Survey of Early Dispute Resolution Movements and Possible Next Steps

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Introduction

In movements like the abolitionist, temperance, labor, anti-communist, women's rights, civil rights, environmental, counterculture, pro-choice and anti-abortion, and evangelical movements, members of the movements typically self-identify as belonging to those movements, and outsiders generally recognize the movements as such.

Probably no one would recognize an early dispute resolution (EDR) "movement," including people who are part of the movement. It would deal with a wide range of civil cases including family, garden-variety civil cases, and large complex cases and include judges, court administrators, lawyers, and neutrals.

It would be more accurate to refer to a **family of EDR movements** that share common values but operate in different contexts. Collaborative practitioners, federal judges conducting Rule 16 conferences, court administrators running EDR programs, civil mediators, and corporate inside counsel designing EDR systems belong to distinct EDR movements. Members of each movement promote the intentional exercise of responsibility for handling legal disputes from the outset of the cases as opposed to passively allowing them to run their course, often out of inertia or habit. But they read their own publications, attend their own conferences, and probably don't interact much

with members of other EDR movements. Typically, their activities blend into the ADR, judicial, or legal fields rather than being distinct elements in those fields.

This article grows out of a presentation to the ABA Section of Dispute Resolution Early Dispute Resolution Committee, focusing on legal disputes in which the parties are represented by lawyers It is a survey of EDR movements and concludes with suggestions about some possible future directions.

Much of my academic career has focused on EDR, and this post provides a travelogue of my intellectual journey studying these movements. Readers who would like to learn more about the issues can consult sources cited in the publications linked in this article. The Litigation Interest and Risk Assessment book described below includes an extensive bibliography.

1. Goals and Limitations of Early Dispute Resolution

Litigation provides numerous benefits to litigants and society. It can help parties solve difficult problems, make relationships and institutions function properly, and promote justice. It enables parties to enlist legitimate, independent government officials to resolve disputes when the parties can't resolve disputes themselves. Indeed, litigation provides mechanisms for structuring dispute resolution processes that enable most parties to ultimately settle disputes themselves, without court adjudication. Litigation is essential to enforce the rule of law, deterring potential lawbreakers who would behave with impunity if they had no fear that they would pay a price for acting illegally. It also provides some remedies for parties who have been harmed and contributes to the development of legal doctrine.

Yet, many – perhaps most – litigants experience litigation as extremely stressful and unpleasant, so they desperately seek resolution of their disputes. The process generally imposes substantial out-of-pocket expenses to pay lawyers and other professionals as well as numerous intangible costs such as stress, damage to relationships and reputations, diversion of energy, and loss of opportunities. Judge Learned Hand famously wrote, "I must say that, as a litigant, I should dread a law suit beyond almost anything short of sickness and death."

There are many obvious potential benefits to managing and resolving legal disputes at the earliest appropriate time, including:

- Helping parties make good decisions
- Tailoring dispute resolution processes to fit parties' needs
- Improving outcomes
- Reducing tangible and intangible costs
- Reducing sunk-cost bias
- Reducing adversarial dynamics

Consider the counterfactual: the classic settlement "on the courthouse steps." After an extended period of pretrial litigation, parties gear up for trial but end up settling in a frenzied, slapdash process minutes before the trial is set to begin. Parties often don't expect to settle that day and feel rushed to make decisions. The judge and/or lawyers may pressure parties to settle, possibly adding to a heightened realization that, after investing a huge amount of time, money, and emotion, they may lose in trial. As a result, they may settle, sometimes having buyer's remorse after reflecting on the process and outcome.

By contrast, EDR processes are designed to promote careful consideration from the outset of a case so that the process is designed to fit parties' procedural and substantive needs. Obviously, the sooner the parties resolve their case, the greater the savings of tangible and intangible litigation costs. They are less likely to harden adversarial attitudes or feel that they need to proceed to justify all their investments in the case. Even if they aren't ready to resolve a case at an early stage, if they **consider** it at an early stage, they can manage the process to their advantage. They may not feel completely satisfied with the outcome, but they are more likely to believe that they achieved the best possible result under the circumstances.

Although resolution of disputes – especially early resolution – can provide many benefits, there also are some risks. If parties resolve cases too soon, they may not make careful decisions. They may fail to get sufficient information, consult key individuals, allow situations to ripen (such as permitting sufficient time for recovery from injury), or be emotionally ready to negotiate and settle. In addition, practitioners and courts may prioritize early resolution over other goals, such as careful decision-making, so that parties may feel excessive or inappropriate pressure to settle prematurely. These risks are manageable, especially if the professionals involved are on the lookout for them.

2. Array of Early Dispute Resolution Processes

In *The Movement Toward Early Case Handling in Courts and Private Dispute Resolution*, I described a range of EDR initiatives. Courts use several EDR approaches to manage cases early. Perhaps most significant, federal courts and many state courts routinely meet with lawyers early in their cases to plan the litigation process. Some courts use differentiated case management systems with procedures differing based on the complexity of cases. Some courts offer or require parties to use early mediation or neutral evaluation processes.

In the private sector, practitioners offer several EDR services. Some lawyers serve as settlement counsel, limiting their work in a case to negotiation. Their clients may or may not simultaneously retain litigation counsel. In collaborative practice, lawyers and parties sign a binding participation agreement committing to negotiate, including a provision disqualifying collaborative lawyers from representing the clients in litigation. The disqualification agreement creates an incentive to negotiate and refrain from litigation and is considered to be the essential element of collaborative practice. In

cooperative practice, parties agree to negotiate but without a disqualification agreement. Collaborative and cooperative practice are described below in more detail.

