EARLY DISPUTE RESOLUTION PRACTICE PROTOCOLS

The Early Dispute Resolution Institute provides these protocols as a guideline for use in early dispute resolution. These protocols should not be construed as legal advice or as creating an attorney-client relationship.

October 1, 2019

INTRODUCTION

The Early Dispute Resolution Institute ("Institute") is a non-profit, 501(c)(3) corporation. Our mission is to work with, attorneys, bar associations, dispute resolution providers, businesses, and individuals to:

- promote the ethical and professional practice of early dispute resolution ("EDR") to resolve civil disputes quickly, economically, and fairly;
- train lawyers and clients in EDR's use;
- educate the public as to EDR's benefits; and
- preserve EDR's integrity.

The EDR Practice Protocols ("Protocols") address EDR's key elements along with the roles of ethics, trust, and relationships in carrying these out. The idea of establishing protocols for the process is borrowed from the Global Collaborative Law Council, which drafted the Protocols of Practice for Collaborative Lawyers, which in turn borrowed from the Protocols of Practice for Collaborative Family Lawyers, drafted by the Collaborative Law Institute of Texas. These organizations recognized that a specialized dispute resolution process raises many issues of practice and ethics that need to be spelled out and adhered to for the process to work.

The Protocols provide guidance to lawyers and parties using EDR to resolve civil disputes. The Protocols don't need to be applied mechanically, and may be adjusted as appropriate to a specific dispute. If adjustments are made, the parties should address them in writing.

The Institute has developed training programs to train lawyers and other professionals in using EDR to resolve civil disputes, and in educating the public on EDR's benefits. We hope that lawyers and parties find the Protocols useful, and that the practicing bar embraces the Protocols as the norm to follow in using EDR to resolve civil disputes.

Early Dispute Resolution Practice Protocols

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Overview

The basic process of Early Dispute Resolution ("EDR") is easy to state. Using terms that will be defined below, parties initially try Simple, Rapid Resolution, which should suffice to resolve many disputes. If it doesn't, the parties engage in an expedited 4-step process, likely guided by an EDR neutral, of Initial Dispute Assessment; Information exchange; Objective Dispute valuation; and Final Resolution. If the parties' goal is to do this in 30 calendar days, the following table showing suggested times (in business days) for doing each phase.

Process	Number of business days
Initial Dispute Assessment	6
Information Exchange	7
Objective Dispute Valuation	3
Final Resolution	6

While the process is easy to state, thorny ethical and practical issues lurk at each stage of the process. The EDR Practice Protocols (the "Protocols") address these issues. Once the protocols are understood and internalized, the process becomes reasonably straightforward.

1. General Provisions

1.1. Definitions. The Protocols use a number of defined terms that allow for clear communication and understanding between parties in negotiating the EDR Agreement, which sets forth the guidelines to be followed in the EDR process and in carrying out the process. The Protocols define these terms in individual protocols, and then for convenience set them out as a glossary at the end.

1.2. Application of professional rules and Protocols. In conducting EDR, lawyers should follow the applicable rules of professional conduct governing lawyers in the jurisdiction. In some instances, the Protocols aspire to higher standards than those rules. If the parties agree to the Protocols as part of their EDR Agreement, they and their counsel agree to conduct themselves consistent with those higher standards.

Commentary: The higher standards are set out in specific protocols applicable to each stage of EDR. It can't be overstated how important it is to have highly ethical counsel on both sides who can be trusted by the other side to comply with the higher standards called for in the Protocols. The Institute recommends that lawyers agree in the EDR Agreement to follow the Protocols.

1.3. Approved forms. The Institute recommends use of its form EDR Agreement, which the parties should tailor appropriately for the EDR process best suited for their dispute. Use of the standardized EDR Agreement assists in compliance with the Protocols, and enhances consistency in the practice of EDR. A copy of the Institute's recommended form *ad hoc* EDR Agreement is attached

as Appendix A, and copy of the Institute's recommended form EDR contract provision is attached as Appendix B.

2. EDR's Fundamentals

2.1. Rationale. EDR's rationale is that parties and lawyers should be able to resolve contentious disputes quickly, economically, and fairly without the need for long, expensive litigation or arbitration. They should be able to quickly and economically gather the information they need to reasonably forecast the likely cost and resolution of the dispute. Clients then have the information that they need to make an informed decision as to whether and how to resolve their disputes. EDR is client-focused by providing clients the information they need to make informed decisions early in the process and economically rather than later and at much greater cost. Businesses and individuals regularly make timely and important decisions based on sufficient limited information; EDR requires lawyers to give clients the information they need to make these decisions in the dispute context.

