MOTIVATING LAWYERS TOWARD EARLY ADR EFFORTS: CAN THE RIDER MAKE THE ELEPHANT MOVE?

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Many lawyers and businesses resort to costly and time-consuming litigation only to settle their disputes just before trial. This is true despite numerous reports that document large amounts of time, money, and opportunities are saved by managing conflict early. This author has personal experience in mediating litigated tort disputes. One case in particular makes the point clearly: at the outset of the lawsuit, the plaintiff's mother wanted to settle her child's claim for less than $100,000 but the main insurance carrier would not negotiate; less than four years later, after untold time and expenses for all concerned, the carrier settled for well over $1,000,000.

This is commonplace – albeit typically with a less extreme dollar differential. Some lawyers prefer early case assessments (ECA) in order to avert excessive, if not ridiculously wasteful, outcomes like the one just mentioned, but it depends on the type of dispute and the relationship lawyers have with their clients. For sure, some "frivolous" claims are assessed early and will not be resolved through ADR. Money does not flow from mere filings. Reputations have to be considered. In some cases, early ADR is not strategically advantageous because delays can create leverage that can save money. Sometimes the problem is getting the other side to be reasonable early in the life of the dispute. In addition, policy questions may need to be answered or a problem-solving approach to the dispute is not feasible or desired.

To be clear, litigation has a legitimate place on the spectrum of conflict management choices. But is extended discovery really necessary when a fair number of disputes fall into general categories and similar patterns? Not every case is so unusual that it requires independent medical examinations, expert opinions, and the like. Not every client wants to endure more risk and delay waiting for the conclusion of litigation. But in many cases, settlements are delayed because lawyers seem to trust trial events more than negotiation when it comes to generating movement toward resolution. Whether settlements can be reached in less time without sacrificing good results depends more on emotional fortitude and less on empirical data.

As Chip and Dan Heath describe in their book *Switch: How to Change Things When Change is Hard*, we are rational beings with a "Rider" that logically analyzes our surroundings. Our Rider tries to direct our emotional side, "the Elephant." Although we like to think our Rider is in control at all times, in truth, the Elephant is in charge much of the time. Data concerning the benefits of ECA and planned early dispute resolution (PEDR) may be appealing to the Rider, but if the Elephant is afraid of an unfamiliar process that might lead to bad outcomes, it will not move.

All this being said, rational people regularly make major life changes absent certainty of outcome. We change jobs, we get married and have kids, we move to new places, we invest in the stock market. We do this knowing that a bad outcome – failure – is possible. In fact, failure is a part of life we grow from and accept. But in our professional worlds, failure is not tolerated. Perceived failure, how one appears to others, is one of the foundations of what University of Missouri School of Law Professor John Lande calls "the prison of fear" that prohibits some lawyers from practicing in new ways. Fortunately, break-outs from the prison can, and do, occur. Break-outs happen when attorneys employ ECA and PEDR.

The Rider can motivate the Elephant toward ECA when the time is right. Approximately three to four months after notice of a dispute, the parties can briefly and thoroughly assess factual discrepancies, the relevant law, and the consequences of unexpected legal rulings. They can consider settlement options to achieve desired goals. Although they are bypassing traditional discovery, the parties and their counsel determine whether and when they are ready to explore settlement options. At bottom, there is little to lose, and much to be gained, with ECA.

The real potential for early resolution starts with a determination from lawyers to do business differently; to think about how cases tend to flow; to engage in meaningful settlement talks before the eve of trial; to interpret an invitation to negotiate as an opportunity that can produce a good result for the client rather than as a sign of weakness; and to fully appreciate the unpredictable nature of law suits regardless of how much subject matter and technical expertise is purchased by one side or another. As some lawyers have learned, they can gain from promoting innovation and cost-savings as value-added benefits to clients. In turn, clients may become Riders capable of motivating Elephants when they realize better results can be obtained in less time, and with less expense, through early ADR.