That article also describes how some businesses use various devices to promote early dispute resolution. Some businesses make general pledges to consider using ADR processes when they have disputes. Business deals commonly include dispute resolution clauses to handle any disputes promptly. When disputes arise, some lawyers and parties use procedures to do "early case assessments" and screen cases for use of mediation or other dispute resolution procedures.

A recent blog post, *Dispute Prevention and Early Dispute Resolution Framework*, identified four EDR processes (described below) as well as four approaches for dispute prevention. As the term "prevention" suggests, these processes are intended to avoid creation of disputes, though it may be more helpful to think of them as proactively solving problems rather than merely avoiding disputes.

"Planned early dispute resolution" refers to systematic planning for handling a series of disputes, including plans to prevent disputes when possible and is discussed below. Parties may focus on dispute prevention throughout negotiation of projects that involve continuing relationships by planning for collaboration and problem solving. This is distinct from merely adding ADR clauses at the end of the negotiation. Partnering, which is most commonly used in major construction projects, involves developing relationships between individuals in projects that involve continuing relationships. Some contracts provide for "standing neutrals" or dispute review boards, which are engaged at the outset of a contract to help solve problems and resolve disputes on an ongoing basis during the performance of the contract. The International Institute for Conflict Prevention and Resolution (CPR) has an active Dispute Prevention Committee, which is promoting dispute prevention in various ways including recruiting businesses to subscribe to a dispute prevention pledge for business relationships.

3. Collaborative Practice

Minneapolis family lawyer Stu Webb is credited with starting collaborative practice in 1990 when he decided to handle his cases without going to court. The International Association for Collaborative Professionals (IACP) was organized in 1999 and the collaborative movement really took off in the 2000s, with a burst of enthusiasm of practitioners in the US, Canada, and around the world. According to its website, "IACP has created Standards for Practitioners, Trainers and Collaborative Practice Training. It has promulgated Ethical Guidelines for Practitioners, and continues to support excellence in Collaborative Practice through resources, training curriculum, practice tools, mentoring and a comprehensive website. ... [It] has over 5,000 members from twenty-four countries around the world." There are numerous local collaborative practice groups promoting collaborative practice in their areas. Collaborative practice is used almost exclusively in family law cases despite efforts to expand it in other types of cases. Individual coaches for parties as well as joint financial and mental health professionals often act as part of collaborative professional teams, so people generally

use the term “collaborative practice” rather than “collaborative law.” In 2010, the Uniform Law Commission approved the Uniform Collaborative Law Act (UCLA), which has been enacted by statute or court rule in 19 states and the District of Columbia.

Collaborative practitioners generally are very conscientious, and rely on a substantial body of knowledge and practice. Collaborative lawyers really are collaborative, seeing themselves as partners in helping their respective clients get the best possible process and outcome. Participation agreements require parties to provide full disclosure of all relevant information at the outset of the case. The process involves “four-way” meetings with lawyers and clients and may include additional professionals in the collaborative team. Practitioners try to use the best possible procedures, consulting with each other before, during, and/or after meetings with clients. For example, collaborative teams often debrief after their meetings with clients and write memos summarizing the status of the negotiations. Team meetings permit professional socialization through regular feedback and mentoring.

I started studying collaborative practice in 2002, intrigued by the idea of collaborative early negotiation. In my first article on the subject, *Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering*, I wrote

> [M]uch CL [collaborative law] theory and practice is valuable, including protocols of early commitment to negotiation, interest-based joint problem-solving, collaboration with professionals in other disciplines, and intentional development of a new legal culture through activities of local practice groups. Although the disqualification agreement is undoubtedly helpful in many cases, it also can invite abuse by inappropriately or excessively pressuring some parties to settle when it would be in their interest to litigate. ... The Article also urges CL practitioners to experiment with "cooperative negotiation," i.e., using CL techniques without the disqualification agreements.

In *Collaborative Lawyers' Duties to Screen the Appropriateness of Collaborative Law and Obtain Clients' Informed Consent to Use Collaborative Law*, collaborative lawyer and mediator Forrest (Woody) Mosten and I analyzed ethical rules requiring collaborative lawyers to screen cases for appropriateness and obtain clients’ informed consent to use the process. Rule 1.2(c) of the ABA Model Rules of Professional Conduct states, “A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.” Our article states:

> [T]he authorization of “reasonable” limitations of scope of employment in Rule 1.2 of the Model Rules of Professional Conduct, which is applicable to all lawyers, establishes a requirement that lawyers screen possible CL cases to determine if CL would be reasonable under the circumstances. Similarly, ... Rule 1.7's prohibition of conflicts of interest also requires lawyers to screen potential CL cases to determine whether there is a significant risk that a conflict of interest

> would materially limit the lawyers' representation and whether the lawyers reasonably believe that they can provide competent and diligent representation.

