# 500

**ADOPTED**

**AMERICAN BAR ASSOCIATION**

**SECTION OF DISPUTE RESOLUTION**
**SECTION OF STATE AND LOCAL GOVERNMENT LAW**
**SENIOR LAWYERS DIVISION**

**REPORT TO THE HOUSE OF DELEGATES**

**RESOLUTION**

RESOLVED, That the American Bar Association urges lawyers and all interested parties to increase the informed and voluntary use of Early Dispute Resolution: party-directed, non-adjudicative approaches to resolve disputes in a time-efficient and cost-effective manner, including, but not limited to, direct negotiation, mediation, and ombuds.

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## REPORT

Since the 1970s, alternative dispute resolution ("ADR") methods have helped manage court backlogs by reducing the amount of time and other resources needed to resolve lawsuits. In the more than 40 years since the 1976 Pound Conference, the use of ADR in litigation has become routine.

This Resolution urges the increased use of non-adjudicated[1] ADR as a dispute resolution strategy for all types of civil disputes and spotlights the timing at which ADR is utilized.

Given the substantial impact COVID-19 had on court systems across the country, and the attendant delays and increased costs left behind in the pandemic's wake, this Resolution is a timely and beneficial policy statement. Notably, the Resolution aligns with existing ethical guidelines and rules, and thus does not seek a change to any rules; but rather seeks to highlight those already adopted.

## I. WHAT IS EDR?

For the proposed Resolution, ADR refers to non-adjudicated methods through which parties privately resolve disputes, e.g., direct negotiation, ombuds, and mediation, without the intervention of a judge or arbitrator. Early dispute resolution ("EDR") is the informed and voluntary use of ADR time-efficiently and cost-effectively.

EDR is not new. Many corporations have been using EDR for years. For instance, many businesses monitor and proactively respond to disagreements before they escalate and often agree to early mediation on negotiated terms, thereby controlling costs, reducing disruptions, and expediting resolutions.

Post-Covid there is a growing interest in EDR and an attendant increased appreciation that EDR's benefits are not restricted only to the parties involved in the subject dispute. Courts realize, for example, that when disputes are resolved early, judicial resources are available to be allocated to other matters. It is undisputed that trials protect essential and fundamental rights fulfilling the important role of setting precedent and creating a space for effective speech on matters of public concern. So, for those cases that *will* be tried, EDR plays a role in helping courts to manage cases to trial on a more predictable timeline and with less delay and expense.

## II. ADR HAS NOT FULLY ACHIEVED ITS INTENDED GOALS

Improving the public's view and experience within the court system has been a topic of discussion at least since Roscoe Pound's 1906 address entitled "The Causes of Popular Dissatisfaction with the Administration of Justice."[2] Between 1959 and 1976, with

[1] Although arbitration is recognized as one of many ADR options, and as an efficient and effective means to resolve many disputes privately, this Resolution focuses on processes that promote full party-autonomy, which is a key attribute of the proposed Resolution.

[2] Lara Traum & Brian Farkas, The History and Legacy of the Pound Conferences, 18 CARDOZO J. CONFLICT RESOL. 677, 679 (2017).

decreasing public expenditures for courts and increasing case filings, Federal civil courts saw caseloads more than double[3] stimulating greater public dialogue about the way disputes were being resolved.

In 1976, Chief Justice Warren Burger convened the Pound Conference to discuss ways to promote greater satisfaction with the judiciary and conflict resolution in general. In his remarks, Chief Justice Burger challenged and encouraged the bench and bar reminding that:

> The obligation of our profession is, and has long been thought to be, to serve as healers of human conflict. To fulfill our traditional obligation means that we should provide mechanisms that can produce an acceptable result in the shortest possible time, with the least possible expense, and with a minimum of stress on the participants. That is what justice is all about.[4]

Looking back, we are reminded that, by the mid-1980s, court-sponsored arbitration had been adopted by approximately half the states and 20 Federal district courts, many courts were using mediation for child custody cases and financial divisions,[5] and some courts were adopting other ADR options for disputants including mini-trials, summary jury trials, and early trial evaluation. Acknowledging the value of ADR, American businesses voluntarily adopted contractual binding arbitration to gain more control over the rules for resolution and decision-maker selection, and to ensure finality (without the time and expense of a trial or an appeal).

