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Practice Areas Blog

Early Dispute Resolution

The EDR Protocols: Mediation Transformed

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The Early Dispute Resolution Institute ("Institute") developed a process for early dispute resolution ("EDR") i

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ibed in the Insti lect thought ı ut the EDR Process, one that is facilitated by a trained EDR neutral and conducted virtually, and that is flexible, adaptable to each case, and usually completed within 30 days. It works for disputes of all sizes, types, and levels of complexity. The key to its success is for parties and their counsel to fully commit to participating in good faith with the shared goal of seeking an early, economical, and principled resolution. The EDR Process transforms the standard single-day mediation into a structured process that empowers clients to make fully informed, self-determined decisions.

The EDR Process has four steps:

- Initial Dispute Assessment
- Information and Document Exchange
- Risk Analysis
- Principled Negotiation and Resolution

If the parties don't reach resolution through Principled Negotiation conducted virtually during the process, the backstop is a mediation session—often just a half-day because the groundwork has already narrowed the issues and equipped clients to make informed settlement decisions that align with their best interests.

This article explains the rationale for the process and then describes the four steps in detail. While the process may appear complex and intimidating at first, it's straightforward in application. EDR Neutrals have been trained to streamline and facilitate the process for any type of case so it flows intuitively, clearly, and smoothly for counsel and clients.

Rationale for the EDR Process

Most cases settle. Given that reality, parties gain the greatest benefit when they resolve their dispute before spending significant time and money. Yet perceived barriers often deter them from seeking early resolution. The EDR Process is designed to overcome those barriers and enable parties to exercise genuine self-determination in deciding whether, and on what terms, to settle.

Overcoming Barriers to Early Resolution

There are inherent barriers to seeking early resolution that often lead parties to defer settlement discussi
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ings,

- Concerns that proposing mediation early makes them look weak or unwilling to try the case—or worse, as if they're trying to conceal bad facts before discovery.
- A need for information and documents from the other side to realistically assess risk.
- Lack of trust and emotionally driven decision-making.
- Overconfidence—parties become entrenched in their own narrative and focus more on winning the battle than on advancing their future interests.
- And yes, some lawyers prefer the economic benefit of litigation over early resolution.

The EDR Process is structured to allow parties to propose early resolution from a position of confidence and strength, exchange limited, material documents and information, rebuild trust, shift from emotion to deliberation, and develop an objective understanding of the case based on each side's risks and advantages. And as businesses learn that they can resolve disputes early, economically, and fairly, they'll soon abandon lawyers who run up litigation fees and instead shift to counsel committed to seeking early resolution.

Party Self-Determination

The Protocols' key principle is party self-determination as defined in Standard 1 of the Model Standards of Conduct for Mediators (Sept. 2005) ("Model Standards"): "Self-determination is the act of coming to a voluntary and uncoerced decision in which each party makes free and informed choices as to process and outcome." In each step of the EDR Process, counsel provide clients with the information and perspective they need to make informed settlement decisions. That includes quantifying risk and providing a clear understanding of how to translate the risk into reasonable settlement goals.

Traditional one-day mediation has significant drawbacks in safeguarding client self-determination. The typical pattern is one where clients—working with limited information and perspective—make a series of time-pressured decisions throughout the day, usually guided by lawyer-driven gamesmanship and limited concessions, followed by a final push to settle late in the day when both sides are worn down, frustrated, and emotionally drained. As a result, traditional mediation rarely enables clients to make truly voluntary, uncoerced, and informed decisions.

The EDR Process transforms mediation by grounding it in self-determination. Each step involves counsel
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realistic

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The Role of the EDR Neutral and Initiating the Process

When counsel unfamiliar with the EDR Process reach out to schedule a traditional one-day mediation, the mediator has the opportunity to propose the EDR process, explain the difference between the role of a traditional mediator and one trained in the EDR Process—an EDR Neutral—and then discuss how to get started.

The EDR Neutral

In traditional mediation, the mediator usually has an initial call with counsel to set the deadline for mediation briefs and the date for the one-day mediation session. Some mediators encourage parties to exchange information or documents the other side needs to assess risk and develop settlement goals. Close to the mediation, the neutral reads the mediation briefs. The mediation session may or may not begin with a joint session. The neutral then has an initial private caucus with each party to talk through the case and ask probing questions, which typically lasts a few hours. The mediator then turns to shuttle diplomacy to elicit concessions from each side until the parties reach agreement or impasse.