The screening and informed consent requirements are codified in Section 14 of the UCLA. Section15 requires collaborative lawyers to make "reasonable inquiries" before prospective parties sign participation agreements about whether the prospective parties have "history of a coercive or violent relationship." In *The Uniform Collaborative Law Act's Contribution to Informed Client Decision Making in Choosing a Dispute Resolution Process*, Woody and I wrote, "The Act requires lawyers to advise prospective parties about certain issues relating to termination of a CP [collaborative practice] process, but otherwise it does not specify what information lawyers must discuss with prospective CP parties. This Article describes how lawyers can educate clients so that they can make good decisions about using a CP process." (footnote omitted)

My article, *An Empirical Analysis of Collaborative Practice*, summarizes the empirical research that had been done to date.

> The research suggests that Collaborative clients are primarily "white, middle-aged, well educated and affluent." ... A small proportion of lawyers handle most of the cases. ... Parties used professionals in addition to lawyers in a substantial percentage of cases. These professionals often provided valuable services, though clients were sometimes concerned about the additional cost. ... The research found that the process in CP cases involves interest-based negotiation in meetings with the parties, their lawyers, and often with other professionals, which was often constructive. In some cases, lawyers and parties found CP to be too slow and cumbersome and some parties felt vulnerable and unprotected. ... Parties settle a large proportion of CP cases. In general, the settlements seemed comparable to what parties would have agreed to in negotiation in a traditional litigation process. In some cases, the results of the ultimate agreement were clearly better than what parties would presumably have otherwise agreed to, thus benefitting the parties and their children.

4. Cooperative Practice

My research on collaborative practice revealed that many parties received substantial benefits from the process. There are so many elements of CP process that it's hard to identify the critical causal factors producing the benefits. I wondered whether parties could get benefits from a similar "cooperative law" process that does not involve a disqualification agreement. I learned that the Divorce Cooperation Institute (DCI) in Wisconsin had 70 members offering this process and I conducted a study of the practices and perspectives of these cooperative law practitioners, some of whom do collaborative cases and traditional litigation. This study is based on interviews and a survey of DCI members, thus reflecting their biases.

DCI members describe a more flexible process than collaborative practice, which may produce both advantages and disadvantages. Cooperative practice is likely to be more efficient but provide a less thorough process and less party engagement.

> DCI members generally see Cooperative procedures as more collaborative than litigation-oriented practice and more flexible than Collaborative Practice. The process in Cooperative cases follows a mutual understanding between the lawyers and parties, which may be in writing or oral, and sometimes is implicit. In general, DCI members try to tailor the process to fit the needs of each case. They say that they usually use four-way meetings and in some cases, most of the negotiation takes place in these meetings. They try to determine the number and length of the meetings based on the needs of the parties, believing that it is sometimes more efficient and appropriate to advance the process through conversations between lawyers outside the four-ways. In general, they say that parties are substantially involved in making decisions, though this varies depending on the clients' situations and preferences. ...
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> DCI members generally see Collaborative Practice as an improvement over litigation-oriented practice in increasing parties' satisfaction, especially with the outcomes. Many DCI members believe, however, that the Collaborative process is sometimes too rigid and elaborate and requires more time and money than necessary, which reduces parties' satisfaction with the process. DCI members believe that parties in Cooperative cases are generally satisfied with the outcomes and process and that the time and expenses are as reasonable as possible.

I know of only one other cooperative practice group, the Cooperative Practice Network of Minnesota. The Center for Principled Family Advocacy in Cleveland offers a "principled negotiation" option, similar to cooperative practice. A handful of lawyers and firms that are not affiliated with cooperative law groups offer cooperative law services.

In 2005, I helped organize the Mid-Missouri Collaborative and Cooperative Law Association (MMCLA). I was intrigued by the idea of offering both processes and giving parties the option of choosing either one. By providing the option of using cooperative practice, parties who chose a **collaborative** process would not feel that this was their only specialized option to focus on early negotiation and this should reduce the risks related to the disqualification agreement. MMCCLA included some of the most experienced and respected family lawyers in the area. It drafted model participation agreements, conducted a training, created a website, and publicized the availability of the processes. The group was located in a small university community where the family lawyers know each other pretty well. The family lawyers in this community generally were cooperative in their cases anyway, so they felt no need to use a new process. None of the members were requested to do any collaborative or cooperative cases, and the group disbanded after a few years.

The difference between use of collaborative and cooperative practice is related to how much they differ from traditional legal practice. Collaborative practice is inherently different because of the disqualification agreement. In addition, a community of collaborative practitioners is committed to a distinctive process involving written participation agreements, four-way meetings, and deeply collaborative relationships between the lawyers, which collaborative practitioners find very appealing.

By contrast, cooperative practice is not that different from traditional legal practice. In cooperative practice, lawyers can selectively use litigation as part of the process while seeking to ultimately resolve cases through negotiation. Some cooperative lawyers said that they sometimes use courts to provide "reality therapy" and as "tools of cooperation." In traditional practice, many family lawyers routinely cooperate because it's in their clients' interest to maintain good continuing family relationships. Lawyers who do a substantial amount of family law, especially in smaller communities, also often cooperate because it reflects their practice philosophy and they value their reputations as being "reasonable." So many family lawyers doing traditional practice generally don't believe that using a cooperative process adds much value to what they routinely do.

To compare the two processes and mediation, I wrote *Fitting the Forum to the Family Fuss: Choosing Mediation, Collaborative Law, or Cooperative Law for Negotiating Divorce Cases* with collaborative and cooperative lawyer and mediator Gregg Herman.

