

EDR: Fairly & Ethically Resolving Construction Disputes at a Hare's Pace

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Early Dispute Resolution (“EDR”) seeks to resolve complex commercial disputes within 30 to 60 days, with an outcome no different from resolution after full discovery and motion practice. ¹ The process is guided by a full set of protocols that may be viewed and downloaded at edrinstitute.org.

A fundamental premise of EDR is that clients routinely forecast risks and make business decisions with limited but sufficient information, and their counsel should be able to provide them with that same level of information at the very early stages of a dispute. ² The only requirement for entering the process is this: parties and their counsel must be willing to act in good faith and abide by higher ethical standards outlined in its protocols, which exceed those required under typical rules of professional conduct. ³

This article will provide an overview of the EDR dispute resolution process and discuss how parties to construction projects might implement these procedures in resolving their disputes.

EDR's Necessary Conditions

EDR's success depends upon the existence of certain “Necessary Conditions.” First, parties and their counsel must be reasonable, skilled (particularly concerning forecasting), and ethical (i.e., willing to abide by “heightened” ethical standards). Second, EDR requires that both parties to a dispute have “Sufficient Knowledge” regarding the conflict, which means that each party sufficiently understands the merits of its position and leverage so as to be able to make an informed judgment as to the value of its case. Finally, EDR requires the parties to seek a “Fair Resolution,” defined as voluntary and based on the merits and all other circumstances of the case. ⁴

The EDR Practice Protocols

The EDR Practice Protocols provide a four-step framework for resolving disputes within 30 to 60 days: 1) Initial Dispute Assessment; 2) Information Exchange; 3) Objective Case Valuation; and 4) Final Resolution. At the onset of any dispute, if the parties are unable to negotiate a resolution of their dispute, they should enter into an EDR agreement, which may incorporate the EDR Practice Protocols, and they should select a neutral to facilitate the EDR process. ⁵

During the “Initial Dispute Assessment” stage, parties identify and interview key witnesses and obtain critical documents to understand helpful and harmful facts. Additionally, parties develop a narrow list of documents and information needed from the opposing party and decide whether an expert is necessary to obtain Sufficient Knowledge. ⁶

The second stage is for the parties to participate in a voluntary “Information Exchange.” This exchange should be limited to information requests necessary for a party to obtain Sufficient Knowledge, rather than the broader discovery standard employed under typical rules of civil procedure. If the parties dispute the scope of either sides' request, they can negotiate the scope of the information exchange between themselves or the EDR neutral. Information requests might include document requests, limited

depositions, interviews of key witnesses or corporate designees, and exchange of truncated expert reports or preliminary opinions.

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The protocols rely on the integrity of the parties and their counsel to produce helpful *and* harmful information during the Information Exchange. 8 Either party can request the other to attest that it has made a “Compliant Response,” which means that it has conducted a good faith search for responsive documents, has not unreasonably withheld documents, and has answered questions truthfully during witness interviews. Parties can condition an EDR-facilitated settlement agreement on the parties’ representation that they have provided a Compliant Response, such that a party could seek to set aside the agreement on a theory of fraudulent inducement if those representations are later determined to be false. 9

Next, each party prepares their “Objective Valuation” of the dispute, in which they consider: 1) attorney’s fees and costs to reach a final award or judgment; 2) best and worst outcomes from arbitration or trial (i.e., “BATNA” or “WATNA”); 3) reasonably likely range of recoverable damages with the parties’ best and worst outcomes; and 4) the percentage likelihood of winning and losing within the range of damages reasonably likely to be awarded. Parties may also consider non-legal factors, along with the availability of interest-based settlement options, outside of monetary damages. 10 Finally, the parties present their valuation of the dispute to the EDR neutral and the opposing party.

The fourth stage of the EDR process is Final Resolution, where the parties seek a negotiated settlement facilitated by an EDR neutral. Absent settlement, the parties can request the EDR neutral to assist in developing a binding dispute resolution process or act as an arbitrator in rendering a final decision.