2.2 Necessary conditions. For EDR to work, the Necessary Conditions are that each party to the dispute:

(a) is reasonable;

(b) has ethical counsel, knowledgeable about the subject matter of the dispute, and trained or otherwise skilled in EDR;

(c) is willing in Information Exchange to seek only Sufficient Knowledge, which is enough information to:

(i) understand the merits of each side's position and leverage, and

(ii) make an informed judgment as to the value of each side's case; and

(d) based on Sufficient Knowledge, is committed in good faith to seek a Fair Resolution, which is a voluntary resolution based on all the circumstances of the dispute.

Commentary: If the necessary conditions aren't present, the EDR process will break down or can be subject to abuse. In entering into an EDR Agreement, lawyers should in good faith believe that they and their clients meet the requirements of the Necessary Conditions.

2.3 Stages of EDR. Initially, the parties seek to resolve the dispute through Rapid, Simple Resolution. If they fail to do so, they proceed to the EDR process, which consists of four distinct stages, often facilitated by an EDR neutral, conducted in a set schedule. The four stages are:

(a) Initial Dispute Assessment
(b) Information Exchange (and, if appropriate, experts);
(c) Objective Dispute Valuation; and
(d) Final Resolution.

Commentary: Parties should set a tight schedule for the process. It can always be changed in good faith as the process develops. The Institute recommends a 30-day process for standard disputes that do not require expert opinion. This is a reasonable time frame. In preliminary injunction proceedings, parties handle pleadings, motions, discovery, briefing, and the hearing in periods as short as 14 days. EDR is far less demanding, and lawyers and clients should be able to

complete it in 30 days. For more complex disputes, the parties should set longer deadlines as is appropriate.

2.4. The EDR Agreement. The EDR Agreement should:

(a) toll statutes of limitations pending the EDR process;

(b) certify that each party satisfies the Necessary Conditions;

(c) address whether an EDR Neutral will be used and, if so, how the parties will select the neutral;

(c) set a timetable for each of the four stages of the process;

(d) define the ethical obligations particular to the EDR stages that the parties and their counsel agree to observe;

(e) set a firm mediation date in the Final Resolution stage if the parties aren't able to completely resolve the dispute through negotiation;

(f) Specify whether the parties will follow a binding dispute resolution process if EDR fails to resolve the dispute and, if so, define that process.

2.5. Selection of EDR Neutral. A skilled EDR neutral can help the parties in Rapid, Simple Resolution and then, if needed, each EDR stage. If the parties plan to use an EDR neutral, they should select the neutral promptly and set a date at the end of the process when the EDR mediation will be held if the parties fail to resolve the dispute through direct negotiation in EDR. The neutral should be dedicated to using the appropriate neutral techniques to advance the EDR process at each stage within the timelines the parties set. By entering into EDR, clients have chosen to resolve their disputes quickly, economically, and fairly, and that goal should guide the neutral in facilitating the process.

Commentary: The Institute recommends use of a neutral in EDR if the parties anticipate any contentious issues. We recommend retaining an EDR Neutral at the beginning of the process, and then using the neutral wisely to control cost by seeking active facilitation only as and when appropriate.

2.6. Rapid, Simple Resolution. Parties should initially try to resolve all disputes with Rapid, Simple Resolution, which means the resolution of a dispute rapidly and with a simple process through problem-solving, distributive or integrative negotiation, or Dynamic Mediation, a mediation process that aims to use case-appropriate, proactive techniques to resolve disputes promptly rather than engaging in the traditional process of reactively setting a date in the future for mediation statements and then a mediation session.

Commentary: Most disputes should be able to be resolved through Rapid, Simple Resolution. The process works best when lawyers are skilled at forecasting the likely result of cases and at negotiating directly at the outset of a dispute without gamesmanship. The Protocols don't address the ethics or procedures of distributive or integrative negotiation, but there is a rich literature addressing these topics and good lawyers should have mastered these skills.

The Protocols don't address Dynamic Mediation beyond defining it as case-appropriate, proactive techniques to resolve disputes promptly rather than engaging in the traditional process of reactively setting a date in the future for mediation statements and then a mediation session. The idea is that good mediators should be able to dig in right away and work with the parties to determine if the matter can be resolved without being limited by the standard process of

mediation statements and a formal mediation, though those procedures may be used if appropriate.

If both negotiation and Dynamic Mediation fail, parties should then consider the 4-step Early Dispute Resolution process rather than standard litigation or arbitration.

2.7 Initial Dispute Assessment. EDR's first stage is the Initial Dispute Assessment. Lawyers and parties should gather the key factual information, do the initial research on key issues, press witnesses to communicate the good and the bad, and determine (i) what information, if any, is necessary to achieve Sufficient Knowledge, and (ii) whether an expert is needed to achieve Sufficient Knowledge.

