




**Early Dispute Resolution:
30 Days from Inception, No Litigation**

Peter R. Silverman
Shumaker, Loop & Kendrick, LLP






Peter R. Silverman
Shumaker, Loop & Kendrick, LLP
Toledo, Ohio



**What we're talking about:
Early Dispute Resolution**





The tortoise, the hare, and us



What is EDR?

A rigorous, disciplined process used systematically to:

- Resolve disputes on satisfactory terms in their earliest stages.
- Minimize cost, time, and disruption to organization from potential reputational risk and relationship impairment.



EARLY

“*Early*” means before filing a lawsuit.

“*Early*” means *really* early.



EDR is *not*

Mandatory mediation (although as part of EDR, mediation is a process to consider)

Holding up a sign saying "I'm a pushover."

A guarantee of early resolution.



Is EDR Feasible?

Survey says.

"YES"



Mean confidence level in forecasting results

- 135 participants, ~65% franchise lawyers with 20+ years of experience
- 10 minute presentation – 57%
- Key documents and witness summary – 62%
- Full discovery and denied SJ motions – 64%
- Discovery changes assessment – 39%



The Necessary Conditions to Make EDR Work

- Both parties are reasonable
- Both parties have skilled, ethical counsel
- Parties and counsel have "Sufficient Knowledge"



What is Sufficient Knowledge?

You don't need to know everything;

Just have sufficient knowledge to:

- understand the merits of each side's position and leverage, and
- make an informed judgment as to the value of each side's case.



Outline of a 30-day plan



The Four Steps

1. Early case assessment
2. Document and information exchange
3. Case valuation
4. Negotiate or mediate to resolution

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1. Early Case Assessment – What is it?

- Brief but thorough analysis at the beginning of a dispute that helps a party:
 - assess litigation risk,
 - explore settlement options (economic/non-economic), and
 - develop a target litigation strategy from the outset

Time Frame: No more than six business days

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2. Document and information exchange

Goal is *Sufficient Knowledge*

- Get real
- Documents
- Witness interviews or short depositions?

Time Frame: No more than seven business days


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Document, information exchange cont'd.

Need for reciprocity

- How deal with overbroad request?


Role for neutral



Document, information exchange cont'd.


Ethics in responding

- A **compliant response** means having done a reasonably diligent, good-faith search, and produced the reasonably responsive documents
- Producing harmful documents/information
- Affidavit of *compliant response*?
- Material representation of *compliant response* in any settlement agreement?



3. Case valuation

- Our and their attorneys' fees to take the case through arbitration or trial?
- Our best and worst outcome?
- Reasonably likely range of damages we stand to win or lose?
- The odds of our winning/losing at each outcome?
- **Time Frame: No more than three business days**



4. Negotiate or mediate to resolution

- Interest-based versus adversarial negotiation
- Use of mediator
- Impasse techniques

Time Frame: No more than six business days



What if it doesn't resolve?

- Structure process to get remaining issues in dispute resolved
 - Single issue resolution?
 - Neutral expert?
 - Set discovery schedule (scope and time)?
 - Baseball, night baseball, etc.?
 - Continue use of neutral?




Experts

- Likely requires more time, but goal remains speed and economy
- What minimally necessary information does expert require?
- Circumscribed *Sufficient Knowledge* report?
- Joint expert?




•Neutrals

- When?
- Function?




Process	# of bus. days
Internal early case assessment	6
Document and information exchange	7
Case valuation	3
Negotiation or mediation	6



Setting Expectations – Announce the Policy

- External announcement – shows strength, not weakness
- Internal – need buy in
- Proposing EDR to other side?



EDR Agreements

- Mandatory pre-dispute contract clause
- Voluntary agreement



Contact Information

Peter Silverman, Esq.
Shumaker, Loop & Kendrick, LLP
1000 Jackson Street
Toledo, OH 43604

psilverman@slk-law.com
419.321.1307

Ohio State Supreme Court
*Integrating Contemporary Dispute Resolution Procedures
into Today's Courts*

**EARLY DISPUTE RESOLUTION: RESOLVING
DISPUTES WITHIN 30 DAYS OF INCEPTION**

Peter R. Silverman
Shumaker, Loop & Kendrick
Toledo, OH

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Columbus, Ohio

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EARLY DISPUTE RESOLUTION – RESOLVING DISPUTES 30 DAYS FROM INCEPTION¹

Can the business sector adopt processes to maximize the likelihood that all disputes will be resolved cost-effectively, quickly, and fairly without litigation? This paper answers that question with an emphatic YES, and discusses processes for achieving this.

