approach.

FINAL RESOLUTION

EDR protocols provide that final dispute resolution be based on a settlement that reflects the informed ranges given each parties' risk tolerance. While the process has largely played out in separate sessions at this point, it is now up to the neutral to decide if a joint conference is the best way to reach a conclusion. One strength of this process lies in the ability to instruct the parties about best practices to incorporate EDR clauses into the settlement agreement, minimizing the need to constantly market the process to new or experienced disputants.

MICHIGAN'S LANDSCAPE

Michigan's domestic relations bar has used a form of early dispute resolution for years. Collaborative law, codified in Michigan as the Uniform Collaborative Law Act,¹² follows a team-like approach to resolving domestic relations disputes (even divorces) where attorneys, tax professionals, therapists, and realtors collaborate to craft settlement agreements prior to litigation.

However, EDR differs from collaborative law in that “[t]he early dispute resolution process is not as client driven as the collaborative law process. The process is a blend of cooperation with advocacy. Positional bargaining is not uncommon in the process, whereas interest-based negotiations are the distinctive characteristic of the collaborative process.”¹³

As reflected in state court civil filings, EDR may be gaining popularity as a cost- and time-effective means to resolve disputes. In their recent book, “What is Happening to State Trial Court Civil Filings?,” authors Alan Carlson and John Greacen document a decline in trial court civil filings.¹⁴ While not drawing a conclusion, Carlson and Greacen posit that the decline should be recognized when it impacts the legal profession.

In any sector of our economy, a decline in the public’s interest in its service or product is a matter for concern. The filings decline we document clearly marks a declining importance of civil lawsuits in the economic life of our country. If it denotes that our citizens have found better, cheaper ways to resolve civil disputes, we should celebrate. If it denotes declining public trust and confidence in our system of justice, the conclusions are much darker and foreboding.¹⁵

The EDR Institute lists four Michigan licensed attorneys who have completed their training. Dennis M. Barnes of Barnes ADR has written about his early experiences with the process:

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.¹⁶

Hon. Stephen J. Murphy III of the U.S. District Court for the Eastern District of Michigan has utilized EDR neutrals in his cases and has a practice guideline that strongly encourages parties to participate in alternative dispute resolution.¹⁷ After consulting with the parties, this court may refer cases to a private mediator.

RESOURCES

Here are more resources on EDR:

- The EDR Institute provides its protocols, training, and resources at edrinate.org.
- ABA Planned Early Dispute Resolution at www.americanbar.org/groups/dispute_resolution/resources/planned_early_dispute_resolution_pedr.
- ABA Guide to Early Dispute Resolution at www.americanbar.org/content/dam/aba/administrative/dispute_resolution/leadership/lira-book-pedr-guide.pdf.
- Ellie K. Vilendrer, “Introducing EDR: The Future of ADR” at www.vilendrerlaw.com/wp-content/uploads/2023/09/Introducing-EDR_-The-Future-of-ADR_Edited-1.pdf [<https://perma.cc/EV6Q-T6U8>].

- Dennis Barnes, “Early Returns on Early Dispute Resolution” at www.americanbar.org/groups/dispute_resolution/publications/JustResolutions/june-2023/early-returns-early-dispute-resolution/.
- Lawrence R. Maxwell Jr., “First Cousins: Collaborative Law and Early Dispute Resolution” at www.americanbar.org/content/dam/aba/publications/just-resolutions/july-2020/maxwell-first-cousins-collaborative-law-and-early-dispute-resolution.pdf.
- Richard Erhard, “An Incremental Paradigm Shift in Special Education Dispute Resolution: Early Dispute Resolution” at www.americanbar.org/groups/dispute_resolution/publications/JustResolutions/june-2023/an-incremental-paradigm-shift.
- Felicia Harris Hoss, “A Former Litigator’s Perspective on Early Mediations” at www.americanbar.org/groups/dispute_resolution/publications/JustResolutions/june-2023/former-litigators-perspective-early-mediations/.
- Ellie Vilendrer and Mary Cullen, “Message from the Committee Chairs: Early Dispute Resolution Committee of the ABA Section of Dispute Resolution” at www.americanbar.org/groups/dispute_resolution/publications/JustResolutions/june-2023/message-from-the-committee-chairs/.

ENDNOTES

1. American Arbitration Association, *Early Neutral Evaluation: Getting An Expert’s Assessment* [<https://perma.cc/TN3R-ZQJQ>] (all websites accessed March 24, 2024).
2. See, e.g., *Early Neutral Evaluation (ENE)*, United States District Court Northern District of California [<https://perma.cc/7HMV-444F>].
3. American Bar Association, *Planned Early Dispute Resolution (PEDR)* https://www.americanbar.org/groups/dispute_resolution/resources/planned_early_dispute_resolution_pedr/.
4. *Id.*
5. The Early Dispute Resolution Institute, *EDR Protocols* (revised November 20, 2023) [<https://perma.cc/V6VS-M8YC>].
6. *Id.*
7. *Id.*
8. *Id.*
9. Silverman, Hawash, & Jordan, *Early Dispute Resolution: A Proven Method To Fairly & Ethically Resolve Disputes In 30 Days* (The EDR Institute, 2021) <https://houstonmediation.com/wp-content/uploads/2021/08/Silverman-Hawash-Early-Dispute-Resolution-CLE.pdf>.
10. Penn & Goodman eds, *Resolving Insurance Claim Disputes before Trial* (Chicago: American Bar Association, 2018) ch 2, pp 45-46.
11. Guralnick, *Formulas For Calculating Damages*, 2nd ed (Chicago: ABA Publishing, 2019), ch 1, p 2.
12. MCL 691.1332.
13. Maxwell, Jr., *First Cousins: Collaborative Law and Early Dispute Resolution*, American Bar Association, Just Resolutions Newsletter (July 2020) <https://www.americanbar.org/content/dam/aba/publications/just-resolutions/july-2020/maxwell-first-cousins-collaborative-law-and-early-dispute-resolution.pdf>.

14. Carlson & Greacen, *What Is Happening to State Trial Court Civil Filings?* (Chicago: American Bar Association, 2024).

15. *Id.* at ch 1, p 2.

16. Barnes, *Early Returns on Early Dispute Resolution*, American Bar Association, Just Resolutions (June 28, 2023)

https://www.americanbar.org/groups/dispute_resolution/publications/JustResolutions/june-2023/early-returns-early-dispute-resolution/.

17. *ADR/Mediation*, United States District Court for the Eastern District of Michigan [<https://perma.cc/3H59-UBNW>].



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