The EDR Neutral's role is more active and sustained. The Protocols refer to the neutral as the EDR Neutral rather than the mediator because different skills and approaches are used. The Institute trains EDR Neutrals in the process's heightened ethics requirements, key concepts, and four steps, as well as in the use of decision trees to help each party analyze the case's risks. Neutrals are also trained to adapt the EDR Process to the circumstances of the dispute. They can adhere closely to the procedures in the Protocols or streamline the steps and start settlement negotiations as early as possible.

Another difference from the role of a traditional mediator is that the EDR Neutral works with the parties at the outset to determine how the EDR Process will be applied, tailoring it to what's most

appropriate for the case. This approach meets the process requirement of party self-determination in Standard uncoerc outcome

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Initi[redacted]ng the EDR Process

Although [redacted]stitute has been training neutrals and litigators since 2019, many litigators are not yet familiar w[redacted]e EDR Process. When an attorney contacts me about acting as a mediator, I respond that I'm w[redacted]to do a traditional mediation on the requested date, but I also offer and encourage using the [redacted]Process, which I explain as follows in my initial email to counsel:

Different [redacted]he traditional approach, I like to cut to the chase, make the process as economical and expe[redacted]as possible, and see if we can resolve the dispute before the scheduled mediation date. I do[redacted]ed mediation briefs. I can get up to speed if you send me settlement letters, key documents, and draft or actual pleadings, and I'll ask if I need anything else. If either side needs a limited set of documents or information to properly assess risk, we can arrange for a prompt exchange. Then I'd start with virtual meetings with each of you and your clients, followed by a session to assess issues and risks, and then begin negotiations. If you don't settle through negotiations, we'll set a backstop mediation date.

If you'd prefer to follow the standard mediation process—mediation statements followed by the mediation—I can do that as well. We can decide that in the initial call.

I've found that almost all attorneys who've asked me to mediate their dispute see the value in the EDR Process and readily agree to it.

I tell the parties that I'll set out the process in my engagement letter, which also serves as their agreement to follow the EDR Process. (I've appended a copy of my form engagement letter.) The process typically starts within a few days with the initial virtual meeting with the parties.

Just as mediators use different approaches, EDR Neutrals proceed differently. Some take a more formal approach working through each step, asking for mediation statements, or scheduling the backstop mediation only if negotiations fail. Others may streamline the initial steps and quickly begin risk analysis and principled negotiation. Another factor accounting for different approaches is that all EDR Neutrals seek to apply the process that works best for each case.

With that as background, let's turn to the four steps.

The Four Steps

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The EDR process moves formal in four steps that the ADR neutral tailors and streamlines to the dispute.

Step One: Initial Dispute Assessment

Step One is the foundation for everything that follows. Its objective is to simplify the case to its material claims, defenses, and legal and factual issues.

Reaching consensus with counsel on this analysis is crucial. It drives the efficiency and effectiveness of Step Two—limited document and information exchange on the core issues—and Step Three—risk analysis of those issues. Without narrowing the case to its essentials, the process becomes longer, costlier, and more likely to obscure the analysis than to sharpen it.

The process of simplifying the case to its material claims and issues is best understood through a hypothetical:

Assume Patty claims that Dan misrepresented facts to induce her to enter into a contract, and then threatened to bankrupt and humiliate her if she sued. Patty sues, bringing claims for fraud, fraudulent inducement, negligent misrepresentation, statutory fraud, and (based on the threats) intentional infliction of emotional distress.

Simplifying the claims means grouping overlapping claims into "families," and reducing them to a single representative claim. Here, fraud, fraudulent inducement, negligent misrepresentation, and statutory fraud are part of the misrepresentation family. Even though the claims have some different elements, the focus should be on the core issue—the alleged misrepresentation—rather than its variations.

The next step is to determine which of the claims are material. A claim is material if its resolution would significantly affect the relief or damages sought or the parties' bargaining posture. In this example, the intentional infliction claim rests on Dan's threatening emails trying to deter Patty from suing. Such threats are commonplace, unlikely to meet the high bar for proving intentional infliction, and, even if successful, wouldn't likely result in meaningful damages. It's not material—it wouldn't significantly change the remedy or shift the dynamics of negotiation.