Commentary: Individuals who have been involved in the matter have the knowledge needed for the Initial Dispute Assessment, and it's human nature for them to be defensive and guarded in discussing their role. It's essential to this stage that individuals know that they should give the helpful and harmful facts now as they will come out in time. Parties need this information to determine whether to request information and documents in Information Exchange and, if so, what to request. Further, parties need this information to make an Objective Dispute Valuation.

2.8. Information Exchange. EDR's second stage is Information Exchange. If either party believes it needs information, documents, or witness statements to achieve Sufficient Knowledge, it should request the information, documents or statements in this stage of EDR. The Protocols address this stage in § 6 below.

2.9. Experts. If either party believes it needs expert opinion to achieve Sufficient Knowledge, experts should be used at the Information Exchange stage. The Protocols address this stage in § 7 below.

2.10. Objective Dispute Valuation. EDR's third stage is Objective Dispute Valuation. Once each party has Sufficient Knowledge, the lawyers should objectively value the case based on interests, costs, leverage, and the likelihood of outcome, as spelled out in § 8 below. The rationale supporting EDR is that the parties can make this valuation early nearly as well as they could if they went through the full process of discovery and motions. Clients then can then make an informed decision whether to resolve the suit at this early stage.

2.11. Final Resolution. EDR's fourth stage is Final Resolution. Once the parties have objectively valued the case, they should negotiate in good faith to resolve the dispute either directly or through mediation facilitated by the EDR Neutral. Good faith means negotiating based on the objective analysis of the interests, costs, leverage, and likely outcome of the dispute, and can involve distributive or integrative bargaining. The Protocols address this stage in § 9 below.

2.12. Procedure absent complete resolution. The parties may succeed in resolving part or all of their dispute through negotiation or mediation in the Final Resolution stage. To the extent the parties don't finally resolve all issues, but still seek to resolve their dispute quickly, economically, and fairly, they should decide on a binding dispute resolution procedure that achieves those goals. The Protocols address this stage in § 10 below.

2.13 Confidentiality. Unless the parties specify otherwise, the conduct of any party, lawyer, or retained expert in EDR and all communications other than requested witness statements, whether oral or written, should constitute compromise negotiations under Federal Rule of Evidence 408 and its state counterparts. These communications and any written materials, tangible items, and other information used in or made a part of the EDR process aren't discoverable or admissible in an adversarial proceeding regarding the dispute, or in any other proceeding among the parties to the dispute, unless they would be admissible or discoverable independently of the EDR process. This restriction does not apply to the admissibility of a full or partial settlement agreement entered into as part of the EDR process. Communications involving the EDR Neutral should constitute communications in mediation for purposes of any state statute governing confidentiality of mediation.

3. <u>The guiding principles</u>

3.1. Voluntariness. EDR is a non-binding voluntary process that seeks speedy, economical, and fair resolution of disputes. Either party may withdraw at any time for any reason.

Commentary: Both parties should enter EDR with a commitment to voluntarily seek speedy, economical, and fair resolution of their dispute. That good faith commitment should preclude either party's seeking to abuse the process for ulterior motives. If at any time, for any reason, either party decides it no longer wants to participate in EDR, or can no longer participate consistent with its duties under the Protocols, it should in good faith promptly terminate the process.

3.2 Speed, economy, and fairness. Clients often (though not always) seek speed, economy, and fairness in resolving disputes. This is similar to how, in their daily dealings, they often make decisions on limited information because of the need for speed and economy in their businesses or lives, and because they have or can obtain a level of information that suffices for informed decision-making. Many informed decisions do not require knowing everything that can be known. Based on Sufficient Knowledge, lawyers should be able to reasonably forecast valuation of the dispute. Lawyers should use dispute resolution techniques to provide clients the level of information they need to resolve disputes quickly, economically, and fairly.

Commentary: A survey was taken of 165 lawyers from the Forum on Franchising of the American Bar Association on how confident they were in forecasting the likely result of a franchise dispute at three stages: after (i) an initial ten-minute briefing; (ii) a follow-up review of some key documents and information from key witnesses; and (iii) full discovery and motion practice. (Silverman, 2017) The results showed that after the initial briefing, the confidence level was 58%; after the secondary review, the confidence level was 62%; and after full discovery and motion practice, confidence level was 64%. (Similar results were obtained from a smaller sample size of lawyers operating in civil law systems.) The clear take away was that experienced lawyers' confidence in their forecast was reasonably high from the initial briefing on the case, and went up very little from full discovery and motion practice. Clients should understand the cost and time of discovery and motion practice in terms of how much information is gained from those processes that help making an informed decision on how to resolve the dispute. The premise of EDR is that very little is gained at a substantial cost in money and time.

