



A Win-Win Strategy

Embracing Planned Early Dispute Resolutions

By Deborah Masucci and Abbie Eliasberg Fuchs

Effective litigation management programs include strategies for managing disputes that reduce legal expenses without compromising the outcome. The overall strategy values a partnership between a lawyer and the client to meet the client's business objectives in tandem with obtaining a favorable resolution.

Settlement discussions frequently take place late in the life cycle of a case after lawyers engage in adversarial jousting. The result can frequently deteriorate the parties' relationship and end potentially profitable future business endeavors. Litigation management strategies can alleviate this problem, while simultaneously monitoring other relevant issues, such as costs and settlement options.

Among the perceived impediments to using early dispute resolution litigation management strategies are the reputation trial lawyers have for enjoying the tactics and the atmosphere of litigation, along with the accompanying concern that the suggestion of settlement negotiations is a sign of weakness. However, today most lawyers, their clients and

litigation management professionals are seeking a more constructive and cost-effective path to achieving a favorable resolution that leverages trial lawyers' skills and advances settlement without signaling weakness.

Planned Early Dispute Resolution (PEDR) assesses the benefits and risks of negotiation and considers which dispute resolution tool will produce the best outcome. A cornerstone of the concept is communicating both a willingness to settle, as well as to litigate, if necessary. The strategy focuses on early planning with more client involvement.

PEDR starts with early case assessment, consisting of internal assessment and discussion. Key facts about the dispute are collected and the business goals and concerns are determined. A team is created to consider a legal and resolution cost/benefit analysis. The team creates a preliminary litigation plan covering settlement strategy, value and proposed paths, including whether to consider alternative dispute resolution (ADR) techniques such as mediation or arbitration.

An example of where PEDR can assist is discovery — notoriously one of the most expensive parts of litigation. Under a PEDR process, the team identifies documents or information required to proceed and assesses alternatives to secure the information short of engaging in protracted discovery or motion practice. For example, the parties may hire an independent site inspector to secure information at a lower cost rather than obtain the same information through interrogatories. Additionally, the parties might agree to a stand still agreement so that certain information can be exchanged and negotiations commenced.

Another early settlement option to consider at this juncture is settlement counsel. Detractors say that engaging settlement counsel is an expensive approach with limited applicability. Supporters counter that engaging settlement counsel for a limited period and purpose seizes a settlement opportunity. Further, supporters note that there are returns to scale — if engaged for a stream of cases, there is a built in benchmark already in place to support settlement offers.

Regardless of whether settlement counsel is employed, or the trial lawyer commences negotiations, assessing settlement at an early stage must involve a consideration of what a settlement seeks to achieve. Fundamentally, litigation can either settle, whether through negotiation or ADR, or proceed to trial, and the best outcome must balance competing interests. On the one hand, trials are expensive, as legal fees, expert fees and other costs continue to accrue. An important consideration in balancing these costs must involve an assessment of the long-term effects of a settlement. For instance, in a one-off case where similar litigation is unlikely to follow, settlement may prevent incurrence of trial costs. However, where a particular case may be the start of an incoming line of similar actions, settlement value must be

monitored to avoid setting dangerous precedent of expressing a willingness not to fight.

Similarly, lawyers or others engaging in settlement negotiations must consider the true settlement value of a claim. While the parties will frequently disagree over the true value of a case, a case is worth what an adversary will accept. Although unreasonable, such valuation may ultimately be the cost necessary to avoid further litigation. The important point is that when engaging in settlement negotiations, it is crucial to consider the big picture and not to evaluate costs in a vacuum of the single claim or one party's own valuation.

Another option the team might consider is engaging a mediator to assist the parties in managing a large complex case. The mediator convenes the parties and discusses the dispute, offering case management suggestions. Engaging a mediator can reduce adversarial tension, reassure the parties about the fairness of the process, manage procedural issues before the ultimate dispute resolution process and allows both parties to share the case management costs.

Before hiring settlement counsel, a mediator or an arbitrator, know the strengths and weaknesses of the individual you intend to hire. Smart litigation management professionals have a list of ADR professionals, the types of cases they handle, their approach to dispute resolution and their strengths and weaknesses.

Though PEDR is a viable option, there are many reasons some trial lawyers do not recommend these approaches. They may be concerned about the client losing confidence in the lawyer, loss of income or simply appearing weak. Lawyers can overcome these fears by reassuring the client that the lawyer is a strong advocate working in the client's best interest. Lawyers can also discuss the benefits of PEDR with the client. Additionally, help the client understand that the up front costs of early case assessment will reduce the overall litigation management costs. Further, give clients a choice of billing systems.

Though it is crucial to convince the client about the benefits of PEDR, it is equally important to convince opposing counsel that PEDR is an effective strategy while maintaining that the attorney is still a forceful advocate for the client. Start by developing a personal relationship with opposing counsel. Offer the other side the option of proceeding down an easier path or doing it the hard way. The lawyer should express a preference for the easy way, but continue to communicate that the difficult path is an option if necessary. With these strategies, PEDR can be an effective tool in reducing costs and settlement amounts, while remaining a helpful dispute resolution tool for all parties involved. [LM](#)

Deborah Masucci is a Vice President in the Office of Dispute Resolution for Chartis. Abbie Eliasberg Fuchs is a member of Harris Beach.