A decade later, the concept of ADR, more specifically mediation, was growing. By the mid-1990s, more than half of all State courts and almost all Federal district courts were ordering mediation in a broad range of civil suits[6] of varying size and complexity of claims.

In the first decade of the 2000s, scholars studying the use of ADR and its impact reported that while lawyers and the parties they represented liked ADR options and found them to be effective, courts were having to order its use. In response, suggestions were made to revise ethical codes to require lawyers to discuss ADR options at the outset of a representation to better educate parties and encourage greater voluntary participation.[7]

In 2019, before the COVID-19 pandemic, Federal and State courts continued to work with ADR providers to help relieve ongoing backlogged dockets. In fact, pursuant to the Alternative Dispute Resolution Act of 1998, all Federal district courts publish ADR procedures and many of them require discussions about ADR at the earliest opportunity in a case.[8] ADR is also prevalently used in State courts. As a matter of public policy, across the country, states approve of resolution of legal disputes through ADR. To

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[3] Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Re-Shaping Our Legal System*, 122 DICK. L. REV. 349, 358-59 (2017) (citations omitted).

[4] Warren E. Burger, *Isn't There a Better Way?* 68 A.B.A. J. 274 (11982).

[5] Hensler, *supra* n. 3 at 365.

[6] *Id.* at 371 (citing Elizabeth Plapinger & Donna Stienstra, *ADR and Settlement in the Federal District Courts: A Sourcebook for Judges and Lawyers* (1996)).

[7] *See, e.g.,* Kimbelee K. Kovach, *The Duty to Disclose Litigation Risks and Opportunities For Settlement: The Essence of Informed Decision-Making*, 33 U. LA VERNE L. REV. 71 (2011).

[8] *See* Compendium of Federal District Courts' Local ADR Rules at https://www.justice.gov/archives/olp/compendium-federal-district-courts-local-adr-rules.

advance ongoing ADR initiatives, many former judges, experienced lawyers, and private dispute resolution organizations provide ADR services to meet growing demand and need for dispute prevention and resolution services.

Notwithstanding, nobody anticipated what happened in 2020. The COVID-19 pandemic wreaked havoc on court dockets exacerbating ongoing backlogs. A comparison of civil filing data from previous decades reflects some of COVID-19's impact on Federal trial courts.[9]

| YEAR | CIVIL FILINGS | CIVIL TERMINATIONS | CIVIL PENDING | PERCENT CHANGE |
|---|---|---|---|---|
| 2000[10] | 257,832 | 252,524 | 254,536 | |
| 2001[11] | 259,927 | 248,447 | 266,016 | 4.5 |
| | | | | |
| 2010 | 293,352 | 314,559 | 287,294 | |
| 2011 | 289,969 | 305,936 | 271,327 | -5.6 |
| | | | | |
| 2019[12] | 296,691 | 306,657 | 359,472 | |
| 2020[13] | 495,086 | 276,446 | 578,112 | 60.8 |
| 2021[14] | 327,863 | 260,722 | 645,435 | 11.6 |
| 2022 | 265,615 | 317,704 | 593,480 | -8 |

What the data shows is that, in 2020, during the height of the pandemic, Federal district courts received 198,395 *more* filings than they received in 2019 and removed 30,211 *fewer* cases from dockets than in 2019. This resulted in 578,112 *backlogged* cases, which was more than a 60% increase from the year before.

In 2021, the upward trends for civil filings and downward trends for removal from the dockets continued, resulting in 645,435 civil backlogged cases, a more than 11% increase from 2020. Simply stated, when compared against the typical number of annual case filings, 645,435 ongoing cases equates to more than two pre-pandemic years of case filings remaining on the docket at the end of 2021. More than double of what the backlogs were at the turn of preceding decades: 2000-2001 and 2010-2011.

By the end of 2022, the data indicates that Federal court dockets cleared more cases in the year than were filed, but the overall year-end backlog still hovered at nearly 600,000 cases.

All of this backlog occurred despite the existence of, and focus on, ADR.

[9] While there is no national database with recent state court statistics, the unlimited civil case clearance rate (civil terminations divided by filings) in California in 2022 was only 41%.