The hypothetical is limited to a single claim with no independent claims—such as a later breach based o[r] affirmati[ve] mirrorin[g] claims too must be simplified so they can be addressed efficiently and effectively in Step Two's document and information exchange and Step Three's risk analysis.

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EDR Neutrals are trained to apply simplification and materiality across all claim structures. They work with counsel to reach consensus on simplifying the material claims and dispositive factual issues. Although the explanation sounds more involved than it is, the process is essentially common sense. In practice, my first call with both counsel usually confirms that they're already aligned on the material claims and dispositive facts driving the case.

With the case simplified, we're ready for Step Two.

Step Two: Information and Document Exchange

The goal of this step is for counsel to obtain the information needed to value their case for settlement. In the Protocols, this level of knowledge is called "Sufficient Information."

1. Sufficient Information Requests

Each party may request that the other side produce limited information and documents needed to develop Sufficient Information. This is not discovery; the requests should be narrowly tied to the core issues. If parties need more information after the initial exchange, they may request it. In some cases, the parties may not need any information from each other, though defendants commonly seek substantiation of the plaintiff's damages claim.

If parties want assurance that the other side has pro[duced] information and documents responsively and in good faith, they may request a declaration to t[he] effect. The Protocols refer to this as a Verification of Compliant Response. While I've never[seen] parties request a verification, some EDR Neutrals believe that requiring it as a matter of cours[e is an] important safeguard.

[phone redacted]

Though not often used, and requiring the other side's [consent], counsel may ask to interview witnesses under the other side's control. To be fair to [witnesses] in light of the expedited nature of the process, interviews work best if they're conducted off the record and kept to a few questions narrowly targeted to core issues. Counsel may ask the questions, or the parties may agree that the EDR Neutral will ask them.

2. Experts

Step Tw[redacted] experts i[redacted] American Arbitration Association® Log In File a Case [redacted]ıg [redacted]ssue, and those opinions tend to cancel each other out. If expert input is needed, the process provides for short-form reports limited to dispositive issues. Because these reports are prepared without the benefit of full discovery, parties may agree that they're without prejudice to different or fuller conclusions the expert might reach later after reviewing a more comprehensive record. Parties may also consider using a joint expert.

3. Practical Application

I typically find that before they call me, counsel already have a sufficient understanding of their client's case—what's really at issue—so that in my initial call with them, it's easy to simplify the case to its material claims. I can then combine Step One with Step Two's information/document exchange (if any) during that same initial call to expedite the process. In straightforward cases, the information/document exchange can be finished in less than a week, and the parties can move quickly to risk analysis and Principled Negotiation.

Other EDR Neutrals may pursue the process m[redacted]mally, dealing with Step One in the initial call, then asking the parties to submit written reque[redacted]the neutral to review as part of Step Two. The neutral then ensures that the requests are appr[redacted]ely limited, sends them to each party, and sets a deadline for production accompanied by a Veri[redacted]n of Compliant Response.

Regardless of whether the EDR Neutral directs [redacted]ocess informally or formally, the outcome of Step Two is the same: counsel should have dev[redacted]d Sufficient Information to value their case for settlement. They then proceed to Step Three to [redacted]uct a risk analysis.

S[redacted] Three: Risk Analysi[redacted]

T[redacted]ral begins this step with a virtual call wi[redacted]h party to learn more about the case, u[redacted]nd the client's goals and concerns, and[redacted] the rapport and trust needed to help parties e[redacted]ly value their case. The neutral then wo[redacted]h counsel to value the case by accounting for li[redacted]ure fees and costs and applying probabilistic analysis of the likelihood of different outcomes. In[redacted]opriate cases, this includes using decision trees to structure the analysis.

Ba[redacted]n the valuation and assessment of the client's subjective risks, counsel can recommend a re[redacted]ble settlement range and explain the factors supporting it. This, coupled with the information

[address redacted]

[phone redacted]

clients gain in Step Two, equips clients to exercise genuine self-determination in making informed negotiat

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1. The

Counsel often use vague words to describe the strength of a case—they may say that it's "reasonably strong" or that it's an "uphill battle." The problem is that clients don't know whether "reasonably strong" means 51% or 80% or whether "uphill battle" reflects 10% or 49%. Further, clients don't know how to correlate these expressions of likely outcome with reasonable settlement goals.

