

4-step Early Dispute Resolution in 30 Days or Less

By Peter Silverman

Companies today aspire to transact business, achieve efficiencies, and improve at the speed of light. Why haven't companies demanded the same from litigators, who remain content with timelines of 12 to 24 months and costs running easily into the hundreds of thousands? I'm not sure why so far they haven't done so, but I am sure they'll soon be demanding it.

By applying early dispute resolution (EDR) processes, parties should be able to resolve disputes fairly and cost-effectively in 30 days from the inception of the dispute. With skilled, trained lawyers representing them, they should also be able to reach roughly the same resolution that they would have reached after months of pleadings, discovery, and motions.

The process should work because at the inception of most disputes, skilled lawyers usually have a reasonably-confident view of how the dispute will likely be resolved. A recent survey showed that lawyers' confidence level in predicting the outcome of a dispute grew only a few percentage points from the time they initially learned the facts and issues in the dispute to the time after discovery and motions have been completed.¹ This means that, based on objective valuations of a dispute, good lawyers should be able to negotiate as fair a resolution at the start of a dispute as they would negotiate after their clients have spent hundreds of thousands of dollars on discovery and motions.

There are early dispute resolution models out there – Guided Choice, Planned Early Dispute Resolution, pre-dispute mediation – but none have caught on in any significant manner, and mediation has become just another step in the long slog of litigation or arbitration.

What is needed is a comprehensive model, with common terms, agreed-to ethical requirements, and sequenced steps with clear procedures. For the process to work, these are the necessary conditions (the Necessary Conditions):

Each party to the dispute needs to:

- (1) be reasonable and willing to engage in the process in good faith;
- (2) have skilled, ethical counsel; and
- (3) have “Sufficient Knowledge,” which is enough information to:
 - (a) understand the merits of each side's position and leverage, and
 - (b) make an informed judgment as to the value of each side's case.

This article presents a 4-step model for resolving disputes in 30 days when the Necessary Conditions are present. This is a short version of a 27-page paper, which can be found at <https://bit.ly/2QBIZMe>.

The notion of accomplishing all the steps in 30 days appears unrealistic to many advocates and neutrals. I don't buy it. In preliminary injunction proceedings, trial lawyers regularly have less than 30 days to prepare pleadings; engage in motion practice; serve and respond to document requests, interrogatories, and depositions; prepare witnesses and exhibits; and try their case at the hearing. A 30-day EDR process is much less demanding. The difference is that the EDR process is *voluntary*. But if early, economical, and fair resolution is important to the clients, lawyers should have no problem with the 30-day timetable.

The four steps and the calendar

The four steps are (i) early case assessment, (ii) document and information exchange, (iii) case valuation, and (iv) negotiation or mediation. Preferably, the parties will hire an EDR neutral to facilitate each step of the process.

The basic steps, and the business days allowed to accomplish them, are:

1. In no more than six business days, perform an early case assessment.
2. In no more than the following seven business days, the parties exchange documents and information in a process with safeguards.
3. In no more than the following three business days, each party values its case on mutually-agreed objective factors.
4. In no more than the following six business days, the parties negotiate or mediate the dispute to resolution.

The use of experts can be integrated into the four steps, but it likely requires extending the timelines.

Here's a chart setting out the steps and the number of days:

Process	Number of business days
Early case assessment	6
Document and information exchange	7
Case valuation	3
Negotiation or mediation	6

The four steps explained

The first step – early case assessment -- requires the process common to early case assessments generally: gather the key facts and do the initial legal research, and analysis. There are two differences required for the EDR process to be successful. First, each party needs to understand the full picture of its case – including negative facts. There is no time for internal defensiveness, spin, or covering up. Second, each party needs to know its case well enough to decide whether it needs further information or documents to obtain Sufficient Knowledge.

The next step – document and information exchange – allows parties to ask the other side for documents, information or witness interviews or depositions. The requests, though, must be limited to only the documents and information that are needed for Sufficient Knowledge. The key idea here is that most disputes boil down to a narrow set of facts and documents that control the case and that allow for an objective valuation of the case. Good lawyers should be able to ask for targeted information and documents that can be exchanged quickly without undue burden.

The third step is valuation. The key here is that parties need to analyze the same objective factors in the case based on hard numbers and percentages. The factors are the likely attorneys' fees each side will incur; each side's WATNA and BATNA; the likelihood of prevailing on each material claim; and the likely range of damages.² Requiring specificity in the analysis does two things. First, it forces lawyers to analyze risk as precisely as the situation allows and then to state their conclusions clearly. Second, it allows each party to see exactly where it differs from the other side, and thus shows where negotiation is needed and would be most fruitful.

The fourth step is negotiation or mediation. If the parties selected an EDR neutral at the beginning of the process, they could have already set aside one or more of these last six days of the process for the negotiation or mediation.

Ethical issues

EDR raises a number of ethical issues for practitioners. While this EDR process is adversarial in the sense that each side seeks to obtain its best result, it's also a cooperative process where both sides agree to comply with specified ethical guidelines so as to obtain the benefits of a speedy, economical, and fair resolution. Lawyers need to fully understand these issues and explain them clearly to clients to obtain written consent to participate in the process.

The Early Dispute Resolution Institute has published for public comment a 13-page draft set of Early Dispute Resolution Protocols to address the ethical issues in the practice. The Protocols may be accessed at www.ambar.org/edrprotocols. The Institute recommends that the parties agree in writing to proceed pursuant to the Protocols to establish best practices and provide safeguards that both parties are proceeding with the same ethical commitments.

Some of the key issues that the Protocols address are:

- informed consent;
- proceeding cooperatively and in good faith;
- requesting only the information and documents that are needed from the other side for Sufficient Knowledge;

- producing good faith, reasonably comprehensive responses to properly-tailored requests for information or documents;
- the expectations for fair negotiation; and
- an attorney's obligation to terminate the process if the client is not following the requirement of the Protocols.

Next steps

This EDR process isn't intended to be used to resolve every dispute. Many disputes can be resolved quicker and cheaper through interest-based negotiation or early mediation. It is aimed instead at disputes where interest-based negotiation or early mediation won't work because of the parties or the nature of the dispute.

For the process to be accepted, counsel and neutrals will need to be trained in the process and Protocols. The process requires trust, and the Protocols provide the safeguards that establish the meaningful level of trust needed for the process to succeed. The Early Dispute Resolution Institute is working on developing training in the process, and is considering some aspect of certification.

Education in the process also needs to be provided to general counsel and business owners. My sense is that if companies³ understand that there is a process that will allow them to resolve difficult disputes quickly, economically, and fairly, they'll soon demand that their lawyers pursue it.

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¹ The survey is summarized in the paper, *Early Dispute Resolution: Resolving Disputes Within Thirty Days*, Ohio State Supreme Court Symposium: Integrating Contemporary Dispute Resolution Procedures into Today's Courts (March 13, 2018). The paper is available at <https://bit.ly/2QBIZMe>.

² Effective attorneys in the EDR process (and generally) should be skilled at objective risk analysis. See, e.g., Michaela Keet, *Informed Decision-Making in Judicial Mediation and the Assessment of Litigation Risk*, 33 Ohio State Journal of Dispute Resolution 65 (2018).

³ I have referred to companies in this article because I think that is the likeliest area in which the process would be adopted. There is a desperate need for an EDR process for individuals. Litigation and arbitration are simply too expensive for the vast majority of people, and they should have the process available to them that are available to businesses for quick, economical, fair resolution of disputes.