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EARLY DISPUTE RESOLUTION PROCESSES

John Lande

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This is the second part of a three-part series on use of litigation interest and risk assessment (LIRA), growing out of a program at CPR's annual meeting in February 2020.

The first part of this series describes how to do LIRAs and includes results from a survey of participants in our program. This part describes various early dispute resolution processes and highlights presentations by Duncan MacKay, Deputy General Counsel & Chief Compliance Officer of Eversource Energy, and Conna Weiner, a mediator and arbitrator at JAMS and CPR, who described their experiences and perspectives. Doing good LIRAs is an important part of these processes.

The final part provides a framework of dispute prevention and early dispute resolution techniques.

Planned Early Dispute Resolution

Several years ago, Peter Benner and I conducted a study of what we called "planned early dispute resolution" (PEDR). CPR's *Alternatives* magazine published two short articles based on our study: *How Businesses Use Planned Early Dispute Resolution* and *How Your Company Can Develop a Planned Early Dispute Resolution System*.

We interviewed inside counsel at fourteen companies that used PEDR systems. There isn't a uniform PEDR model, but we could make some generalizations based on our interviews. Early case assessment (ECA) is the heart of the process. Good PEDR systems include systematic use of dispute prevention and resolution processes, dispute prevention and resolution contract clauses, and practice materials and training for lawyers and business people. Ideally, PEDR systems have at least one individual who is responsible for overseeing the system.

The ABA Section of Dispute Resolution conducted a PEDR Project, which included a user guide for developing PEDR systems. CPR produced a valuable ECA Toolkit.

Duncan MacKay described the robust PEDR system at Eversource Energy. Eversource is a signatory of the original CPR pledge (to explore using ADR when in disputes with other parties that have signed the pledge) and the CPR 21st Century Corporate ADR Pledge© (to "manage and resolve disputes through negotiation, mediation, and other ADR processes when appropriate, with a view to establishing and practicing global, sustainable dispute management and resolution processes").

Its inside lawyers participate in regular business, risk, and operations meetings, and provide day-to-day advice on how to minimize legal, business and strategic risk, including the risk of disputes.

Many of its commercial contracts include stepped ADR provisions that provide a natural transition from informal negotiation to binding arbitration. Most disputes get resolved well short of binding arbitration, and many before formal mediation.

Eversource's Outside Counsel Guidelines place expectations on its law firms to sign or recognize the principles contained in the CPR Law Firm Policy Statement on Alternatives to Litigation©. Eversource requires firms to ensure that the lawyers assigned to work on their cases are knowledgeable about ADR and recognize that ADR is more appropriate than traditional litigation in some cases.

The Guidelines include its Case Management Plan & Budget process, which is a template for performing ECAs in larger, more complex, or more sensitive disputes. The ECA process requires inside and outside counsel to evaluate potential liability, exposure, impact on the business, adverse publicity, regulatory or political action, and early resolution opportunities. The Case Management Plan is a "living document" that gets updated periodically. There is a rebuttable presumption is that cases should proceed promptly to formal mediation, generally within 90-120 days of filing.

Settlement Counsel and Lawyering with Planned Early Negotiation Generally

When lawyers are responsible for both litigation and negotiation, the combination of goals can create confusion for the lawyers and their counterparts. Lawyers know that most cases eventually settle, but there is a widespread fear that merely suggesting negotiation or mediation would signal weakness to the other side.

To work around this dilemma, some parties use separate counsel to pursue settlement and litigation. Sometimes inside counsel perform the role of settlement counsel while retaining outside counsel to litigate. By having separate settlement and litigation counsel, parties can credibly pursue settlement while still signaling a readiness to fight vigorously if unsatisfied

with the counterparts' offers. This is analogous to the political slogan of "peace through strength."

Settlement counsel operate largely independent of their clients' litigation counsel. Settlement counsel tell the other side, in effect, that "You can negotiate a reasonable deal with me – or face tough litigation counsel." Parties may set a deadline for negotiation to focus everyone's attention on negotiation at an early stage. If parties don't settle initially, parties may re-engage settlement counsel to negotiate again later in the case.

Settlement counsel's goal is to reach reasonable settlements, so they typically are attuned to each side's intangible costs of continuing litigation. When parties value their intangible costs, they are willing to reduce their monetary expectations, which can lead to agreement.

Even when parties hire lawyers who may litigate and negotiate in the same case, there are ways they can engage in early negotiation as described in my book, Lawyering with Planned Early Negotiation.

