

The Early Dispute Resolution Institute
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EARLY DISPUTE RESOLUTION:

**A Proven Method to Fairly & Ethically
Resolve Disputes In
30 Days**

Peter R. Silverman
Shumaker, Loop & Kendrick
419.321.1307
psilverman@slk-law.com
Toledo, OH

Michael A. Hawash
Hawash Houston Mediation
713.658.9015
mhawash@HoustonMediation.com
Houston, TX

Anne Jordan
Jordan Associates, LLC
312.654.2704
anne@jordanassociates.com
Chicago, IL



Peter R. Silverman is a partner in Shumaker, Loop & Kendrick, and has been practicing law since 1981. He specializes in franchise law and alternative dispute resolution. As a neutral, Peter has been an arbitrator since 1986 and a mediator since 1990. He is a member of the American Arbitration Association Large, Complex Case Arbitration Panel, the Conflict Prevention & Resolution Panel of Distinguished Neutrals, and the Ohio Chapter of the National Academy of Distinguished Neutrals. He is also the sole United States arbitrator on the Chair/Sole Arbitrator Panel of the European Union-based International

Distribution Institute, which offers expedited arbitration for international distribution and franchising disputes. He founded and is a trustee of the Early Dispute Resolution Institute. He teaches seminars nationwide and writes widely on alternative dispute resolution.

Michael A. Hawash is the founder of Hawash Houston Mediation in Houston, Texas. Over a litigation career spanning four decades, Michael represented many of the world's largest corporations and insurance companies while working for Big Law. In 2009, Michael opened his own litigation boutique and slowly but surely found himself shedding trial work in favor of alternative dispute resolution. Today, Michael is a mediator, arbitrator and trained early dispute resolution neutral, committed to helping disputants avoid the time, expense and uncertainties of the courthouse. An early advocate of the Early Dispute Resolution Practice Protocols, Michael organized the first court sponsored EDR program in the country. Michael frequently writes and speaks on early dispute resolution topics and serves as a trustee for the EDR Institute.



Anne Jordan has focused on corporate, commercial, technology and intellectual property law, working for years as general counsel to three corporations and as outside counsel during her 30+ year career. She has substantial experience drafting and negotiating complex commercial transactions, including M&A, joint ventures, and technology licenses. Anne is on the American Arbitration Association's large complex case, commercial and employment panels, the International Institute for Conflict Prevention & Resolution's (CPR) Panel of Distinguished

Neutrals, and is included on the Northern District of Illinois's list of mediators available for the Lanham Act Mediation Program. As an arbitrator and mediator, she has helped resolve numerous complex, high-value disputes, including matters related to breaches of contract, various patent and trademark infringements, failed software development deals and wrongful terminations.

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I. OVERVIEW

In traditional litigation, settlement typically comes after lawyers engage in months or years of adversarial posturing and discovery that costs an ever-increasing amount of time and money. Conversely, **Early Dispute Resolution** or **EDR** is a form of dynamic mediation that seeks to short-circuit the traditional litigation model and provide parties with methods, using the services of a trained neutral/mediator, to resolve almost all disputes within 30-60 days at a fraction of the cost, without the need for extensive in-person discovery or the threat of an impending jury trial. Further, if done correctly, the parties can expect to reach roughly the same resolution they would have reached after protracted discovery and motion practice.

For example, in Harris County, a vast majority of district court and county court cases are mediated before trial. In fact, the new form docket control order approved by the Civil Division of the Harris County District Courts that went live on April 20, 2020, assumes mediation as a prerequisite to trial in all cases.¹

Still, under the existing traditional litigation and mediation model, a mediator is typically not chosen, nor a mediation date set, until many months into the litigation process and, quite often, not until the eve of trial. The parties then appear for a one-day mediation, where real negotiations don't even begin until the end of the day. Many cases do settle at mediation, but at a real cost to the litigants, as the parties have already incurred substantial expenses in discovery and preparing for a trial that is statistically unlikely to occur. As every trial lawyer knows, even without mediation, nearly all cases ultimately settle before trial.

One way to avoid the massive cost of litigation is to mediate right at the beginning of a case rather than a few days or weeks before a trial setting. To be sure, mediating early in a case poses particular challenges. It is not unusual that what led to a lawsuit being filed is that the parties' attempts at a pre-suit settlement broke down. At that point, they may then be locked into contrasting views of the dispute and in no mood to rehash settlement talks. Or, even if one or both parties want to restart discussions, they don't want to appear too eager to compromise out of a fear of projecting weakness or a lack of confidence in their case. Another early roadblock is that once a suit is filed, both sides may feel they need significant discovery to know what a fair settlement would be. And while we'd likely prefer not to believe this is the case, some lawyers may prefer to simply continue billing for discovery, motions, and trial rather than settle early.

The fundamental question all lawyers need to ask themselves is this: "What serves my clients' interests best?" Much of the time, what serves clients best is an early, economical, and fair resolution of their dispute. EDR provides a structured process to do just that.

