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# AN INTRODUCTION TO EARLY DISPUTE RESOLUTION
## Fairly & Ethically Resolving Disputes
## 30 Days from Inception

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## I. OVERVIEW

In traditional litigation, settlement typically comes only after lawyers engage in months or years of adversarial posturing that escalates the original conflict, deteriorates the relationship of the parties, and costs an ever-increasing amount of time and money.

Early Dispute Resolution (or EDR) seeks to short-circuit the traditional litigation model and provide parties with methods, optimally using the services of a trained neutral, to resolve almost all disputes within 30-60 days at a fraction of the cost. Further, when properly implemented, the parties should reach roughly the same resolution they would have reached after protracted discovery and motion practice.

This paper introduces the techniques and strategies for EDR primarily through an overview of the EDR Practice Protocols, a set of provisions that have been developed to help parties, lawyers and neutrals navigate the thorny ethical and practical issues that lurk within the EDR process. Following the introduction of the topic in Section I, Section II presents examples of how other dispute resolution processes, especially mediation, have rapidly changed the process of dispute resolution, setting the stage for the next major advance. Section III examines tools from established EDR models that can be tailored to business disputes. And Section IV discusses a rigorous four-step, 30-day process for resolution of business disputes: (i) Initial Dispute Assessment, (ii) Exchange Information with the goal of obtaining Sufficient Knowledge, (iii) engage in Objective Dispute Valuation, and (iv) achieve Final Resolution. Finally, the appendixes attach a sample EDR contract clause and EDR agreement, as well as disclose the latest version of the EDR Practice Protocols, a set of guidelines and procedures developed to assist parties and neutrals implement the EDR process.[1]

EDR should be of specific interest to mediators and other alternative dispute resolution professionals as the methods opens up an entirely new practice area for appropriately trained neutrals to guide parties through the EDR process.

### A. The Tortoise and the Hare Revisited

In Aesop's fable of the tortoise and the hare, the hare runs fast and then, overconfident, takes a nap. The tortoise, plodding along slowly and steadily, wins the race – leading to the lesson that "slow and steady" is always the better approach. That lesson, however, doesn't work in today's economy—business now wants to be the hare (no snoozing, though), and the hare always wins.

Most litigators, on the other hand, are still fine being the tortoise. When clients come to us with a dispute, we tell them that it will take at least a year or two to get through trial, then another year or so if there is an appeal, and that the whole thing will likely cost hundreds of thousands of dollars. We then offer a sliver of hope by adding that after months of expensive discovery and dispositive motions, the case may be ripe for

[1] The EDR Protocols were developed by the EDR Institute and its founder Peter Silverman. The EDR Institute is a non-profit corporation organized to promote the fair, effective and ethical use of early dispute resolution principles and to educate lawyers, judges, neutrals, businesses and the general public about EDR's benefits.

mediation.[2]

And, at least so far, *many clients buy it without blinking an eye*. That won't last. Soon enough, consistent with their everyday business reality, clients will tell us that they don't need a year of discovery and motions, and that they want disputes resolved quickly, cost-effectively, and fairly. They won't tolerate litigation tortoises. They'll start demanding litigation hares.

### B. Why EDR Works: A Survey on Forecasting

Even if business starts demanding litigation hares, is that feasible or smart? Can litigation hares succeed in resolving disputes quickly, economically, and fairly?

Unquestionably yes. Ninety-five percent of filed cases don't go to trial.[3] Using EDR, most of those disputes could be resolved in 30-60 days without the filing of a complaint.

We gave the survey that follows to 135 franchise lawyers, about two-thirds having more than 20 years of practice. We will summarize the results at the end of the discussion, but please answer the questions yourself before you get there. Don't overthink the answers—go with your best initial judgment.

1. Assume that a client gives you a ten-minute summary of a new franchise dispute. The client explains the pros and cons; tells you the state the franchisee is in; and gives you the franchise agreement, in which you review the clause at issue, the governing law, and the dispute resolution clause. With just that information, you tell your client what you think the likely outcome of the dispute will be. What's your confidence level that your prediction will be right within a reasonable range (+/- 20%)?

2. Now assume that in your next discussion, the client gives you the few most material e-mails; summarizes the key participants' recollections; and based on your prodding, acknowledges more negative facts. With just that additional information, you tell your client what you think the likely outcome of the dispute will be. What's your confidence level that your prediction will be right within a reasonable range (+/- 20%)?

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[2] In 2010, a group of civil justice reform groups attempted to quantify the perceived wastefulness of modern discovery by performing a survey of litigation costs of Fortune 200 companies, which they submitted to a judicial conference on civil litigation. After noting a marked increase in litigation costs between 2000 and 2008, primarily due to burgeoning e-discovery, the report noted that of the 4,980,441 pages of documents produced on average in major cases that went to trial in 2008 (with "major cases" being defined as those with more than $250,000 in litigation costs), only 4,772 pages ended up as trial exhibits, or 0.10% of the pages produced. The report concluded that the produced-to-used ratio of 1,044 to 1 suggested that "document discovery may be an inefficient resource for the finder of fact." *See* Lawyers for Civil Justice, et al., *Litigation Cost Survey of Major Companies*, Duke Law School (May 2010).

[3] While one often sees the assertion that over 95% of cases "settle," the statistics reflect cases that resolve other than through trial. But cases can be dismissed for reasons other than settlement, so the 95% number likely overstates the percentage of cases that settle. *See, e.g.*, John Barkai, Elizabeth Kent, and Pamela Martin, *A Profile of Settlement*, Court Review: The Journal of the American Judges Association 42:3-4 (Dec. 2006).

3. Now assume that the dispute goes to litigation, you take full discovery, and the court or arbitrator denies both sides' summary judgment motions. With just that additional information, you tell your client what you think the likely outcome of the dispute will be. What's your confidence level that your prediction will be right within a reasonable range (+/- 20%)?

The results were that after the initial ten-minute presentation, lawyers had an average 57 per cent confidence level that their prediction was within a range of plus or minus 20 percent. After seeing a few key documents and a few key witness summaries, the average confidence level rose five percentage points to 62 per cent.[4] After full discovery and summary judgment, the average confidence level rose only another *two* percentage points.[5]

Suppose you told your client that your confidence level at the beginning of a dispute—before a complaint or answer is filed—is about 60%, and that spending a few hundred thousand dollars on discovery and summary judgment motions will increase your confidence level by next to nothing? What do you think your client would then say is the best time is to try to resolve the dispute? Our sense is most clients will say, without hesitation, to try to resolve the dispute not just early, but as early as possible, without litigation.[6]

### C. Rapid, Simple Resolution and The Basic Four Steps in EDR

The EDR process described in this paper is a scalable process that can be applied to resolve disputes in 30-60 days without the filing of a complaint. Initially, the parties seek "Rapid Simple Resolution," whether through distributive or integrative negotiation or dynamic mediation.[7] Most disputes should be able to be resolved through this process.

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[4] Scott Korzenowski of Dady & Gardner pointed out that the initial inquiry usually includes calling opposing counsel to see if they have key points that one may not have heard from one's own client. That is correct, and we would add that to the survey if we were to use it again. If that were added to the hypothetical question, our sense is that the confidence level would likely rise.

[5] The survey asked one more substantive question: How often do you learn information in discovery that changes your assessment of the likely outcome of a case by more than plus or minus 20 per cent. Here the average answer was 39 per cent of the time. We are not sure how to square that average answer with the average answer that full discovery and motion practice basically don't add to experienced counsel's confidence level that their prediction of a dispute's outcome is within a 20 per cent range. One answer is that the discovery may change our view of the assessment of the likely outcome of the case, but only within that range. But our sense is that there's more to it that would need to be fleshed out by further research.

[6] This assumes that the client is interested in speed, economy, and obtaining maximum value. Clients may have other interests, however, such as spending their adversary into submission out of pique or to deter others.

[7] In traditional mediation, the parties contact a mediator and then set a date in the future to meet and attempt to mediate a resolution to a dispute. Prior to that date, little or no work is done to bring about the resolution of the matter other than providing position statements to the mediator. In dynamic mediation, the mediator gets involved early, sometimes in person, but more often over the telephone and through email, to learn about the case and issues prior to any sort of formal mediation. The primary goal of the dynamic mediator is to make sure the parties have the information they need to form a settlement

If the parties aren't able to resolve the dispute rapidly through this process, then the parties would engage in the 4-step EDR process: (i) initial dispute assessment, (ii) information exchange, (iii) objective valuation, and (iv) final resolution.

