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Litigation Prenups: Getting the Civil Justice System Back in the Business of Dispute Resolution

PLUG THE TERMS "legal profession" and "innovation" into googlefight.com and you will see that the legal profession is one that is known more for its traditions than for its new ideas. But the time-honored conventions of the civil litigation system are rapidly falling out of favor with the American corporate community. Corporate in-house counsel, themselves pressed by their business peers to provide meaningful budgets and reduce needless expenses, are increasingly intolerant of a civil justice system that uses a limitless process for the resolution of limited business disputes.

Arbitration no longer is seen as the alternative of choice to civil litigation. Arbitration often carries the same costs and delays of civil litigation, but without the right of appeal and the consequent loss of the common law on which lawyers can base sound legal advice for future conduct. While the legal profession has thus far avoided the paradigm shift that has been shaping the medical profession in the last several years, the race to the bottom of the billable hour is accelerating, and we might just be next—unless we innovate and improve.

One new idea that is attracting the attention of corporate legal departments is the economical litigation agreement (ELA), sometimes referred to as the "civil litigation prenup." The ELA is an alternative to arbitration agreements, which allows any dispute in a business contract to be decided in the civil justice system. Unlike conventional civil litigation, which allows an infinite process for finite disputes, the ELA is a discovery contract incorporated into the underlying agreement that provides for a finite process for finite disputes—a process that is proportionate to the amount of any controversy. The discovery contract itself is enforced by a discovery arbitrator, the ELA arbitrator, with cost-shifting and a "loser pays" provision for most discovery disputes. All discovery issues are heard and decided by the ELA arbitrator rather than by a civil justice judge, and all discovery decisions are enforced in the form of arbitration awards.

Rule 29 of the Federal Rules of Civil Procedure (and most state rules that parallel the federal rules) provides that the parties in civil litigation can stipulate to "other procedures governing or limiting discovery. …" As a practical matter, Rule 29 is not often used in practice because it is difficult to achieve agreement to limit the universe of discovery in the heat of battle. Imagine the reaction of defense counsel in a newly filed action when the plaintiff's counsel calls to introduce herself and then suggests no more than two depositions per party. The best time to reach agreement is during the formation of the underlying transaction, when both parties to the transaction are focused on their shared interests in the deal. Such agreement, an ex ante contract for discovery, has been described in one legal publication as a possible "game changer" that can reduce the costs and delays of business litigation in America.

Every dollar saved in litigation is a dollar of profit added directly to a company's bottom line. Because the most expensive part of business litigation is discovery, the ELA promises significant savings for American companies that embrace this innovation. In addition to boosting profits, the ELA also promises to make litigation costs more predictable and susceptible to accurate budgeting. For law firms so accustomed to competing on the basis of billable hours, the ELA will create value for experience, strategic thinking, and ability to achieve favorable results as law firms compete in the marketplace. When lawsuits are not bottomless pits of procedure, lawyers can give clients a better sense of costs and the pace of the litigation that clients can expect.

What about the judges? The ELA will get judges back into the dispute resolution business that has been ceded for so long to arbitrators. By shifting discovery enforcement to the ELA arbitrator, the ELA will leave for judges those tasks they perform uniquely within the civil justice system: threshold motions, dispositive motions, and trial. Judicial resources and sessions will not be consumed by discovery disputes, and every substantive task presented to a judge will create an opportunity for resolution of the case on its merits. If a judge insists on conventional discovery enforced in the conventional way, the ELA reserves to the parties the right to resort to arbitration instead of the civil justice system to decide the merits of their

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