3.3 EDR and informed decision-making. EDR aims to quickly and economically allow lawyers to develop Sufficient Knowledge for their clients, and to present their clients an analysis of the dispute and forecast of its likely results based on objective measures used by both sides in the dispute. This allows clients to make informed decisions to resolve disputes quickly, economically, and fairly. EDR is client-focused.

3.4. Cooperation and advocacy. EDR combines advocacy and cooperation. While continuing to advocate for their clients, lawyers should cooperate in each stage to accomplish the objectives of each stage. Cooperation allows for speed and economy to gain the information needed for informed negotiation or mediation in the Final Resolution stage. In negotiation or mediation, cooperation means seeking a reasonable settlement under all the circumstances and not using bad-faith negotiation tactics.

Commentary: Litigation and arbitration combine advocacy and cooperation. The rules of cooperation are set by the rules of the tribunal and are enforced by the judge or arbitrator. Combining advocacy with cooperation mandated by the rules is integral to professionalism. ED requires a higher degree of cooperation because it compresses the dispute resolution process and does not include enforcement by a judge or arbitrator. Also, the advocacy and cooperation in EDR have a different focus. In litigation and arbitration, the client and lawyer focus on "winning;" in EDR, they focus on achieving a fair resolution as efficiently and quickly as possible.

3.5 Integrity. EDR is not court- or arbitrator-supervised and depends completely on the parties' and counsel's integrity in carrying out the process.

Commentary: Litigation and arbitration also depend on the parties' and counsel's, integrity. In discovery, parties regularly depend on representations from the other side as to the scope of search for documents and the responsive documents that were found. Parties assume that each side's counsel is observing the Code of Professional Responsibility. EDR depends more on integrity of counsel because there is no judge or arbitrator to sanction malfeasance. EDR also aspires to a higher level of ethics that is needed to make the voluntary nature of the process succeed. Further, counsel should terminate the process if counsel and the client can no longer operate in good faith under the Protocols. This requires the highest levels of integrity and trust. Thus parties and counsel should act with integrity throughout the process, and communicate clearly on any issues of concern so as to demonstrate that the trust is warranted.

4. <u>The Lawyer-Client Relationship</u>

4.1 Integrity in serving clients in disputes. Lawyers have specialized knowledge in the process of dispute resolution. At the beginning of an engagement related to a dispute, lawyers should inform their clients about all reasonably-suited processes for resolving the dispute, including EDR and other alternative dispute resolution methods, arbitration, and litigation. Lawyers should communicate this in understandable fashion so as to allow clients to make informed decisions.

Commentary: Whether warranted or not, a perception exists that some lawyers don't advise their clients about dispute resolution options because lawyers make more money representing clients in standard litigation or arbitration. Under the Protocols, lawyers are obligated to discuss dispute resolution alternatives, pro and con, to empower clients to make an informed judgment as to the best dispute resolution procedure to resolve the dispute. To

provide this advice properly, lawyers should be reasonably knowledgeable about all dispute resolution procedures.

4.2. Informing clients about EDR. EDR involves four elements that are not part of standard litigation or arbitration, and not required in mediation. These are (i) tight (voluntary) deadlines for each EDR stage; (ii) cooperative sharing of information, documents, and witness-statements; (iii) a negotiating process that requires parties to use similar specified measures for valuing the dispute, and to use good faith in negotiating a speedy, economical, and fair resolution of the dispute; and (iv) the opportunity to structure a speedy and economical binding resolution process if the parties don't completely resolve the dispute in the Final Resolution stage. In discussing EDR with clients, lawyers should explain clearly the pros and cons of using EDR to satisfy the client's interests and goals and, more specifically, the ethical issues related to agreeing to each of these EDR processes. Lawyers should discuss, among other things, cost, risk, harm, leverage, privacy, and delay so that clients have a meaningful basis for choosing their preferred dispute resolution process. A client's consent to participating in EDR should be meaningfully informed.

Commentary: Clients should know how EDR's mechanisms differ from standard litigation, arbitration, or mediation, and how the Protocols require attorneys to aspire to higher standards than the applicable codes of conduct otherwise governing the lawyer in dispute resolution.

4.3. Zealous representation of client. In EDR, lawyers should zealously represent their clients in pursuit of the clients' interests and goals. Zealous representation, though, is not always adversarial or confrontational representation; it should be advocacy tailored to what best advances the client's interest. In EDR, zealous representation includes cooperative information-sharing limited to achieving Sufficient Knowledge; sharing valuation of the case with the other side based on common measures; and negotiating in good faith to try to resolve the dispute quickly, economically, and fairly.

