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An Introduction to Early Dispute Resolution:

A Proven Method for Resolving Disputes in 30-60 Days

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I. OVERVIEW

In traditional litigation, settlement typically comes after lawyers engage in months or years of adversarial posturing and discovery that costs an ever-increasing amount of time and money. Conversely, **Early Dispute Resolution** or **EDR** is a form of dynamic mediation that seeks to short-circuit the traditional litigation model. Using the services of a trained neutral/mediator, EDR provides parties with methods to resolve almost all disputes within 30-60 days at a fraction of the cost, without the need for extensive in-person discovery or a costly jury trial. Further, if done correctly, the parties can expect to reach roughly the same resolution they would have reached after protracted discovery and motion practice.

In Harris County, Texas, a vast majority of district court and county court cases are mediated before trial. In fact, the new form docket control order approved by the Civil Division of the Harris County District Courts that went live on April 20, 2020, assumes mediation as a prerequisite to trial in all cases.[1]

Under the existing traditional litigation and mediation model, a mediator is typically not chosen, nor a mediation date set, until many months into the litigation process. Often, mediation is not held until the eve of trial. The parties then appear for a one-day mediation, where real negotiations may not begin in earnest until the end of the day. Many cases do settle at mediation, but at a real cost to the litigants. The parties already have incurred substantial expenses in discovery and preparing for a trial that statistically is unlikely to occur. As every trial lawyer knows, even without mediation, nearly all cases ultimately settle before trial.

One way to avoid the massive cost of litigation is to mediate right at the beginning of a case, rather than a few days or weeks before a trial setting. To be sure, mediating early in a case poses particular challenges. Often, a lawsuit is filed because the parties' attempts at a pre-suit settlement have failed. At that point, the parties may be locked into contrasting views of the dispute and in no mood to rehash settlement talks. Or, even if one or both parties want to restart discussions, they don't want to appear too eager to compromise out of a fear of projecting weakness or a lack of confidence. Another early roadblock is that once a suit is filed, both sides may feel they need significant discovery to know what a fair settlement would be. And while we'd prefer not to believe this is ever happens, some lawyers may prefer to continue billing for discovery, motions, and trial rather than settle early.

The fundamental question all lawyers need to ask themselves is this: "What serves my clients' interests best?" Most of the time, what serves clients best is an early, economical, and fair resolution of their dispute. EDR provides a structured process to do just that.

This paper introduces the techniques and strategies for EDR. This paper provides an overview of the EDR Practice Protocols - provisions that have been developed by the

[1] According to the Harris County Civil District Courts website, a new form of Docket Control Order should be used "in almost all Civil District Courts whenever a new DCO is issued in a case" *see*, https://www.justex.net/Article.aspx?ArticleID=1271

non-profit EDR Institute to help parties, lawyers and neutrals navigate the thorny ethical and practical issues that lurk within the EDR process.[2]

Following the introduction of the topic in Section I, Section II presents examples of how other dispute resolution processes, especially mediation, have rapidly changed the process of dispute resolution, setting the stage for the next major advance. Section III examines tools from established EDR models that can be tailored to business disputes. Section IV discusses a rigorous four-step, 30-day process for resolution of disputes: (i) Initial Dispute Assessment, (ii) Information and Document Exchange with the goal of obtaining Sufficient Knowledge, (iii) conducting a Risk-Analysis Valuation, and (iv) achieving Final Resolution. The appendices include a sample EDR contract clause and EDR agreement, as well as the latest version of the **EDR Practice Protocols**, or **Protocols,** a set of guidelines and procedures developed to assist parties and neutrals implement the EDR process.

A. The Tortoise and the Hare Revisited

In Aesop's fable of the tortoise and the hare, the hare runs fast and then, overconfident, takes a nap. The tortoise, plodding along slowly and steadily, wins the race – leading to the lesson that "slow and steady" is always the better approach. That lesson, however, doesn't work in today's economy—business now wants to be the hare (no snoozing, though), and the hare always wins.

Most litigators, on the other hand, are still fine being the tortoise. When clients come to us with a dispute, we tell them that it will take at least a year or two to get through trial, then another year or so if there is an appeal, and that the whole thing will likely cost hundreds of thousands of dollars. We then offer a sliver of hope by adding that after months of expensive discovery and dispositive motions, the case may be ripe for mediation.[3]

And, at least so far, *many clients accept that process without blinking an eye*. That won't last. Soon enough, consistent with their everyday business reality, clients will tell us that they don't need a year of discovery and motions, and that they want disputes resolved quickly, cost-effectively, and fairly. They won't tolerate litigation tortoises.

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[2] The EDR Protocols were developed by the EDR Institute and its founder, Peter Silverman, with generous assistance from arbitrator-attorney, Anne Jordan. The EDR Institute is a non-profit corporation organized to promote the fair, effective and ethical use of early dispute resolution principles and to educate lawyers, judges, neutrals, businesses and the general public about EDR's benefits.

[3] In 2010, a group of civil justice reform groups attempted to quantify the perceived wastefulness of modern discovery by performing a survey of litigation costs of Fortune 200 companies, which they submitted to a judicial conference on civil litigation. After noting a marked increase in litigation costs between 2000 and 2008, primarily due to burgeoning e-discovery, the report noted that of the 4,980,441 pages of documents produced on average in major cases that went to trial in 2008 (with "major cases" being defined as those with more than $250,000 in litigation costs), only 4,772 pages ended up as trial exhibits, or 0.10% of the pages produced. The report concluded that the produced-to-used ratio of 1,044 to 1 suggested that "document discovery may be an inefficient resource for the finder of fact." *See* Lawyers for Civil Justice, et al., *Litigation Cost Survey of Major Companies*, Duke Law School (May 2010).

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