Before fully discussing Rapid Simple Resolution and the four steps in EDR, the next section asks whether it is realistic to think that the business legal community could rapidly develop and implement a new dispute resolution model. We think it is realistic and, in support of that, review three EDR processes that have rapidly changed dispute resolution over the last three decades – mediation, collaborative law, and structured negotiation—which can serve as models for rapid change.

## II. RAPID CHANGE: MODELS FROM OTHER DISPUTE RESOLUTION PROCESSES

This section looks at the history of three models that have rapidly changed dispute resolution over the last three decades, showing the opportunity for new processes to do the same in the next three decades.

### A. Mediation

In the late-19th century, mediation began as a process for resolving collective bargaining disputes.[8] In the late 1970s, the Department of Health, Education, and Welfare enlisted the Federal Mediation and Conciliation Service to help mediate disputes under the Age Discrimination Act of 1975.[9] In 1979, the International Institute for Conflict Prevention & Resolution ("CPR") was formed as a think tank to seek alternatives to costly, antagonistic, lengthy litigation, and began to promote mediation.[10] In the early 1990s federal courts began to encourage early settlement options through court-conducted settlement conferences and private mediation. State courts soon followed suit.[11] Once considered a controversial innovation, mediation is now universally accepted as a favored

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position and bring the parties closer to resolution before a formal mediation even begins. Dynamic mediation may involve a traditional mediation. For reasons that will become clear, dynamic mediation and EDR can be integrated to increase the chance of reaching a final resolution to a dispute.

[8] Created in 1913, the U.S. Department of Labor mediated labor/management disputes and in 1917 appointed Commissioners of Conciliation to mediate the disputes. *See History of Mediation,* Mediation Matters, http://www.mediationmatterssd.com/mediationmatters/history.html; and Michael McManus and Brianna Silverstein, *Brief History of Alternative Dispute Resolution in the United States,* Cadmus (Nov. 1, 2011), http://www.cadmusjournal.org/node/98.

[9] *See generally History of Mediation* and *Brief History, supra* note 4.

[10] F. Peter Phillips, *Introduction,* in *Managing Franchise Relationships through Mediation* (CPR 2008).

[11] Dana Shaw, Mediation Certification: An Analysis of the Aspects of Mediator Certification and an Outlook on the Trend of Formulating Qualifications for Mediators, U. Toledo L. Rev. (Winter, 1998), at 31-32. The author drew her information from the 1995 SPIDR Commission's report titled Ensuring Competence and Quality in Dispute Resolution Practice (April 1995), https://bridge.acrnet.org/?t=store.php.

practice in dispute resolution.

### B. Collaborative Law

Collaborative law arose in the divorce and family law context. It involves the use of a participation agreement, where both parties to a divorce hire collaborative lawyers who agree to work cooperatively to try to resolve the dispute without litigation. If they're unable to do so, both lawyers must resign, and both parties need to retain new counsel to try the lawsuit.

Collaborative law was started in the late 1980s by one lawyer, Stuart Webb in Minnesota. In 1990, he and three other lawyers started an institute to promote the practice. Soon, training and certification began. In 2001, Texas amended its Family Code to add collaborative law procedures.[12] Now, some 30 years after its first use, more than 20,000 lawyers have been trained in collaborative law worldwide, and The International Academy of Collaborative Professionals has over 5,000 members. In 2009, the Uniform Law Commission adopted the Uniform Collaborative Law Rules and Uniform Collaborative Law Act ("Uniform Collaborative Law Rules/Act"),[13] and 15 states have already adopted versions of it.

When it first started, collaborative law threatened the status quo of family law lawyers, family law courts, and state bar ethics rules. Yet it has been successful in supplanting a significant percentage of traditional divorce litigation (and divorce mediation) as the preferred method for resolving contested divorces.

### C. Structured Negotiation

In 1995, three civil rights lawyers[14] were approached to represent blind clients seeking to compel national banks to make ATM machines accessible. Rather than bring a class action, the plaintiffs' counsel wrote Bank of America, Wells Fargo, and Citibank to suggest a cooperative process to resolve the dispute. The banks agreed to sign tolling agreements and then negotiated rigorous ground rules for the dispute resolution process, which now goes by the name "structured negotiation" (described in more detail below). Resolution of that dispute required the technical innovation of talking ATMs, which took four years to develop. Following the technical solution, the original banks signed settlement agreements with the claimants, which was followed by settlement agreements

[12] *See* Lawrence Maxwell, Jr., *The Development of Collaborative Law*, Alternative Resolutions (Summer/Fall 2007).

[13] *See* Uniform Collaborative Law Rules and Uniform Collaborative Law Act, Final Act 2010 (the National Conference of Commissioners on Uniform State Laws ("NCCUSL") 2010) ("Uniform Collaborative Law Rules/Act") at 4-9, https://bit.ly/2RdN9xF (broad description of how widespread collaborative law has become).

[14] The three were Barry Goldstein, Linda Dardarian, and Laney Feingold. *See* Laney Feingold, *Structured Negotiation: A Winning Alternative to Lawsuits* at 7-10 (ABA 2016).

with close to 25 other banks.[15]

Since that time, one of the original attorneys, Laney Feingold, has used structured negotiation to resolve more than 60 civil rights disputes nationwide without filing a lawsuit. The opposing parties have included Major League Baseball, CVS, Charles Schwab, and Denny's. Large hospitals now use the process to resolve disputes with patients, and the nation's largest pharmacies use the process to handle customer claims.[16]

### D. Lessons

There are two lessons here. The first is that, since the late 80s/early 90s, practitioners have diligently sought to develop and apply new processes to shorten the time of dispute resolution, to make it more economical, and to minimize or eliminate the need for lawsuits. The second is that the bar rapidly adopted these models to the point that the models became fixtures in dispute resolution.

The next section examines the processes involved in these and other dispute resolution models.

## III. EXISTING DISPUTE RESOLUTIONS TOOLS USEFUL FOR EDR

A number of successful alternative dispute resolution processes exist beyond standard mediation. They each offer effective tools that are applicable to EDR. So before turning to a full discussion of EDR, this paper reviews more fully collaborative law, structured negotiation settlement counsel, and the combination of mediation and arbitration known as med-arb.

### A. Collaborative Law

Collaborative law is used primary in family law. While its applicability to business disputes has been limited for reasons described below,[17] its core concept of cooperative culture and procedures are directly applicable to EDR.

The starting point for collaborative law is that parties hire lawyers who subscribe to the collaborative law process and are trained in cooperative negotiating.[18] For example,

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[15] *Id.*

[16] *Id.* at 10.

[17] *See, e.g.,* David A. Hoffman, *Collaborative Law in the World of Business*, 6:3 Collaborative Review (2003); Diana Fitzpatrick, *Using Collaborative Law to Resolve Commercial Business Disputes*, https://bit.ly/2SIjoSy; *Civil and Commercial Application of Collaborative Practice* (International Academy of Collaborative Professionals), https://bit.ly/2AHzftE; R. Paul Faxon & Michael Zeytoonian, *Prescription for Sanity in Resolving Business Disputes: Civil Collaborative Practice in a Business Restructuring Case,* 5:2 Collaborative Law Journal (2007); Michael Zeytoonian, *Three Misconceptions About Using Collaborative Law in Employment Disputes;* https://bit.ly/2QdefAl

[18] *See also generally,* John Lande, *Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering*, 64 Ohio St. L.J. 1315 (2003) *("Possibilities").*

the parties' counsel help them "communicate with each other, identify issues, collect and help interpret data, locate experts, ask questions, make observations, suggest options, help express [their] needs, goals, interests, and feelings, check the workability of proposed solutions, and prepare and file all required documents for the court."[19] Collaborative attorneys aren't supposed to take advantage of points the other attorney misses or amounts miscalculated. If experts are needed, the parties hire them jointly. The parties are supposed to make full and honest disclosure of all relevant information.[20]

The parties enter into a collaborative law agreement[21] that governs informed consent,[22] disclosure of information and documents,[23] voluntary termination of the process,[24] enforceability of settlement agreements, and the role of parties, non-parties, and counsel. The key provision is that the lawyers and parties agree that if the parties do not resolve their dispute and either party then wants to proceed to litigation, the lawyers must resign and the parties then need to retain new counsel.[25]

A variation on this is "cooperative law." The distinguishing factor in cooperative law is that while the parties initially pursue settlement using the same cooperative negotiation principles, the lawyers aren't required to resign if the parties later choose to litigate.[26] Cooperative law in the business context has evolved into a process known as planned early negotiation and includes the notion of hiring settlement counsel (discussed in more detail below).[27]

One key issue that makes the collaborative law process work involves the legal ethics rules surrounding the "good-faith duty to make timely, full, candid, and informal

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[19] Collaborative Law Institute of Illinois Principles and Guidelines, §4, https://bit.ly/2AICktD.

