

# **THE 30-DAY LAWSUIT:**

## **Ending Litigation Before it Begins**

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## **TABLE OF CONTENTS**

### **I. Introduction: The Cost of “Litigation as Usual”**

### **II. What Is Early Dispute Resolution?**

### **III. EDR vs. Traditional Mediation: Why the Distinction Matters**

### **IV. The EDR Process: Four Steps to Resolution in 30 Days**

- A. Step One: Initial Dispute Assessment
- B. Step Two: Information and Document Exchange
- C. Step Three: Risk-Analysis
- D. Step Four: Resolution

### **V. The Role of the EDR Mediator**

### **VI. EDR in the Corporate Context: Reducing Legal Costs**

### **VII. Implementing an EDR Policy: Practical Considerations**

### **VIII. Conclusion**

### **About the Author**

## **I. Introduction: The Cost of “Litigation as Usual”**

Don't read this if you like spending hundreds of thousands of dollars on endless litigation that keeps your company's focus on lawsuits rather than on your business.

For the rest of you, consider the following: the overwhelming majority of civil cases never reach a jury. In Texas, of the more than 553,000 civil cases that concluded in a single recent year, only 608 were tried to a jury. The rest were resolved by other means—principally settlement. Nationally, the numbers are similar: fewer than five percent of filed civil cases proceed to trial. Yet parties routinely spend months or years—and hundreds of thousands of dollars—in discovery, depositions, motion practice, and trial preparation before reaching a settlement they could have achieved far earlier.

This paper poses a straightforward question that every in-house counsel and business leader should ask: If the vast majority of disputes end in settlement, why do we tolerate a process that requires parties to endure prolonged and expensive litigation before they get there?

Early Dispute Resolution mediation (“EDR”) offers an answer. EDR is a structured, four-step dispute resolution process that uses a trained neutral to guide parties to a fair, informed, and principled resolution within 30 to 60 days—before significant discovery or motion practice, and at a fraction of the cost of traditional litigation. For business leaders and general counsel looking to control legal budgets, reduce disruption, and resolve disputes on their own terms, EDR represents a fundamentally better approach.

## **II. What Is Early Dispute Resolution?**

Simply put, EDR is an expedited, cost-effective, voluntary dispute resolution process that parties engage in before significant discovery or motion practice. It is structured to be completed in as little as 30 days. It is grounded in the reality that most cases settle and that engaging in a prolonged, adversarial process prior to settling is often unnecessary. Instead, the parties can undertake EDR in the earliest stages of their dispute and achieve a fair resolution.

EDR is not traditional mediation. In a traditional mediation, a mediator is chosen and a date is set many months into the litigation process. The parties appear for a one-day session, where real negotiations rarely begin until late in the day. While many cases do settle at mediation, this comes at a real cost: the parties have already incurred substantial expense in discovery and trial preparation for a trial that, statistically, will never occur.

EDR addresses these problems by providing a structured process—facilitated by a specially trained EDR Mediator—that enables parties to gather the information they actually need, conduct a rigorous risk analysis, and engage in risk-informed negotiation to reach resolution, all before the traditional litigation clock has barely started.

The EDR process was developed by the EDR Institute, a non-profit corporation organized to promote the fair, effective, and ethical use of EDR principles and to educate lawyers, judges, neutrals, businesses, and the general public about EDR’s benefits. The Institute maintains and continually updates the EDR Mediation Guidelines (formerly called the Protocols) which provide a flexible framework for the process, which the EDR Mediator tailors to the circumstances of each dispute.

### III. EDR vs. Traditional Mediation: Why the Distinction Matters

To understand EDR’s value, it is important to understand how it differs from the traditional litigation and mediation model.