By applying early dispute resolution processes, parties should be able to resolve disputes in 30-60 days and at a fraction of the cost. They should also reach roughly the same resolution they would have reached after months of pleadings, discovery, and motions.

This paper addresses techniques and strategies for early dispute resolution (“EDR”) of business disputes. After introducing the topic in Section I, we discuss in Section II examples of how other dispute resolution processes, especially mediation, have rapidly changed the process of dispute resolution, setting the stage for the next major advance. Section III examines tools from established EDR models that can be tailored to business disputes. And Section IV discusses a rigorous four-step, 30-day process for resolution of business disputes.

I. EARLY DISPUTE RESOLUTION

A. 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 slow and steady, 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.

Business 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 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.

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 and cost-effectively. They won’t tolerate litigation tortoises.

¹ This paper is adapted from pages 1-21 of Peter Silverman, Nancy Gourley, and William Whitner, *Nipping it in the Bud: Effective Early Evaluation and Resolution of Franchise Disputes*, ABA 16th Annual Forum on Franchising (2017).

B. Why EDR Works: A Survey on Forecasting

Even if business starts demanding litigation hares, is that feasible or smart? Can litigation hares aggressively and effectively advance their clients' interests?

Unquestionably yes. More than 95% of cases don't go to trial.² Using EDR, most of those disputes could be resolved in 30-60 days without the filing of a complaint.

Here's a survey I gave to 135 franchise lawyers, about 2/3rd of them with over 20 years of practice. I'll summarize the results at the end of the discussion, but please pencil in what you think the average answer would be from litigators experienced in the field. Or substitute yourself in your area of expertise. 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, and the governing law and 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%)?

- 10%
- 20%
- 30%
- 40%
- 50%
- 60%
- 70%
- 80%
- 90%
- 100%

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%)?

- 10%
- 20%
- 30%
- 40%
- 50%

² 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).

60%
70%
80%
90%
100%

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%)?

10%
20%
30%
40%
50%
60%
70%
80%
90%
100%

The results were that after the initial 10-minute presentation, lawyers had an average 57% confidence level that their prediction was within a +/- 20% range. After seeing a few key documents and a few key witness summaries, the average confidence range rose 5% to 62%. After full discovery and summary judgment, the average confidence level rose only another 2% to 64%.³

What if 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 will likely increase only a per cent or two by spending a few hundred thousand dollars on discovery and summary judgment motions? Then you ask your client when the best time is to try to resolve the dispute. My sense is most clients will say, without hesitation, to try to resolve the dispute not just early, but as early as possible, without litigation.⁴

³ 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 more than +/- 20%? Here the average answer was 39% of the time. I'm 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% 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 +/- 20% range. But my sense is that there's more to it that would need to be fleshed out by further research.

⁴ This assumes that the client is interested in speed, economy, and obtaining maximum value. Clients may have other interests like, for example, spending their adversary into submission out of pique or to deter others.

C. The Basic Four Steps in EDR

The EDR process described in this paper is a scalable four-step process that can be applied to resolve disputes in 30-60 days without the filing of a complaint. The four steps are (i) early case assessment, (ii) document and information exchange, (iii) case valuation, and (iv) negotiation or mediation.

Before fully discussing these four steps, 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. I 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 been rapidly adopted in different areas of dispute resolution in the last 25 years.

A. Mediation History

In the late-19th century, mediation began as a process for resolving collective bargaining disputes.⁵ In the late 1970's, the Department of Health, Education, and Welfare enlisted the Federal Mediation and Conciliation Service to help mediate disputes under the Age Discrimination Act of 1975.⁶ 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.⁷ 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.⁸

⁵ 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>.

⁶ See generally *History of Mediation* and *Brief History*, *supra* note 4.

⁷ F. Peter Phillips, *Introduction*, in *Managing Franchise Relationships through Mediation* (CPR 2008).

⁸ 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>.