[20] *Id.* § 6.

[21] The minimal requirements are set out in Rule 4 of the Uniform Collaborative Law Rules. *See* Uniform Collaborative Law Rules/Act, *supra* note 16, at 48-50. Beyond the core requirements, parties may vary agreements based on their interests and concerns. *See* discussion of Uniform Collaborative Law Rules/Act in Section II.B, *supra*.

[22] *See* Uniform Law Rule 14. Uniform Collaborative Law Rules/Act, *supra* note 16, at 60-61.

[23] *See* Uniform Law Rule 12. *Id.* at 59.

[24] *See* Uniform Law Rule 5. *Id.* at 50-53

[25] *See* Uniform Law Rules/Act. *Id.* at 9-11.

[26] *Id.*; *see, e.g.,* John Lande, *The Movement Toward Early Case Handling in Courts and Private Dispute Resolution,* 24 Ohio St. J. Disp. Resol. 81, 121-126 (2008).

[27] There are also advocates for using collaborative law to resolve commercial disputes. *See, e.g.,* R. Paul Faxon & Michael Zeytoonian, *Prescription for Sanity in Resolving Business Disputes: Civil Collaborative Practice in a Business Restructuring Case,* 5 Collab. L. J. (Fall 2007); Sherri R. Abney, *Avoiding Litigation: A Guide to Civil Collaborative Law* (Trafford Publishing 2005). *See also* website for the Global Collaborative Law Council, whose mission is "advancing the use of collaborative process for resolving civil disputes around the world." (http://www.collaborativelaw.us/about.html).

disclosure" to the other side, which must be promptly updated.[28] For example, to insure informed consent for entering into the process, collaborative attorneys must clearly explain to their clients that their spouse may not make full disclosure of information and documents.[29] Further, collaborative lawyers have the duty to screen out from a collaborative law process any clients who may not be trusted to make full, good-faith disclosure.[30] If either party suspects that the other side isn't disclosing fully, either party may withdraw from the process at any time.[31] (Parties may also withdraw at any time in the process for any reason.[32]) Attorneys who discover that their clients are withholding information must terminate the collaborative process.[33] The final protection is that settlement agreements may be challenged where one party fails to disclose material information after committing in the collaborative law agreement to disclose all such information.[34]

Because this approach significantly departs from the attorney's traditional role in dispute resolution, it raises a host of issues. One is ethical.[35] Do lawyers' agreements to resolve the dispute without resort to litigation contradict their usual professional obligation to zealously advocate for their clients' interests? As a general matter, the American Bar Association, state bar associations, and legislatures have taken the position that practicing collaborative law in the family law area with a client's informed consent doesn't violate the rules or obligations of professional responsibility.[36] There is no strong

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[28] *See* Uniform Collaborative Law Rule 12. Uniform Collaborative Law Rules/Act, *supra* note 16, at 59.

[29] *See* John Lande, *Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering*, 64 Ohio St. L. J. 1315, 1342 (2003); and Eric Fish, Michael Kerr, & Nicole Julal, The Uniform Collaborative Law Act: Frequently Asked Questions ("FAQ") 5-6, http://apps.americanbar.org/dch/thedl.cfm?filename=/DR035000/sitesofinterest_files_FAQson the UCLA.pdf (last visited June 8, 2017).

[30] John Lande & Forrest S. Mosten, *Collaborative Lawyers' Duties to Screen the Appropriateness of Collaborative Law and Obtain Clients' Informed Consent to Use Collaborative Law*, 25 Ohio St. J. on Disp. Resol. 347, 359-60 (2010).

[31] *See* Uniform Collaborative Law Rules/Act, *supra* note 16, at 29.

[32] *See* Uniform Collaborative Law Rule 5(f). *Id*. at 51.

[33] *Lande*, *supra* note 32, at 1322.

[34] *E.g., Rawls v. Rawls*, No. 01-13-00568, 2015 WL 5076283, at *4 (Tex. App.—Houston 2015) (genuine issue of material act as to whether husband violated collaborative law agreement); and *Howard S. v. Lillian S.*, 62 A.D.3d, 187, 193, 876 N.Y.S.2d 351, 355 (2009) (based on wife's concealment of child's actual father, husband entitled to damages related to cost of collaborative law process). *See also Fish, et al, supra* note 32, at 6 (available theories for challenging a settlement agreement may include fraud, constructive fraud, reliance, breach of fiduciary duty of disclosure, and breach of duty to disclose based on superior knowledge and access to information).

[35] *See generally Possibilities*, *supra* note 27, at 1330-1372.

[36] *See generally* Scott R. Peppet, *The (New) Ethics of Collaborative Law*, 14 Disp. Resol. Mag. 23 (Winter 2008). The ABA Standing Committee on Ethics and Professional Responsibility in Formal Opinion

reason why that analysis should change when applied to commercial disputes. If anything, parties in a business dispute are generally more sophisticated than spouses going through a divorce and, thus, more capable of giving informed consent.

While the general notion of cooperative discovery applies well to business disputes, other aspects of the collaborative process would likely require modification in a business setting. [37]

- In a divorce proceeding, it's reasonably clear what information and documents are relevant for division of property. Further, if both parties have fully and honestly disclosed their assets in the collaborative process, family law is fairly well settled as to division of property and monetary settlement. In business disputes, to the contrary, the facts and law are usually contested and the universe of relevant documents and information is potentially far more expansive. Thus, more rigor is required to define full cooperative disclosure in the business setting.

- Divorcing parents with custody disputes have a common goal in trying to determine their children's best interests, which is also the formal legal standard for determining custody. Because of this, both parties have an incentive to seek a positive relationship. Likewise, at times, businesses may have relationship concerns when they are in disputes with parties with whom they'll have ongoing dealings, but both sides also have a strong self-interest that their positions are intended to protect. Thus, some business disputes may involve a choice whether to work on maintaining a positive relationship. For parents, that usually is the preferred choice for the children's benefit.

- If a business dispute isn't resolved through EDR and the case proceeds to arbitration or litigation, the collaborative law's disqualification requirement would disrupt the way businesses traditionally use their litigation counsel.[38] Each side may resist using a process where its long-time counsel could not continue to represent it if the dispute proceeded to litigation. This could change over time – for example, businesses could have certain lawyers they use collaboratively and others that they use for litigated matters, with both sets of lawyers developing a deep understanding of the business's values. Such a change would take time to evolve.

- In collaborative law, there is a nationally-recognized set of principles and

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447 found that the practice doesn't violate any ethical requirements. A number of states have enacted statutes that recognize and authorize collaborative law. *See. e.g.,* CAL. FAM. CODE § 2013; N.C. GEN. STAT. §§ 50-79; and TEX. FAM. CODE ANN. § 6.603.

[37] *See generally* David A. Hoffman, *Collaborative Law in the World of Business*, *Collaborative Rev.*, Vol. 6, No. 3, at 1 (Winter 2003), https://bit.ly/2PDDC1h.

[38] *See* John Lande, *Evading Evasion: How Protocols Can Improve Civil Case Results*, 21 Alternatives to High Cost Lit. 149, 163-65 (2003); Robert W. Rack, Jr., S*ettle or Withdraw: Collaborative Lawyering Provides Incentive to Avoid Costly Litigation,* Disp. Res'n. Mag., at 8 (Summer 1998).

associated training to become certified as a collaborative law practitioner. In the commercial context there is none of this, although many lawyers may be aware of the general principles.

### B. Structured Negotiation

In structured negotiation, which has been applied primarily to civil rights disputes, the parties sign a tolling agreement and then negotiate ground rules to govern the cooperative process, including longer-term tolling agreements, confidentiality, information sharing, and experts.[39] Because the cases generally involve civil rights, particular attention is paid to the issue of who the claimants are and who they represent,[40] and to fee-shifting statutes.[41]

Structured negotiation doesn't require mutual withdrawal of attorneys if a settlement isn't reached. That approach would not be feasible in the civil rights area because plaintiff's counsel is usually paid only by negotiating their fees as part of settlement. Further, cases can take years, and it would not make sense for plaintiff's counsel to withdraw after having developed all the experience on that particular matter.