Here's a collection of my publications about lawyering, including collaborative and cooperative practice. Some of those pieces summarize the preceding articles.

5. **Lawyering with Planned Early Negotiation**

Although the logic of collaborative and cooperative practice could be applied in most civil disputes, they are used almost exclusively in family law cases. They involve negotiation process agreements, which many family lawyers feel aren't necessary or helpful. Moreover, at the outset of cases, many parties and lawyers often are suspicious of the other side and are not willing to make process agreements.

I was interested in expanding the range of cases using early negotiation processes so that they wouldn't be limited to family cases and that lawyers could initiate unilaterally, without an agreement with the other side. In other words, I was looking for a process that lawyers would use in their normal practice. Indeed, good lawyers routinely engage in early negotiation and I wanted to document what they do.

So I interviewed lawyers who specialized in negotiation and dispute resolution in a wide range of cases, leading to the publication of my book, *Lawyering with Planned Early Negotiation: How You Can Get Good Results for Clients and Make Money*. It describes a "prison of fear" keeping lawyers and parties from negotiating early in a case and suggests techniques for "escaping" from that prison. It discusses processes with bilateral process agreements (collaborative and cooperative practice) as well as approaches that lawyers use unilaterally, including as settlement counsel. It focuses on

the importance of good lawyer-client relationships, lawyers' fee arrangements promoting clients' interests, good relationships between counterpart lawyers, constructive engagement of other professionals, and careful planning of negotiation. It includes numerous appendixes dealing with conflict analysis, early case assessment, factors affecting appropriateness of different processes, information sheets for clients, and forms developed by MMCCLA, among others.

I later conducted a study of cases settled by lawyers who were identified as good lawyers, without regard to their use of negotiation. This study, *Good Pretrial Lawyering: Planning to Get to Yes Sooner, Cheaper, and Better*, found that the lawyers unilaterally used many of the techniques described in *Lawyering with Planned Early Negotiation*. They typically use a strategic approach to negotiation, including plans to negotiate at the earliest appropriate time by taking charge of their cases from the outset, getting a clear understanding of clients' interests, developing good relationships with counterpart lawyers, carefully investigating the cases, making strategic decisions about timing, and enlisting mediators and courts when needed. There is no label for these techniques. I called it "Nike lawyering" – lawyers just do them. Another term might be just "good lawyering."

I wrote another article from the same study as *Good Pretrial Lawyering*, entitiled *A Framework for Advancing Negotiation Theory: Implications from a Study of How Lawyers Reach Agreement in Pretrial Litigation*, in which I asked lawyers to describe settled cases starting from the first contact with their clients.

> In practice, negotiation is routinely infused in litigation from the outset of a case. Lawyers not only negotiate about the ultimate issues, such as how much a defendant will pay a plaintiff, but they also negotiate about substantive issues during litigation, such as temporary orders during divorce proceedings, as well as a myriad of procedural issues. The process of reaching such agreements often is integrated into regular communications throughout the course of pretrial litigation rather than occurring in a single dramatic settlement event to resolve the ultimate issues in a case. ...
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> Despite the fact that pretrial litigation is supposed to prepare for trial, such preparation often is designed to prepare for negotiation because the expected trial outcome is a major factor affecting negotiation in many, if not most, cases. Indeed, some lawyers continuously consider how the litigation process may affect negotiation. For example, one lawyer said, "It is all negotiation from the time suit is filed. You are constantly negotiating or setting up the negotiation. It doesn't just happen. You are negotiating from the outset, setting up where you want to go. You are judging [the other side] and they are judging you." He elaborated, "Negotiations don't occur in a week or a month. They occur in the entire time of the lawsuit. If anyone tells you they aren't negotiating, they really are. Every step in the process is a negotiation. You don't call it negotiation, but in effect, that's what it is." Another lawyer expressed the same view, saying that he "prepares for settlement from day one of the lawsuit" and that there is a

> "constant process of evaluating the claim" throughout the litigation. A third lawyer said that he "always has an eye toward settling," taking care of matters as fast and cheaply as possible and minimizing clients' risk. (footnotes omitted)

Disability rights lawyer Lainey Feingold wrote *Structured Negotiation, A Winning Alternative to Lawsuits* based on her experiences negotiating without filing lawsuits. This book describes how to write invitations to negotiate, establish ground rules, share information, hold collaborative meetings, use experts, resolve disputes, use mediators, and draft settlement documents to ensure that settlements are monitored and enforced.

I use the word "planned" to distinguish from unplanned early processes, which may not be effective. Planning reflects the virtually universal belief of ADR experts in the importance of preparation. Indeed, unplanned early processes can be counterproductive if parties aren't ready to negotiate because they lack necessary information or aren't emotionally ready. This can disappoint parties, damage relationships, and increase time or cost. So a process that merely is "early" doesn't necessarily fulfill the potential for helping clients make good decisions.

6. Litigation Interest and Risk Assessment

Conducting early case assessments is critically important for early dispute resolution. These assessments enable lawyers and parties to understand the disputes and develop the most efficient and satisfying strategies for handling the disputes.

Litigation Interest and Risk Assessment: Help Your Clients Make Good Litigation Decisions, which I co-authored with University of Saskatchewan Professors Michaela Keet and Heather Heavin, is a guide for helping clients make thorough assessments beginning at the outset of a representation and continuing throughout the cases. Too often, lawyers focus exclusively or primarily on the expected court outcomes and ignore or discount the tangible and intangible costs, which clients often value greatly.