[10] https://www.uscourts.gov/sites/default/files/statistics_import_dir/c00dec01.pdf.

[11] *Id.*

[12] https://www.uscourts.gov/statistics/table/c/statistical-tables-federal-judiciary/2020/12/31.

[13] *Id.*

[14] https://www.uscourts.gov/statistics/table/c/statistical-tables-federal-judiciary/2021/12/31.

The direct and indirect costs attendant to delayed resolution through the courts are hurdles many parties do not want to (or simply cannot) clear. Because time is money, enhanced backlogs reflect more delays and strain on limited judicial resources, which for litigants represents greater costs along with prolonged uncertainty, creating a greater need and interest in EDR.

## III. EDR HIGHLIGHTS THE IMPORTANCE OF TIMING

One of the most pivotal points along the continuum of a dispute occurs when decisions are made about when and how the parties will endeavor to resolve the conflict. The importance of early discussions between a lawyer and a client about dispute resolution options are reflected in the Model Rules of Professional Conduct (the "Model Rules") and the ABA Section of Litigation Ethical Guidelines for Settlement Negotiations.[15]

Although parties, lawyers, and the courts know the benefits of ADR, "[t]here is little evidence that alternative dispute resolution procedures within courts have reduced the average time to dispose of civil lawsuits, or the average public or private expense to litigate cases" to conclusion.[16] However, in courts in which early mediation was mandated, there is evidence that litigant costs and court workloads were reduced, and, importantly, participants were satisfied with the process.[17]

### A. EDR ENHANCES ADR

With the help of experienced counsel, parties successfully resolve disputes through both adjudicated and non-adjudicated processes. However, there are several differences that tend to make ADR methods more appealing and satisfying options to parties who understand and appreciate the differences.

Key attributes of ADR not associated with adjudication include the following:

> Party self-determination, including greater procedural and substantive control. Party self-determination is not only a critical aspect of ADR, but also the cornerstone of ADR, which permeates the other attributes below. In its purest form, party self-determination is honored when parties *voluntarily* agree not only to engage in ADR but control the timing and type of ADR method to be used.
>
> Efficiency. Parties are at liberty to adopt ADR strategies at any time and to determine when and how the dispute will be resolved.
>
> Cost-Effective. When compared to the resources (financial and human) invested in adjudicated processes, the cost of ADR is significantly lower. Even if the parties do not settle at an early stage, the issues can be clarified to focus the future legal work.

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[15] *See infra* at Sections IV and V.

[16] Hensler, *supra* at n. 3 at 380

[17] John Lande, *the Movement Toward Early Case Handling in Courts and Private Dispute Resolution*, 24 OHIO ST. J. ON DISP. RESOL. 81, 102-03 (2008) (discussing JUDICIAL COUNCIL CAL., ADMIN OFFICE OF THE COURTS, EVALUATION OF THE EARLY MEDIATION PILOT PROGRAMS (2004); Howard H. Dana, Jr., *Court-Connected Alternative Dispute Resolution in Maine*, 57 ME. L. REV. 349, 375 (2005).

Informed Decisions. A reality check of the strengths, weaknesses, and ambiguity of a case early in the litigation may help the parties develop reasonable expectations and to make better informed decisions about the course of the dispute.

Preserves Relationships. ADR opens lines of communication to resolution preventing or reducing emotional responses which are often triggered and misunderstood when lines of communication are closed, conflicts are escalated, and resources are worn down.

Creative Solutions. When compared to courts, which can only render awards of damages or injunctive or declaratory relief, the options available to parties who engage in ADR are limited only by their creativity and willingness to accept proposals.

Increase Availability of Judicial Resources. ADR is an option, but it is not appropriate in every case. This, in fact, is a reason the impact of this Resolution could profoundly and positively improve the justice system. Some cases warrant public adjudication to establish legal standards and, thus, should be *efficiently and cost-effectively* resolved through the public court system.

EDR maintains all of ADR's virtues set forth above and enhances them by deferring to parties greater control over when and how ADR efforts will be undertaken.