Structured negotiation's fixed-step process is generally applicable to all business disputes, but the application differs because class-type civil rights disputes present special issues and challenges not present in most business disputes.

### C. Settlement Counsel

Settlement counsel are retained solely to try to settle a dispute; they don't participate in litigation.[42] Their role could be sequential, where settlement counsel would initially try to resolve the dispute and, if unsuccessful, the matter would be turned over to litigation counsel. Or settlement counsel could stay active throughout the litigation, acting in parallel with trial counsel, and be prepared to negotiate settlement when appropriatee.

Ideally, both sides would use settlement counsel, but that isn't necessary. Good settlement counsel should be skilled enough to work with traditional litigation counsel who are willing to engage in the process in good faith.

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[39] *See* Feingold, *supra* note *17,* at 59-99.

[40] *Id.* at 42-44.

[41] *Id.* at 65-66.

[42] *See, e.g.,* Heather D. Heavin & Michaela Keet: *A Spectrum of Tools to Support Litigation Risk Assessment: Promises and Limitations,* 15 Canadian Journal of Law and Technology 265 (2017); Kathy Brian, *Why Should Businesses Hire Settlement Counsel?,* 2008 J. Disp. Resol. 195; Dan Churay, Frank M. Bedell, Eric O. English & J. Patrick O'Malley, *Case Studies in Settlement Counsel: Best Practices for Litigation Exit Strategies,* 33 No. 8 ACC Docket 50 (Oct. 2015); James E. McGuire, *Settlement Counsel: Answer to the* FAQs, 3:2 NYSBA Disp. Resol. Law (Fall, 2010); William F. Coyne, Jr., *The Case for Settlement Counsel*, 14 Ohio St. J. on Disp. Resol. 367 (1999); Roger Fisher, *What About Negotiation as a Specialty*, 69 A.B.A.J. 1221, 1221-1224 (1983); James E. McGuire, *Why Litigators Should Use Settlement Counsel,* 18 Alternatives to High Cost Litig. 107, 120-23 (2000).

Another potential concern in the use of settlement counsel is that settlement counsel may be biased toward settlement and not assert the parties' respective positions as strongly as they should. In light of the benefits that can be realized from early resolution of a dispute, this should not be a major concern (and is in some ways the reverse of litigators being biased toward full-course litigation because it is more lucrative). The process can work if parties hire ethical, highly skilled lawyers who would handle the process objectively, and who would be able to advocate their client's position strongly while still seeking settlement at fair terms.

### D. Med-Arb

As suggested by the name, Med-Arb is the joining of mediation and arbitration in a sequential dispute resolution process. At its most general level, if mediation fails, then arbitration follows, often with the mediator becoming the arbitrator.

The advantage to the process is that neutrals have the full set of tools needed to bring the matter to conclusion, whether by consensual settlement or through an arbitration award. For example, neutrals have flexibility to arbitrate vexing issues, while using mediation to resolve other issues. Likewise, the neutral can fashion a settlement on some issues, while leaving others for arbitration. Finally, if mediation fails, the parties don't need to incur the time and expense of finding a new neutral to be the arbitrator.

The process has two downsides that have led many to avoid it. First, if parties know the neutral will become the arbitrator, the parties may be reluctant to share openly with the neutral in mediation out of concern that information could later be used against them if the matter proceeds to arbitration. Second, if the neutral has the ultimate power to rule on the matter as an arbitrator, that gives the neutral coercive control, which could undermine the voluntariness principle of mediation.

Despite these downsides, Med-Arb demonstrates that mediators, regardless of whether they also serve as the arbitrator, can help develop an economical, streamlined arbitration to resolve outstanding issues if the parties are unable to resolve a dispute cooperatively through mediation. This can include any number of options, ranging from structuring litigation or arbitration by sequence, scope, discovery limits, or otherwise, to variants on standard arbitration such as baseball,[43] night baseball,[44] or high-low.[45]

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[43] In baseball arbitration, each party chooses and discloses to the arbitrator a settlement number. The arbitrator's sole decision is which of the two numbers to choose for the award.

[44] Like baseball arbitration, each party chooses a settlement number but doesn't reveal it to the arbitrator. The arbitrator then rules on how she values damages. The actual award will be the number closest to the arbitrator's damages finding.

[45] In high-low arbitration, the parties' bracket damages between an agreed high and low number. If the award is lower than the low number, the respondent pays the agreed-upon low figure. If the award is higher than the high number, the claimant accepts the high number. If the award is in between, the parties are bound by the arbitrator's figure. The parties choose whether to disclose the high and low numbers to the arbitrator before the arbitration.

## IV. ADOPTING AND IMPLEMENTING A 30-60 DAY EARLY DISPUTE RESOLUTION POLICY

There is no generally-accepted procedure for EDR like that developed over the years for mediation. EDR principles have been written about in a number of different contexts and under a number of different names. The ABA's Dispute Resolution Section has published a brochure on one approach called Planned Early Dispute Resolution,[46] and that Section has an EDR Committee that continues to focus on the area. Others have written on more specific approaches under the names Planned Early Negotiation,[47] Guided Choice,[48] Early Active Intervention,[49] and Early Intervention Mediation.[50]

This section of the paper presents a proposal for initially trying to resolve disputes through what we call rapid simple resolution: Based on the facts known at the outset of the dispute, resolving the dispute rapidly and simply using straightforward distributive or integrative bargaining or dynamic mediation. If the dispute doesn't resolve through Rapid Simple Resolution, the parties would engage in a specific four-step EDR process drawing on insights from mediation, collaborative and cooperative law, structured negotiation, Med-Arb, and earlier approaches to EDR. The process would be applicable to all business disputes, absent unusual circumstances. It aims to resolve disputes in 30-60 days.

### A. The Necessary Conditions: Parties, Counsel and Sufficient Knowledge

Successful EDR requires certain conditions, which we call the Necessary Conditions. They are that each party to the dispute:

(1) is reasonable;

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[46] John Lande, Kurt L. Dettman & Catherine E. Shanks, *Planned Early Dispute Resolution*, A.B.A. Sec. Disp. Resol., https://bit.ly/2EWTub9 (2015). *See also* John Lande and Peter W. Benner, *Why and How Businesses Use Planned Early Dispute Resolution,* 13 U. St. Thomas L. J. (2017).

[47] *See* John Lande, *Lawyering with Planned Early Negotiation: How You Can Get Good Results for Clients and Make Money* (ABA 2d ed. 2015); *see also* John Lande, "A Framework for Advancing Negotiation Theory: Implications from a Study of How Lawyers Reach Agreement in Pretrial Litigation," 16 Cardozo J. of Con. Res'n.1 (2014).

[48] For a comprehensive description of and bibliography on Guided Choice, *see* www.gcdisputeresolution.com.

[49] *See e.g.,* Peter Silverman, *Mediation 2.0.,* 15 The Franchise Lawyer 4 (Fall 2012); Steven Fedder, John Lande, & Peter Silverman, *Can We Resolve Franchise Disputes Faster, Cheaper, Better*, Franchising Business and Law Alert 16:10 (LJN 2010).

[50] Douglas McQuiston, *Early Intervention Mediation: A Path to Quicker, Better Dispute Resolution*, Colorado Lawyer (November 2018).

(2) has skilled, ethical counsel; and

(3) has "Sufficient Knowledge," which is enough information to:

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

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

(4) based on Sufficient Information, be committed in good faith to seek a "Fair Resolution" (defined as a voluntary resolution based on all the circumstances of the dispute and that the parties prefer rather than having a factfinder decide the dispute).

The importance of skilled, ethical counsel can't be overstated. Regarding collaborative law, for example, numerous articles stress how the development of a good-faith culture among collaborative lawyers has been fundamental to the development of the process.[51] Our sense is that this culture is present in many litigation bars. Without it, EDR likely wouldn't work. The second necessary skill is the ability to forecast results with a reasonable degree of accuracy and confidence. Most lawyers do this instinctively, but there is relatively little training in the area. Training in forecasting would be a key part of developing EDR.