In Ohio, the Supreme Court began to explore mediation as a court service in 1989. It developed a pilot project in six municipal courts and, based on its success, expanded it to 18 more. In 1997, the Court began offering start-up grants to common pleas courts to enable them to hire a full-time mediator/coordinator. The grants have funded 37 courts serving 46 counties. The Supreme Court and the Courts of Appeals also have their own mediation programs. More than 60% of the appellate cases referred to mediation are resolved by the process. The Supreme Court's Dispute Resolution Section consults with Ohio courts on creating and expanding mediation services.⁹

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.¹⁰ Now, some 30 years after its first use, more than 20,000 lawyers have been trained in collaborative law worldwide, and The International Academy of Collaborative Professionals has over 5,000 members. In 2009, the Uniform Law Commission adopted the Uniform Collaborative Law Rules and Uniform Collaborative Law Act ("Uniform Collaborative Law Rules/Act")¹¹, 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.

⁹ All the information in this section is from the Court-Connected Mediation in Ohio page on Ohio Supreme Court website, <https://www.sconet.state.oh.us/JCS/disputeResolution/resources/mediation.asp>

¹⁰ See Lawrence Maxwell, Jr., *The Development of Collaborative Law*, Alternative Resolutions (Summer/Fall 2007).

¹¹ 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 http://www.uniformlaws.org/shared/docs/collaborative_law/uclranducla_finalact_jul10.pdf (broad description of how widespread collaborative law has become).

C. Structured Negotiation

In 1995, three civil rights lawyers¹² 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.¹³

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.¹⁴

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 processes to the point that the processes became fixtures in dispute resolution.

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

III. EXISTING DISPUTE RESOLUTIONS TOOLS USEFUL FOR EDR

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

¹² 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).

¹³ *Id.*

¹⁴ *Id.* at 10.

A. Collaborative Law

Collaborative law is used primarily in family law. While its applicability to business disputes has been limited for reasons described below,¹⁵ 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.¹⁶ 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."¹⁷ 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.¹⁸

The parties enter into a collaborative law agreement¹⁹ that governs informed consent,²⁰ disclosure of information and documents,²¹ voluntary termination of the

¹⁵ 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*, <http://www.nolo.com/legal-encyclopedia/collaborative-law-business-commercial-disputes-30152.html>; *Civil and Commercial Application of Collaborative Practice* (International Academy of Collaborative Professionals), <https://www.collaborativepractice.com/public/about/about-collaborative-practice/civil-commercial-application-of-collaborative-practice.aspx>; 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*; <http://www.mediate.com/articles/ZeytoonianMbl20140228.cfm>

¹⁶ See Uniform Collaborative Law Rules/ Act, *supra* note 16 at 1, which also states that there are roughly 22,000 lawyers trained worldwide in collaborative law. 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").

¹⁷ Collaborative Law Institute of Illinois Principles and Guidelines, §4, <http://collablawil.org/about-collaborative-law-institute-of-illinois/collaborative-law-principles-and-guidelines>.

¹⁸ *Id.*, § 6.

¹⁹ 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*.

²⁰ See Uniform Law Rule 14. Uniform Collaborative Law Rules/Act, *supra* note 16, at 60-61.

²¹ See Uniform Law Rule 12. *Id.* at 59.

process,²² 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.²³

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.²⁴ 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).²⁵

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.²⁶ 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.²⁷ 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.²⁸ If either party suspects that the other side isn’t disclosing fully, either party may withdraw from the process at any time.²⁹ (Parties may also withdraw at any time in

²² See Uniform Law Rule 5. Id. at 50-53

²³ See Uniform Law Rules/Act. Id. at 9-11.

²⁴ *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).

²⁵ 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>.

²⁶ See Uniform Collaborative Law Rule 12. Uniform Collaborative Law Rules/Act, *supra* note 16, at 59.

²⁷ 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, [apps.americanbar.org/dch/thedl.cfm?filename=/DR035000/sitesofinterest_files_FAQson the UCLA.pdf](https://apps.americanbar.org/dch/thedl.cfm?filename=/DR035000/sitesofinterest_files_FAQson%20the%20UCLA.pdf) (last visited June 8, 2017).

²⁸ 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).

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

the process for any reason.³⁰) Attorneys who discover that their clients are withholding information must terminate the collaborative process.³¹ 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.³²

Because this approach significantly departs from the attorney's traditional role in dispute resolution, it raises a host of issues. One is ethical.³³ 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.³⁴ 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 are spouses going through a divorce, and are 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.³⁵

- 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

³⁰ See Uniform Collaborative Law Rule 5(f). *Id.* at 51.