Feature	Traditional Mediation	EDR Process
Timing	Months or years into litigation	Earliest stages of a dispute
Information Exchange	Broad, costly discovery	Targeted “Sufficient Information”
Mediator’s Role	Facilitates one-day session	Guides multi-step virtual process
Risk Analysis	Often informal or absent	Structured, objective valuation
Cost	High (usually after discovery, depositions, experts)	Low (typically before formal discovery, depositions or experts)
Duration of Process	Single day, scheduled weeks or months in advance	30 days (entire process)
Good Faith Requirement	Customary but informal	Contractual; Compliant Response
Ethical Standard	Standard mediation ethics	Heightened EDR ethics requirements

Under the traditional model, mediation typically occurs late in the case—after months or years of litigation, after the parties have sunk significant resources into the matter, and often on the eve of trial. The mediator is selected, a date is set, and the parties appear for a marathon session where real negotiation rarely doesn’t begin until hours into the process. Even when mediation succeeds, the parties have already paid a steep price in legal fees and opportunity cost.

One alternative is to mediate at the very beginning of a lawsuit. But this poses its own challenges. Frequently, what led to the lawsuit being filed was a breakdown in pre-suit negotiations. The parties may be locked into contrasting views of the dispute and in no mood to restart settlement discussions. Even if one or both sides want to re-engage, they may not want to appear weak. Another roadblock is that once a suit is filed, both sides often feel they need discovery before they can evaluate what a fair settlement would be.

EDR addresses each of these obstacles. By using a specially trained mediator to facilitate a structured process—one that includes targeted information exchange, objective risk analysis, and risk-informed negotiation—EDR allows parties to reach informed resolution without the delay, expense, and uncertainty of protracted litigation.

## **IV. The EDR Process: Four Steps to Resolution in 30 Days**

EDR is a four-step process, facilitated by an EDR mediator, and designed to resolve disputes economically, fairly, and typically in no longer than 30 days. The EDR mediator's training covers the techniques used in the process, the ethical issues that can arise, how to overcome the roadblocks to early resolution, and, and risk analysis to determine a reasonable settlement range. The four steps work equally well with both simple and complex disputes and regardless of the size of damages sought.

Before beginning the formal four-step process, the EDR mediator will typically explore whether there is sufficient common ground to reach a prompt resolution without proceeding through the entire EDR procedure. This preliminary assessment often uses evaluative and facilitative techniques to gauge whether the parties' positions are closer than they realize.

### **A. Step One: Initial Dispute Assessment**

The first step of the formal EDR process is for each party's counsel to obtain a thorough understanding of their own client's case—generally by reviewing important documents and interviewing key witnesses. The lawyers then provide the EDR mediator with an overview of the dispute and identify the limited information they need from the opposing party to make an informed decision about the fair value of the case.

This is a critical distinction from traditional discovery. In EDR, the parties are not seeking “any and all” documents. Instead, they identify only what they need—what in EDR is called “Sufficient Information”—to make an informed judgment about the merits and value of each side's position. The EDR mediator plays an active role in helping the parties identify what is truly necessary and trimming down any requests that veer toward traditional broad-based discovery.

## **B. Step Two: Information and Document Exchange**

In the second step, the parties exchange the information identified during the Initial Dispute Assessment. Each side may request specific documents, and in some cases may interview the other party's witnesses. Again, the focus is on targeted, proportional information—not “leave no stone unturned” discovery.

This step requires an ethical commitment from each side: they will produce the information the other side reasonably requests. If a client refuses to produce reasonably requested information, the client's attorney must end the EDR process. This good-faith commitment is foundational to the integrity of EDR.

Consistent with the maxim of “trust but verify,” the Protocols allow each party to ask the other to declare in writing that they have made a “Compliant Response” to information exchange requests. A Compliant Response means: (a) the client has made a reasonably diligent, good-faith search for information and documents and has produced the reasonably responsive materials; (b) the client has not narrowly construed requests to withhold material information or documents; and (c) party witnesses have made reasonably responsive and accurate answers to questions.

## **C. Step Three: Risk-Analysis**

Once the parties have Sufficient Information, the next step is to establish a risk-adjusted value for the dispute. This is often the most challenging step for attorneys unfamiliar with EDR, as it requires each side to disclose to the EDR mediator an honest appraisal of the case and the potential outcomes. However, this transparency is essential to the integrity of the process and to achieving a principled resolution.