### B. EDR AS AN ADDITIONAL OPTION FOR DISPUTANTS

Experienced litigants, judges, and lawyers know that adjudication is an effective dispute resolution option but is not always the best option. Adjudication's effectiveness is exemplified in the power that judges and arbitrators exercise to ensure a dispute will eventually end. But, decisions from judges and arbitrators require parties to consider trade-offs, which often include a delayed resolution, and greater costs and uncertainty.

Highlighting the effectiveness of ADR and its value to parties and the courts, many backlogged courts often require parties to participate in some form of ADR as a prerequisite to trial. Given the sheer volume of lawsuits that are filed and the success rate of ADR, data indicates that the chances of getting to trial are typically low, sometimes less than 1%.[18]

**What we learn from experienced litigants.** Attracted to the problem-solving aspects of ADR, businesses often adopt policies that rely on the early use of ADR. Results from a 2011 survey of Fortune 1000 corporate counsel indicate that those who have had repeat experience with adjudicatory dispute resolution processes (litigation and arbitration) prefer a negotiated, versus litigated, outcome. The 2011 survey also revealed a dramatic drop in the percentage of companies that purport to "litigate first" before moving to ADR.[19]

[18] *Id.* at 325 n.125.

[19] *See Mediation Advocacy: Negotiating Tips and Perspectives to Help Up Your Game at Mediation, by Rebecca Callahan, Orange County Lawyer, citing* Thomas J. Stipanowich and J. Ryan Lamare, Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration and Conflict Management in Fortune

But, the benefits of early adoption of ADR are not – and should not be – restricted to experienced business litigants. Consistent with the growth and promotion of ADR options over the last few decades, studies indicate that inexperienced litigants, when asked, also view ADR procedures as fair, and welcome the opportunity for greater self-determination.[20] However, the rate of voluntary usage of ADR remains relatively low.[21]

One reason for low voluntary usage of ADR is thought to be the parties' lack of experience with ADR.[22] Because many litigants have never used dispute resolution options like an ombuds or mediator, they "don't know what they don't know."[23] As a result, for inexperienced litigants, the paths away from, into, through, and out of the courthouse or arbitration are often unchartered.

While legislative, judicial, and arbitrator[24] mandates for the use of ADR in pending litigation have guided and promoted mediation's use and introduced many inexperienced litigants to its benefits, the shortcoming of mandates is that their influence on parties is indirect, delayed, and typically imposed without party input, understanding, or buy-in.

Consistent with the fiduciary and professional nature of the attorney-client relationship, lawyers can and do influence the decisions parties make with regard to both the timing and type of dispute resolution processes used. In effect, lawyers – not judges – often serve as gatekeepers to ADR. Consequently, lawyers' procedural preferences and settlement tendencies can influence and inform decisions parties make about their timing and approaches to ADR processes, more so than do judges.[25]

Even though ADR methods are efficient and cost-effective in resolving legal disputes and afford parties broader options and control, concerns about using ADR too early are common. For example, there may be a concern about how an "adversary" may interpret a proposal to engage in direct negotiation or mediation early in the conflict. Would the adversary view EDR as a sign of weakness? Or, there may be instances in which EDR is not deemed appropriate because more information is needed from which to evaluate and recommend resolution options.

**On the first concern, in many ways EDR should be viewed as a sign of confidence.** This Resolution, without adding any enhanced ethical responsibilities to the bar, aligns with many legitimate, rational, and reasonable reasons why a party would be interested in discussing resolution early. In cases in which EDR advances party objectives and

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1,000 Corporations, 19 Harv. Negot. L. Rev. 1 (2014), *available at* www.mediate.com/articles/LivingWithADR.cfm.

[20] Donna Shestowsky, *Disputants' Preferences for Court Centered Dispute Resolution Processes: Why We should Care and Why We Know So Little*, 23 OHIO ST. J. ON DISP. RESOL. 549, 563 (2008).

[21] *Id.* at 579-80.

[22] Elayne E. Greenberg, *… Because "Yes" Actually Means "No": A Personalized Prescriptive to Reactualize Informed Consent in Dispute Resolution*, 102 MARQ. L. REV. 197, 200 (2018).

[23] A recent study found that, despite the expansion of ADR, its processes are not well understood by the general public. *See* Blankley, et al., 99 NEB. L. REV. at 799; Barry, *supra* n. 17 at p. 328.

