EARLY DISPUTE RESOLUTION

Overview
and
Model Rollout Presentation
Key Elements of EDR Programs

- Model Process
- EDR Indications
- Creation of the EDR Team
- Early Case Assessment
- ADR Issues to Consider
- Develop ADR Plan
- Approaches to ADR Metrics
- “Plain English” Metrics
Model EDR Process

**Conflict Arises**
- Business Unit Attempts\n  - Informal Resolution

  **Conflict Resolved?**
  - No
    - Create EDR Team (legal & business)
    - Early Case Assessment
    - Develop Resolution Strategy
    - Ongoing EDR Discussions
    - Conflict Resolved?
      - No
        - No Further Action
      - Yes
        - No Further Action
  - Yes
    - No Further Action

**Level 1: Private Resolution**

**Level 2: Facilitated Resolution**
- No ADR\n  - Negotiation\n  - Mediation\n  - Arbitration

  **Conflict Resolved?**
  - No
    - No Further Action
  - Yes
    - No Further Action

**Level 3: Public Adjudication**
- No Litigation
  - Conflict Resolved?
    - No
      - No Appeal
    - Yes
      - No Further Action
The conflict is a threat to existing business relationships

The conflict poses a regulatory or financial risk to the business

The conflict is a threat to corporate reputation

The conflict is part of an emerging pattern

Unable to resolve conflict informally
Create EDR Team

Business or legal colleague notification to litigation group

- Litigation counsel performs **preliminary case assessment** (10 days)
  - nature of dispute
  - apparent amount at risk
  - business and/or regulatory issues
  - identification of stakeholders
  - document retention issues
  - risk Management notification, if necessary
  - regulatory/CIA reporting obligations

- **Litigation counsel assembles team** members, as necessary
  - business contact
  - subject matter expertise within business
  - outside counsel
  - outside expertise
- **Perform Early Case Assessment if:**
  1. Financial risk over company threshold
  2. Major Corporate Reputation Issues
  3. Major Precedent Issues
  4. Potential Pattern – *e.g.*, Mass Tort
  5. Corporate Reserve, or
  6. Discretion of Litigator

- **Develop Resolution Strategy**
  - What is the optimal mix of direct negotiation, facilitated resolution and litigation?
  - Are all of the necessary elements in place?
EDR Team identifies **Tasks**, develops **Timeline and Assigns Responsibilities to address Key ECA Elements**

**Early Case Assessment**

- Relevant History
  - Industry
  - Company
  - Issue

- Abridged Factual Review
  - S-P counsel
  - S-P business
  - Outside counsel

- Abridged Damages Analysis
  - Expert
  - Counsel

- Abridged Legal Review
  - Outside counsel
  - S-P counsel

- Evaluation of opposing counsel, venue, judge or neutral
  - Outside counsel
  - S-P counsel

- Estimation of legal fees, expenses, costs
  - Expert
  - S-P counsel

- Analysis of non-economic risks/benefits
  - S-P counsel
  - S-P business

**Integrate and Analyze**

- ECA Report proposing ADR Plan (strategy and process) (60 days)

- Implementation of ADR Plan (begin within 30 days)

- Lessons Learned/Continuous Improvement
ADR

Issues to Consider

Is ADR right for the case?
- Is the issue one that can be compromised?
  - Core business issues
  - Products
  - Scale

Is ADR process available?
- Contract term
- Court requirement
- Ability to steer to EDR absent requirement

Are necessary elements in place?
- Have essential facts been developed?
- Have potential damages/value been analyzed?
- Has business bought into the process?
- Has settlement authority been granted?