The book describes reasons why lawyers and parties often make poor decisions to go to trial, methods to help parties develop good "bottom lines," and ways that lawyers and mediators can help parties use litigation interest and risk assessments in negotiation and mediation. Bottom line calculations combine expected court outcomes and the expected tangible and intangible costs of continuing to litigate and going to trial.

Bottom lines for negotiation should incorporate any substantive interests that cannot be adequately satisfied by one-time monetary payments, such as desires for payment plans, apologies, business opportunities, in-kind arrangements, and non-disclosure agreements. In addition, bottom lines should reflect intangible costs of the litigation process that parties often don't recognize or incorporate into their litigation decision-making. For example, litigation can add stress, distract parties from other activities, and harm relationships and reputations. Litigation stress can cause individuals to suffer anxiety, emotional and relationship difficulties, impaired memory, and neurosis. Indeed, it can impair parties' ability to make litigation decisions and work effectively with their

lawyers. Intangible impacts of litigation on businesses can dwarf the potential liability and tangible costs. For example, litigation can disrupt companies' internal dynamics, prevent them from pursuing some priorities, and harm their public image.

This book discusses intangible interests and costs in detail and provides appendixes with model questions for lawyers and mediators to help parties make comprehensive assessments to help them make their decisions in litigation, negotiation, and mediation.

7. Early Mediation

In many civil cases, parties mediate late in the litigation. Lawyers and courts often assume that mediation is not appropriate until lawyers have completed discovery and a trial date is looming. When lawyers are ordered to mediate early in a case, they may feel unable to settle because they don't have enough information to feel confident in settling. Of course, late mediation loses much of the value that parties get from early mediation. This section describes several variations of early mediation processes.

Preparation before parties convene is extremely important, especially before early mediation. The ABA Section of Dispute Resolution developed several pamphlets to help parties and lawyers prepare for mediation. This is a general guide and here are versions for family and complex civil cases.

A. Pre-Suit Mediation

Ideally, parties who want to mediate would do so before filing suit. Lawyer-neutral Conna Weiner described the benefits of pre-suit mediation in business disputes. 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." She notes 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.

She 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.

B. Planned Early Two-Stage Mediation

In many practice settings, there is a strong norm of trying to settle civil cases in one mediation session if possible. In cases following the one-session norm, parties 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 others before making decisions.

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 later re-convene. Although this may eventually produce good resolutions, it does not provide the benefits of a **planned** early two-session mediation (PETSM) process of being better organized and more humane.

In a PETSM process, the first session should occur soon after the parties have done some basic fact-finding and legal research. In the first session, mediators can help identify critical uncertainties and potentially unrealistic assumptions, and then encourage people to check them out as "homework" to be completed before the second session.

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 PETSM, 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.

C. Planned Early Multi-Stage Mediation

In many practice communities, family mediations routinely consist of a series of sessions. In the early sessions, the parties define the issues. As the process continues, parties collect and share information, consult experts as needed, and eventually try to negotiate an agreement.

This process is much less common in (non-family) civil mediations. However, in the wake of the coronavirus crisis, some civil mediators have offered planned early **multi-**stage mediation. With video, lawyers and clients not only save travel time to attend

mediations, but they avoid the dead-time waiting while mediators caucus with the other side. It's 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.

D. Early Dispute Resolution Institute Process

Lawyer and neutral Peter Silverman founded the Early Dispute Resolution Institute to help resolve disputes within 30 days. The process involves parties making contractual commitments to participate in good faith and comply with the higher ethical standards required in the process.

After the defendant files an answer in a lawsuit, the parties engage a specially-trained mediator to assess the procedural needs and recommend a process. Parties may be able to mediate right away or may need to exchange certain limited additional information so that they can make informed decisions. This may involve short interviews or depositions that would be conducted promptly.

When the parties are ready to mediate, they present their valuations of the case including specific numbers and explanations about "(1) How much ... each side expect[s] to spend on fees and expenses to take the case through trial? (2) What would be the best and worst outcome for each side from trial? (3) What is the percentage likelihood of winning on each of the core claims in the suit? (4) If a party prevails on a claim, what's the low, middle and high range of damages, as well as the likelihood of winning at each level?" Finally, the mediator helps the parties try to resolve the dispute.

The EDRI website provides detailed protocols for the process.

E. Guided Choice Early Dispute Resolution

Lawyer and neutral Paul Lurie developed the Guided Choice Early Dispute Resolution process. It involves mediators to facilitate the exchange of information, analyze factors leading to stalemate, and recommend a customized settlement process to overcome impasses. The process involves the following steps:

- An obligation to mediate
- Retaining a mediator as early as possible
- A mediator's confidential investigation and diagnosis
- Information exchange
- Anticipating and overcoming impasse

- Continued use of the mediator after negotiations are suspended
- Customizing arbitration for disputes that do not settle

The Guided Choice website includes model forms.

8. Planned Early Dispute Resolution Systems

One might assume that sophisticated business executives would rarely use litigation because of the huge costs and uncertainties, which businesses generally loathe. Litigation undermines many business interests such as efficiency, protection of reputations and relationships, control of business operations, and risk management, among others. Major businesses are repeat-player litigants that have large staffs of financial and legal experts that could develop proactive systems to avoid, minimize, and efficiently handle disputes.