[24] *See, e.g.*, American Arbitration Association Commercial Arbitration Rule R-10 (requiring parties to mediate "all cases where a claim or counterclaim exceeds $100,000")

[25] Donna Shestowsky & Jeanne Brett, *Disputants' Perceptions of Dispute Resolution Procedures Ex Ante and ExPost Longitudinal Empirical Study*, 41 CONN. L. REV. 63, 98, n.116-118 (2008).

interests, proposing EDR is not a sign of weakness; but, instead, an acknowledgement of the realities of the investment of time and costs inherently connected to process-related decisions, the impact on relationships of adjudicated versus non-adjudicated resolutions, and the ability of parties to influence and control the timing and manner of resolution.

**Additionally, EDR, in many ways, facilitates the kind of information gathering and sharing commensurate with cost-efficient decision-making.** There may be situations in which additional information is legitimately only available through formal discovery; but there are also many situations in which it is not. In all instances, parties and their counsel may agree to information exchanges as part of any EDR process. In fact, EDR processes open lines of communication which often provide new and valuable insights leading to either (i) resolution or (ii) a sharper focus as to the information needed to consider available resolution options fostering streamlined, less-costly information exchanges on the path to resolution.

Utilized effectively, EDR can enhance the litigation process and help parties better understand the good, the bad, and the ambiguities of a case early on, as they privately and simultaneously evaluate and consider their options for resolution.

## IV. THE RESOLUTION ALIGNS WITH EXISTING ABA GOALS AND POLICIES

"*The courts of this country should not be the place where resolution of disputes begins. They should be the places where the disputes end after alternative methods of resolving disputes have been considered and tried*."

*~Sandra Day O'Connor*

Two ABA Goals seek to (1) improve our profession and (2) advance the rule of law. The proposed Resolution aligns with and seeks to advance both of those policies.

Improve Our Profession (Goal II): Under Goal II, the Resolution aligns with the objective to promote competence, ethical conduct, and professionalism.

An underlying tenet of EDR is the importance of engaging in early discussions with clients about their objectives for the representation, to assist clients in understanding the various dispute resolution options that are available, and in making informed decisions about their options to best advance and satisfy their objectives and interests, in the least amount of time and with the lowest cost. The importance of these discussions, and particularly in respecting client autonomy, is reflected in Model Rules 1.2 and 1.4, and Section 3 of the ABA Section of Litigation Ethical Guidelines for Settlement Negotiations (2002).[26] Committee Notes to Section 3.1.1 recognizes not only the assistance that early discussion about options of pursuing settlement provide to the client in making "better

[26] Model Rule 1.2 states that "a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued." Model Rule 1.4 states that "[a] lawyer shall … reasonably consult with the client about the means by which the client's objections are to be accomplished" and "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

informed decisions about the course of the dispute", but it also recognizes that such discussions "may reduce the risk of clients second-guessing their attorneys' strategies" if settlement occurs following substantial legal fees.

Advance the Rule of Law (Goal IV): Under Goal IV, the Resolution aligns with the objective to increase public understanding of and respect for the rule of law, the legal process, and the role of the legal profession at home and throughout the world.

The proposed Resolution seeks to advance public confidence in the legal industry's obligation "to serve as healers of conflict" and to do so in "the shortest possible time, with the least possible expense, and with a minimum of stress on the participants."[27] Because it promotes "the informed and voluntary use of" EDR by lawyers and "all interested parties," the proposed Resolution intuitively places procedural and substantive consideration on equal footing honoring the cornerstone attribute of ADR – self-determination. Resolutions obtained through an informed, voluntary and timely ADR process invite greater appreciation for and satisfaction with the legal system, which in turn can enhance confidence and satisfaction in its effectiveness and use.