To give clients the information and understanding they need to make informed settlement decisions, Step Three requires counsel to use specific percentages in analyzing risk. Forecasting a percentage likelihood of prevailing and achieving different outcomes is not meant to be an exact science. The aim, following Aristotle's dictum, is to "attain the clarity that accords with the subject matter [,] to look for precision in each class of things just so far as the nature of the subject admits." (Nicomachean Ethics, 1.3.4) Here, the clarity sought is to reasonably convey counsel's confidence level in the forecasted outcome of the case so that the client can weigh it in deciding whether, and on what terms, to settle.

2. Risk-Adjusted Value and Decision Trees

Forecasting percentages of prevailing and recovering certain damage amounts allows counsel and parties to calculate their case's Risk-Adjusted Value ("RAV"), which is the weighted average of the likely recoverable damage amounts discounted by the likelihood of their occurring, then subtracting future litigation fees and costs. As defined here, RAV is a subset of expected-value calculations integral to decision-making in numerous fields. The skill of forecasting RAV reasonably accurately should be regarded as a core competency for litigators and neutrals.

In some cases, the calculation is straightforward. For example, assume a breach of contract case where damages are liquidated at $100,000. The plaintiff has a 50% chance of winning and would spend $25,000 to take the case through trial. The calculation is 50% of $100,000, which is $50,000, minus $25,000 in fees, yielding an RAV of $25,000.

But most cases aren't so simple. There may be different likely damage levels or different claim structures: independent claims, dependent claims, independent and mirroring counterclaims, and third-party or cross-claims. Also, future attorney's fees may be governed by the American Rule or fee-shifting.

Faced with these more complex claim structures, calculating RAV is best done using decision trees. EDR Neutrals are trained in the probability logic of how to sequence and align different claim structures and account for different damage levels and fee-shifting to correctly calculate RAV. As

trees become more complex, simplicity and materiality become more important to keep the tree clear enc

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3. For

The next step is for counsel to forecast three variables:

- What is the percentage likelihood of winning on each claim?
- What are the low, middle, and high levels of damages for each claim and the likelihood of recovering (or paying) each level?
- How much are litigation fees and costs to take the case through trial?

In discussing the likelihood of winning and recovering (or paying) different damages amounts with counsel, the EDR Neutral reviews both sides' evidence and arguments to encourage counsel to forecast realistically. The goal of the process is for counsel's forecasts to inform clients of the attorneys' best judgment in light of the risks the case presents. And as parties learn more information and better understand the arguments and the elements of uncertainty in the case, counsel should continue to update the estimation of RAV and consider expressing it in ranges as a form of sensitivity analysis—that is, showing how changes in probability forecasts affect the resulting RAV.

Once counsel forecasts these variables, the best way to calculate the RAV is to use a decision-tree app. There are several very good proprietary apps with specific tools for litigation analysis, as well as a free open-source expected-value app, SilverDecisions.pl.

Perspective is required in using RAV to inform settlement decisions. The process isn't about being "right" in predicting the future; instead, it's best understood as a structured way to account for the material risks and costs of the case. It's a snapshot of the case's value based on counsel's informed judgment. One way to view RAV is as a benchmark—settling better than RAV means that, on average, accepting parties achieve a better outcome than they would have at trial.

4. Subjective Factors and Reasonable Settlement Range

RAV is an analytical baseline for setting realistic settlement goals. Those goals, however, should also account for the subjective risk factors of the case. The Protocols identify four recurring subjective risk factors to consider: risk tolerance, leverage, collectability, and personal and business impact, though there may be others depending on the circumstances. An example of how RAV and subjective factors interact is that clients with an RAV of X might decide on a settlement range below X because of a low risk tolerance or to avoid unfavorable publicity.

Counsel should walk through these factors with clients to help them understand the trade-offs well enough
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5. The Difference between Internal and External Assessments

Counsel forecast RAV for their clients for two different purposes. The first is the internal forecast—the purpose is for counsel to forecast the RAV factors objectively so that the RAV provides clients with a sound and realistic basis for making informed settlement decisions aligned with their best interests. Counsel should approach the internal forecast with a scout's mindset, seeking to accurately reflect the RAV factors and underlying assumptions as objectively as possible. Clients use this internal assessment to analyze whether a proposed final settlement offer is likely to provide a better outcome than the most likely result of trying the case.