Surprisingly, few businesses have such systems. To find out why some do and some don't, I conducted a study with lawyer and mediator Peter Benner, *Why and How Businesses Use Planned Early Dispute Resolution* (PEDR). We interviewed inside counsel at major corporations using PEDR systems to understand why these businesses adopted these systems, unlike many of their competitors.

PEDR is a general approach designed to enable businesses to resolve disputes favorably and efficiently as early as reasonably possible. It involves strategic planning for preventing conflict and handling disputes in the early stages of conflict, rather than dealing with disputes ad hoc as they arise. There is no uniform PEDR model. Various companies' PEDR initiatives include some or all of the following elements:

- Building support for PEDR systems
- Changing the corporate disputing culture
- Dealing with resistance
- Designating PEDR counsel
- Using dispute prevention and resolution contract clauses
- Conducting early case assessments
- Determining appropriateness of cases for a PEDR process
- Systematically using dispute prevention and resolution processes
- Providing practice materials and training
- Using alternative fee arrangements
- Ensuring survival of PEDR systems

Especially important elements include designating individuals to manage the process, using early case assessments, building support, and changing the culture.

The study illuminated numerous reasons why many businesses **don't** use PEDR systems:

> This study illustrates that key stakeholders have their own interests, which often are satisfied by continuing with the status quo of litigation-as-usual (LAU) rather than switching to a PEDR system. The C-Suite often does not want to "get into the weeds" of managing litigation. Inside counsel and middle-level employees may feel that they currently handle disputes effectively, and they may resent efforts to reduce their autonomy. Outside counsel may worry about interference with their professional responsibility to produce the best legal results and their ability to generate substantial revenue that generally flows from LAU. Although general counsel have the formal authority to direct inside and outside counsel to use PEDR processes, the general counsel may not do so for various reasons such as their temperament, background, training, or reading of internal business priorities. Even if they implement a PEDR system, the system is unlikely to be as effective as possible if key stakeholders resist.
>
> More generally, what may seem irrational to outside observers may seem quite rational to individual stakeholders. Although the status quo may not seem optimal to some stakeholders, doing something different may seem risky, possibly subjecting them to criticism if things do not work out well. Business people normally do not get involved in dispute resolution and they may not be interested in PEDR processes unless it "hits them personally." One lawyer said that the biggest barrier to adopting a PEDR system was simply agreeing to change. "People get set in their ways. Teaching an old dog new tricks is very tough. Change is upsetting the apple cart and people don't want to hear it." So, although adopting a PEDR system may seem like a no-brainer at first blush, proponents of this approach often face significant barriers that make it difficult to adopt and sustain this innovation. (footnotes omitted)

Anna Howard's new book on corporate counsel's attitudes about cross-border commercial mediation in the European Union found that internal organizational culture plays a significant role in handling these disputes.

The Planned Early Dispute Resolution Task Force of the American Bar Association Section of Dispute Resolution produced a PEDR user guide and other materials to encourage businesses to develop PEDR systems. Eversource Energy is an exmaple of a company using a PEDR system, as described in this post.

9. Possible Next Steps for EDR Movements

The ADR community always has aspired to innovate and improve traditional processes of dispute resolution. This was expressed in 1982 by former Chief Justice Warren Burger when he asked, "Isn't there a better way?" This certainly reflects the views of EDR proponents.

EDR movements have had mixed success so far. This paper documents both significant achievements and also limitations. Members of the movement understandably feel some pride but also some disappointment that they have not been

more successful in changing traditional mindsets and practices. This section suggests ideas for advancing their ideals.

A. Develop Realistic Theories of Change

In the second half of the Twentieth Century, a group of scholars and practitioners developed methods to promote social and organizational change, which they referred to as developing theories of change. Carol Weiss, a leader of that movement,

> argued that stakeholders of complex community initiatives typically are unclear about how the change process will unfold and therefore give little attention to the early and mid-term changes that need to happen in order for a longer term goal to be reached. The lack of clarity about the "mini-steps" that must be taken to reach a long term outcome not only makes the task of evaluating a complex initiative challenging, but reduces the likelihood that all of the important factors related to the long term goal will be addressed. ... Since the publication of [her] book, the use of planning and evaluation using theories of change has increased exponentially among philanthropies, government agencies, international NGOs, the UN and many other major organizations in both developed and developing countries. This has led to new areas of work, such as linking the theory of change approach to systems thinking and complexity. Change processes are no longer seen as linear, but as having many feedback loops that need to be understood. Theories of change are strengthening monitoring, evaluation and learning. They are also helping to understand and assess impact in hard to measure areas, such as governance, capacity strengthening and institutional development.

The Center for the Theory of Change identifies the following stages in the process:

- Identifying long-term goals
- "Backwards mapping" to connect the requirements for achieving the goals and explain the necessity and sufficiency of those requirements
- Identifying assumptions about relevant context
- Identifying interventions to create the desired change
- Developing indicators to measure outcomes and assess the initiative's performance
- Writing a narrative explaining the logic behind the initiative

EDR movements are more likely to be effective if they follow these steps, particularly by making explicit assumptions and realistically analyzing how their potential initiatives might – and might not – achieve their goals.

It's particularly important to clearly understand how potential EDR users view their situations, what problems they experience, and what could "add value" to their work. It should be helpful to ask what "drives them crazy" about their status quo.