### B. Rapid Simple Resolution

One conclusion clear from the survey is that, right from the beginning of a dispute, good lawyers have a reasonable idea where a case should resolve. This should allow many cases to resolve through simple application of integrative bargaining if there is an interest-based resolution, or distributive bargaining if the resolution is simply arm-wrestling over the right number.

Negotiating from the outset of the dispute should be a reasonably clear process, but often requires skilled, sophisticated negotiators. With integrative bargaining, the parties explore interests and game playing is minimized. Negotiators trained in win-win, interest-based negotiation and in negotiating at the outset of disputes should be able to negotiate resolutions where interests and risk can be reasonably aligned.[52]

But most disputes involve primarily or only distributive bargaining. In this type of

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[51] *See, e.g.,* Joshua Isaacs, *A New Way to Avoid the Courtroom: The Ethical Implications Surrounding Collaborative Law*, 18 Geo J. Legal Ethics 833, 843 (2005); Peter Reilly, *Was Machiavelli Right? Lying in Negotiation and the Art of Defensive Self-Help*, 24 Ohio St. J. on Disp. Resol. 481, 527-28, 530-32 (2009); and Scott Peppet, *Lawyers' Bargaining Ethics, Contract, and Collaboration: The End of the Legal Profession and the Beginning of Professional Pluralism*, 90 Iowa L. Rev. 475, 486-487 (2005).

[52] The classic text on win-win negotiation is Roger Fischer and William Ury, *Getting To Yes: Negotiating Agreement Without Giving In* (Penguin 2011). Classic texts on how to negotiate when emotional stakes are high, as they frequently are at the outset of a business dispute, are Douglas Stone, Brude Patton, and Shelia Heen, *Difficult Conversations: How to Discuss What Matters Most* (Penguin 2010), and Patterson, Grenny, McMillan, and Switzer, *Crucial Conversations: Tools for Talking When Stakes are High,* 2nd Ed. (McGraw Hill 2011).

negotiation, the traditional safest process is to start, as appropriate, as reasonably low or high as possible while still inviting a counter-offer. Then the parties engage in incremental steps until they're close enough that they decide to split the difference. This can last months and involve intensive efforts to exert leverage. It doesn't lend itself well to rapid resolution.

With the Necessary Conditions met, good lawyers should be able to use a more get-to-the-point process[53] that still involves top-notch negotiating skill, but that quickly gets to the appropriate range of settlement.

If the parties can't resolve the dispute through rapid simple negotiation, they should engage in Dynamic Mediation. The traditional mediation process involves finding a mediator, setting the mediation date for weeks or months in the future, and then sending confidential or shared mediation statements a week or so before the mediation, and showing up for the mediation session where the true bargaining doesn't begin until 4:00 in the afternoon. With the Necessary Conditions met, this process is often an unnecessary waste of time and money. It's a tortoise in a hare's world.

The parties should instead engage in Dynamic Mediation. This involves selecting a neutral trained in the process, who ideally has subject matter knowledge to help absorb the issues quickly. The neutral is proactive, promptly calling each party and being briefed by each. The neutral would then ask each side to send the neutral any key documents, which are often just a few, and any key cases if there is a material, contested legal issue. (Everyone would then be roughly at step 2 of the survey questions, where the lawyers were 62% confident that they knew where the dispute should resolve.) The neutral would then dynamically try to move the parties toward settlement using facilitative or evaluative tools as appropriate. This process can be done in person, but is much quicker if done over the telephone, video conference and using email.

This process may seem inconsistent with mediation ethics, which are premised on a process that safeguards voluntarism. The ABA Model Standards of Conduct for Mediators (2005)[54] defines mediation as follows:

> Mediation is a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision making by the parties to the dispute.
>
> Mediation serves various purposes, including providing the opportunity for parties to define and clarify issues, understand different perspectives, identify interests, explore and assess possible solutions, and reach mutually satisfactory agreements when desired.

Standard I(A) provides:

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[53] There is a Yiddish term that more colorfully captures this concept: *tuches afn tisch,* which figuratively means to lay your cards on the table, but literally means to put your ass on the table.

[54] https://bit.ly/2xO1VzY.

> A mediator shall conduct a mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome.

Dynamic mediation is voluntary, but the mediator would actively set the process and deadlines, request documents, and actively encourage settlement using evaluative techniques as appropriate. So as to preserve ethical compliance, the parties should agree to this process.

Even with good-faith and skilled counsel and clients on both sides, some disputes won't resolve at this stage for any number of reasons. At that point in the traditional model, parties turn to litigation or arbitration. In early dispute resolution, they would turn to the 4-step EDR process instead.

Further, having gone through Dynamic Mediation, each of the 4 steps in the EDR process should be able to be handled quickly as the parties will have already analyzed their cases, thought about whether they need any documents or information, and valued their case.

### C. EDR Process Overview: Four Steps in 30 Days

Assume a 30-day goal for resolution, which means 22 business days. The basic steps, and the business days allowed to accomplish them, are:

1. In no more than six business days, perform an initial dispute assessment, which involves internally gathering all necessary information on the case, researching the basic applicable legal principles, and determining what information and documents are needed from the other side to analyze the case. If the parties have gone through Dynamic Mediation, they have likely finished this stage.

2. In no more than the following seven business days, the parties exchange documents and information in a process with safeguards.

3. In no more than the following three business days, each party objectively values its case. If the parties have gone through Dynamic Mediation, this will be updating their prior valuations.

4. In no more than the following six business days, the parties negotiate or mediate the dispute to final resolution.

The use of experts could be integrated into the four steps or may require additional time.

Here's a chart setting out the steps and the number of days:

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

A cautionary note on 30 days: As Boswell said *"Depend upon it, Sir, when a man knows he is to be hanged in a fortnight, it concentrates his mind wonderfully."*[55] A 30-day deadline does concentrate the mind, but not all disputes can be resolved in 30 or even 60 days. The policy should be to *try* to resolve disputes within this time, but the process may be extended so long as the parties are moving forward effectively in good faith.

Having said that, the 30-day goal should not be dismissed out of hand as unrealistic. In business disputes, preliminary injunction litigation is relatively common, and judges regularly require lawyers to do their research, file briefs, exchange documents, do depositions and try the case within 14-21 days. We do this as a matter of course. Likewise, framed properly, a 30-day resolution process provides the parties ample time to carry out the process appropriately to resolution.

### D. The Four Basic Steps in Each Dispute

The four basic steps in EDR are initial dispute assessment; information exchange; objective dispute valuation; and final resolution. Experts, if needed, would be an additional step that would likely extend the time.

Once a matter reaches a certain threshold, a neutral skilled in EDR principles should be involved. In a simple dispute, the neutral may be needed only for a short phone call to help structure the process, and then be on call as needed. In a complex dispute, the parties should expect that the neutral would be involved in each step of the process. Since EDR processes are new, the best neutrals are those who understand the overall EDR process and are experienced in implementing it.

#### 1. The First Step: Initial Dispute Assessment

The first step is prompt, cost-effective initial dispute assessment. In practical terms, this means that when the company first learns of a dispute, it begins the investigatory process immediately through in-house or outside counsel (or through retaining settlement counsel).

The first step is determining the key internal players. Next, key documents are gathered. Then the key players must be interviewed. The goal is to get to Sufficient

[55] James Boswell, *The Life of Samuel Johnson* (Various from 1791), quoting Dr. Samuel Johnson, on September 19, 1777, explaining how an uneducated convict might have come to quickly write an eloquent plea for mercy (which was actually written by Johnson).

Knowledge,[56] which means looking for harmful as well as helpful documents and facts.

The early case assessment should provide a good idea of what a party's employees know and what the key documents say. A final step is to come up with a list of what's not known and what, if anything, *needs* to be known to make the EDR process work. The list isn't a fishing expedition, and it's much narrower than discovery would be in the lawsuit or arbitration. It requests only that information needed 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, which is the definition of Sufficient Knowledge.

*To stay within the 30-day time frame, each side should complete this process in six business days.*

### 2. The Second Step: Information Exchange

At this point in the process – the seventh business day – the parties exchange the requests for information and documents they need to develop Sufficient Knowledge. By proposing a narrowly-focused, highly-relevant request, parties can show good faith and hopefully encourage the other side to make the same tailored type of request.

There are different ways to obtain information, and the process doesn't require that one particular method always be used. There are four basic methods: (1) simply ask the other side for the information and documents, and their counsel responds; (2) along with requesting the information and documents, ask for a response by affidavit from a corporate representative who has inquired as to the answers and searched for the documents; (3) interview the corporate representative or person(s) with knowledge; and (4) take limited depositions.