The internal assessment is confidential. The EDR Neutral may not share it with the other side. Likewise, counsel and clients don't need to share their internal forecast with the neutral, just as they wouldn't share their bottom line in a mediation session.

The second purpose is the external forecast—counsel uses the RAV forecasts adversarially to advocate for the best settlement for their clients. Counsel should approach the external forecast with a soldier's mindset, using principled, defensible, and strategically favorable numbers and assumptions to persuade the other side to increase its offer or lower its demand. This approach is used in Step Four as part of Principled Negotiation.

6. A Postscript: AI

Over the past year, ChatGPT has become very good at calculating RAV—but it depends on presenting the prompt with the right variables in clear, ordinary language. To use it properly and confirm that ChatGPT (or other LLM) has given you the correct answer, you still need a strong understanding of decision-tree probability logic to simplify claims, structure prompts, and detect errors such as misinterpretation, faulty assumptions, or hallucinations. ChatGPT is also effective at suggesting ways to simplify claims, assess materiality, weigh RAV alongside subjective risks, and identify a reasonable settlement range. Used properly, it can walk you through each step and be a valuable aid in the risk-analysis process.

Step Four: Principled Negotiation and Resolution

By the time Principled Negotiation begins in Step Four, clients have the knowledge and understa

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lve their dispute t liation where cl gamesmanship—make narrow, time-pressured concessions that often culminate in a late-day push to settle after both sides are worn down and emotionally drained.

Here's how Principled Negotiation works: By this stage, parties have had ample time for reflection, received the information they need to value settlement, assessed the case's risks, and developed a reasonable settlement range. They come to negotiations focused on the same material claims and issues and able to make reasoned demands supported by the risks and advantages each side faces. The EDR Neutral uses standard mediation techniques and risk-analysis tools to reason with parties and encourage principled, reason-based counters. Parties have the time to consider the offers and demands and make reasoned counters. In my practice, parties are usually able to resolve their disputes through this process.

If the parties don't settle through Principled Negotiation, they proceed to a formal mediation session, in person or virtual, that often requires only a half day because of the progress already made. Some neutrals schedule this in advance as a backstop; others schedule it only if the virtual caucuses don't result in settlement.

If the parties don't resolve the dispute in mediation, they will have developed a comprehensive understanding of the case. They can then consider the option of negotiating an expedited and economical process for resolving the case or, for example, asking the arbitrator or court to decide a specific legal issue before resuming settlement discussions within the EDR Process.

Why the EDR Process is Effective

Here's why the EDR Process is effective:

1. Signaling confidence: Because it's grounded in objective risk analysis and Principled Negotiation, proposing the EDR Process signals strength and confidence in seeking to resolve disputes early, economically, and on the merits.
2. Clarity and structure: The four defined steps give the parties clear guidelines on how to move forward. They're not left to create their own early-resolution process.
3. Common frame: Having simplified the case to the material claims and issues, the parties assess risk and negotiate settlement within a common framework.

4. Sufficient Information: Parties have an expedited way to obtain just the documents and infc
5. Prc hey nar probabilistic outcomes.
6. Right mindset: By focusing on what matters, exchanging needed information and documents, and analyzing risks realistically, the process builds trust, lowers emotions, and helps parties shift their focus from past battles to future interests.

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Structural Transformation

The EDR Process transforms mediation and also has the potential to transform the structure of dispute resolution.

- The AAA has mediators who are trained and experienced in the EDR Process, and is exploring ways of expanding and highlighting EDR as a specialty panel.
- Federal and state courts now have pilot projects offering the EDR Process. Courts can use the process to relieve crowded dockets while affording litigants the opportunity to resolve their disputes early, economically, and fairly.
- General counsel who want to drive down litigation costs and disruption can develop programs that encourage early resolution of all disputes.
- I'm now teaching a seminar on the EDR Process and decision trees at The Ohio State University Moritz College of Law. These are skills that law students should learn, and that all law schools should teach.

Conclusion

This article has examined the EDR Process at the level used by the Institute in its two-day training program for EDR Neutrals. Equipped with this knowledge, EDR Neutrals facilitate the EDR Process so that it is straightforward, clear, and intuitive for parties–simplify the case to its material claims, exchange information and documents if needed for Sufficient Information, and then engage in Principled Negotiation with a focus on risk analysis. By the time negotiations begin, clients have developed the informed judgment they need to exercise genuine self-determination in deciding whether—and on what terms—to settle.