ADR proponents sometimes are hindered by the naive realism cognitive bias, assuming that potential ADR users would view their situations the same way that proponents do. The PEDR study illustrates how many potential EDR users have very different perspectives than proponents.

To implement effective initiatives, EDR proponents may need to de-bias themselves by rigorously learning the perspectives of potential users rather than assuming that users would have the same perspectives as proponents. Neutrals routinely use this perspective-taking skill when working with disputants. EDR proponents should use it when planning and implementing their initiatives so that they can be rigorously honest about the likely reactions. Writing an explicit theory of change can help proponents be realistic.

In particular, it is important for proponents to assume that they will encounter resistance. If it was easy to convince people to use EDR, they probably already would use it. EDR initiatives should include strategies for recognizing and dealing with resistance. These initiatives are unlikely to be effective by simply disseminating materials on the assumption that people will adopt the suggestions without personal engagement. EDR initiatives should include plans to spend substantial time in outreach through presentations, one-on-one conversations, and other means to engage opinion leaders, organizational decision-makers, and skeptics. These efforts should be designed so that people don't feel that proponents are primarily interested in getting more work.

When proponents encounter resistance, it would be helpful to identify the causes of resistence such as comfortable habits, bad experiences, fear of specific risks, contrary professional or organizational norms, personal practice philosophy, or something else. Based on this assessment, proponents can engage in conversations about options addressing their professional concerns.

Persuasion efforts are likely to be more effective when sponsored by respected professional organizations at varying levels, from local to global. These efforts should emphasize how EDR initiatives would add value by helping solve practitioners' problems as they perceive them. Proponents might emphasize how EDR is consistent with and an extension of potential adopters' existing values and practices rather than a repudiation of or radical change from them.

Theories of Change for the Dispute Resolution Movement: Actionable Ideas to Revitalize Our Movement is a collection of short pieces suggesting discrete theories of change. These pieces are not complete theories of change and relate to a wide variety of ADR issues, but they may provide useful ideas for EDR proponents. The introductory essay lists many goals and strategies that proponents might consider.

B. Promote Effective Early Case Assessment Processes

All the EDR movements are premised on educating parties and lawyers about their situations early in process so that they can make good decisions about handling their cases. Lawyers generally do some early case assessment (ECA) in their cases, but the vary in depth, quality, and engagement of clients in the process. They often focus exclusively or primarily on predictions of the expected court outcomes, with little or no focus on parties' tangible and intangible costs and interests. Parties would benefit if more lawyers routinely do more thorough ECAs.

A big part of the problem is the default counteroffer negotiation process, which exacerbates lawyers' partisan role bias. Lawyers often consciously and unconsciously bias their assessments of expected court outcomes in favor of their clients. The logic of the counteroffer process requires each side to make extreme, disingenuous claims about the expected court outcome. This anchors people's expectations on unrealistic numbers and aggravates adversarial relationships. The counteroffer process is deeply embedded in American legal practice culture and presumably won't go away. EDR initiatives might try to counteract it to reduce the problems it creates.

Early case assessment processes should focus on helping parties make good litigation decisions. This requires more than improving estimates of court outcomes and litigation costs. It involves engaging parties in the assessment process, helping them understand the litigation process and potential consequences so that they can make the best possible decisions. Parties' intangible interests, which can be extremely important to them, are inherently subjective, and ECA processes should help parties identify, value, and prioritize their interests.

Lawyers should help parties make these assessments throughout the cases, as the assessments invariably evolve in the process. Thus lawyers should conduct case assessments at the earliest appropriate time and continue as clients need to make decisions.

Mediators routinely help lawyers and parties improve their case assessments, helping them overcome their partisan biases and focus on their interests and strategies. EDR initiatives might consider ways to improve these efforts.

Case assessment processes vary based on many factors including characteristics of parties and professionals involved, subject matter of disputes, amount at stake, and professional and organizational culture. Thus EDR initiatives to improve case assessments would need to vary accordingly. CPR's ECA toolkit is a good example for major corporate disputes.

C. Focus on Building Constructive Relationships

Problematic relationships often cause late, inefficient, and counterproductive dispute resolution. EDR proponents could undertake initiatives designed to improve key relationships in litigation.

As described in my post, *Lawyers Are From Mars, Clients Are From Venus – And Mediators Can Help Communicate in Space*, lawyers and clients often seem like they live on different planets. Lawyers can do better to understand and communicate with their clients.

Parties often react to experiences or expectations from their network of relatives, friends, co-workers, community members etc. So it could help if lawyers regularly ask clients about potential reactions of key people in their networks. This may be particularly significant when the parties are organizations composed of individuals with differing perspectives and interests as described in the PEDR study. Similarly, mediator Jeff Trueman documented tensions between insurance claims adjusters and defense counsel who supposedly are on "the same side."

Of course, lawyers' relationships with their counterpart lawyers can have a major impact on whether parties can resolve disputes quickly and efficiently. My article, *Getting Good Results for Clients by Building Good Working Relationships with "Opposing Counsel"*, describes the situation and offers suggestions to build good relationships.