Commentary: The caricature of a zealous lawyer is one who is relentless and merciless, and whose sole aim is to crush the other side. While that may be one approach to zeal in advocacy, the better way to look at it is that zealous lawyers are passionate and fervent in pursuing their client's goals with the appropriate tone and approach. In EDR, the goal is a quick, economical, and fair resolution of the dispute. Zeal in EDR is commitment to the process and its ethics in pursuing the client's interests. Where both lawyers display this zeal, parties should be able to reach Final Resolution in EDR.

5. The Lawyer-Lawyer Relationship

5.1. Respect for the other lawyer and client. For EDR to succeed, a lawyer needs to meet a heightened requirement of professionalism in dealing with the opposing lawyer. Failing to do so leads to distrust, which jeopardizes the prospect of voluntarily resolving the dispute through EDR.

5.2. Mutual reliance on other party's integrity. Representation of clients in EDR requires that lawyers in good faith believe their clients will act in a manner consistent with the Protocols and with EDR's objective of speedy, economical, and fair resolution of the dispute. A lawyer must terminate the process if the lawyer's client does not continue to act in a manner consistent with the Protocols and EDR's objectives, but won't voluntarily terminate the process.

Commentary: Before consenting to EDR, clients should be aware that their lawyer is obligated to terminate the process if the lawyer believes the client is no longer acting in a manner consistent with the Protocols and EDR's objective of speedy, economical, and fair resolution of the dispute. By full disclosing this issue to the client before the client consents to EDR, lawyers should minimize the risk that they may need to mandatorily terminate the process because their client is not acting consistently with the Protocol's requirements.

6. Information Exchange

6.1. Integrity of the Information Exchange stage. EDR requires parties to voluntarily exchange information with the expectation that each party will (i) request only that information needed for Sufficient Knowledge, and (ii) make a Compliant Response. For EDR to be successful, lawyers and clients need to be fully committed to the integrity of this process.

6.2. Sufficient Knowledge. One key element of EDR is that parties may request from each other disclosure of information, documents or witness statements or interviews. Parties should request only the information that they need for Sufficient Knowledge, which means enough information about a dispute to understand the merits of each side's position and leverage, and to make an informed judgment as to the value of each side's case. Parties should seek solutions in good faith to limit the cost and burden of any disclosure.

Commentary: The common practice in litigation and arbitration is to ask for all documents that refer or relate to any possibly relevant subject matter, and then to depose all witnesses with knowledge. This leaves no stone unturned, imposes maximal burden and cost on the other party, and is very profitable for litigators. But, as discussed in the commentary to § 3.2, experienced attorneys have strong confidence in how to value a case with the narrow core facts; discovery adds little to that confidence. During Information Exchange, parties should limit their requests to that information needed for Sufficient Knowledge. This requirement places a premium on parties having experienced counsel with good judgment to sort through what, if any, information the parties need to attain Sufficient Knowledge. This stage may require the active involvement of the EDR neutral to encourage parties to limit their requests appropriately.

6.3. Disclosure of documents and information. If parties limit their requests to information and documents needed for Sufficient Disclosure, the information produced would clearly be discoverable in arbitration or litigation. Thus parties should be willing to produce it voluntarily in EDR to facilitate early resolution. But the parties needs to show good faith in construing requests reasonably, not narrowly, and producing responsive information or documents even if they are harmful to that party's case. In deciding whether to produce information or a document, lawyers should follow the Golden Rule: If I requested specified information or documents, and the other side had material information or documents like this that were arguably responsive to the request, would I expect them to produce the information or documents?

6.4. Witness statements. As part of EDR, parties may request the opportunity to question witnesses, on or off the record, or for a witness to provide written responses to questions. For party witnesses or witnesses that a party otherwise controls or can influence, parties should encourage witnesses to make reasonably responsive answers to questions, and not to unreasonably parse questions so as to avoid disclosing information that may be harmful to that party's case.

Commentary: For witness interviews in EDR, defending lawyers may prepare witnesses just as they would in arbitration or litigation. But given the narrowness of requests

limited to Sufficient Knowledge, defending lawyers should encourage witnesses to answer questions directly so that the other party understands what the witnesses recalls and what the witness would testify to in trial or arbitration. Questioning lawyers may cross-examine witnesses aggressively because that may be needed to develop Sufficient Knowledge, which may include gauging how a witness would hold up to aggressive cross-examination at trial or arbitration.

6.5. Verification of Compliant Response. Parties may ask the other party and its lawyers to declare in writing that they have made a Compliant Response to Information Exchange requests, which means (i) the client has made a reasonably diligent, good-faith search for information and documents, and produced the reasonably responsive information and documents; (ii) the client has not narrowly construed requests for information or documents to withhold material information or documents; and (iii) party witnesses or witnesses under the party's control have made reasonably responsive and accurate answers to questions. Settlement agreements may state as a material representation that the parties have each made a Compliant Response.

