NIPPING IT IN THE BUD:
EFFECTIVE EARLY EVALUATION AND RESOLUTION OF FRANCHISE DISPUTES

Peter R. Silverman
Shumaker
Toledo, OH

Nancy Glisan Gourley
LQ Management L.L.C.
Irving, TX

William K Whitner
Paul Hastings LLP
Atlanta, Georgia

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NIPPING IT IN THE BUD: EFFECTIVE EARLY EVALUATION AND RESOLUTION OF FRANCHISE DISPUTES

Can the franchise 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.

Franchisors and franchisees each benefit from early resolution of disputes. By applying early dispute 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. For disputes involving ongoing relationships between a franchisee and franchisor, early resolution allows both parties to save time and money, and to focus on the common task of building the business and the brand. And for post-termination disputes, it is also in both parties' interests to resolve matters as quickly and economically as possible so that they each go on their way unfettered by the costs and distraction of litigation.

This paper addresses techniques and strategies for early dispute resolution (“EDR”) of franchise and other 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 franchise disputes. Section IV discusses a rigorous four-step, 30-day process for resolution of franchise disputes. Section V reviews the general principles of early case assessment (“ECA”), an effective first step to addressing early resolution. Section VI examines internal processes for avoiding, identifying, and resolving disputes, such as impact policies and ombudsmen programs. The paper finishes in Section VII with a discussion of applying EDR to the resolution of multi-party, systemwide, or potential class action disputes.

I. EARLY DISPUTE RESOLUTION

A. Aesop’s 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, does not work in today’s economy – business now wants to be the hare (no snoozing, though), and the hare always wins.

While business wants to be the hare, business litigators -- in-house and outside counsel -- have been just fine being the tortoise. When clients come to counsel with a dispute that needs to be resolved through litigation, counsel 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. Counsel 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, clients have bought it without blinking an eye. That just will not last. Soon enough, consistent with their everyday business reality, clients will tell their counsel they do not need a year of discovery and motions, and that they want disputes resolved quickly and cost-effectively. Soon enough, businesses will not tolerate litigation tortoises.
Dispute resolution traditionally just takes too long and costs too much. No more slow and steady wins the race. Now, fast and economical wins.

B. Why EDR Works: A Thought Experiment on Forecasting

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

The authors of this paper think so. More than 95% of cases do not go to trial.\(^1\) Using EDR, most of those disputes can be resolved in 30-60 days without the filing of a complaint.

Here is a thought experiment in forecasting that should help explain why this is the case.\(^2\) Consider the following five steps in a typical franchise dispute. Do not overthink the answers – go with your best initial judgment.

1. Assume that a trusted, informed colleague or client takes ten minutes to summarize for you a dispute that recently started, giving you the pros and cons; shows you the franchise agreement and the clause at issue; and tells you the state law(s) involved, and whether the applicable state(s) have a franchise relationship statute. With just that information, how confident would you be that you could predict the outcome of the dispute within a reasonable range (+/- 20%)? Our sense is that most experienced franchise lawyers would be reasonably confident they could do so at a 50-55% confidence level.

2. Now assume that your colleague or client gives you more key pieces of information (and does not hold back on acknowledging the negative facts) – maybe the few most material e-mails or the key participants’ recollections. How much more confident would you be in your ability to predict the reasonable range for the outcome? Would your confidence level significantly increase? Perhaps up to 65-70%?

3. Finally, assume that the dispute goes to litigation and you take discovery and the court denies both sides’ summary judgment motions. How much higher would your confidence level be in predicting the reasonable range of the outcome? In our experience, the increase is not likely to be more than another 10%, to 75 - 80%.

4. Now a comparison: Assume that you try to resolve the dispute (i) after receiving the core information in assumptions 1 and 2, as opposed to (ii) after discovery and motion practice as in assumption 3. How much difference would there be in your ability to resolve the suit on a reasonably objective basis? Our sense is that, notwithstanding the massive amount of information learned from discovery and motion practice, there is very little actual difference in the ultimate outcomes in the two scenarios.

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\(^1\) 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).

\(^2\) This section is adapted from Peter Silverman, Early Dispute Resolution – the Basics (Oct 28, 2016), https://www.americanbar.org/.../dispute_resolution/.../silverman_early_dispute_resolution.
And now the fifth step: Assume that you compare for your client the cost versus the value of six months of discovery and motion practice (and perhaps then mediation) in obtaining a fair settlement. Then you ask your client when the best time is to try to resolve the dispute. Our sense is your client will tell you, without hesitation, to try to resolve the dispute not just early, but as early as possible, without litigation.³

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 franchise business sector could rapidly develop and implement a new dispute resolution model. We 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.