³¹ *Lande, supra* note 32, at 1322.

³² *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).

³³ See generally *Possibilities, supra* note 27, at 1330-1372.

³⁴ 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.

³⁵ See generally David A. Hoffman, *Collaborative Law in the World of Business*, *Collaborative Rev.*, Vol. 6, No. 3, at 1 (Winter 2003), http://www.motsayandlay.com/articles/CL_in_the_World_of_Business.pdf.

the universe of relevant documents and information is potentially far more expansive. Thus more rigor is required to define full cooperative disclosure in the business setting.

- Divorcing parents with custody disputes have a common goal in trying to determine their children's best interests, which is also the formal legal standard for determining custody. Because of this, both parties have an incentive to seek a positive relationship. Likewise, at times, businesses may have relationship concerns when they are in disputes with parties with whom they'll have ongoing dealings, but both sides also have a strong self-interest that their positions are intended to protect. Thus, some business disputes may involve a choice whether to work on maintaining a positive relationship. For parents, that usually is the preferred choice for the children's benefit.
- If a business case 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.³⁶ 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, though 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.³⁷ Because the cases generally involve civil rights, particular attention is paid to the issue of who the claimants are and who they represent,³⁸ and to fee-shifting statutes.³⁹

³⁶ 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).

³⁷ See *Feingold*, *supra* note 17, at 59-99.

³⁸ *Id.* at 42-44.

³⁹ *Id.* at 65-66.

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

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

C. Settlement Counsel

Settlement counsel are retained solely to try to settle a dispute; they don't participate in litigation.⁴⁰ 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 at any appropriate time.

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

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

The advantage to the process is that the neutrals have the full set of tools needed to bring the matter to conclusion, whether by consensual settlement or through an

⁴⁰ See, e.g., 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).

arbitration award. The neutrals have flexibility: for example, they could arbitrate one vexing issue, then turn back to mediation to resolve remaining issues, or could fashion a settlement on a number of issues, but leave others for arbitration. Finally, if mediation fails, the parties don't need to incur the time and expense of finding a new neutral to be the arbitrator.

The process has two downsides that have led most parties 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 one the voluntariness principle of mediation.

Despite these downsides, the most useful insight from Med-Arb that may be applicable to EDR is that the 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. 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,⁴¹ night baseball,⁴² or high-low.⁴³

IV. ADOPTING AND IMPLEMENTING A 30-DAY EARLY DISPUTE RESOLUTION POLICY⁴⁴

There is no generally-accepted procedure for EDR like that developed over the years for mediation. EDR principles have been written about in a number of different contexts and under a number of different names. The ABA's Dispute Resolution Section has published a brochure on one approach called Planned Early Dispute Resolution,⁴⁵

⁴¹ 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.

⁴² 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.

⁴³ 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.

⁴⁴ This section of the paper is adapted from Peter Silverman, Anne Jordan, and Les Wharton, *Faster, Cheaper, Better: The New Standard for Dispute Resolution*, (IFA 49th Annual Legal Symposium 2016).

⁴⁵ John Lande, Kurt L. Dettman & Catherine E. Shanks, *Planned Early Dispute Resolution*, A.B.A. Sec. Disp. Resol.,

and that Section has an EDR Task Force that continues to focus on the area. Others have written on more specific approaches under the names Planned Early Negotiation,⁴⁶ Guided Choice,⁴⁷ and Early Active Intervention.⁴⁸

This section of the paper presents a specific four-step EDR proposal, drawing on insights from mediation, collaborative and cooperative law, structured negotiation, Med-Arb, and earlier approaches to EDR. The process would be applicable to all business disputes, absent unusual circumstances. It aims to resolve disputes in 30-60 days.

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

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

- (1) is reasonable;
- (2) has skilled, ethical counsel; and
- (3) has “Sufficient Knowledge,” which is enough information to:
 - (a) understand the merits of each side’s position and leverage, and
 - (b) make an informed judgment as to the value of each side’s case.

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 My sense is that this culture is present in many litigation bars. Without it, EDR likely wouldn’t work.

http://www.americanbar.org/groups/dispute_resolution/resources/planned_early_dispute_resolution_pedr.html (2015). See also John Lande and Peter W. Benner, *Why and How Businesses Use Planned Early Dispute Resolution*, 13 U. St. Thomas L. J. (2017).