Commentary: Verification helps create the conditions in which trust is warranted. It also may provide a remedy if the parties verify and represent in a settlement agreement that each made a Compliant Response, and one party later learns that the opposing party had concealed material information or documents that it should have produced to qualify as a Compliant Response. Under those conditions, the deceived party may have grounds to challenge the agreement as fraudulently induced.

7. Experts

7.1. Role of experts. Some cases may require expert opinion to allow the parties to have Sufficient Knowledge. While this adds to the cost and time of the process, it is appropriate to use experts when it assists in resolving the dispute quickly, economically, and fairly under the dispute's circumstances.

7.2. Sufficient Expert Knowledge. So as to serve EDR's goal of speed and economy, experts should be encouraged to opine based on Sufficient Expert Knowledge, which means the core information on which the expert can offer an informed initial opinion, but not the full knowledge that might be required before formally opining in litigation or arbitration.

7.3. Written agreement governing use. Given that expert opinions would be based only on Sufficient Expert Knowledge, parties should define in writing how expert opinions given in EDR may be used if the case does not resolve and proceeds to litigation or arbitration. This should include whether the opinions may be used in litigation or arbitration and, if they may be used, any limits on their use. Absent a written agreement providing otherwise, expert opinions in EDR are considered confidential within the meaning of § 2.12.

7.4. Joint expert. Parties may jointly retain an expert. In addition to addressing the prejudice issue in § 7.03, the written agreement retaining the joint expert should address guidelines for communications with the parties, lawyers, and witnesses; access to the expert's work product; and whether the expert may participate in any subsequent litigation or arbitration if the matter does not resolve through EDR.

8. Objective Dispute Valuation

8.1. Integrity in sharing Objective Dispute Valuation. EDR's Objective Dispute Valuation stage is premised on the idea that parties should present the other side with their assessment of the case so that each side can understand the other parties' position and where the parties agree or disagree. This can then serve as the basis for meaningful negotiation in the Final Resolution stage.

Commentary: The term "objective" doesn't mean that parties cease being adversarial, and instead cooperatively try to arrive together at the solution that they believe a Solomonic decision-maker would reach. Rather, "objective" means that each party addresses each issue that a decision-maker would likely consider; that parties present reasonable positions objectively based on their analysis; and that they explain the objective bases for their positions. This stage may involve the EDR neutral's working with the parties to make sure each presents a full evaluation sufficient for both parties to enter into meaningful negotiation, whether direct or through mediation.

This stage should be client-focused. Lawyers should explain to clients that seeing how the other party views the case is valuable information. This is the type of information that well-informed businesses and individuals regularly use to make day-to-day decisions for purposes of speed and economy, and it helps gauge fairness. Further, if the other party raises issues that the lawyer didn't see or gauge properly, the lawyer should tell this to the client so the client has the best basis for making informed decisions.

8.2. Required elements in Objective Dispute Valuation. At minimum, an Objective Dispute Valuation should include:

Commentary: By requiring each party to address the same valuation measures, the parties can understand where they differ on valuation and why. This provides an informed basis for negotiation or mediation in the Final Resolution stage. There is a rich literature addressing systematic risk assessment methods. See, e.g., Michaela Keet, Informed Decision-Making in Judicial Mediation and the Assessment of Litigation Risk, 33 Ohio State Journal of Dispute Resolution 65 (2018). Effective EDR professionals should understand these methods and be able to apply them rigorously.

a. The expected cost of continuing litigation or arbitration for both the client and the opposing party;

Commentary: One primary reason to settle early is to avoid legal costs. Lawyers should give clients an accurate estimate of the likely fees and costs of proceeding to trial or arbitration. Surveys show lawyers regularly underestimate fees, which often reach two to five times the estimate. See R. Kiser, *Soft Skills for the Effective Lawyer* (Cambridge 2017) at 248, notes 89, 90. *Underestimation of costs and fees does a significant disservice to clients seeking to make an informed decision as to whether to settle early. With both parties spelling out expected fees, the opportunity exists to discuss whether the fee forecasts are reasonable.*

b. The best and worst the client and the other party can do absent a negotiated agreement (often referred to as BATNA and WATNA).

c. The likelihood of prevailing on each of the material claims, preferably expressed in percentages (for example, a 70% chance of prevailing on the breach claim, as opposed to a reasonably strong chance of prevailing).

Commentary: Lawyers are prone to say things like "We have a reasonably strong position on this claim." The client may hear, "We'll win this," while the attorney may mean "there's a 51/49 chance." Using percentages rather than vague terms establishes clarity. It also helps define the magnitude of difference in views between the parties on the likelihood of success on claims. Lawyers should explain to clients that the numbers are not meant as an exact science, but as a good gauge to communicating the lawyer's level of confidence in prevailing on an issue or in the dispute overall.

d. Leverage factors apart from legal considerations in the case.

