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Alternative Dispute Resolution





Early Dispute Resolution

No Jury, No Trial, No Problem:

A New Form of Dynamic Mediation Is Helping to Unclog Harris County's Civil Dockets

By **MICHAEL A. HAWASH** and **JUDGE JIM F. KOVACH**

With the backlog of cases growing over COVID-19, Judge Jim Kovach worked with mediator Michael Hawash to pilot a new dispute resolution process, known as Early Dispute Resolution (“EDR”), to resolve cases that may otherwise be languishing on a stalled, pandemic trial docket. The success of the program indicates other courts in Harris County and elsewhere may wish to do the same.

THE GROWING BACKLOG OF CASES

Traditional litigation has ground to a halt with the COVID-19 pandemic. In-person discovery has all but disappeared. According to the Texas Office of Court Administration, the number of juries that were seated between April and October 2020 has declined almost 80%.¹

The right to jury trial is fundamental to our justice system and guaranteed by the Sixth and Seventh Amendments to the U.S. Constitution. Consequently, throughout the pandemic, Harris County courts have continuously been looking for means to safely resume jury trials.

On September 14, 2020, the District Courts announced that tireless efforts by the Harris County Courts, District Clerk, and Commissioners Court to find a solution had paid off: in-person jury selection could safely resume by holding *voir dire* at NRG Arena.² Although county officials deserve considerable credit for implementing this novel and creative solution, the practical reality is only a limited number of jury panels can be safely accommodated at any one time. Further, due process and other concerns mean priority must be given to criminal, family, and juvenile cases.

Although it appears that vaccines for COVID-19 are effective, the logistics of mass immunization make it likely that the pandemic will be with us well into 2021. Meanwhile, despite the best efforts of the county, the backlog of civil cases continues to mount

as virus-related risks to jurors, lawyers, judges, and court personnel leads to unavoidable delays getting cases to trial.

With obtaining discovery difficult and the chance of jury trial fleeting, resolving cases out of court is proving to be equally daunting, with continuances making it almost impossible to set a firm trial date. As every litigator knows, it can be very challenging to “settle on the courthouse steps” without the specter of trial on the horizon.

Looking to address the growing backlog of cases, Judge Kovach and Michael Hawash started an early dispute resolution pilot program in June 2020. While EDR has been around in different forms for some time, it is particularly well-suited to use during the pandemic *because EDR was specifically designed to avoid lengthy discovery and trials and can be accomplished remotely.*³

THE DRAWBACKS TO TRADITIONAL MEDIATION

The new Harris County form docket control order that went live on April 20, 2020, assumes mediation will be a prerequisite to trial in all cases.⁴

Traditional mediation, however, has many drawbacks. The mediator is typically not chosen nor a mediation date set until many months into the litigation process and, quite often, not until the eve of trial. Many cases do settle through mediation, but at a real cost to the litigants, as the parties have already incurred substantial expense in discovery and preparing for a trial that is statistically unlikely to occur. As every trial lawyer knows, even without mediation, nearly all cases ultimately settle before trial.⁵

One way to avoid these massive costs would be to mediate right at the beginning of a case rather than just before a trial setting. However, mediating early in a case poses its own challenges. It's not unusual that what led to a lawsuit being filed is that the parties' pre-suit negotiations broke down. At that point, they may then 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 in their case. Another early roadblock is that once a suit is filed, both sides may feel they need significant discovery to be able to determine what a fair settlement would be. And while we'd likely prefer not to believe this is the case, some lawyers may want to continue billing for discovery, motions, and trial rather than settling early, unable to forego the revenue they obtain from the traditional timing of settlement discussions.

The fundamental question all lawyers need to ask themselves is this: "What serves my clients' interests best?" Much of the time, what serves clients best is an early, economical and fair resolution of the dispute. EDR provides a structured process to do just that.⁶

THE BASICS OF EARLY DISPUTE RESOLUTION (EDR)

A basic outline of EDR, based on the Early Dispute Resolution Practice Protocols promulgated by the EDR Institute (a non-profit corporation organized to promote the fair, effective, and ethical use of early dispute resolution principles)⁷ is as follows:

Once an answer is filed, the parties engage a specially-trained EDR neutral/mediator.⁸ The neutral's goal is to help parties resolve even contentious disputes economically, fairly, and within 30 days of starting the EDR process.⁹ The neutral's training covers the techniques used, the ethical issues that can arise, how to overcome the roadblocks to early resolution, and, depending on the issues and amounts at stake, whether to apply the process flexibly or rigorously. The rigorous approach usually involves the parties contractually committing to an EDR Agreement with terms requiring that they participate in good faith, comply with the higher ethical standards required for the process to work, and undertake confidentiality obligations consistent with other forms of alternative dispute resolution. *If either party doesn't want to participate in the process in good faith, commit to the higher ethical standards, or agree to confidentiality, that party should simply decline to participate in the process.*

For parties who do want to attempt to find a fair and economical resolution to the dispute in good faith, the process involves four steps.¹⁰

Step One: Initial Dispute Assessment

The first step of EDR is for the lawyers to obtain a thorough understanding of their clients' case, generally by reviewing relevant documents and interviewing witnesses. The lawyers will then be able to give the neutral their overview of the case and identify the limited information they need from the other side to make an informed decision as to the fair value of a case. This should be only what the parties need—what in EDR is called "Sufficient Knowledge"—to make that judgment.