⁴⁶ See John Lande, *Lawyering with Planned Early Negotiation: How You Can Get Good Results for Clients and Make Money* (ABA 2d ed. 2015); see also John Lande, “A Framework for Advancing Negotiation Theory: Implications from a Study of How Lawyers Reach Agreement in Pretrial Litigation,” 16 *Cardozo J. of Con. Res’n*.1 (2014).

⁴⁷ For a comprehensive description of and bibliography on Guided Choice, see www.gcdisputeresolution.com

⁴⁸ See e.g., Peter Silverman, *Mediation 2.0.*, 15 *The Franchise Lawyer* 4 (Fall 2012); Steven Fedder, John Lande, & Peter Silverman, *Can We Resolve Franchise Disputes Faster, Cheaper, Better*, *Franchising Business and Law Alert* 16:10 (LJN 2010).

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*

B. Overview: Four Steps in 30 Days

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

1. In no more than six business days, perform an early case assessment, which involves internally gathering all necessary information on the case, researching the basic applicable legal principles, and determining what information and documents are needed from the other side to analyze the case.
2. In no more than the following seven business days, the parties exchange documents and information in a process with safeguards.
3. In no more than the following three business days, each party values its case.
4. In no more than the following six business days, the parties negotiate or mediate the dispute to resolution.

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

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

Process	Number of business days
Early case assessment	6
Document and information exchange	7
Case valuation	3
Negotiation or mediation	6

A cautionary note on 30 days: As Boswell said “*Depend upon it, Sir, when a man knows he is to be hanged in a fortnight, it concentrates his mind wonderfully.*”⁵⁰ A 30-

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).

⁵⁰ 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).

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 should be extended so long as the parties are moving forward effectively in good faith.

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

C. The Four Basic Steps in Each Dispute

The four basic steps in EDR are early case assessment; document and information exchange; case valuation; and negotiation or mediation to either settlement or further structured dispute resolution. Experts, if needed, would be an additional step that would likely extend the time.

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

1. The First Step: Early Case Assessment

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

The first step is determining the key internal players. Next, key documents are gathered. Then the key players must be interviewed. The goal is to get to Sufficient Knowledge,⁵¹ which means looking for harmful as well as helpful documents and facts.

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

⁵¹ 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.

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 must complete this process in six business days.

2. The Second Step: Document and Information Exchange

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

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

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

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

Both sides should expect that the other will act ethically and exchange both helpful and harmful documents. Having said that, though, full disclosure should be encouraged by including in the EDR process the imposition of sanctions for non-compliance. This might include asking for verification from each side's counsel that they have made a reasonably diligent, good-faith search, and produced the reasonably responsive documents (a "Compliant Response"). Settlement also could be conditional on a representation that each party has made a Compliant Response. That would allow a fraudulent inducement challenge to any settlement if it is later learned that the other side withheld material information or documents.

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

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

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

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

3. The Third Step: Case Valuation – the Four Questions

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

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

1. How much does each side expect to spend in attorneys' fees to take the case through arbitration or trial?
2. What would be the best and worst outcome from trial or arbitration?
3. Recognizing that the worst and best outcomes simply set outer limits, what is the reasonably-likely range of damages from winning or losing?
4. What is the percentage likelihood of a win or loss at numbers within that range?

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

1. Fees. A would likely spend \$300,000 to take the case through trial, but B would likely spend \$500,000 because B will have to do extensive e-discovery searching and production, and B is using a very expensive law firm.
- 2a. A's best and worst outcome. If A wins the case, its best outcome would be to win \$1 MM less the \$300,000 it spends in attorneys' fees (no prevailing party provision). Its worst scenario would be a finding of no liability, meaning a net loss of \$300,000 from the attorneys' fees. Thus its best outcome is a net gain of \$700,000 and its worst outcome is net loss of \$300,000.

- 2b. B's best and worst outcome. B's best case would be a net loss of \$500,000 in attorneys' fees if it prevailed, and a net loss of \$1.5 million if it lost.
3. Most likely range of damages. While A is asking for \$1 million, there's fluff in the request. If A wins, it would likely win somewhere between \$5-600,000.
4. Likelihood of prevailing. A stands a 60% chance of winning.