If either side thinks the other is requesting information or documents that go beyond what is needed for Sufficient Knowledge, the parties will need to negotiate scope, and they may need a neutral's help for that. Both sides need to be reasonable and responsive to keep the process within the 30-day deadline.

If harmful documents are found that the other side doesn't know about, there may be an incentive to try to resolve the dispute before there is any document exchange. If that isn't possible or has other downsides associated with it, the parties have to be prepared to turn over documents that might be harmful or end the EDR process.

Both sides should expect that the other will act ethically and exchange both helpful and harmful documents. Having said that, though, full disclosure should be encouraged by including in the EDR process the imposition of sanctions for non-compliance. This might include asking for verification from each side's counsel that they have made a reasonably diligent, good-faith search, and produced the reasonably responsive

[56] *See* § 5(A), above. Sufficient Knowledge is defined as enough information 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.

documents (a "Compliant Response"). Settlement also could be conditional on a representation that each party has made a Compliant Response. That would allow a fraudulent inducement challenge to any settlement if it is later learned that the other side withheld material information or documents.

Strategically, this will be a revealing stage in the EDR process. A broad, bad-faith request for information and documents by the opposing party sends the message that it hasn't bought into the process. If that happens, the response could be to say that the broad request doesn't fit into a good-faith, cost-effective, 30-day resolution process, and to ask opposing counsel to reconsider what they need for Sufficient Knowledge. A neutral may be needed to help work through this.

If the other party won't narrow its request, a decision has to be made whether to comply with the request or pivot to an alternative process, options for which are described later. One guiding principle for parties may be: if the document is eventually going to be discoverable and produced anyway, why not produce it now?

Likewise, if one side stalls in producing documents or information that the other needs for Sufficient Knowledge, or is only appearing to cooperate without actually engaging in the process in good faith, it may signal that a nerve has been struck and a leverage point revealed. A neutral may be needed to help get things back on track.

*To stay within the 30-day time frame, each side should complete this process in seven business days.*

### 3. The Third Step: Objective Dispute Valuation – the Four Questions

At this point, both sides should have Sufficient Knowledge to assess their cases. They should now undertake an analysis to establish an objective value for the dispute based on defined variables that each party should use, and that should set the basis for meaningful negotiation or mediation.[57] Two business days should be allotted for this, which takes the process through the end of the 15th business day if tracking the 30-day process.

Specifically, each side should now have the information, documents, and legal research it needs to be able to answer these four questions:

1. How much does each side expect to spend in attorneys' fees to take the case through arbitration or trial?

[57] This section sets forth a recommended procedure for case valuation. There is a rich literature on systematic valuation methods. *See, e.g.*, Michaela Keet, Heather Heavin, and John Lande, *Litigation Interest & Risk Assessment: Help Your Clients Make Good Litigation Decisions*, American Bar Association (2020); Heather D. Heavin & Michaela Keet, *Litigation Risk Analysis: Using Rigorous Projections to Encourage and Inform Settlement,* Journal of Arbitration and Mediation (forthcoming); Michaela Keet, *Informed Decision-Making in Judicial Mediation and the Assessment of Litigation Risk*, 33 Ohio State Journal of Dispute Resolution 65 (2018)

2. What would be the best and worst outcome from trial or arbitration?

3. Recognizing that the worst and best outcomes simply set outer limits, what is the reasonably-likely range of damages from winning or losing?

4. What is the percentage likelihood of a win or loss at numbers within that range?

To make this more concrete, A's counsel could conclude that:

1. Fees. A would likely spend $300,000 to take the case through trial, but B would likely spend $500,000 because B will have to do extensive e-discovery searching and production, and B is using a very expensive law firm.

2a. A's best and worst outcome. If A wins the case, its best outcome would be to win $1 MM less the $300,000 it spends in attorneys' fees (no prevailing party provision). Its worst scenario would be a finding of no liability, meaning a net loss of $300,000 from the attorneys' fees. Thus, its best outcome is a net gain of $700,000 and its worst outcome is net loss of $300,000.

2b. B's best and worst outcome. B's best case would be a net loss of $500,000 in attorneys' fees if it prevailed, and a net loss of $1.5 million if it lost.

3. Most likely range of damages. While A is asking for $1 million, there's fluff in the request. If A wins, it would likely win somewhere between $5-600,000.

4. Likelihood of prevailing. A stands a 60% chance of winning.

B's counsel would go through this same exercise. It could differ in none, some, or all the conclusions. The key is that A and B both assess the same factors and set out specific numbers and percentages. That allows for effective, objective-based negotiation.

A potential criticism of early settlement efforts is the perceived difficulty of valuing the case before counsel has thoroughly reviewed all their client's and the other side's documents, received responses to written interrogatories, taken depositions, and filed dispositive motions. The reality, though, is that with Sufficient Knowledge, parties should be able to answer the four questions at a reasonably high confidence level without engaging in a process that leaves no stone unturned.

Each party should prepare these answers in a report that it will use as part of negotiation or mediation. As the parties share their perspectives with each other directly or with a neutral, their differences on the dispute and its value will generally become clear because each party's report addresses the same four questions. If one side is misguided in its assessment, it should welcome being challenged on such assumptions at the earliest stages of the dispute, not after going through months or years of discovery and motions.

One last point. The process so far has not been simple. But if the parties don't take these steps early and cost-effectively, they'll end up doing it in bits and pieces over many months. When the parties finally get to settlement negotiations or mediation at the end of discovery and dispositive motions, the ultimate cost to settle will have increased by orders of magnitude.

*To stay within the 30-day time frame, each side should complete this process in three business days.*

### 4. The Fourth Step: Final Resolution

Assuming there have been no delays and no need for experts, there are seven business days remaining in the 22-business day period.

In negotiating directly with the other side or using a neutral, you should use all the negotiation strategies that would be used in any business negotiation. If it is in both parties' best interest, interest-based negotiation may be used to develop a solution that works for both sides.[58] This involves a discussion of each side's interests as well as creative problem-solving or, put another way, looking for positive-sum solutions where both parties satisfy important interests.

These negotiations would often involve a neutral and could occur in a setting very much like traditional mediation. The key, though, would be having a skilled and effective neutral willing to be assertive in working through impasses and toward resolution.

If an impasse relates to one or a few major issues, the parties could agree to streamlined binding or advisory arbitration on just those issues. They could use the neutral for making that determination, but that poses numerous ethical and practical problems (*see* discussion in Med-Arb above). It would usually be better practice to find a separate neutral reasonably quickly for prompt arbitration of discrete issues.

### 5. Using Experts in EDR

In some cases, experts may be needed for one or both sides to attain Sufficient Knowledge. Experts could be brought in and integrated into the four steps. To the extent the need for an expert is identified early, the expert can be used during the first six days of the process. If the expert needs the documents and information from the information exchange, then that process can't begin until day 14.

In some cases, one side may want to be able to question the other's expert or even to have the experts discuss the issues together in front of both sides. And in some cases, the parties may want to jointly retain one independent expert.

The use of experts should be consistent with the goal of limiting information to only what's needed to gain Sufficient Knowledge. This means that the parties would more likely ask their experts to prepare more of a report tailored for Sufficient Knowledge as opposed to a full report.

Even with the request for only a tailored report, however, using an expert would likely require that the 30-day deadline be extended. The parties may need longer than a few days to retain an expert on short notice, or the expert may have scheduling issues. Also, if the expert's opinion involves any complexity, testing or surveys, even more time would be needed. If the quality or accuracy of an expert's opinion would be materially

[58] For literature on interest-based negotiation, see n. 50.

affected by the compressed schedule, it should not be sacrificed simply to meet the self-imposed deadline. To do otherwise could lessen the chances of settlement and undermine the larger goal of lowering dispute resolution costs and the time it takes to get resolution.

### E. The Next Step if the Process Doesn't Result in Final Resolution

There will be times when the dispute can't be resolved after having worked through the EDR steps in good faith. When that happens, consistent with the larger goal of expedited, cost-effective resolution, parties should try to negotiate a streamlined process for any ensuing litigation or arbitration. That might include time and scope limits on discovery, motions, and the hearing on the merits. A skilled EDR neutral should be able to provide strong guidance on this.