Commentary: Settlement is often driven by matters other than who is likely to win and the likely amount of recovery. For example, parties have different level of resources to afford litigation, or often are concerned with relationships, publicity, effect on similar disputes, or the opportunity cost of attention to a lawsuit. By articulating each party's views on these factors, valuable information is learned and misperceptions, if any, can be addressed. The ethics of EDR don't preclude parties from considering leverage. The process is supposed to seek a fair resolution considering all the factors. If one side can't afford litigation, that is a key factor. Eliminating it from the EDR process does a disservice to both parties. EDR is reality-based.

e. The likely range of damages depending on what happens on liability as to each material claim.

Commentary: This estimate is different from WATNA and BATNA. It requires making a reasonable *estimate of damages, not the best or worst case. Combining this estimate with the percentage chance of likelihood of prevailing on certain claims provides objective bases to see where parties differ in their evaluation of the case and the magnitude of their disagreement. Formal decision-tree forecasting is the gold standard for this type of approach, but is often unwieldy. Regardless of whether counsel uses decision–tree forecasting, skilled counsel should understand the process because it sharpens the ability to spot and analyze risk and issues. See generally, Marjorie Corman Aaron, Risk and Rigor: A Lawyer's Guide to Decision Trees for Assessing Cases and Advising Clients (DRI Press 2019)*

f. All settlement options, including interest-based and damages.

Commentary: Some cases may be settled only on a distributive basis – one party pays the other a sum of money. Other cases allow for interest-based options – in essence a new business deal based on interests that work for both sides and aren't necessarily related to the dispute. This is often referred to as a win-win resolution. Both sides should think hard to generate interest-based settlement options, though this approach doesn't fit all cases.

9. Final Resolution

9.1. Direct Negotiation or Mediation. By this fourth stage of EDR, the parties and lawyers should know whether they can productively negotiate directly to resolution or whether they should mediate using the EDR neutral. If either party prefers mediation, the parties should mediate with the EDR neutral.

9.2. Negotiation principles. EDR's blend of cooperation with advocacy continues to apply in this 4th stage. The parties should now have Sufficient Knowledge for comprehensive, meaningful Objective Case Valuations. This should allow them to negotiate from reasonable positions based on all the circumstances. Negotiations may be integrative, distributive, or otherwise.

9.3. Fairness. In EDR, the parties should in good faith seek a fair resolution to the dispute. The term "fair," however, doesn't mean that the resolution definitively reflects which party is legally or morally right or wrong. Instead, the term "fair" refers only to a settlement based on the parties' having considered all the circumstances and reaching an agreement that they prefer instead of letting a factfinder decide their dispute.

Commentary: The idea of fairness is to provide clients the informed opportunity to resolve the dispute early and economically with roughly the same material information that they would have after discovery and motions in a lawsuit or arbitration.

10. Binding procedure absent complete settlement.

10.1. Even proceeding in good faith, parties may not reach a complete settlement through negotiation or mediation in the Final Resolution stage. If parties want to continue to seek to resolve their dispute quickly and economically, they should design a binding procedure appropriate to resolving the dispute quickly, economically, and fairly.

Commentary: The EDR neutral may be able to help the parties craft the binding dispute resolution mechanism. This might be arbitration (including baseball or other variants) of one or more key issues and then returning to negotiation or mediation, full arbitration on a compressed time schedule with limited discovery, early neutral variation, or any other procedure that meets the parties' interests in quick, economical, fair resolution.

10.2. If the parties want the EDR neutral to exercise binding authority, the EDR neutral should explain the downside of doing so, and should consider the same ethical issues the neutral would consider if parties to a mediation requested the mediator to act as decision maker.

Dispute resolution has included a process generally called Med-Arb, where the parties agree that the mediator will be able to render a binding decision on the dispute if the parties don't resolve the dispute voluntarily in mediation. There is extensive literature on the pros and cons of this process, and the ethical issues a neutral faces in agreeing to the process. Counsel should full understand those issues before agreeing to this process.

GLOSSARY

(a) "Compliant Response" means a party's declaration in writing that in response to Information Exchange requests, (i) the party has made a reasonably diligent, good-faith search for information and documents, and produced the reasonably responsive information and documents; (ii) the party has not narrowly construed requests for information or documents so as to withhold material information or documents; and (iii) party witnesses or witnesses under the party's control have made reasonably responsive and accurate answers to questions.

(b) "Dynamic Mediation" is a mediation process that aims to use case-appropriate, proactive techniques to resolve disputes promptly rather than engaging in the traditional process of reactively setting a date in the future for mediation statements and then a mediation session.

