

THE EARLY DISPUTE RESOLUTION INSTITUTE

EDR PROTOCOLS

The Early Dispute Resolution Institute Protocols are guidelines for the process of early dispute resolution. The Protocols should not be construed as legal advice or as creating a lawyer-client relationship.

©EDR Institute 2019-2023 (revised November 20, 2023)

THE INSTITUTE

The Early Dispute Resolution Institute is a non-profit corporation, whose mission is to work with counsel, neutrals, courts, bar associations, dispute resolution administrators, businesses, and the public to:

- promote the Institute’s early dispute resolution process (“EDR Process”) to resolve civil disputes early, economically, and on a principled basis;
- train neutrals, counsel, and parties in the EDR Process;
- educate neutrals, counsel, parties, judges, judicial administrators, and the public on the advantages of the EDR Process; and
- facilitate the use of the EDR Process by maintaining and updating the Early Dispute Resolution Practice Protocols (“Protocols”) to reflect best practices.

EDR OVERVIEW

Cases rarely go to trial or arbitration hearing. Some are dismissed through motion practice; most others settle. But settlement often comes only after parties have expended considerable time and money in discovery and motion practice. Parties can avoid these costs by using the EDR Process to reach settlement early, economically, and through principled negotiation based on an objective risk analysis that helps quantify the value of the case.

Many of the perceived barriers to early settlement are circumvented by the EDR Process, which is simple to summarize. Counsel quickly and economically obtain the information they need to evaluate a dispute, enabling them to confidently forecast the expected value of a case and corresponding settlement ranges. Clients are then able to make informed decisions regarding resolution of the dispute.

The EDR Process has four steps: (i) initial dispute assessment, (ii) information and document exchange, (iii) risk analysis, and (iv) principled resolution. The Protocols provide guidance for each step and establish ethical standards to ensure the integrity of the process and increase the likelihood that the dispute will be resolved. The EDR process is flexible; parties can adapt the process for their particular dispute.

The EDR Process works best when facilitated by a trained neutral with a comprehensive understanding of the four steps, concepts, skills, and ethical standards laid out in the Protocols, *and* of their practical application. The neutral can help parties tailor the EDR Process to their dispute, execute each step, stay on schedule, and avoid impasse.

The Institute first published the Protocols in 2019. Since then, neutrals, judges, counsel, and parties have been using the EDR Process to resolve disputes. Based on feedback from users of the EDR Process, the Institute periodically updates the Protocols to reflect best practices. This is the Institute’s fourth revision.

THE PROTOCOLS

1. General Provisions

1.1 EDR is a Process

Dispute resolution under the Protocols is a process, not an event. As soon as practicable after the parties have agreed to engage in the EDR Process and retained an EDR Neutral, the neutral works with the parties to determine what they will do in each of the four steps and to set deadlines for completing each step. If, after going through the four steps, the parties have not resolved their dispute, they proceed to a customary mediation session.

1.2 Flexible Application

The Protocols define the steps, processes, concepts, skills, and ethical standards that guide counsel and parties in seeking early resolution of their dispute. Parties may formally adopt the Protocols in whole or part as the process they will use, or may draw on them flexibly as general guidelines. The EDR Neutral should work with the parties to simplify the process to the extent appropriate for the dispute.

1.3 The Four Steps

The EDR process consists of four steps:

- (a) Initial Dispute Assessment;
- (b) Information and Document Exchange (including, if appropriate, EDR Experts);
- (c) Risk Analysis; and
- (d) Final Resolution.

1.4 The EDR Neutral

The EDR Process works best when the parties retain an EDR Neutral trained in the Protocols to facilitate the EDR Process.

2. Ethics of the EDR Process

2.1 The Protocols and Professional Rules of Conduct

2.1.1 In the EDR Process, counsel remain subject to the rules of professional conduct in their respective jurisdictions. The Protocols set additional ethical standards

that are specific to the EDR Process and that may not be directly addressed by the applicable rules of professional conduct.

2.1.2 In proceeding under the Protocols, either formally or when using them as guidelines, counsel and parties shall also comply with the following ethical standards:

- (a) Counsel should fully explain the EDR Process to their clients to allow clients to make an informed decision whether to use the process;
- (b) The parties and counsel should engage in the EDR Process in good faith, committed to resolving the dispute speedily, economically, and on a principled basis;
- (c) At every stage of the process, counsel should provide their clients with the relevant information they need to make informed decisions as to resolution; and
- (d) At every stage of the process, counsel should act with integrity and treat the other party's counsel with the highest level of professionalism and civility.