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

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

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

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

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

4. The Fourth Step: Negotiating or Mediating to Resolution

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

In negotiating directly with the other side or using a neutral, you should use all the negotiation strategies that would be used in any business negotiation. If it is in both parties' best interest, interest-based negotiation may be used to develop a solution that works for both sides.⁵² This involves a discussion of each side's interests as well as

⁵² The literature on interest-based negotiation is vast. The classic statement of the principles is from Bruce Patton, Roger Fisher, and William Ury, *Getting to Yes* (Penguin Books 1981).

creative problem-solving or, put another way, looking for positive-sum solutions where both parties satisfy important interests.

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

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

5. Using Experts in EDR

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

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

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

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

D. The Next Step if the Process Doesn't Result in a 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.

E. Other Factors in Process Implementation

1. Announcing the Policy

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

a. Internal Communication

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

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

b. External Communication

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

Here's what an announced policy could look like:

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

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

3. Contract Provisions

One way for a company to start EDR is simply to announce it as a policy as opposed to including it in contract dispute resolution clauses. That allows easing into the process as it becomes more widely understood and the company system becomes more sophisticated in using it. Even if the business does add an EDR clause to contracts, it 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 should be ethical and proceed in good faith. Obviously, this cannot be mandated by contract. With high-integrity parties and skilled counsel on both sides, all that is needed for the process to work is a good faith commitment to try to resolve the dispute through EDR. Without high-integrity parties and skilled counsel on both sides, the contract clause could be as long and detailed as possible and it still would not work. There needs to be a process for working through that so as to avoid wasting time on EDR if it will be fruitless.

A proposed EDR contract clause is attached as Appendix B.

4. Practical Impediments to Implementation

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

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

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

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

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

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

A sixth concern is ethics. Most lawyers have a reasonably thorough understanding of the well-developed ethical rules in standard dispute resolution, but this would not be the case with the ethical rules in EDR. The commercial litigation bar will need to advance the ethical rules for cooperation in EDR as the family law bar has done in collaborative law.⁵³ While some day 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 and informed consent to make sure clients fully understand and accept the process, and to make sure counsel is ethically carrying out the client's intent. Another focus would be to set out clearly the parties' ethical obligations related to document and information exchange as discussed above regarding the second step in EDR.

⁵³ 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.

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 quickly⁵⁴ In a longer dispute resolution process, there is time to work through and undo these quick-evaluation biases, but how is that done in a rapid process?

This is a legitimate concern, but it is a concern even in standard litigation with full discovery and motions. Lawyers should be able to develop more certainty in prediction if they have Sufficient Knowledge from the outset. Further, lawyers already make significant judgments quickly from the beginning of any matter, and rely on them. Lawyers must initially evaluate whether a client has a claim. Contingency lawyers have sufficient confidence in their prediction abilities to decide whether to risk their fees on winning a case. The same is true with the burgeoning growth in the litigation finance industry, where private equity firms have experts judge the likelihood of success of matters as the basis for deciding whether to finance a party's lawsuit, usually non-recourse.⁵⁵ 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.⁵⁶

⁵⁴ These errors were extensively reviewed in a recent book by one of the pioneers in the field, Daniel Kahneman, *Thinking Fast and Slow* (Farrar, Straus, and Giroux 2013). Michael Lewis related how Kahneman and his partner, Amos Tversky, developed the field in *the Undoing Project: A Friendship that Changed Our Minds* (W.W. Norton & Co. 2017). There is extensive literature discussing these issues in terms of thinking about settlement and legal analysis. On negotiation and settlement, see Russel Korobkin, *Aspirations and Settlement*, 88 Cornell L. Rev. 1, 5-6 (2002); Russel Korobkin & Chris Guthrie, *Psychological Barriers to Litigation Settlement: An Experimental Approach*, 93 Mich. L. Rev. 107 (1994); Russel Korobkin & Chris Guthrie, *Heuristics and Biases at the Bargaining Table*, 87 Marq. L. Rev. 795, 800 (2004); Christine Jolls, Cass R. Sunstein, & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 Stan. L. Rev. 1471, 1503-04 (1998) On legal analysis, see Ian Weinstein, *Don't Believe Everything You Think: Cognitive Bias in Legal Decision Making*, 9 Clinical L. Rev. 783 (2002); Philip G. Peters, Jr., *Hindsight Bias and Tort Liability: Avoiding Premature Conclusions*, 31 Ariz. St. L. J. 1277, 1280 (1999); and Edna Sussman, *Arbitrator Decision-Making: Unconscious Psychological Influences and What You Can Do About Them*, 24 Am. Rev. Int'l Arb. 487, 499 (2013).