Use of EDR Protocols to Resolve Construction Disputes

There is ample precedent for the practice of early mediator engagement as a means to resolve construction disputes, often through the Guided Choice process. 11 Under a Guided Choice mediation model, only once a dispute arises do the parties engage a mediator to “design” voluntary or binding dispute resolution processes. 12 Over time, the ConsensusDocs have endorsed Guided Choice as an alternative to the default mediation provision found in the 200 Agreement and General Conditions. 13

A key advantage to EDR, as compared to Guided Choice, is that it provides set protocols and ethical standards in a flexible dispute resolution process that parties can agree to before a dispute arises. Thus, parties who wish to implement EDR protocols should strongly consider modifying the voluntary mediation provisions within their construction agreements to incorporate an EDR Clause. 14 Where the parties have not included an EDR Clause in their agreement, the protocols provide for an ad hoc agreement once a dispute arises. 15

Further, like Guided Choice, EDR recognizes that parties may formulate a customized binding dispute resolution process in the absence of a mediated settlement agreement. 16 As such, parties should consider including a provision in their binding dispute resolution clause that allows for modification by mutual agreement of the parties. Finally, parties should also consider including an EDR Clause and any associated revisions within all prime contracts and subcontracts to ensure all parties bearing responsibility for a dispute become participants.

Circumstances may arise where key parties, such as insurance companies or remote, downstream parties, will not be contractually obligated to participate in the EDR process. Like Guided Choice, EDR protocols provide parties the flexibility to institute binding dispute resolution proceedings while keeping the resolution process open. For instance, the parties to an EDR protocol may elect to file suit for the limited purpose of triggering insurance coverage or to allow for the collection of documents from non-parties to the dispute.

Ultimately, EDR’s success depends largely on the parties’ commitment to abide by heightened ethical standards during the dispute resolution process, particularly regarding the voluntary sharing of helpful *and* harmful information and their respective dispute

valuations. In circumstances where these conditions are present, EDR provides a viable framework for fair and efficient construction dispute resolution.

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Endnotes



1. Silverman, P., Jordan, A., and Hawash, M., [Early Dispute Resolution Institute](#) (last visited May 7, 2021).
2. Silverman, P. and Hawash, M., [AN INTRODUCTION TO EARLY DISPUTE RESOLUTION Fairly & Ethically Resolving Disputes 30 Days from Inception](#), Association of Attorney-Mediators, pp. 1-3 (Sept. 11, 2020) (last visited May 7, 2021).
3. [Early Dispute Resolution Practice Protocols](#), ¶1.2 (Oct. 1, 2019) (last visited May 7, 2021).
4. *Supra*, n. ii, pp. 12-13; *Supra*, n. 3, ¶ 2.2.
5. *Supra*, n. iii, p. 1; ¶¶ 2.4-2.5.
6. *Id.*, ¶ 2.7.
7. *Id.*, ¶¶ 6.1-6.4.
8. *Id.*, ¶ 3.5.
9. *Id.*, ¶ 6.5
10. *Id.*, ¶¶ 8.1-8.2.
11. See Thomson, D., *Early Mediator Engagement*, 15 No. 1 *Journal of the American College of Construction Lawyers* 2 (Winter 2021) (discussing case studies showing effective early mediator engagement resolved construction disputes).
12. Lurie, P. *Guided Choice: Early Mediated Settlements and/or Customized Arbitrations*, 7 No. 2 *Journal of the American College of Construction Lawyers* 5 (2013).
13. ConsensusDocs, [Consensus Docs Guidebook, 2020 Edition](#), (November 2020) pp. 10-11 (last visited May 7, 2021).
14. *Supra*, n. iii, Appendix B.

15. *Supra*, n. iii, Appendix A.

16. Compare Lurie, P. *Guided Choice: Early Mediated Settlements and/or Customized Arbitrations*, 7 No. 2 *Journal of the American College of Construction Lawyers* 5 (discussing the use of a mediator as an “arbitration process designer”) (Aug. 2013) with *Supra* n. ii at p. 20; *Supra* n. iii at ¶¶ 10.1-10.2.



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