2.2 Permissive and Mandatory Withdrawal by Parties

A party may withdraw from the EDR Process at any time for any reason. A party must withdraw if it cannot continue the process in compliance with the Protocols' ethical standards or the EDR Agreement.

2.3 Permissive and Mandatory Withdrawal by the EDR Neutral

The EDR Neutral may withdraw from the EDR Process at any time or for any reason. If the neutral becomes aware that either party is not compliant with the Protocols' ethical standards or the parties' EDR Agreement, the neutral must provide notice, *ex parte*, to the noncompliant party. If that party does not timely cure the noncompliance, the neutral must withdraw but shall not provide an explanation for the withdrawal.

3. The Fundamentals of the EDR Process

3.1 The EDR Agreement

Before starting the EDR Process, the parties should prepare an EDR Agreement to reflect the terms and schedule under which they will proceed. The EDR Agreement may be in the form of the EDR Neutral's retention letter, a dispute resolution clause in a contract, or a stand-alone agreement.

3.2 Confidentiality

State statutes and court rules governing the confidentiality of mediation may not apply to the EDR Process. As a result, parties should consider stating in their EDR Agreement that they intend for such statutes and rules to apply. To maximize

confidentiality protection, parties should also consider affirmatively acknowledging that:

- (a) All communications made in the course of the EDR Process, whether oral or written, between or among the parties, counsel, retained experts (if applicable), and the EDR Neutral shall constitute compromise offers and negotiations under Federal Rule of Evidence 408 and its state counterparts; and
- (b) Communications and any written materials, tangible items, and other information used in the EDR Process shall not be discoverable or admissible in any proceeding to the extent it would be deemed inadmissible under the Federal Rule of Evidence 408 or its state counterparts, unless the communications or materials 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, which would be governed only by the confidentiality or other restrictions, if any, in that agreement.

3.3 The Immediate Primary Effort and the Mediation Backstop.

The EDR Process should begin immediately after the parties sign the EDR Agreement, with the EDR Neutral engaging in communications with the parties, either individually or jointly, to work through the four steps of the process for a scheduled period of time. If the parties are unable to resolve their dispute by the date set in the initial schedule for the EDR Process, they should engage in a standard mediation session to try to resolve the dispute.

3.4 Fundamental Defined Concepts

3.4.1 Sufficient Information - Counsel, Parties and Experts

Sufficient Information refers, respectively, to the limited set of information that:

- (a) counsel needs to make an informed forecast of the Expected Value and Reasonable Settlement Range for the case;
- (b) parties need to make informed decisions as to settlement of the case; and
- (c) experts (if used) need to render an EDR Expert Report.

3.4.2 Sufficient Information Request

Sufficient Information Request refers to the information the parties may request from each other as needed to develop Sufficient Information.

3.4.3 Compliant Response

A party making a Sufficient Information Request can ask the responding party to provide a written declaration that it has responded to the request consistent with the requirements of the Protocols.

3.6. Expected Value

3.4.4 Expected Value

Expected Value is a statistical tool that uses probability to forecast the value of a case. Its formal definition is the average of the likely recoverable damage amounts discounted by the likelihood of their being awarded, with attorneys' fees then subtracted. The Protocols are based on the premise that skilled lawyers with Sufficient Information can forecast the Expected Value of the case early, with roughly the same level of confidence as if they had conducted full discovery and engaged in motion practice.

3.4.5 Risk Analysis

Risk Analysis is the calculation of Expected Value adjusted by subjective risk factors that should be considered in determining a reasonable settlement range for the case.

3.4.6 Principled Negotiation

Principled negotiation refers to negotiations that are informed by the applicable facts and an objective valuation of the likely outcome that a party will achieve.

4. Step One—Initial Dispute Assessment

4.1 Rationale

Through the first three steps of the EDR Process, a party should develop an informed understanding of the case that results in an informed Risk Analysis. Step One provides the process for the parties, with the assistance of the EDR Neutral, to develop an objective understanding of their case and to simplify the case to its core claims, defenses, and issues. Step One also provides the necessary basis for each party's Sufficient Information Request, Risk Analysis, and Principled Negotiation (Steps Two, Three, and Four).