Each party presents its valuation of the case to the EDR mediator, addressing four fundamental questions common to most civil disputes:

1. How much does each side expect to spend in attorneys' fees and expenses to take the case through trial or arbitration?
2. What would be the best and worst outcome for each side at trial?
3. Recognizing that the worst and best outcomes simply set outer limits, what is the most likely range of damages (high, middle, low) on the core claims and counterclaims in the dispute?
4. What is the percentage likelihood of a win or loss at each level of damages identified above?

The EDR mediator then works with both sides to reconcile their analyses, identify areas of agreement and disagreement, and establish the basis for meaningful negotiations.

## **D. Step Four: Risk-Informed Negotiation & Resolution**

The final step is to try to resolve the dispute. The risk-analysis performed in Step Three grounds the settlement discussions in reality rather than just posturing and saber rattling. Using the risk analysis of the parties, the EDR mediator facilitates negotiations informally, usually through successive telephone calls or videoconferences. With all the information the parties have gathered and exchanged, they may be able to promptly negotiate a settlement. If the informal negotiations are unsuccessful, the EDR mediator will schedule a formal mediation session.

In the author's experience, mediation sessions at this stage tend to be much shorter than traditional mediations because the EDR process has already required the parties to become well-versed in the core issues and the valuation of the case. Accordingly, real negotiation and bargaining occurs much earlier in the session than in a typical traditional mediation.

Even if the parties do not reach full resolution, the EDR process typically narrows the dispute substantially. If a dispositive legal or factual issue is causing an impasse, the parties can seek a binding resolution on that discrete issue—through expedited arbitration, a summary judgment motion, or another targeted mechanism—and then return to the EDR mediator to complete negotiations. Courts and arbitrators generally cooperate with parties seeking an expedited, cost-effective schedule.

## **V. The Role of the EDR Mediator**

The EDR mediator's role is more active and sustained than that of a traditional mediator. The Guidelines refer to this professional as the "EDR mediator" rather than the "mediator" because different skills and approaches are required. The EDR Institute trains mediators in the heightened ethics requirements, key concepts, and four-step process, as well as in the use of decision trees to help each party understand the risk-adjusted value of a dispute.

EDR mediators are also trained to adapt the EDR process to the circumstances of a particular dispute. They can adhere closely to the procedures in the Guidelines or streamline the steps and begin settlement negotiations as early as possible. The EDR mediator works with the parties at the outset to determine how the EDR process will be applied, tailoring it to what is most appropriate for the case. This flexibility is one of EDR's greatest strengths.

Unlike the traditional mediator who typically enters the case on mediation day, the EDR mediator is engaged from the beginning and guides the parties through each step. The mediator helps identify what information is truly needed, keeps the process on

schedule, assists in the risk-analysis valuation, and facilitates the final resolution through risk-informed negotiation.

## **VI. EDR in the Corporate Context: Reducing Legal Costs**

For in-house counsel and business leaders, EDR's most compelling benefit may be its impact on legal budgets. Consider the typical trajectory of a commercial dispute under the traditional model: months of discovery, often including extensive document production and management through e-discovery, and multiple depositions; widespread motion practice; and constant trial preparation for a trial that is, statistically, unlikely to ever occur. Each stage adds cost and disrupts business operations.

EDR short-circuits this cycle. By typically resolving disputes in no less than 30 days from inception—often before a lawsuit is even filed—EDR can eliminate or dramatically reduce the largest expense categories in commercial litigation: discovery costs, expert fees, motion practice, and trial preparation.

The indirect savings are equally significant. Litigation diverts management attention, strains business relationships, and creates uncertainty that can affect strategic planning and business development. An EDR policy that resolves disputes quickly and definitively frees management to focus on the business rather than the courthouse.

General counsel who adopt an EDR-first approach to dispute management can expect several benefits: lower total delivered cost per dispute, faster resolution timelines, reduced management disruption, preservation of business relationships that might otherwise be destroyed by protracted litigation, and greater predictability in legal budgets.