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 by

¹ According to the Harris County Civil District Courts website, a new form of Docket Control Order should be used "in almost all Civil District Courts whenever a new DCO is issued in a case" *see*, <https://www.justex.net/Article.aspx?ArticleID=1271>

the non-profit EDR Institute to help parties, lawyers and neutrals navigate the thorny ethical and practical issues that lurk within the EDR process.² 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 disputes: (i) Initial Dispute Assessment, (ii) Information and Document Exchange with the goal of obtaining Sufficient Knowledge, (iii) conduct a Risk-Analysis Valuation, and (iv) achieve Final Resolution. Finally, the appendices include a sample EDR contract clause and EDR agreement, as well as the latest version of the **EDR Practice Protocols**, or **Protocols**, a set of guidelines and procedures developed to assist parties and neutrals implement 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 mediation.³

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.

² 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.

³ 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).

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.⁴ 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%)?

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.⁵ After full discovery and summary judgment, the average confidence level rose only another *two*

⁴ 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).

⁵ 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 have added this question to our current survey. If that were added to the hypothetical question, our sense is that the confidence level would likely rise.

percentage points.⁶

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.⁷

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

The EDR process described in this paper is a scalable, flexible 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,” attempting to resolve the dispute themselves through direct negotiation. Many disputes should be able to be resolved through this process.

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 and document exchange, (iii) risk-analysis 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.

⁶ 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.

⁷ 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.

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 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

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>.

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

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 lawyers¹⁴ 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 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.

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).

¹⁵ *Id.*

¹⁶ *Id.* at 10.

III. EXISTING DISPUTE RESOLUTION 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, 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 agreement²¹ that governs informed consent,²² disclosure of information and documents,²³ voluntary termination of the

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").

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.

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 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

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>).

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_FAQsontheUCLA.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.

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 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

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 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>.

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 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

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., *Settle or Withdraw: Collaborative Lawyering Provides Incentive to Avoid Costly Litigation*, Disp. Res'n. Mag., at 8 (Summer 1998).

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

⁴⁰ *Id.* at 42-44.

⁴¹ *Id.* at 65-66.

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 appropriate.

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.

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

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).

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

IV. THE PRACTICE PROTOCOLS FOR EARLY DISPUTE RESOLUTION: ADOPTING AND IMPLEMENTING AN EDR POLICY

After first publishing the Protocols in 2019, the EDR Institute has refined the early dispute resolution process, ensuring that it has all the elements necessary to become a standard alternative dispute resolution option. Although still relatively new, the Protocols have been successfully used in numerous disputes throughout the United States, most notably in Texas, Illinois and Ohio. At least one court in Texas has formally adopted an EDR program using the Protocols.⁴⁶ Other courts, as well as the American Arbitration Association, have voiced similar interest in adopting the Protocols for their own EDR programs.⁴⁷ Like traditional mediation 30 years ago and collaborative law 20 years ago, EDR is poised to become an accepted and regularly used tool of alternative dispute resolution.

What follows is an introduction to the Protocols as well as a strategy for

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.

⁴⁶ Michael Hawash & Judge Jim Kovach, *No Jury, No Trial, No Problem: A New Form of Dynamic Mediation is Helping to Unclog Harris County's Civil Dockets*, The Houston Lawyer (February 2021).

⁴⁷ Presenter, Harold Coleman, *The Future of ADR: Early Dispute Resolution*, American Arbitration Association Panel Conference (March 5-6, 2021).

implementing them.

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;
- (2) has skilled, ethical counsel, knowledgeable about the dispute;⁴⁸ and
- (3) in the Information and Document Exchange will seek only what is necessary for “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) with Sufficient Knowledge, be committed in good faith to seek a “Fair Resolution” (defined as a resolution agreed to by the parties based on an objective and informed evaluation of all the circumstances of the dispute, and one that the parties prefer to 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.⁴⁹ 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

⁴⁸ Although it is technically “possible” for EDR to work where one or both sides are not represented by an attorney, it is the experience of the authors that the type of critical analysis and objective dispute valuation essential to a successful EDR process can be difficult for non-lawyers and *pro se* parties to grasp. The ability for a party to understand the merits of each side’s position, including the relevant law, is crucial to the process.

⁴⁹ 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).

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.⁵⁰

But most disputes involve primarily or only distributive bargaining. In this type of 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 accept an offer/demand or, quite often, simply splitting 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 process⁵¹ 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 embark on a formal EDR process. 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 late in the day. 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.

On the other hand, EDR, a form of dynamic mediation, 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

⁵⁰ 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, Bruce 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).

⁵¹ 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.

Mediators (2005)⁵² 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:

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.

EDR 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 calendar days allowed to accomplish them, are:

1. In no more than six days, perform an initial dispute assessment, which involves internally gathering all necessary information on the case, researching the basic applicable legal principles, interviewing witnesses, 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 twelve days, the parties exchange documents and information in a process with safeguards.

⁵² <https://bit.ly/2xO1VzY>.