4.2 Thoroughly Investigate the Material Facts of the Case

In light of the expedited nature of the EDR Process, counsel need to promptly develop a thorough understanding of the material facts by interviewing the key people involved, locating and reviewing key documents; and identifying other material information, both helpful and harmful to their case. Counsel needs to develop this thorough understanding to determine whether they need additional information or documents to develop Sufficient Information.

4.3 Identify Core Claims/Defenses/Issues

Counsel should identify the core claims, defenses and issues in the dispute, disregarding those that are peripheral, and should simplify claims by combining those that have overlapping elements (e.g., classify fraud, negligent misrepresentation, and statutory fraud as one claim for misrepresentation). The EDR Neutral should help parties develop consensus as claims, defenses, and issues that are the core to the case, which will then serve as the basis for Sufficient Information Requests, Risk Analysis and Principled Negotiation.

5. Step Two—Information and Document Exchange

5.1 Rationale

In Step Two the parties may request from, and produce to, each other the narrow set of information and documents, if any, that allows counsel to develop Sufficient Information to make an informed valuation of the case. Given that the information and documents would almost certainly be discoverable in a court case or arbitration, neither party is prejudiced by providing the information in the early stages of the dispute. Producing these as part of the EDR Process simply allows the parties to have an early informed basis on which to resolve their dispute.

5.2 Request Information/Documents Needed to Develop Sufficient Information

Each party should identify the limited information or documents, if any, they need from the other side to develop Sufficient Information, which they may request in a Sufficient Information Request. This is not general discovery as practiced in court. The EDR Neutral should facilitate the parties' framing their requests narrowly, and should ensure that each party concurs that the other's requests are reasonably limited to what is necessary to obtain Sufficient Information. To the extent that there is disagreement, the EDR Neutral should work with the parties to resolve the issues, working to minimize the burden on the producing party while ensuring that each party receives the information and documents it reasonably needs to develop Sufficient Information.

5.3 Construe Sufficient Information Requests Broadly

In determining whether documents are responsive to a Sufficient Information Request, the responding party should construe the requests broadly and provide the information or documents that that the other side would consider reasonably covered by the request. Requests should not be parsed to avoid providing what the other party is seeking, nor should a party respond with a document dump. The requests should elicit the documents needed for Sufficient Information. Responsive documents that are unfavorable to a party must be produced.

5.4 Questioning Other Side's Witnesses

5.4.1 Limited Use. If needed to develop Sufficient Information, counsel may ask to interview witnesses, on or off the record, whom the other side controls. The number of interviews and the questions to the witnesses should be narrowly tailored to what is needed for counsel to develop Sufficient Information. The process should be used sparingly; these are not depositions.

5.4.2 Procedure. Parties should agree on a procedure that seeks to elicit information fairly, which may include requesting the EDR Neutral to ask the questions that counsel provides. Parties should encourage their witness(es) to answer questions responsively and not to parse questions in a way that would hold back relevant information or render a response misleading.

5.5 Verification of Compliant Response

A requesting party may ask the responding party and its counsel to declare in writing that the responding party has made a Compliant Response to the requesting party's Sufficient Information Request, which means that:

- (a) the responding party has made a diligent, good-faith search of reasonable scope for, and has produced the responsive information and documents that resulted from the search;
- (b) the responding party has not narrowly construed requests for information or documents to withhold responsive information or documents; and
- (c) witnesses under the responding party's control have been forthcoming and have accurately answered questions.

If the parties resolve their dispute through the EDR Process, the settlement agreement could include a material representation from each party that it made a Compliant Response to the other party's Sufficient Information Request.

5.6 Subsequent Requests

As needed, counsel may make further limited Sufficient Information Requests in order to be able to make an informed forecast of the Expected Value for the case.

5.7 EDR Experts

5.7.1 Experts Discouraged. Experts should be used in the EDR Process ("EDR Experts") only when needed by counsel to develop Sufficient Information. The use of EDR Experts in the EDR Process is discouraged. They add significant cost and time and provide opinions that contradict each other, which are often already known to the parties; in most cases they will add little value. If counsel does need to retain an EDR Expert, the expert's work should be limited to preparing an EDR Expert Report.

5.7.2 EDR Expert Sufficient Information Exchange. If an expert is retained, counsel should request from the other side the limited information or documents, if

any, that the expert needs to issue an EDR Expert Report. Counsel should cooperate in providing the necessary information to each other, with the EDR Neutral facilitating the process.