⁵⁵ 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>.

⁵⁶ See, 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-co81ea5244a1>; *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.balancelegalcapital.com/litigation-superforecasting-part-3-way-of-thinking/>. The articles draw insights from the best seller business book, Philip Tetlock and Dan Gardner, *Superforecasting – The Art & Science of Prediction* (Broadway Books 2015). See also Linda Babcock, George Loewenstein, & Samuel Issacharoff, *Creating Convergence: Debiasing Biased Litigants*, 914 L. Soc. Inquiry 913, 916, 922-23 (1997) (most successful technique in eliminating bias is deliberately considering counterarguments and weaknesses – if the other side wins, what was the most likely reason?)

5. Adapting the Tools to the Dispute

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

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

CONCLUSION

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

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APPENDIX A – SAMPLE EDR AGREEMENT

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

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

2. **Tolling.** As of Start Date, each party’s claims against the other are tolled until ten days after either party gives the other party a Termination Notice or the EDR process is otherwise completed. Before expiration of this ten-day period, neither party may initiate a lawsuit or arbitration against the other.⁵⁷

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

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

- Internal early case assessment and preparation of document and information requests – 6 days
- Document and information exchange – 7 days
- Case valuation – 3 days
- Negotiation or mediation – 6 days

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

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

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

⁵⁷ If litigation or arbitration has started, the parties would agree to notify the court or arbitration panel that they’re staying the matter to try to resolve the dispute voluntarily.

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

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

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

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

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

APPENDIX B – SAMPLE EDR CONTRACT CLAUSE

1. In any dispute between the parties, before commencing arbitration pursuant to § [], representatives of each party with the authority to resolve the dispute shall meet in good faith to try to resolve the matter as early as possible, but no later than 14 days after one party gives the other notice of the dispute.
2. If the parties do not resolve the dispute within the 14 days, then before commencing arbitration, the parties shall engage in good faith in a 30-day early dispute resolution (“EDR”) process as described below. Either party may terminate the process by serving a termination notice (the “Termination Notice”) on the other party, which shall terminate the process as of ten days following service of the notice., as follows:
 - a. Within three business days of the end of the 14-day period (the “Trigger Date”), with both parties’ consent, the parties shall select a neutral skilled in the EDR process. The parties shall share equally the costs of the neutral.
 - b. Within six business days of the Trigger Date, the parties shall each determine in good faith the documents and information, if any, that are in the other party’s possession and that each party deems essential to evaluating the case. Both parties shall in good faith limit the requests to the information and documents necessary to obtain sufficient knowledge to understand the merits of each side’s position and leverage, and to make an informed judgment as to the value of each side’s case. By the end of the sixth business day, each party shall serve its request, if any, on the other side for information and documents.
 - c. Within the following seven business days, each side shall provide the other the requested documents and information. If either side believes the other side’s request seeks more than essential information or documents, the parties shall in good faith discuss limiting the request, and shall involve the neutral if they cannot resolve the issue themselves. Neither party may be compelled to produce information or documents; the process is a good-faith exchange that may be terminated at any time. If parties do produce information and documents, each party’s counsel shall provide a declaration that the party reasonably searched and produced the reasonably responsive information and documents in response to the other party’s requests. If either party does not want to produce certain responsive documents or information, the party shall terminate the EDR process.
 - d. Within the following three business days, the parties shall each prepare an EDR case analysis to exchange with the other side and, if appropriate, the neutral. Each EDR case analysis shall discuss, among other things, the party’s position on the key issues and damages and equitable relief, and shall estimate the party’s expected attorneys’ fees.

- e. Within the following six business days, the parties shall meet in good faith in a mutually-convenient location to negotiate or mediate to try to resolve the dispute. If the parties do not resolve the dispute within this time, the process shall terminate unless both parties choose to continue.
3. Every claim of each party is tolled from the date of initial notice of the dispute until 10 business days following service of a Termination Notice or termination of the EDR process.
4. During the EDR process, nothing in this section prevents either party from seeking preliminary or emergency injunctive relief in court [or with the arbitration administrator. Apart from seeking emergency relief, neither party may commence arbitration until the EDR process concludes