

## INTERVIEW WITH MICHAEL HAWASH

*Michael Hawash is a Texas Mediator and Lawyer Pioneering Early Dispute Resolution*

By: Jack J. Nichols, Esq.<sup>1</sup>

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**Q: What is a short explanation of Early Dispute Resolution (EDR)?**

**A:** EDR is a voluntary process that seeks to expedite the resolution of a dispute by providing parties with a procedure, usually guided by a specially trained neutral, to resolve most matters within 30-60 days. Importantly, if a lawsuit has already been filed, EDR can be accomplished *before* significant time and money has been incurred on traditional discovery and motion practice.

**Q: How does the EDR process work?**

The EDR method I use is the laid out in the Protocols of Early Dispute Resolution published by the non-profit EDR Institute. This process involves four steps: (1) understanding the legal and factual basis underlying the core issues in the case; (2) exchanging information each party needs to reasonably value its case; (3) evaluating the chances of prevailing, potential damages recoverable, and litigation costs to develop a risk-adjusted value of the case, and (4) engaging in principled negotiations

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<sup>1</sup> Jack Nichols serves as counsel to the Texas Justice Center.

in an effort to resolve the dispute.

**Q: What are the advantages of EDR for lawyers and their clients?**

A: The primary advantage of EDR for parties is a massive savings in time, expense and heartache. In many, if not most instances, parties don't attempt mediation until a case is deemed ready or nearly ready for trial. This typically comes after an enormous amount of time and money has already been spent on discovery, motion practice, and preparation for a trial that is statistically unlikely to ever occur. The EDR process provides lawyers with *sufficient knowledge* at the outset, so clients can determine a *risk-adjusted value* of the case and use that value to make an *informed judgment* on what a resolution looks like. The parties can then attempt to resolve their case at an early stage of the litigation instead of a few weeks before trial.

**Q: How do the fees and costs of EDR compare to traditional mediation?**

A: EDR neutrals have different fee structures for EDR just as they do for mediation. Some charge by hour, others charge a fixed fee for a matter. I charge the same fee that I would charge for traditional mediation, so the cost of EDR is generally the same as mediation. That being said, the cost of EDR is often negligible compared to the cost savings for the parties when resolving a case at its earliest stages rather than on the courthouse steps.

**Q: I understand you integrate decision tree technology into your EDR Practice. How**

does this work?

A: Some people think EDR is just “mediation with some discovery;” it’s not. EDR neutrals are trained in sophisticated risk-analysis techniques, including decision trees, to help the parties determine the value and risks associated with their case. The risk-adjusted value of a case is a financial estimate that considers the likelihood of prevailing on claims or defenses, the range of potential damages, as well as costs associated with proceeding with litigation. Back of the napkin calculations as to case value are often wrong and, therefore, misleading, making it harder to resolve a dispute. To avoid this, EDR neutrals use decision trees to help each party more accurately assess the potential value of their case while considering the inherent uncertainties and risks involved in having a judge, jury or arbitrator decide the case for them.

**Q: How will EDR grow in its recognition and use in the next five years?**

A: EDR is poised to become a routinely-used method to resolve disputes both domestically and abroad as lawyers, clients, and courts come to realize the immense value of the process. The number of EDR-trained neutrals is growing annually. The ABA has adopted Resolution 500 urging lawyers to inform their clients about early dispute resolution options. The American Arbitration Association is preparing its own version of EDR based on the EDR Institute Protocols. Over the next five years, I envision EDR becoming ubiquitous, the same way the use of mediation grew

through the 1990s.

**Q: What do you say to lawyers or their clients who are unfamiliar with EDR?**

Don't worry. Since the EDR process is guided by a specially-trained neutral, it is OK that the parties and their counsel may be unfamiliar with the process. I thoroughly explain each phase and what is expected as we go through each step. Since EDR is voluntary, if a party or lawyer decides it's not for them, they can withdraw at any time. For clients who are unfamiliar with EDR, lawyers should advise their clients that it is an option, so the client can determine what is best for them under the circumstances. In almost all cases, finding a resolution quickly, economically, and on the merits, is preferable to contentious, expensive, time-consuming, relationship-destroying litigation where the vast majority of parties eventually settle anyway.

And if the parties don't settle in EDR, at worst they have learned a lot about the case and what the other side thinks of their position. That knowledge can be used to negotiate a streamlined process to litigate the dispute or narrow the issues that need to be decided.

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