

(Really) Early Dispute Resolution

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Georgia Pacific estimates that it saved over \$30 million from the first ten years of its early dispute resolution (“EDR”) program. GE estimated that its EDR program cut its litigation costs almost in half. EDR is something every company – not just Fortune 100 corporations -- should be considering.

What is EDR?

At the first sign of a dispute, each side:

- agrees to try to resolve the dispute voluntarily, cooperatively, quickly, and cost-effectively (or to follow an EDR clause in their contract that requires the process);
- internally gathers and analyzes the key facts and relevant law;
- exchanges the information (if any) the other side needs to make a reasoned judgment on the merits of the dispute; and
- negotiates or mediates to resolution.

EDR reduces the costs of litigation, and frees management’s and employees’ time from the ongoing distraction of lawsuits.

The aim should be to resolve all disputes in 30, but no longer than 90, days. Even with a complex dispute, this is doable. Companies and trial counsel regularly put in that intensive level of work on a complex matter when they need to obtain

a preliminary injunction. There’s no reason they can’t do the same to resolve disputes early.

What isn’t EDR?

- EDR isn’t mediation. Mediation is one tool that may help resolve disputes early as part of EDR. But EDR is much more -- a rigorous, disciplined system that focusses internal management and outside counsel on resolving disputes early and cost-effectively.
- EDR isn’t holding up a neon sign saying *I’m a push-over*. If you can resolve the dispute early and fairly, you do so. If not, all options are open.
- EDR isn’t a guarantee that you’ll resolve every dispute early. For the process to work, you need the other side to act in good faith and be represented by ethical (not looking to run up fees), skilled counsel. Even then, there may be good reasons (e.g., precedent, timing, principle, or commercial reasons) why both parties can’t agree on terms. Business reasons can trump speed and cost-efficiency. EDR puts you in the position where, early in the process before significant litigation expense, you can make a reasoned judgment on what’s best for your company.

How do you implement it?

1. Start by proactively minimizing suits. Look at your lawsuits the past five years. Are there patterns in what causes them? Change incentives and systems to discourage activities that lead to disputes.
2. Adopt internal policies so that everyone in the organization knows that the goal is to resolve disputes early and cost-effectively by rapidly gathering all the key facts (especially the potentially harmful ones) and analyzing what would be fair terms to resolve a dispute. This includes a hard look at issues like timing, what sort of leverage each side has, and whether the case has commercial ramifications or the potential to set a good or bad precedent.
3. Involve your outside counsel in planning the process. Have them committed to mastering the rapid gathering of facts; analyzing the dispute; figuring out what information, if any, you need to make a reasoned judgment on the case; and negotiating or mediating toward resolution. Consider a role for settlement counsel. Consider using settlement counsel.
4. If you don't resolve the dispute, you may want to structure arbitration or litigation to try the case quickly or cost-effectively. Or you may want to do that with just one key issue, and then try to mediate or negotiate resolution. Or you may choose aggressive litigation. The benefit is being given the opportunity to make a reasoned decision based on how the EDR negotiations or mediation proceeded, and on the information learned in the process.
5. Be smart with the use of neutrals skilled in EDR. It may be worthwhile to bring on a neutral at the beginning of the thirty-day process to keep both parties on track in moving the process along quickly and cost-effectively.
6. State on your web site that you're committed to attempting early dispute resolution in good faith. That way, when you propose it, the other side will know that it's part of your culture and not a signal that you perceive weakness on your side of the dispute.
7. Think through how you may want to modify your dispute resolution clause to implement EDR.

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Mediation was a new idea 35 years ago; it's now commonplace. While some companies like Georgia Pacific and GE have implemented comprehensive EDR for a number of years, the disciplined, rigorous use of the process is new. My sense is that it will be rapidly adopted by companies nationwide and soon will become the new normal in dispute resolution.

Peter Silverman has written and spoken on EDR for a number of years. He has co-authored a detailed paper on the process that he'll be presenting at the IFA Legal Symposium in May. If you'd like a copy of the paper, e-mail him at psilverman@slk-law.com.

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