This is not the time for traditional discovery that leaves no

stone unturned or for requests that seek "any and all" documents. Instead, the requests for information should be specifically targeted to only that information needed to form an educated position on the value of the case. The neutral will then work with both sides to trim down the requests to only the "sufficient information" needed and to reduce the risk that any side's requests could become unduly burdensome.

This step should take no longer than five business days.

Step Two: Information Exchange

The next step is to exchange the information gathered during the initial dispute assessment. This requires an ethical commitment from each side that they'll produce the information the other side reasonably requests. If necessary, this step may involve some interviews or short depositions, most likely "off the record." If a client doesn't want to produce the information, the attorney must end the process.

If trust is an issue, parties may ask the other party and its counsel to declare in writing that they have made a "Compliant Response" to Information Exchange requests. A Compliant Response means: (i) the client has made a reasonably diligent, good-faith search for information and documents, and produced the reasonably responsive information and documents; (ii) the client has not narrowly construed requests for information or documents to withhold material information or documents; and (iii) party witnesses, or witnesses under the party's control, have made reasonably responsive and accurate answers to questions.¹¹

This step should take no longer than seven business days.

“
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and ethically move
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associated with
in-person discovery
or live jury trials.”

Step Three: Objective Dispute Valuation

Once the parties have Sufficient Knowledge to assess their respective cases, the next step is to undertake an analysis to establish an objective value for the dispute based on defined variables that each party should use, which in turn should set the basis to start meaningful negotiations.

Attorneys unfamiliar with EDR often find this to be the most difficult step in the EDR process as they are not used to being forced to think about the true value of a case, let alone disclose their opinions to the other side. However, it is essential to the integrity of the EDR process that disputes are valued using objective criteria, and once completed, the objective values are shared with all sides.

Although different causes of action and complex cases may require some tinkering with the specific questions that need to be answered to conduct this step effectively, there are four basic questions that are common to most disputes:

1. How much does each side expect to spend in attorneys' fees and expenses to take the case through trial?

2. What would be the best and worst outcome for each side at trial?¹²
3. Recognizing that the worst and best outcomes simply set outer limits, what is the most likely range of damages (high, middle, low) on the core claims/counterclaims in the dispute?
4. What is the percentage likelihood of a win or loss at each level of damages identified above?

Once each party answers these questions, their responses should be given to the neutral and the other side. This allows each party to know clearly where the other stands and for the neutral to know each party's view of the case. This evaluation will serve as the basis for the upcoming negotiations to resolve the case.

This process should take no longer than four days.

Step Four: Final Resolution

The final step is to try to resolve the dispute.

At this stage, with all the information the parties have learned, they may be able to promptly negotiate a settlement. The neutral can aid in this negotiation or, if informal talks aren't successful, conduct a formal mediation. If a formal mediation is necessary, it should be a much shorter process where real negotiation and bargaining occur much sooner than what is typical in traditional mediation.

This step should take no longer than six days.

WHAT IF THE PARTIES FAIL TO SETTLE?

Even if the parties cannot reach a resolution through EDR, all is not lost. By engaging in EDR, the parties most likely will have narrowed the issues to such an extent that further negotiations may prove fruitful once the factual or legal issues that are causing an impasse can be more fully investigated or resolved. For example, if the parties' disagreement on the resolution of a dispositive legal issue is preventing settlement (e.g., the application of the statute of limitations on a claim), then it may benefit the parties to file a motion for summary judgment on a discreet legal issue or even to engage an arbitrator in a limited role to resolve a factual or legal dispute. With the issue out of the way, the parties can then re-engage the neutral to

attempt to fully and finally resolve the case.

EDR enables the parties to quickly discover the theories and motives of the opposing side. The neutral-driven process also helps identify miscommunications and misunderstandings between the parties. Often, engaging in EDR creates options for resolution that were simply not considered pre-suit. Even if the case does not settle, the parties will return to the courthouse much more knowledgeable about the case, making eventual settlement that much more likely.

EDR IN THE POST-PANDEMIC WORLD

The pandemic is not going to last forever. There are already in-



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dications that vaccinations from multiple sources may herald a return to some semblance of normalcy by the second or third quarter of 2021.¹³ In the meantime, the backlog of cases awaiting jury trials in Harris County courts continues to grow.