## V. THE RESOLUTION ALIGNS WITH ABA SECTION OF LITIGATION ETHICAL GUIDELINES FOR SETTLEMENT NEGOTIATIONS

Through a Task Force, the ABA Dispute Resolution Section ("DRS") has studied and promoted Planned EDR as a method of dispute prevention for businesses. Continuing and expanding the discussion about EDR beyond businesses, in 2018 DRS formed the Early Dispute Resolution Committee, which now has grown to more than 300 members. In 2022, the ABA's Mediation Week program was a joint effort between the Mediation Committee and the EDR Committee entitled "*Winning from the Beginning*" which highlighted EDR benefits and strategies in business and beyond. The program's attendance was the largest in 2022 for the ABA Section of Dispute Resolution and was awarded Best Program of the Year by the Committee on Committee Development and Oversight. This resolution acknowledges the growing interest in EDR and aligns with the ABA Section of Litigation's Ethical Guidelines for Settlement Negotiations (2002) (the "Guidelines"), listed below.[28]

### Section 3.1 "The Client's Ultimate Authority Over Settlement Negotiations"

#### 3.1.1 Prompt Discussion of Possibility of Settlement

> A lawyer should consider and discuss with the client, promptly after retention in a dispute, and thereafter, possible alternatives to conventional litigation, including settlement.

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[27] Warren E. Burger, *Isn't There a Better Way?* 68 A.B.A. J. 274 (1982).

[28] See https://docplayer.net/2036237-Ethical-guidelines-for-settlement-negotiations.html The ABA recommends the Guidelines as a resource to facilitate and promote ethical conduct in settlement negotiations.

### 3.1.2 Client's Authority Over Initiation of Settlement Discussions

The decision whether to pursue settlement discussions belongs to the client. A lawyer should not initiate settlement discussions without authorization from the client.

### 3.1.3 Consultation Respecting Means of Negotiating Settlement

A lawyer must reasonably consult with the client respecting the means of negotiation of settlement, including whether and how to present or request specific terms. The lawyer should pursue settlement discussions with a measure of diligence corresponding with the client's goals. The degree of independence with which the lawyer pursues the negotiation process should reflect the client's wishes, as expressed after the lawyer's discussion with the client.

## VI. PRIOR ABA RESOLUTIONS

The ABA has adopted two prior resolutions which are similar to the proposed Resolution and which the proposed Resolution would further enhance.

**17A103** – encouraging ombuds as an effective means of preventing, managing, and resolving individual and systemic conflicts and disputes.

**16M100** – urging lawyers and all interested parties to increase the informed and voluntary use of ADR processes as an effective, efficient, and appropriate means to resolve health care disputes.

The ABA has adopted numerous other resolutions supporting the greater use of mediation and ombuds in different contexts, including 01A107D, 17A103, 88A103A, 98A101, and 20M104A.

The proposed Resolution is consistent with and supports these other ABA policies.

For all of these reasons, the resolution should be adopted.

Respectfully submitted,

Ana Sambold, Chair
Section of Dispute Resolution

February 2024

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## GENERAL INFORMATION FORM

Submitting Entity: Dispute Resolution Section

Submitted By: Ana Sambold

1. Summary of the Resolution(s). This Resolution encourages the informed and voluntary use of party-directed, non-adjudicative procedures to resolve disputes in a time-efficient and cost-effective manner (Early Dispute Resolution or "EDR"). Such procedures include, but are not limited to, early negotiation, mediation, and ombuds.

2. Indicate which of the ABA's Four goals the resolution seeks to advance (1-Serve our Members; 2-Improve our Profession; 3-Eliminate Bias and Enhance Diversity; 4-Advance the Rule of Law) and provide an explanation on how it accomplishes this.

   The Resolution aligns with and seeks to advance ABA Goal (2) Improve our Profession and ABA Goal (4) Advance the Rule of Law.

   Improve Our Profession (Goal 2): Under Goal 2, the Resolution aligns with the objective to promote competence, ethical conduct, and professionalism.

   An underlying tenet of EDR is the importance of engaging in early discussions with clients about their objectives for the representation, to assist clients in making informed decisions about their dispute resolution options to best serve their objectives and interests. The importance of these discussions, and particularly in respecting client autonomy, is reflected in Model Rules 1.2 and 1.4, and Section 3 of the ABA Section of Litigation Ethical Guidelines for Settlement Negotiations (2002). Committee Notes to Section 3.1.1 recognizes not only the assistance that early discussion about options of pursuing settlement provide to the client in making "better informed decisions about the course of the dispute", but it also recognizes that such discussions "may reduce the risk of clients second-guessing their attorneys' strategies" if settlement occurs following the accrual of substantial legal fees.