II. RAPID CHANGE: MODELS FROM OTHER DISPUTE RESOLUTION PROCESSES

A. Mediation History – Generally and in the Franchise Community

In the late-19th century, mediation began as a process for resolving collective bargaining disputes.⁴ 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 1975.⁵ 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.⁶ 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.⁷

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³ This assumes that the client is interested in speed, economy, and obtaining maximum value. Clients may have other interests like, for example, spending the franchisee into submission out of pique or to deter others, or rallying other franchisees to join in an action.


⁵ See generally History of Mediation and Brief History, supra note 4.


The franchise community began to address mediation organizationally in 1992, following the passage of Iowa’s franchise protection statute.\(^8\) Recognizing that the relationship between franchisors and franchisees had reached a new low, general counsel from Holiday Inn and McDonalds gathered general counsel from seven other franchisors to discuss new, amicable dispute resolution methods that would be accepted by both franchisors and franchisees.\(^9\) They concluded that mediation was the best procedure to promote and, through the International Franchise Association, created the Franchise Mediation Program to promote the use of mediation. They selected CPR to administer the program.\(^10\)

Mediation was a regular topic at Forum events between 1993 and 2013.\(^11\) In 2008, the Franchise Mediation Program published Managing Franchise Relationships Through Mediation (CPR), in which top practitioners, general counsel, and franchisee business advocates extolled mediation’s effectiveness in resolving franchise disputes quickly and economically.\(^12\) By 2009, over 60 franchisors had signed the Commitment to CPR Procedure for Resolution of Franchise Disputes, which committed to using the Franchise Mediation Program and the CPR Procedure for Resolution of Franchise Disputes.\(^13\) Starting as a novel approach in 1993, mediation has now become a fixture in dispute resolution in the franchise community.\(^14\)

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\(^9\) *Id.*, at 8, n 3. The other seven franchisors were Burger King, Dunkin Donuts, Hardee’s, Jiffy Lube, Pizza Hut, Southland, and Wendy’s.

\(^10\) *Id*. At that time, CPR was known as the Center for Public Resources.


\(^12\) Articles were written by Matt Shay (IFA President), Scott McLester (Wyndham General Counsel), Marcus Banks (Vice-President Legal, Wyndham), John Kujawa (Vice-President-Franchising, McDonalds), William Hall (franchisee), Robert Purvin (Chair, American Association of Franchisees & Dealers), and Fred Schwartz (President, Asian American Hotel Owners Association), and outside counsel Mort Aronson, Harris Chernow, Arthur Pressman, Ron Gardner, and John Diennel. Interviews were done of Kay Ainsley (Managing Director, Michael H. Seid & Associates, Raxit Shah (President, Liberty Group of Companies), and outside counsel Richard Rosen.


\(^14\) By 2010, mediation had become so independently successful in the franchise community that the IFA’s Mediation Program became inactive as its mission had been accomplished. (Mr. Silverman served on the committee.) The IFA is now exploring formation of an Early Dispute Resolution Task Force.
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 are 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. 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”), 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 wildly successful in supplanting a significant percentage of traditional divorce litigation (and divorce mediation) as the preferred method for resolving contested divorces.

C. **Structured Negotiation**

In 1995, three civil rights lawyers 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 this dispute resolution process, which now goes by the name “structured negotiation.” 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.

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.

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


17 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).

18 Id.

19 Id. at 10.
There are two takeaways 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, make it more economical, and minimize or eliminate the need for lawsuits. The second is that the bar rapidly adopted these processes to the point of becoming fixtures in dispute resolution, as discussed more fully in Section III, below. The EDR process in this paper borrows from these processes to forge a new process for improving the speed, economy, and fairness of dispute resolution to the full spectrum of disputes.

III. TOOLS APPLICABLE TO EDR FROM OTHER DISPUTE RESOLUTION MODELS

As shown in Section II, a number of successful alternative dispute resolution processes exist beyond standard mediation. While none could be wholesale transported to the franchise business sector as a model, they offer effective tools that are (though some are not) 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.

A. Collaborative Law

Collaborative law is used primarily in family law. While its applicability to business disputes has been limited for reasons described below, its core concept of cooperative culture and procedures are directly applicable to EDR.

The starting point with collaborative law is that parties hire lawyers who subscribe to the collaborative law process and are trained in cooperative negotiating. 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.” Collaborative attorneys are not supposed to take advantage of points the other attorney misses or amounts miscalculated. If experts are needed, they are hired jointly. The parties are supposed to make full and honest disclosure of all relevant information.