(c) "Early Dispute Resolution" or "EDR" is a voluntary, dispute resolution process in which the parties and their lawyers agree to try to resolve their dispute quickly, economically, and fairly by following a structured process involving initial case assessment, information sharing, objective case valuation, and negotiation or mediation.

(d) "EDR Agreement" is an agreement between the parties setting out the guidelines to be followed in the EDR process. The EDR Agreement may be a provision in an existing contract, or may be adopted *ad hoc* to resolve a specific dispute.

(e) "EDR Neutral" is a neutral who facilitates each stage of the EDR process.

(f) "Fair Resolution" is a resolution agreed to by the parties based on objective, informed valuation of the dispute.

(g) "Final Resolution" is the fourth stage of the EDR process in which the parties negotiate or mediate in good faith to resolve the dispute or, if they don't completely resolve the dispute, they may agree to binding dispute resolution procedures to resolve the remaining issues.

(h) "Information Exchange" is the second stage of the EDR process in which the parties (i) exchange the information or documents, they need, to achieve Sufficient Knowledge, and (ii) use experts, if needed, to attain Sufficient Knowledge.

(i) "Initial Dispute Assessment" is the first stage in the EDR process in which each party assesses the facts and issues to determine (i) what information, if any, it needs to attain Sufficient Knowledge and (ii) whether it needs experts to attain Sufficient Knowledge.

(j) "Necessary Conditions" are, generally, the conditions that are necessary for EDR to work. These are set out in § 2.02.

(k) "Objective Dispute Valuation" is the third stage of the EDR process in which each party objectively values the dispute based on common valuation measures.

(l) "Protocols" means these Early Dispute Resolution Practice Protocols.

(m) "Rapid Simple Resolution" means the resolution of a dispute rapidly and with a simple process through problem solving, distributive or integrative negotiation, or Dynamic Mediation.

(n) "Sufficient Expert Knowledge" is the minimally sufficient amount of knowledge an expert needs to opine on a matter for purposes of EDR.

(o) "Sufficient Knowledge" is the minimally sufficient amount of knowledge that a party needs to make an informed judgment whether and how to resolve the dispute.

APPENDIX A – FORM AD HOC EDR AGREEMENT

(*) and (*) enter into this agreement (**"Agreement")** as of (*) (the "**Start Date**") to try to resolve their dispute voluntarily through early dispute resolution ("**EDR**").

1. Voluntariness. This is a voluntary process. Either party may terminate the process by giving the other party notice in writing that it is terminating the process (the "**Termination Notice**"). The termination shall be effective ten days following service of the Termination Notice (the "**Termination Date**").

2. EDR Protocols. The parties adopt the EDR Practice Protocols (EDRI), a copy of which is attached as Exhibit A. All definitions in the Protocols apply in this Agreement. In executing this Agreement, the parties represent that:

- they've read the Protocols;
- they and their counsel understand that the Protocols place duties on them that are different from the duties in litigation or arbitration;
- they knowingly consent to their and their attorneys' complying with those duties; and
- they believe in good faith that they and their counsel meet the Necessary Conditions.

3. Tolling. As of the Start Date, each party's claims against the other are tolled until the Termination Date. Neither party may commence litigation or arbitration until after the Termination Date.

4. EDR Neutral. (*) shall serve as the EDR Neutral**.** [Or: Within (*) days of the Start Date, the parties shall select an EDR Neutral.]

5. Schedule. Within [ ] days following selection of the EDR Neutral, the parties shall begin the EDR process, and shall in good faith seek to comply with the following schedule (all days are business days):

- Initial Case Assessment –(*) days
- Information Exchange – (*) days
- Objective Valuation – (*) days
- Final Resolution – (*) days
- Mediation date in Final Resolution stage (if parties can't resolve dispute completely by negotiation)

6. [*Optional:* Binding procedure. If the parties do not completely resolve their dispute in Final Resolution, they shall submit to [binding process] to resolve the dispute, which process can be changed by mutual consent as part of the Final Resolution process.]

[Signatures of each party and each party's counsel]

APPENDIX B – FORM EDR CLAUSE

Comment: Based on the Necessary Conditions, the Institute recommends that any dispute resolution clause that specifies EDR requires that the parties first make a good faith attempt to resolve the dispute voluntarily, and that EDR is triggered only if the parties are unable to do so. The clause assumes that the contract provides for this with a defined voluntary period for resolving the dispute.

If the parties do not resolve the dispute voluntarily in the Voluntary Period, they shall seek to resolve the dispute through early dispute resolution. Within [*] of the termination of the Voluntary Period, the parties shall enter into an ADR Agreement in the then-current form of Appendix A to the Early Dispute Resolution Practice Protocols (EDR Institute).