5.7.3 EDR Expert Report. The EDR Expert Report should be limited to a concise statement of the expert's opinions and key findings. Unless the parties otherwise agree, parties may not use the EDR Expert Report in litigation or arbitration if the EDR Process does not result in settlement.

5.7.4 Joint Experts. The parties may jointly retain an EDR Expert to issue an EDR Expert Report. The written agreement to retain the joint EDR Expert should address guidelines for (i) communications between the expert, on the one hand, and either or both parties' counsel, on the other, and (ii) access to the expert's work product. Unless the parties otherwise agree, parties may not use the joint EDR Expert Report in litigation or arbitration if the EDR Process does not result in settlement.

5.8 Simplified Process for Steps One and Two

In some cases, you may need to follow all the steps in both Steps One and Two, but in other situations, you can simplify the process. The EDR Neutral should collaborate with the parties to make the process more efficient based on the dispute's nature. Initially, during the initial calls with both parties, the EDR Neutral should discuss the facts and issues, try to reach agreement on important claims and defenses, assess the need for experts, identify key documents and information to share, and set a deadline for this exchange. The parties can then share this information without going through the formal request and response process described in Protocol 5.

6. Step Three - Risk Analysis

6.1 Rationale

At this point, the parties should have reached agreement on the core claims, defenses, and issues, and should have developed Sufficient Information to make an informed valuation of the case. Working with the EDR Neutral, each counsel in Step Three undertakes a risk analysis of the case based on a set of seven risk-analysis factors, three of which are used to compute Expected Value, and four of which address key subjective risk-benefit factors. This creates a common framework for the parties to engage in Principled Negotiation.

6.2 Forecasting the Expected Value Variables

To calculate the Expected Value of the client's case, each counsel uses probability logic to forecast three variables:

- (a) the party's percentage likelihood of prevailing on each of the material claims or defenses;
- (b) the party's likely range of damages as to each material claim (often using three alternatives - low, medium, and high), and the percentage likelihood of recovering each amount within that range; and
- (c) the estimated future expenses and attorney's fees to pursue litigation or arbitration through final judgment or award. Where warranted, counsel should also forecast expenses and fees through appeal or award confirmation, discounted by the likelihood that appeal or confirmation would not happen.

6.3 The Calculation of Expected Value

Based on these variables, counsel should calculate the Expected Value of their cases using the Expected Value statistical formula. The EDR Neutral should be skilled in this process and can assist counsel with forecasting, probability logic, and calculation of Expected Value.

6.4 The Subjective Risk Factors

Counsel should also assess subjective risk factors as part of making informed decisions on a reasonable settlement range. These include each side's risk tolerance, leverage, collectability, and the personal and business impact of continuing the dispute on each party.

6.5 Reasonable Settlement Range

Based on the Expected Value and evaluation of the subjective risk factors, counsel should recommend to their client a reasonable range within to settle the dispute. When appropriate, non-monetary options should also be explored as a way to settle the dispute. Counsel should explain to their clients the variables and reasons supporting the range so that the client has Sufficient Information to make informed decisions when negotiating settlement.

7. Step Four—Final Resolution

7.1 Rationale

Having prepared Risk Analyses based on common factors, the parties can now engage in Principled Negotiation, which seeks to find a mutually-acceptable settlement that realistically reflects the risks each party faces. The entire EDR Process has built the foundation for Principled Negotiation, which can be contrasted to the more common practice of engaging in positional bargaining that is often untethered to the merits of the dispute.

7.2 Principled Negotiation

Based on the Risk Analysis, each party in the Final Resolution step should be prepared to engage in Principled Negotiation based on objectively discussing the parties' respective positions on Expected Value and their assessment of the subjective risk factors. The EDR Neutral should facilitate the Principled Negotiation through shuttle diplomacy or, if appropriate, joint sessions, to help the parties resolve the dispute before the scheduled mediation.

7.3 Backstop Mediation Session

If the parties have not resolved the dispute before the scheduled mediation session, they continue to engage in Principled Negotiation in the session. The EDR Neutral should facilitate the session consistent with standard expectations for mediation, except that the process should focus on the parties' underlying Risk Analyses and prior negotiations.

7.4 Binding Procedure Absent Final Resolution Through EDR

If the parties do not resolve the dispute before or at the mediation session, the parties should have substantially narrowed the issues and reduced the discovery needed to further pursue the dispute. As a result, the parties, with the EDR Neutral's assistance, should consider agreeing to an expedited, economical and binding resolution process that they will follow in court or arbitration.

** ** **