21 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”).


23 Id., § 6.
The parties enter into a collaborative law agreement that governs informed consent, disclosure of information and documents, voluntary termination of the process, 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.

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 are not required to resign if the parties later choose to litigate. Cooperative law in the business context has evolved into planned early negotiation and includes the notion of hiring settlement counsel (discussed in more detail below).

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. 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. 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. If either party suspects that the other side is not...

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24 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.


26 See Uniform Law Rule 12. Id. at 59.

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

28 See Uniform Rules/Laws/Act. Id. at 9-11.


disclosing fully, either party may withdraw from the process at any time.\textsuperscript{34} (Parties may also withdraw at any time in the process for any reason.\textsuperscript{35}) Attorneys who discover that their clients are withholding information must terminate the collaborative process.\textsuperscript{36} The final protection is that settlement agreements may be challenged where one party failed to disclose material information after committing in the collaborative law agreement to disclose all such information.\textsuperscript{37}

Because this approach significantly departs from the attorney’s traditional role in dispute resolution, it raises a host of issues. One is ethical.\textsuperscript{38} 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 and state bar associations and legislatures have taken the position that practicing collaborative law in the family law area with a client’s informed consent does not violate the rules or obligations of professional responsibility.\textsuperscript{39} 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 require modification in a business setting.

- In a divorce proceeding, it is 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, the facts and law are usually contested and 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 the best interests of their children. Further, “best interests” is the standard applied by the court in divorce litigation. Because of this, both parties have an incentive to seek a positive relationship. Businesses may also have relationship concerns when they

\textsuperscript{34} See Uniform Collaborative Law Rules/Act, supra note 16, at 29.

\textsuperscript{35} See Uniform Collaborative Law Rule 5(f). Id. at 51.

\textsuperscript{36} Lande, supra note 32, at 1322.

\textsuperscript{37} 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).

\textsuperscript{38} See generally Possibilities, supra note 21, at 1330-1372.

\textsuperscript{39} 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 does not 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.
are in disputes with parties with whom they will have ongoing dealings (like franchisors and franchisees in non-termination related disputes), but both sides also have a strong self-interest that their positions are intended to protect. They also may be forever severing their relationship as is the case with franchise termination disputes. Thus, in business disputes, choices exist as to whether to work on maintaining a positive relationship. Parents arguably do not have the same choice.

- If a business case is not 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.\(^{40}\) For example, in disputes between franchisors and franchisees, each side often uses counsel who know their business, values, and approach to disputes. Both sides may resist using a process where its long-time counsel could not continue to represent them 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.\(^{41}\)

**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.\(^{42}\) Because the cases generally involve civil rights, particular attention is paid to the issue of who the claimants are and who they represent,\(^{43}\) and to fee-shifting statutes.\(^{44}\)

Structured negotiation does not require mutual withdrawal of attorneys if a settlement is not 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.


\(^{42}\) See Feingold, supra note 17, at 59-99.

\(^{43}\) Id. at 42-44.

\(^{44}\) Id. at 65-66.
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 used only for voluntary resolution of a dispute.\(^{45}\) This 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 is not necessary. Franchisees that do not have disputes with the regularity that franchisors do might be less inclined to hire separate settlement counsel, but franchisors’ 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-on litigation because it is more lucrative representation). 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 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 do not need to incur the time and expense of finding a new neutral.

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 mediator out of a 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 negates 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 structured litigation or arbitration to variants on standard arbitration such as baseball,\textsuperscript{46} night baseball,\textsuperscript{47} or high-low.\textsuperscript{48}

IV. ADOPTING AND IMPLEMENTING A 30-DAY EARLY DISPUTE RESOLUTION POLICY\textsuperscript{49}

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,\textsuperscript{50} 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,\textsuperscript{51} Guided Choice,\textsuperscript{52} and Early Active Intervention.\textsuperscript{53}

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 franchise disputes, absent unusual circumstances. It aims to resolve disputes, in 30, but no more than 60, calendar days.

\textsuperscript{46} 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.

\textsuperscript{47} 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.

\textsuperscript{48} 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.

\textsuperscript{49} 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 49\textsuperscript{th} Annual Legal Symposium 2016).


\textsuperscript{52} For a comprehensive description of and bibliography on Guided Choice, see www.gcdisputeresolution.com

\textsuperscript{53} 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).
A. The Necessary Conditions: Parties, Counsel and Sufficient Knowledge

For EDR to succeed, certain conditions need to be present, which we 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 cannot 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.54 Likewise, this paper’s authors believe the ABA Forum on Franchising, with its emphasis on collegiality, professionalism, integrity and education, provides the right culture for developing a critical mass of focused, well-trained lawyers with the skills and ethics to implement EDR successfully throughout the franchise business sector.