Pre-Suit Mediation

Conna Weiner is a proponent of pre-suit mediation. She writes, "Simply put, litigation can exacerbate conflict, take on a life of its own and make it that much harder to get back to the table to come up with a customized, sensible business solution within the parties' control." (Michael Moffitt's excellent article, *Pleadings in the Age of Settlement*, elaborates how the mere act of filing pleadings is likely to aggravate conflict.)

She noted that one of the benefits of pre-suit mediation is reducing the risk of stimulating a series of counter-claims. Moreover, filing suit often ends the business discussion, shifting the conversation from business people to litigators. Litigation is backward-looking, where parties dig up evidence of grievances, instead of forward-looking, where parties figure out how they can do business together profitably. Consideration of settlement is put on hold as the parties gear up for litigation. The mere filing of a lawsuit may cause major business disruption, including initiating document holds and preparing for discovery.

In the CPR survey described in the first part of this series, almost half of the lawyers said that they almost never mediate before filing of a suit or arbitration. About a third said that they engage in pre-suit mediation in a substantial proportion of their cases but less than half of the cases, and about a fifth said that they do so in at least half of their cases.

Of course, the appropriateness of pre-suit mediation depends on many factors including the type of case. For example, it may generally be more appropriate in commercial cases than

some categories of tort cases.

Conna recommends that parties (1) consider where they are on the "future business relationship continuum," (2) switch from a litigation mindset to a pre-litigation business mindset, (3) hire proactive mediators with strong transactional backgrounds and the ability to evaluate potential litigation, (4) prepare carefully before mediation, and (5) use procedures focused on promoting a deal rather than merely settling potential litigation.

Planned Early Two-Stage (and Multi-Stage) Mediation

In many practice settings, there is a strong norm of trying to settle in one mediation session if possible. In cases following the one-session norm, people sometimes endure marathon mediations lasting late into the evening. However, parties and lawyers usually get new information and perspectives during mediation, and they may need time to digest it and possibly consult with the ultimate decision-makers.

When parties don't have enough information or aren't ready to make confident decisions, they may feel pressured to settle their cases. Even when mediators avoid intentionally exerting pressure, parties can feel pressed to settle if everyone assumes that mediation normally should involve only one session. This can cause "buyer's remorse," leading parties to renege on agreements, perform them inadequately, file suit to rescind them, or even sue neutrals or lawyers.

These problems generally can be avoided if everyone plans for two possible mediation sessions. People now sometimes have **unplanned** two-session mediations, where they unsuccessfully push to settle in one session and mediate again later. Although this may eventually produce good resolutions, it does not provide the benefits of a **planned** early two-session mediation process of being better organized and more humane.

In a two-stage process, the first session should occur soon after the parties have done some basic fact-finding and legal research.

In the first session, everyone could plan "homework" to be completed before the second session. Mediators can identify critical uncertainties and potentially unrealistic assumptions, and then encourage people to check them out. This should reduce problems from mediators providing their own assessments and pressing parties to settle.

In the first session, the parties may be ready to settle. If so, a second mediation session would not be needed. If parties plan for the possibility of a second session, they are less likely to feel pressured to settle.

To maximize the benefits of two-stage mediation, participants need to change their expectations about how mediation would work. Mediators can post information on their websites explaining the process and provide materials to help people plan for particular mediations.

Many savvy parties would be happy to take a little more time to get a more deliberate, predictable, and possibly more efficient process. Some mediators would really enjoy managing a two-stage process and might be in demand if they develop a reputation for doing them especially well.

Two-stage mediation is described in more detail in this post and the LIRA book.

In the wake of the coronavirus crisis, not only might two-stage become normalized, but so might planned early **multi**-stage mediation. With video, lawyers and clients would not only save travel time going to mediations, but they could avoid the dead-time waiting while mediators caucus with the other side. It should be possible to schedule several steps in a mediation that might unfold over a specified period, such as a week.

This might also address the recurring problem of lack of engagement of actual decision-makers in large organizations. People with authority to settle, such as high-level executives, usually aren't willing to invest the time to travel to a mediation and endure a lengthy process in which their input isn't needed for most of the time. As parties and lawyers become used to video communications, ultimate decision-makers could be engaged by video for the limited, critical times when their input is necessary.

The final part of this series relates LIRA, early dispute resolution processes, and dispute prevention in a coherent framework.

DISPUTE RESOLUTION PRACTICE DISPUTE SYSTEM DESIGN MEDIATION
PLANNED EARLY DISPUTE RESOLUTION SKILLS AND TECHNIQUES