   Advance the Rule of Law (Goal 4): Under Goal 4, the Resolution aligns with the objective to increase public understanding of and respect for the rule of law, the legal process, and the role of the legal profession at home and throughout the world.

   The Resolution seeks to advance public confidence in the legal industry's obligation "to serve as healers of conflict" and to do so in "the shortest possible time, with the least possible expense, and with a minimum of stress on the participants." Because it promotes "the informed and voluntary use of" EDR by lawyers and "all interested

parties," the proposed Resolution intuitively places procedural and substantive consideration on equal footing honoring the cornerstone attribute of ADR – self-determination. Resolutions obtained through an informed, voluntary, and timely ADR process invite greater appreciation for and satisfaction with the legal system, which in turn can enhance confidence and satisfaction in its effectiveness and use.

3. Approval by Submitting Entity. The Council and Executive Committee of the Dispute Resolution Section voted to sponsor this Resolution on October 13, 2023.

4. Has this or a similar resolution been submitted to the House or Board previously? Yes.

5. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption? The ABA House of Delegates has passed resolutions which are similar to the proposed Resolution and which the Resolution would further enhance:

   17A103 – encouraging ombuds as an effective means of preventing, managing, and resolving individual and systemic conflicts and disputes.

   16M100 – urging lawyers and all interested parties to increase the informed and voluntary use of ADR processes as an effective, efficient, and appropriate means to resolve health care disputes.

   The ABA has adopted numerous other resolutions supporting the greater use of mediation and ombuds in different contexts, including 01A107D, 17A103, 88A103A, 98A101, and 20M104A.

6. If this is a late report, what urgency exists which requires action at this meeting of the House? None.

7. Status of Legislation. (If applicable) None.

8. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. The Dispute Resolution Section will conduct outreach through programs and publications to educate attorneys and the public about what EDR is, its various forms, its benefits, and ways to successfully engage in it.

9. Cost to the Association. (Both direct and indirect costs) None.

10. Disclosure of Interest. (If applicable) None.

11. Referrals.

    The ABA Section of International Law
    ABA Section of Labor and Employment Law
    ABA Section of Business Law
    ABA Section of Family Law
    ABA Section of Real Property, Trusts & Estates
    ABA Judicial Division
    ABA Section of Tort Trial & Insurance Practice
    ABA Section of Infrastructure & Regulated Industries
    ABA Senior Lawyers Division
    ABA Section of Intellectual Property
    ABA Section of Taxation Law
    ABA Section of Litigation
    ABA Section of State and Local Government Law
    ABA Young Lawyers Division

12. Name and Contact Information (Prior to the Meeting. Please include name, telephone number and e-mail address). *Be aware that this information will be available to anyone who views the House of Delegates agenda online*.)

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13. Name and Contact Information. (Who will present the Resolution with Report to the House?) Please include best contact information to use when on-site at the meeting. *Be aware that this information will be available to anyone who views the House of Delegates agenda online*.

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## EXECUTIVE SUMMARY

1. Summary of the Resolution.

This Resolution encourages the informed and voluntary use of party-directed, non-adjudicative procedures to resolve disputes in a time-efficient and cost-effective manner (Early Dispute Resolution or "EDR"). Such procedures include, but are not limited to, early negotiation, mediation, and ombuds.

2. Summary of the issue that the resolution addresses.

This Resolution is needed to address the problem of overcrowded dockets in courts. These growing backlogs inflict more delays and strain on limited judicial resources, which for litigants represents greater costs along with prolonged uncertainty and create a greater need and interest in EDR.

Although a significant number of cases will remain in litigation up until the eve of trial, most will not be tried. By engaging settlement discussions earlier, judicial resources in our congested courts are freed up, and the cases that require public adjudication get to trial in a timely manner and without costly delay.

3. Please explain how the proposed policy position will address the issue.

The direct and indirect costs attendant to delayed resolution through the courts are hurdles many parties do not want to (or simply cannot) clear. This Resolution seeks to bring awareness of EDR as an additional option for disputants, particularly for first-time litigants who are unfamiliar with the legal system and their resolution options.

4. Summary of any minority views or opposition internal and/or external to the ABA which have been identified.

None.