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 is a chart setting out the steps and the number of days:

<table>
<thead>
<tr>
<th>Process</th>
<th>Number of business days</th>
</tr>
</thead>
<tbody>
<tr>
<td>Early case assessment</td>
<td>6</td>
</tr>
<tr>
<td>Document and information exchange</td>
<td>7</td>
</tr>
<tr>
<td>Case valuation</td>
<td>3</td>
</tr>
<tr>
<td>Negotiation or mediation</td>
<td>6</td>
</tr>
</tbody>
</table>

Since franchisors set the terms of dispute resolution in their franchise agreements, EDR is primarily applicable as a process for franchisors to adopt. EDR is as favorable to franchisees as it is to franchisors, and should be promoted by franchisees. But there may be no institutional way for smaller franchisees to effectuate EDR as franchisors can do.

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.” A 30-day deadline does concentrate the mind, but not all disputes will be resolved in 30 or even 60 days. The policy should be to try to resolve disputes within 30, but no longer than 60, days. That way the policy is not deemed a failure simply by setting an aggressive deadline that may prove hard to achieve in every case.

Having said that, the 30-day goal should not be dismissed out of hand as unrealistic. Especially in the franchise area, preliminary injunction litigation is relatively common. In those cases, judges regularly require lawyers to do their research, file briefs, exchange documents, do depositions and try the case within 14-21 days. Framed properly, a 30-day resolution process provides the parties ample time to carry out the process appropriately.

One other clarifying point. This process applies to all business disputes, not just to franchisor-franchisee disputes. Thus franchisors should consider adopting this comprehensively as their dispute resolution policy – even when disputes involve parties other than their franchisees.

C. Implementing EDR

1. 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. Routine disagreements can and should be resolved through a phone call or meeting on the business side or by dialogue between counsel. Companies may also want to have a more streamlined process for certain types of disputes

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55 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).
rather than use the negotiation-centric process discussed so far. For example, one might look to an ombudsman program for franchisee concerns, which is discussed in Section VI, below.

Even with disputes that lend themselves to the four-step process, the policy need not be followed mechanically. The right tools should be used at the right time and in the right way. These tools could, but do not need to, 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. However, each dispute 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.

2. Announcing the Policy

To ensure success, the policy should be documented in writing, clearly explaining the rationale for EDR, and setting expectations internally and externally.

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 are far more likely to embrace the policy.

Management also needs to understand that the process cannot 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. That boomerangs quickly in a compressed process like this, hindering success, and needs to be avoided from the outset.

b. External Communication

Outside parties, especially franchisees, need to understand what the process is and why the franchisor 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 overly risk-averse. EDR works to both parties’ benefit or it does not work at all. It should improve relations between franchisors and franchisees because it aims to save both sides time and cost, while still being fair. Finally, it is also a good sales tool for the franchise system as it suggests the franchisor has high integrity in the way it deals with disputes.

Here is 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.

c. **Using a Neutral**

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. The neutral can be used beyond that if there is a need for help getting through any of the steps below. Cost-effectiveness, speed, and the extent of the other side’s cooperation will drive the decision. In significant cases, 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.

**D. 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.

If EDR is part of the dispute resolution clause in the franchise agreement, both parties are bound to comply. If it is not, the parties would need to agree to EDR and specify the steps to be taken and the schedule. If it appears that one party will not be cooperative or constructive, the parties would need to change course. Having an announced EDR policy should make it reasonably easy and effective for a franchisor to reach out to franchisees as a matter of course to seek resolution through EDR.

1. **The First Step: Early Case Assessment**

The first step is prompt, cost-effective early case assessment (ECA). ECA is discussed in depth in Section V as a stand-alone tool for early dispute resolution. Just the essential elements are reviewed here.

In practical terms, ECA means that when the franchisor or franchisee first learns of a dispute, it begins the investigatory process immediately through in-house or outside counsel. One issue to consider is whether to retain settlement counsel who specializes in franchise litigation.

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, which means looking for harmful as well as helpful documents and facts.

The ECA should provide a good idea of what a party already knows. A final step is to come up with a list of what is not known and what, if anything, needs to be known to properly assess the facts, law and each side’s leverage.

*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

There are different ways to obtain information, and the process does not require that one particular method always be used. There are four basic methods: (1) simply ask the other side for the information, and their counsel responds; (2) 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.