### F. Other Factors in Process Implementation

#### 1. Announcing the Policy

To ensure success, companies should document the EDR policy, clearly explaining the rationale for EDR and setting internal and external expectations.

##### a. Internal Communication

Internally, management must be educated on the nature of, and rationale for, the process. If they understand how it can significantly lower costs and reduce the demands on them and their staff in the longer term, they're far more likely to embrace the policy.

Management also needs to understand that the process can't be tainted by emotional factors like a desire to avoid embarrassment, to prove that the company or some executive or employee is right, or to even the score. Such emotional responses boomerang quickly in a compressed process like EDR, hindering success, and needs to be avoided from the outset.

##### b. External Communication

Actual and potential litigation adversaries need to understand what the process is and why the party advocating EDR is committed to it as a matter of policy. That helps eliminate suspicion that it is a veiled attempt to gain an advantage in a particular case. At the same time, the policy should be communicated in a way that makes clear that parties are not expected to simply roll over and settle quickly at any cost or that anyone is too risk-averse.

Here's what an announced policy could look like:

> *As a company, we're committed to resolving all disputes quickly, economically, and fairly. Our ideal is to resolve even the most serious disputes in their earliest stages without litigation, and we'll try to do so in 30 days using early dispute resolution principles (EDR). More information on EDR principles is available on our*

*website . . . .*[59]

*We recognize that, even with both sides using EDR principles in good faith, we may not resolve every dispute. Our further commitment is that if we don't resolve the dispute in 30 days (or a longer time that we've agreed on), we'll try to structure dispute resolution guidelines through court or arbitration that allow the process to proceed as quickly, economically, and fairly as possible to a final resolution.*

### 2. Establish the Ground Rules in Writing

Once the ground rules for the EDR process have been established with the opposing side, they should be set out in writing. At a minimum, the writing should deal with tolling (if appropriate), deadlines, and clear provisions governing the process and ethics of document and information exchange (as discussed in § IV(C)(2) above). Clients should sign the document so it is clear that they are authorizing their attorneys to exchange documents and information pursuant to the procedures and ethical guidelines set forth. A sample ground-rules agreement is attached as Appendix A.

### 3. Contract Provisions

One way for a company to start EDR is simply to announce it as a policy as opposed to including it in contract dispute resolution clauses. That allows easing into the process as it becomes more widely understood and the company system becomes more sophisticated in using it. Even if the business does add an EDR clause to contracts, parties will be resolving disputes under the prior clauses for many years. So regardless, there will be a transition from prior dispute resolution methods to EDR.

If a company wants to consider drafting an EDR clause to use in its contracts, part of the challenge is that the principles and tools of EDR aren't widely understood. The substantive terms and general processes in EDR lack the precision and common understanding that, say, mediation has. Thus, the clause would need to be reasonably prescriptive.

Another challenge is that the first two necessary conditions for EDR to succeed are that both parties and their counsel be ethical and proceed in good faith. Obviously, this cannot be mandated by contract. With high-integrity parties and skilled counsel on both sides, all that is needed for the process to work is a good faith commitment to try to resolve the dispute through EDR. Without high-integrity parties and skilled counsel on both sides, the contract clause could be as long and detailed as possible and it still would not work. There needs to be a process for working through that so as to avoid wasting time on EDR if it will be fruitless.

A proposed EDR contract clause is attached as Appendix B.

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[59] The most up to date version of the EDR Practice Protocols can be found on the EDR Institute website at https://www.edrinstitute.org/.

### 4. Practical Impediments to Implementation

Numerous objections can be raised as to why EDR won't work for the business sector. All have some merit, but they are all issues that can be worked through.

One concern for inside counsel is how they would find the resources to manage EDR. This would involve a significant shift in the way in-house counsel address disputes, but the overall effect should be to significantly decrease the cost and time of litigation, thus freeing inside counsel's time over the long run.

A second concern is that employees will need to search for and provide information as soon as a dispute is identified. It can be very difficult to persuade employees to prioritize a project just to meet a legal department-mandated deadline. It will be even more challenging if information is needed from suppliers or service providers. Again, though, once parties realize that this is important to the company and will significantly save their time in the long run, they should comply.

A third concern is that first-rate outside litigation counsel handle many complex cases at a time. If a TRO or preliminary injunction is needed, they drop everything to handle it, but that is the exception, not the rule. The best outside litigation counsel simply may not be set up for an expedited 30-day dispute resolution process for all matters. While that may be the case now, once companies start demanding this (*litigation just costs too much and takes too long*), outside counsel will change or there will be a long line of others waiting to step in. The process will require much more participation of higher-level attorneys, with significant experience and developed judgment. The process has little room for firms that push down as much work as possible to a team of younger lawyers.

A fourth concern is that a lot of disputes are complex and simply cannot be compressed into a 30-day dispute resolution procedure. There may be cases like that, but the 30-day process, even if extended to 60 or 90 days, should force a hard look at significantly shortening the time and lowering the cost of the dispute.

A fifth concern is that one side has no control over the opposing parties or their counsel. An opposing party could exploit a 30-day policy to gain leverage, or just be suspicious of it and refuse to participate. If they are suspicious and refuse to participate, then resorting to standard litigation is likely. If they use the process to try to gain leverage, the other side has to push back from letting them abuse the process and try to persuade them to use the process in good faith. If they don't, terminating the EDR process and resorting to standard litigation may be the only option.

A sixth concern is ethics. Most lawyers have a reasonably thorough understanding of the well-developed ethical rules in standard dispute resolution, but this would not be the case with the ethical rules in EDR. The commercial litigation bar will need to advance the ethical rules for cooperation in EDR as the family law bar has done in collaborative law.[60] While someday bar associations and state legislatures may adopt rules and

[60] To the extent that the principles of EDR become widely embraced, ethics rules could evolve to require lawyers to explain to all clients the options to use EDR for resolution of disputes.

legislation governing early dispute resolution, the key initial focus for attorneys practicing EDR should be full disclosure and informed consent to make sure clients fully understand and accept the process, and to make sure counsel is ethically carrying out the client's intent. Another focus would be to set out clearly the parties' ethical obligations related to document and information exchange as discussed above regarding the second step in EDR.

A seventh concern is the fear that one cannot forecast likely results of a dispute well enough to meaningfully engage in a 30-60 day resolution process. The general difficulty in forecasting is compounded by the need to overcome the common biases in evaluating issues quickly.[61] In a longer dispute resolution process, there is time to work through and undo these quick-evaluation biases, but how is that done in a rapid process?

This is a legitimate concern, but it is a concern even in standard litigation with full discovery and motions. Lawyers should be able to develop more certainty in prediction if they have Sufficient Knowledge from the outset. Further, lawyers already make significant judgments quickly from the beginning of any matter (and routinely rely on them in everyday situations). For example, at the outset of a new case, most lawyers will evaluate whether a client has a claim. Contingency fee lawyers regularly rely on their prediction abilities to decide whether to risk their time (and often their money) on whether a new matter can be successfully resolved. The same is true with the burgeoning growth in the litigation finance industry, where private equity firms have experts judge the likelihood of success of matters as the basis for deciding whether to finance a party's lawsuit, often through non-recourse loans.[62] Finally, as the use of EDR processes grows, lawyers will need to improve their skills at forecasting the likelihood of success or loss, the potential for damages, and costs, and to do so with percentages conveying confidence levels for the most likely possible outcomes.[63]

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[61] These errors were extensively reviewed in a recent book by one of the pioneers in the field, Daniel Kahneman, *Thinking Fast and Slow* (Farrar, Straus, and Giroux 2013). Michael Lewis related how Kahneman and his partner, Amos Tversky, developed the field in *the Undoing Project: A Friendship that Changed Our Minds* (W.W. Norton & Co. 2017). There is extensive literature discussing these issues in terms of thinking about settlement and legal analysis. On negotiation and settlement, *see* Russel Korobkin, *Aspirations and Settlement*, 88 Cornell L. Rev. 1, 5-6 (2002); Russel Korobkin & Chris Guthrie, *Psychological Barriers to Litigation Settlement: An Experimental Approach*, 93 Mich. L. Rev. 107 (1994); Russel Korobkin & Chris Guthrie, *Heuristics and Biases at the Bargaining Table*, 87 Marq. L. Rev. 795, 800 (2004); Christine Jolls, Cass R. Sunstein, & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 Stan. L. Rev. 1471, 1503-04 (1998). On legal analysis, *see* Ian Weinstein*, Don't Believe Everything You Think: Cognitive Bias in Legal Decision Making*, 9 Clinical L. Rev. 783 (2002); Philip G. Peters, Jr., *Hindsight Bias and Tort Liability: Avoiding Premature Conclusions*, 31 Ariz. St. L. J. 1277, 1280 (1999); and Edna Sussman, *Arbitrator Decision-Making: Unconscious Psychological Influences and What You Can Do About Them*, 24 Am. Rev. Int'l Arb. 487, 499 (2013).