The EDR Process transforms how disputes are resolved. Instead of a traditional one-day mediation, the proc l, and principle s a best practice

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For those interested in learning more, the Institute will soon offer its on-demand EDR course at its website, edrinstitute.org.

Appendix: Engagement Letter

Date
Via E-Mail

Counsel for *Counsel for*

Re:

Dear Counsel:

This letter is my proposed agreement to serve as the mediator for your case. If your clients agree to the terms, please have them sign the agreement and return it to me. If you have questions or would like changes to the agreement, please call me to discuss it.

Terms

1. When I use the word "you," I mean each side's attorneys and clients.
2. Process. My preference is to begin promptly after being retained:
    - We will schedule a formal mediation date and determine whether it will be virtual or in person. I will try to resolve the dispute before the mediation, and that should be our focus.
    - Mediation statements aren't required. Instead, send me settlement communications, pleadings, and key documents to familiarize myself with the case and the issues. An initial goal will be to narrow the case down to what's really at issue.
    - If either side needs a limited set of documents or limited information from the other side to make an informed assessment of its case, I'll ask the other side to produce it. This won't foreclose any party from seeking additional discovery in a later action if the parties don't settle.
    - I'll then work with each side – separately and confidentially – to develop a realistic assessment of the expected value of the case based on each counsel's judgment as to

the likelihood of prevailing in the case, the likely range of damages, and the future

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gamesmanship or positional bargaining.

- If the dispute isn't resolved before the scheduled mediation, we'll proceed to the formal mediation. By that time, we should have made significant progress, and the mediation should be very focused. Depending on our progress, we should consider limiting the mediation to half a day.
- The process I use as a guideline is set forth in the Early Dispute Resolution Protocols of the Early Dispute Resolution Institute, which can be found in the Latest EDR Protocols. I simplify and compress the process as described above.

3. Good faith. You each commit to promptly and civilly proceed in good faith to seek resolution.
4. Voluntary. Dispute resolution is a voluntary process. If at any time you don't want to continue, you may stop. Likewise, if I choose to stop, I may do so. And if at any time you feel you can't continue in good faith, you should terminate the process, no explanations required.
5. Decision makers. If we do proceed to the formal mediation session, you shall have at the mediation the person(s) with the authority to resolve this dispute.
6. Confidentiality of communications.
   - You agree that any applicable state statute governing the confidentiality applies to the dispute resolution process we'll engage in.
   - During the process, if you tell or show me something that you don't want me sharing with the other side, let me know and I won't share it.
   - As to anyone not involved in the process, I won't disclose anything to them that you tell or show me unless you authorize me to do so.
   - In any legal proceeding, unless ordered to do so by a judge or arbitrator, neither you nor I may disclose anything that is said or shown during the process. Note, though, that evidence or information otherwise admissible or discoverable doesn't become inadmissible or not discoverable solely because it was disclosed during the process.
   - If you do settle your dispute, and you each sign an agreement containing the settlement terms, that document may be used in a legal proceeding to prove the settlement.
   - While I don't expect this to occur, I need to add one exception to confidentiality: If I learn of child abuse, a real threat to hurt someone physically, or a plan to commit or conceal a crime, I'm not obligated to treat that information as confidential.
7. You won't call me as a witness or name me as a party. You won't call me as a witness, or name me as a party, in any legal proceeding that relates to this process. I'm not a necessary party to any proceeding related to this process.

8. I'm not liable to you. I'm not liable to you for anything I do or don't do in connection with this prc
9. I'm rely

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10. Fees. I assume the parties are splitting my fee. If that's not the case, let me know how I should split the bill. I request a retainer of * from each party. My hourly rate is * per hour, billed monthly. I look forward to working with you to make this process expedited, economical and successful.

Sincerely yours,

PRS:aan

Enclosures

I agree to the terms:

[signatures]

About the Author

Peter Silverman developed the EDR Protocols and chairs the EDR Institute along with trustees Anne Jordan and Michael Hawash. He is an EDR Neutral, mediator, and arbitrator, and practices law at Shumaker, Loop & Kendrick.

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