> Lawyers often say that they can predict how well a case will proceed once they know who their counterpart lawyer is. If the counterparts have a good relationship, they are more likely to be able to exchange information informally, agree on procedural matters, take reasonable negotiation positions that recognize both parties' legitimate expectations, resolve matters efficiently, satisfy their clients, and enjoy their work. On the other hand, if the lawyers have a bad relationship, the case is likely to be miserable for everyone involved. Lawyers may decline to grant each other routine professional courtesies (such as extensions of deadlines to file court papers), bombard each other with excessive and unjustified discovery requests, file frivolous motions, make outrageous negotiation demands, yell and scream, and generally behave badly. ... Unfortunately, it is easy to start a cycle of escalating hostility and, once it gets started, it is hard to stop. Both sides may start by intending to cooperate, but a single event can trigger a chain reaction of hostilities. ...
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> [The article describes] general techniques for providing effective representation by building good working relationships. ... The techniques include getting to know each other personally, initiating mutually helpful actions, and displaying appropriately respectful relationships in front of clients.

Collaborative lawyers routinely rely on using good relationships with their counterpart lawyers as do many lawyers in traditional practice. Unfortunately, some lawyers do

behave badly, which can harm parties' interests. EDR initiatives may try to prevent, reduce, or neutralize such behavior.

D. Change Disputing Cultures

Professional practice cultures strongly affect the handling of legal disputes. Major, long-lasting changes in dispute resolution involve modified professional practice cultures.

The history of ADR is a history of innovations that were considered radical when proposed but became taken for granted. Consider juvenile courts, family courts, small claims courts, labor arbitration, workers' compensation and other administrative adjudication, and court-connected arbitration and mediation, among others. These reforms resulted from changes in perceptions of professional leaders and rank-and-file practitioners that parts of the legal system weren't working properly and that there were better ways to solve their problems. Professionals came to believe that some innovations, such as court-connected arbitration, were problematic and shifted to other procedures.

Changing legal practice culture is a long, slow process. There is a strong status quo bias, especially in a field that values tradition and precedent. People generally prefer the devil they know over the devil they don't know.

It may be helpful to consider several examples of changes in legal practice culture to provide insights about potential future changes. For much of US history, judges viewed themselves almost exclusively as adjudicators. During the Twentieth Century, judges increasingly saw their roles as litigation managers and settlement judges in addition to adjudicators. In a related development, my study of federal court clerks showed that they are executives of complex organizations administering justice with limited resources, not simply trial court administrators.

Not long ago, lawyers generally didn't know much about mediation and often were skeptical or resistant to using it in their cases. In a relatively short time, many lawyers came to value mediation as described in my article, *Getting the Faith: Why Business Lawyers and Executives Believe in Mediation*. Julie Macfarlane's study, *Culture Change - A Tale of Two Cities and Mandatory Court-Connected Mediation*, showed how lawyers developed reactions ranging from being true-believers in mediation to "oppositionists," and that lawyers in Ottawa generally were more supportive than in Toronto reflecting different local practice cultures. Indeed, mediation has become institutionalized in many practice communities in what I called "liti-mediation" culture, where it is taken for granted that mediation would be the normal way to end litigation.

Culture change involves both top-down and bottom-up forces. Opinion leaders – such as judges, bar association officials, law firm leaders, experts, and legal academics – can have a major influence. Rank-and-file practitioners also affect colleagues' and supervisors' views based on their experiences "in the trenches." Changes are uneven,

varying by type of dispute, locale, and presence or absence of influential leaders, among other factors.

This may be a particularly opportune time for changes in disputing culture because we already are in a period of intense social and technological change, as described by Michael Buenger, executive vice-president and chief operating officer of the National Center for State Courts. There also has been a radical global disruption of normal routines due to the coronavirus pandemic, which created a "new normal." After the pandemic is brought under control, we may resume some parts of the old normal, but the crisis also presents the opportunity to discard some old routines, and we will undoubtedly continue some new routines developed since the pandemic hit. In this period of flux during and immediately after the pandemic, people may be open to considering other changes, unrelated to the pandemic.

The routine use of video, in particular, has collapsed space and time so that it has become normal to communicate with large numbers of people simultaneously all over the globe – and also promote useful asynchronous communication. As Creighton Professor Noam Ebner has described, negotiating is changing – as are dispute processes generally. Lawyers, neutrals, and courts have functioned virtually, some times in sweat pants or cat avatars. People notice what they appreciate about interacting in person – as well as doing so by video. Presumably, after people feel safe to regularly interact in person, people will choose in-person, video, and perhaps some other communication modes.

As Mike Buenger and Noam Ebner suggest, the technological changes are only one part of a wide range of major changes now affecting how people live, think, deal with each other, handle problems, and resolve disputes. This period of flux provides opportunities to initiate culture changes.

10. Conclusion

Proponents of EDR innovations display a combination of idealism and pragmatism. They promote methods of handling disputes that satisfy clients' interests – as well as their own professional interests in producing the "better way" that Chief Justice Burger called for. Based on their extensive experience, they have succeeded in handling disputes that produced real benefits for parties and society.

Yet there is a yearning to do more, to realize more of the unfulfilled potential of EDR methods. This paper suggests several possibilities for advancing these aspirations.

We may be in the middle of a period of multiple changes, after which we may settle into a set of new normal routines for an extended period of time. If so, this is a good time to undertake change strategies.

EDR proponents might consider starting with initiatives to get “low-hanging fruit” that can be achieved relatively easily and quickly. This can provide a sense of accomplishment, momentum, and motivation to continue.