3. In no more than the following four 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 eight 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:

EDR Step	Number of calendar days
Initial Dispute Assessment	6
Information Exchange	12
Objective Dispute Valuation	4
Final Resolution	8

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.*”⁵³ 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 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; risk-analysis 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 is relatively new, it is preferable to select a neutral who has been trained in the overall EDR process and is experienced in implementing it.

⁵³ 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).

1. The First Step: Initial Dispute Assessment

The first step is to undertake a prompt, cost-effective assessment of the dispute. 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 by retaining settlement counsel).

A party usually starts by determining the key internal players and interviewing them. Key documents and information are gathered. The goal is to get to Sufficient Knowledge,⁵⁴ which means looking for harmful as well as helpful documents and facts.

The initial dispute assessment should result in a good idea of what a party's employees know, what their documents reflect and what the core claims and defenses of the dispute are. Then, a party comes up with a list of what's not known and what, if anything, it *needs* to know to meaningfully continue with EDR through to final resolution. The list isn't a fishing expedition, and it's much narrower than discovery would be in the lawsuit or arbitration. A party should seek 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 days.

2. The Second Step: Information and Document Exchange

At this point in the process – the seventh day – the parties exchange their requests for information and documents based on what 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 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 other party's 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.

⁵⁴ 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.

If a party finds documents or facts harmful to its position that the other side doesn't know about, it may be incentivized 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 party has to either be prepared to turn over the documents or information that might be harmful or end the EDR process. A party should consider this, however: if the document is eventually going to be discoverable and produced in any follow-on litigation or arbitration, is there any more downside to producing it now?

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 may include asking for verification from each side's counsel that they have made a reasonably diligent, good-faith search, and produced the responsive documents that result from it ("Compliant Response"). Settlement can be conditional on a representation that each party has made a Compliant Response and relied on the Compliant Response of the other in entering in to the agreement. This may 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.

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 or even terminate the process if EDR is being used for a an unintended purpose, such as delay.

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

3. The Third Step: Risk-Analysis Valuation – the Six Questions

At this point, both sides should have Sufficient Knowledge to assess their cases. They should now undertake an analysis to establish a risk-analysis valuation for the dispute based on defined variables that each party should use, and that should set the

basis for meaningful negotiation or mediation.⁵⁵ Four days should be allotted for this, which takes the process through the end of the 22nd day of the 30-day process.

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

1. How much does each side expect to spend in attorneys' fees and costs to take the case through arbitration or trial?
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 as to each material claim or defense, expressed in percentages?
4. Given the likely range of damages as to each material claim or defense, what is the likelihood of prevailing as to each number in the range?
5. Forecasting the estimated possible case outcomes, how should they be discounted by the predicted likelihood of their occurring?
6. What are the leverage factors apart from legal considerations in the case?

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

⁵⁵ 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)

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 when they are most cost-effectively done, 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 four days.

4. The Fourth Step: Final Resolution

Assuming there have been no delays and no need for experts, there are eight days remaining in the 30 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.⁵⁶ 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.

⁵⁶ For literature on interest-based negotiation, see n. 50.

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 and document exchange, then that process can't begin until day 18.

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 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. Where the parties' inability to settle is tied to a fundamental and irresolvable disagreement as to the likelihood of prevailing on a dispositive issue, the parties could consider engaging in an abbreviated arbitration or other process to determine that issue.

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 website⁵⁷

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 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.

⁵⁷ The most up to date version of the EDR Practice Protocols can be found on the EDR Institute website at <https://www.edrinstitute.org/>.

A sample ground-rules agreement is available on the EDR Institute's website.⁵⁸

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 long and detailed and still 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.

4. Practical Impediments to Implementation

Numerous objections can be raised as to why EDR won't work. Some have merit. However, all can be overcome.

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

⁵⁸ <https://www.edrinstitute.org/>.

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 or arbitration 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 act in good faith. If they don't, terminating the EDR process and resorting to litigation or arbitration 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.⁵⁹ While someday bar associations and state legislatures may adopt rules and legislation governing early dispute resolution, the key initial focus for attorneys practicing EDR should be full disclosure to and informed consent of clients to make sure they 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.⁶⁰ In a longer dispute resolution process, there is time to work

⁵⁹ 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.

⁶⁰ 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*

through and undo these quick-evaluation biases, but how is that done in a time-compressed process?

This is a legitimate concern, but it is a concern even in standard litigation or arbitration 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 predictive abilities to decide whether to risk their time (and often their money) on whether and at what value 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 who judge the likelihood of success of matters as the basis for deciding whether to finance a party's lawsuit, often through non-recourse loans.⁶¹ 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.⁶²

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, the EDR steps 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

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).

⁶¹ 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>.

⁶² 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) <https://www.balancellegalcapital.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?).

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 resorting to litigation or arbitration. If the other side in a dispute isn't willing to proceed in good faith or doesn't have highly skilled or ethical counsel, or if trust has broken down between the parties, EDR probably wouldn't work, and we're relegated to being tortoises in the dispute resolution race. But where both parties have skilled, ethical counsel and are willing to proceed in good faith, we should do everything we can to be hares. Clients will soon demand it.

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