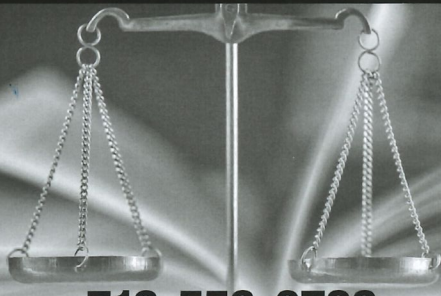
Instead of waiting for in-person discovery and jury trials to return to pre-pandemic levels, EDR offers a procedure to fairly and ethically move cases towards resolution without the need to incur the health risks associated with in-person discovery or live jury

trials. EDR can also bring much needed certainty to parties that cannot wait for a delayed resolution to their dispute.

But importantly, the benefits of EDR go beyond the pandemic. Once lawyers, courts, and clients are exposed to the possibility of resolving almost any dispute in 30–60 days without the need for extensive litigation, EDR should remain a viable alternative to “litigation as usual” once the pandemic is relegated to history. 

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Michael A. Hawash is the founder of Hawash Houston Mediation, where he routinely serves as a mediator, arbitrator, and EDR neutral. Michael serves on the Early Dispute Resolution Committee of the American Bar Association and is a board member of the EDR Institute, a non-profit corporation organized to educate lawyers, judges, neutrals, businesses, and the general public about EDR principles and benefits. For more information on EDR, go to www.TexasEDR.com.

Judge Jim F. Kovach is the presiding judge in Harris County Civil Court No. 2 and served two terms as the Administrative Judge for the Harris County Civil Courts at Law. In June 2020, Judge Kovach instituted an EDR pilot program in his court that gave litigants the option to voluntarily engage in an Early Dispute Resolution process in lieu of traditional mediation.

Endnotes

1. The Texas Office of Court Administration reports that 97 juries were selected in Harris County civil courts between January and March 2020, compared to 20 between April and October 2020 (data on file with author).
2. *Harris County Resumes In-Person Jury Duty*, ABC13 HOUSTON (Sept. 20, 2020), <https://abc13.com/in-person-jury-duty-harris-county-district-clerk-marilyn-burgess-court-covid-19/6453903/>.
3. EDR principles have been described in a number of similar approaches under the names: Planned Early Dispute Resolution, Planned Early Negotiation, Guided Choice, Early Active Intervention, and Early Intervention Mediation.
4. According to the Harris County Civil District Courts, this new form should be used “in almost all Civil District Courts whenever a new DCO is issued in a case.” *Civil District Courts New Form Scheduling and Docket Control Order*, DIST. COURTS OF HARRIS CNTY., <https://www.justex.net/Article.aspx?ArticleID=1271> (last visited Jan. 7, 2021). Nevertheless, individual judges enjoy great leeway to order or not order mediation or some other form of alternative dispute resolution.
5. According to recent statistics, 95% of all cases settle before trial. *What Percentage of Lawsuits Settle Before Trial? What Are Some Statistics on Personal Injury Settlements?*, LAW DICTIONARY, <https://thelawdictionary.org/article/what-percentage-of-lawsuits-settle-before-trial-what-are-some-statistics-on-personal-injury-settlements/> (last visited Jan. 7, 2021).
6. There is no generally-accepted procedure for EDR. The EDR Institute has drafted and continually updates its own “Early Dispute Resolution Practice Protocols.” It is the opinion of the authors that these EDR Practice Protocols should be the standard for EDR practitioners. The latest version of the EDR Practice Protocols can be found at <https://edr.institute.org/latest-protocols/>.
7. *Early Dispute Resolution*, EDR INST., www.EDRinstitute.org (last visited Jan. 7, 2021).
8. For purposes of this article, “EDR neutral” and “EDR mediator” are synonymous.
9. Sixty days may be required to resolve more complex disputes.
10. See, e.g., TEX. CIV. PRAC. & REM. CODE § 154.073 (providing for confidentiality in alternative dispute resolution procedures).
11. EDR INST., *EARLY DISPUTE RESOLUTION PRACTICE PROTOCOLS* 6.4 (July 20, 2020), https://edr.institute.org/latest-protocols/#_Toc21941138.
12. See ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (2d ed. 2011), for a description of best alternative to a negotiated agreement (“BANTA”) and worst alternative to a negotiated agreement (“WANTA”).
13. *Carlie Porterfield, Here’s when Experts Say Things Could Get Back to Normal After Coronavirus*, FORBES (Nov. 15, 2020), <https://www.forbes.com/sites/carlieporterfield/2020/11/15/heres-when-experts-say-things-could-get-back-to-back-to-normal-after-coronavirus/?sh=df016bc36ed8>.