The fundamental question that, not only general counsel, but every lawyer should ask is: “What serves my client’s interests best?” In most cases, the answer is an early, economical, and fair resolution of the dispute. EDR provides a structured process to achieve precisely that.

## **VII. Implementing an EDR Policy: Practical Considerations**

For organizations considering the adoption of an EDR policy, several practical considerations are worth addressing:

- **Contractual EDR Provisions.** The most reliable way to ensure that disputes will be resolved through EDR is to include an EDR clause in your commercial agreements. Such a clause commits both parties to engage in the EDR process before resorting to litigation or arbitration. For example, the parties agree to

engage in an American Arbitration Association EDR Mediation before filing a lawsuit or arbitration. See, <https://www.adr.org/panel/edr-panel/>

- **Selecting Skilled EDR Counsel:** Advocating well in EDR Mediation requires knowledge of the process, skill in risk analysis, and a commitment to seeking early and favorable resolution. Consider using counsel skilled in EDR as settlement counsel.
- **Selecting an EDR Mediator.** Because the EDR mediator plays a more active and sustained role than a traditional mediator, it is important to select a mediator who has been trained in the EDR Guidelines and who has experience with the process. The American Arbitration Association has a national panel of EDR Mediation who have been assessed and qualified to sit on the Panel. The EDR Institute maintains a roster of mediators who have taken EDR training.
- **Good Faith Commitment.** EDR only works if both parties commit to participating in good faith. This means complying with the heightened ethical standards required by the process, producing information that is reasonably requested, and engaging in negotiations with a genuine intent to reach a fair resolution. If a party is not willing to make this commitment, it should decline to participate.
- **Measuring Results.** Organizations that adopt an EDR policy should track meaningful metrics—that is foremost total spend on individual matters, but should also indirect costs such as general counsel and management time, business disruption, and opportunity costs. These metrics will demonstrate the true value of an EDR-first approach.
- **Training.** Both in-house and outside counsel benefit from training in the EDR process. The EDR Institute offers a 6-hour streaming course and, from time to time, in-person training programs for both neutrals and advocates. Lawyers who understand how EDR works—and who are skilled in decision-tree analysis and principled negotiation—are more effective participants in the process.

## X. Conclusion

Litigation takes too long and costs too much. That is not a novel observation, to business leaders and general counsel who bear the direct and indirect costs of the traditional litigation model.

EDR offers a fundamentally better approach. By using a specially trained mediator to guide parties through a structured, four-step process—initial dispute assessment, targeted information exchange, objective risk-analysis, and risk-informed negotiation—EDR enables parties to resolve disputes typically in no longer than 30 days, at a fraction of the cost of traditional litigation, and without sacrificing the quality or fairness of the

outcome. For businesses that value efficiency, fairness, and control over their legal budgets, EDR is not merely an alternative to litigation, it is a forward-thinking approach that brings an end to litigation before it even begins.

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## **About the Author**

Michael A. Hawash is the founder of Hawash Houston Mediation LLC in Houston, Texas, where he routinely helps parties resolve disputes and avoid the uncertainties of the courthouse.

Michael is an Adjunct Professor at the University of Houston Law Center, where he teaches courses on legal negotiation, litigation risk-analysis, and mediation advocacy. A member of the National Academy of Distinguished Neutrals, Michael is the current Chair of the ADR Section of the Houston Bar Association, a board member of the Texas Mediator Credentialing Association, and a trustee of the EDR Institute.

Michael serves on the American Arbitration Association's commercial and construction panels for both mediation and arbitration. He organized the first court-sponsored EDR program in the country in partnership with Judge Jim Kovach of Harris County Civil Court No. 2.

A thirty-year litigation veteran, Michael represented major corporations and insurance companies before transitioning his primary focus to mediation, arbitration, and EDR. He frequently writes and speaks on alternative dispute resolution topics at bar associations and law schools nationwide and is a nationally recognized authority on the EDR process.

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