[62] See, *e.g.*, Christopher Bogart, *Litigation Finance, Big Data and the Limits of AI* (April 20, 2017), https://www.law360.com/articles/914716/litigation-finance-big-data-and-the-limits-of-ai.

[63] *See* note 52 citations. *See also, e.g.,* Robert Rothkopf, *Litigation Superforecasting, Part 1: Put a Number on It* (April 1, 2016), http://www.lexology.com/library/detail.aspx?g=ad326704-56be-4e34-85e3-c081ea5244a1; *Part 2: Hedgehogs and Foxes* (May 17, 2016); http://www.lexology.com/library/detail.aspx?g=f63dd411-4562-4e19-8f26-cfa4e1dc722d; and *Part 3: A Way of Thinking* (July 24, 2016)

### 5. Adapting the Tools to the Dispute

While the 30-day goal should apply to all disputes, a dispute should meet a threshold before seeking to use all steps in the process. Even with disputes that lend themselves to the four-step process, an EDR policy need not be followed mechanically. The right tools should be used at the right time and in the right way. These tools could include investigation, early case assessment, document exchange, information exchange, negotiation, mediation, joint use of experts, early neutral evaluation, selective issue arbitration, and others.

Like wanting to play with every toy in the toy box, there can be a temptation to want to use every tool in the EDR toolbox. Each dispute, though, should be analyzed so that the selection and use of tools is guided solely by economy, speed, and value. The tools and cost should always be proportional and economical to the size of the dispute.

## CONCLUSION

Our hope is that you're now open to the idea that it's possible to resolve almost any dispute in 30-60 days without litigation. If the other side in a dispute isn't willing to proceed in good faith or isn't highly skilled or ethical, EDR probably wouldn't work, and we're relegated to being litigation tortoises. But where both parties are skilled, ethical, and willing to proceed in good faith, we should do everything we can to be litigation hares. Our clients will soon demand it.

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https://www.balancelegalcapital.com/litigation-superforecasting-part-3-way-of-thinking/. The articles draw insights from the best seller business book, Philip Tetlock and Dan Gardner, *Superforecasting – The Art & Science of Prediction* (Broadway Books 2015). *See also* Linda Babcock, George Loewenstein, & Samuel Issacharoff, *Creating Convergence: Debiasing Biased Litigants*, 914 L. Soc. Inquiry 913, 916, 922-23 (1997) (most successful technique in eliminating bias is deliberately considering counterarguments and weaknesses – ask yourself: if the other side wins, what will be the most likely reason?).

## APPENDIX A – SAMPLE EDR AGREEMENT

[ ] and [ ] enter into this agreement as of [ ] ("Start Date") to govern the early dispute resolution ("EDR") process to try to resolve their dispute voluntarily without [further] litigation.

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

2. **Tolling**. As of Start Date, each party's claims against the other are tolled until ten days after either party gives the other party a Termination Notice or the EDR process is otherwise completed. Before expiration of this ten-day period, neither party may initiate a lawsuit or arbitration against the other.[64]

3. **Neutral**. Within [ ] days of the Start Date, the parties shall select a neutral skilled in EDR process to facilitate the EDR process.

4. **Protocols**. In carrying out EDR, the parties agree to adopt the then-current Early Dispute Resolution Practice Protocols of the Early Dispute Resolution Institute.

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 dispute assessment – 6 days
- Information exchange – 7 days
- Objective dispute valuation – 3 days
- Final resolution– 6 days

6. **Discovery guidelines**. The stage of document and information exchange shall be governed by the following rules:

a. Either party may request from the other party documents or information through written requests for documents, written answers to questions, interviews, or depositions.

b. Each party should limit its document and information request solely that information needed to obtain sufficient knowledge to understand the merits of each party's position and leverage, and to make an informed judgment as to the value of each party's case. ("Sufficient Knowledge")

[64] If litigation or arbitration has started, the parties would agree to notify the court or arbitration panel that they're staying the matter to try to resolve the dispute voluntarily.

c. If either party thinks the other party's requests exceed the goal of Sufficient Knowledge, the parties shall discuss in good faith whether the requesting party would limit its requests.

d. In responding to requests for documents and information, each party shall conduct a reasonably-diligent, good-faith search, and shall produce the reasonably responsive documents and information (a "Compliant Response"). In producing the documents and information, counsel for each party shall represent in writing to the other party that it has made a Compliant Response. If the parties should enter into a settlement agreement as part of this process, both parties shall represent that they made a Compliant Response, and that that representation is a material inducement to settlement.

e. If either party chooses not to make a Compliant Response, it shall terminate the process pursuant to a Termination Notice before the other party produces any documents or information.

7. **Party consent.** By consenting to this process, each party consents to its counsel's abiding by the steps in this process, including making a Compliant Response to document and information requests from the other party, and verifying that it has made a Compliant Response.

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

## APPENDIX B – SAMPLE EDR CONTRACT CLAUSE

1. In any dispute between the parties, before commencing arbitration pursuant to § [ ], representatives of each party with the authority to resolve the dispute shall meet in good faith to try to resolve the matter as early as possible, but no later than 14 days after one party gives the other notice of the dispute.

2. If the parties do not resolve the dispute within the 14 days, then before commencing arbitration, the parties shall engage in good faith in a 30-day early dispute resolution ("EDR") process as described below. Either party may terminate the process by serving a termination notice (the "Termination Notice") on the other party, which shall terminate the process as of ten days following service of the notice, as follows:

    a. Within three business days of the end of the 14-day period (the "Trigger Date"), with both parties' consent, the parties shall select a neutral skilled in the EDR process. The parties shall share equally the costs of the neutral.

    b. Within six business days of the Trigger Date, the parties shall each determine in good faith the documents and information, if any, that are in the other party's possession and that each party deems essential to evaluating the case. Both parties shall in good faith limit the requests to the information and documents necessary to obtain sufficient knowledge 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. By the end of the sixth business day, each party shall serve its request, if any, on the other side for information and documents.

    c. Within the following seven business days, each side shall provide the other the requested documents and information. If either side believes the other side's request seeks more than essential information or documents, the parties shall in good faith discuss limiting the request, and shall involve the neutral if they cannot resolve the issue themselves. Neither party may be compelled to produce information or documents; the process is a good-faith exchange that may be terminated at any time. If parties do produce information and documents, each party's counsel shall provide a declaration that the party reasonably searched and produced the reasonably responsive information and documents in response to the other party's requests. If either party does not want to produce certain responsive documents or information, the party shall terminate the EDR process.

    d. Within the following three business days, the parties shall each prepare an EDR case analysis to exchange with the other side and, if appropriate, the neutral. Each EDR case analysis shall discuss, among other things, the party's position on the key issues and damages and equitable relief, and shall estimate the party's expected attorneys' fees.

    e. Within the following six business days, the parties shall meet in good faith in a mutually-convenient location to negotiate or mediate to try to resolve

the dispute. If the parties do not resolve the dispute within this time, the process shall terminate unless both parties choose to continue.

3. In carrying out EDR, the parties agree to adopt the then-current Early Dispute Resolution Practice Protocols of the Early Dispute Resolution Institute.

4. Every claim of each party is tolled from the date of initial notice of the dispute until 10 business days following service of a Termination Notice or termination of the EDR process.

5. During the EDR process, nothing in this section prevents either party from seeking preliminary or emergency injunctive relief in court [or with the arbitration administrator. Apart from seeking emergency relief, neither party may commence arbitration until the EDR process concludes.

# APPENDIX C – EDR PRACTICE PROTOCOLS

# 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.*

December 8, 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

## Table of Contents

## 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. 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 solely 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.*

**2.3 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.*

**2.4 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.*

**2.5. 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.

**2.6. 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.*

**2.7 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 dispositive 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. Binding Procedure absent Final 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 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. The Lawyer-Client Relationship

**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 passionately pursue 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. Golden rule.** 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. <u>Experts</u>

**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 Final Resolution.

**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 evalation, 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.