Yes

Develop ADR Plan

No

• Continue with litigation
  • Identify future opportunities to reconsider ADR

No

• Continue with litigation
  • Identify future opportunities to reconsider ADR

No

• Develop plan for getting necessary elements in place
  • Develop timeline for moving forward with ADR
<table>
<thead>
<tr>
<th>ADR</th>
<th>Develop ADR Plan</th>
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<tbody>
<tr>
<td>Determine form of ADR best suited to case/issue</td>
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<table>
<thead>
<tr>
<th>Facilitative Mediation:</th>
<th>Evaluative Arbitration:</th>
<th>Binding Arbitration:</th>
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<tbody>
<tr>
<td>+</td>
<td>+</td>
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</tr>
<tr>
<td>• most flexible</td>
<td>• existing formal frameworks</td>
<td>• formal framework</td>
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<tr>
<td>• decision by parties</td>
<td>• decision assured but must be accepted</td>
<td>• decision assured</td>
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<tr>
<td>• least risk of</td>
<td>• low risk of unacceptable outcome</td>
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<td>unacceptable outcome</td>
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<td>• least expensive</td>
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| Δ                      | Δ                      | Δ                    |
| can’t force issue to resolution | more time-consuming | decision imposed and final |
|                         | more expensive        | time consuming      |
|                         |                        | most expensive      |
|                         |                        | can be the worst of all worlds |
Identify/Choose Mediator/Arbitrator(s)

How many?
- One (mediation)
- Three (arbitration)

• Is choice predetermined?
  - by contract

• If not, key factors:
  - Level of experience (in general/with issue)
  - Judgment
  - Ability to maneuver/push issues to closure
  - Ability to identify blocking issues and develop a process for resolving them

• Can you live with opponent’s choice?
  - for mediations, this can make a big difference
Approaches to EDR Metrics

• Six Sigma/Extensive use of Statistical Tools

• Fully Developed Metrics/Less Statistically Oriented

• Beginning at the Beginning
  – “Plain English” Metrics
“PLAIN ENGLISH” EDR METRICS

• Six Sigma requires resources that are not always available
  – Statisticians
  – Blackbelts
  – Greenbelts
  – Training
• Quality metrics are not contingent on the availability of Six Sigma resources
“PLAIN ENGLISH” EDR METRICS

• The key to quality metrics is to begin by focusing on function
  – Caseload management
    • “What gets measured gets managed”
  – Communication
    • Where we are
    • Where we were
    • Where we are going

*Function + Objectives = meaningful metrics*
“PLAIN ENGLISH” EDR METRICS

• Objectives
  – Enable management of processes to quality outcomes
  – Establish meaningful and reliable benchmarks
  – Understand “success” and “failure”
  – Facilitate consistency
  – Enable “early warning”
  – Enable continuous improvement

Meaningful Metrics Demonstrate Value
“PLAIN ENGLISH” EDR METRICS

• Practical pointers for developing caseload management metrics
  – Should the caseload be managed as a whole or are there good reasons to subdivide?
    • Core Business Issues
    • Plaintiff or defendant
    • Specialty subjects
      – Patent
      – Employment
“PLAIN ENGLISH” EDR METRICS

- Practical pointers for developing caseload management metrics (cont.)
  - Where are you seeking performance improvements
    - Volume
    - Time
    - Costs/savings
      - Counsel costs
      - Settlement costs
    - Results
“PLAIN ENGLISH” EDR METRICS

• Practical pointers for developing caseload management metrics (cont.)
  – What are the factors that appear to drive outcomes
    • Industry issues
    • Early case assessment
    • ADR
    • Fee structures
    • Counsel/expert performance
“PLAIN ENGLISH” EDR METRICS

- Practical pointers for developing caseload management metrics (cont.)
  - What are the available sources of data
    - Budget process
    - Matter management systems
    - “Significant Litigation” reports
    - Satisfaction surveys
  - If the data you need is unavailable, think of tools to generate it, but remember

*Perfection is the enemy of the good*
“PLAIN ENGLISH” EDR METRICS

• Communication--Using metrics to demonstrate value
  – Identify the audience
    • Management
    • Clients
    • Other stakeholders
  – Identify the message
    • What has meaning to the audience

• Meaningful metrics enable you to manage performance AND communicate the message