At this point in the process – the seventh business day – the parties should know what 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.

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 does not know about, there may be an incentive to try to resolve the dispute before there is any document exchange. If that is not 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 has not bought into the process. If that happens, the response could be to say that the broad request does not 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 will not 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/produced anyway, why not 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 may be used to try to 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:

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

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 on the likely cost of the matter, which party is likely to prevail, or the likely damages that are recoverable, it should want to understand 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 do not do it early and cost-effectively, they will 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, one should plan to 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. This involves a discussion of each side’s interests as well as 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 cannot 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 is needed to gain Sufficient Knowledge. This means that the expert would more likely be asked to prepare more of an executive summary than a full report.

Even with the request for only an executive summary, 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 will 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.

E. **The Next Step if the Process Does Not Result in a Resolution**

There will be times when the dispute cannot 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 will be able to provide strong guidance on this.

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F. Other Factors in Process Implementation

1. Establish the Ground Rules in Writing

Once the ground rules have been established with the opposing side, they should be set out in writing.


One way to start EDR is simply to announce it as a policy without changing the dispute resolution clause in the franchise agreement or designating it as a brand standard in a standards manual. That allows easing into the process as it becomes more widely understood and as the franchise system becomes more sophisticated in using it. Even if there is a change to the dispute resolution clause in the franchise agreement now, the parties will be resolving disputes under the prior clauses for many years, unless the franchise agreement permits mandating these kinds of provisions in a standards manual. So regardless, there will be a transition from prior dispute resolution methods to EDR.

If a franchisor wants to consider drafting an EDR clause for its franchise agreement or, if permissible, for its standards manual, part of the problem is that the principles and tools of EDR are not widely understood. The terms in EDR lack the precision and common understanding that, say, mediation has. Thus the clause would need to talk in terms of steps, and the franchisor may need to educate franchisees on how the process works. Posting the general policy on the web site would help that effort.

Another problem is that the first two of the driving principles of EDR require 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 clause could be as long and detailed as possible and it still would not work. There will need to be a process for working through that so as to avoid wasting time on EDR if it will be fruitless.

A proposed EDR clause is attached as Appendix A for consideration.

3. Practical Impediments to Implementation

Numerous objections can be raised as to why EDR will not work for the franchise 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 do not, 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. While some 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.

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 quickly. 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?

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57 To the extent that the principles of EDR become embraced, ethics rules could evolve to require lawyers to explain to all clients the options to use EDR for resolution of disputes.

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.\textsuperscript{59} 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.\textsuperscript{60}

4. Measuring Results

When implementing a comprehensive EDR program, many companies will not have historical data on the average length of time to resolve a dispute or the costs of litigation and arbitration. For counsel to champion the use of EDR, management will need some sense of whether the process delivers the promised cost savings. To that end, it is a good idea to gather the information that is available historically and organize it in such a way that it gives as complete a picture as possible of cost and timing of resolving various types of disputes. Then track the time to resolution of all disputes handled by the law department (or applicable outside counsel) and also the costs versus settlement offers made at various points, organizing the information by type of dispute. Outcomes can then be benchmarked against the value that the in-house legal team (or outside counsel, when they are involved) forecasted for the dispute. Regular and periodic review and evaluation of the program is critical to its success.

The 30-day EDR process described above would be a significant change in dispute resolution in the franchise business sector (or in business dispute resolution in general). Still, there are generally accepted practices that are widely used now for early resolution, which are addressed next.

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V. STAND-ALONE USE OF EARLY CASE ASSESSMENT (ECA) PRE-LITIGATION OR AS FIRST STEP ONCE LITIGATION FILED

Conducting an Early Case Assessment (ECA) pre-litigation or immediately after litigation is filed is one of the primary tools one can use for an EDR process. ECA is particularly valuable in circumstances where the financial risk is high, or where there are major reputation or precedent issues at stake. Additionally, ECA should be considered if there is concern for a potential pattern that will lead to more disputes by others in the franchise system. So what is it?

A. Process Defined

ECA is a brief but thorough analysis done at the beginning of a dispute that suggests it could turn into litigation (within 90-120 days) which helps a party assess risk, explore settlement options, both economic and non-economic, and develop a target EDR and/or litigation strategy from the outset. Though ECA stands for Early Case Assessment, it can and should be used well before litigation commences, and it need not be applied only to “cases.” In practical terms, it means that when the party first learns of a dispute, it begins the investigatory process immediately through in-house or outside counsel. Examples of this are the use of ECA in compliance reviews and any situations that suggest protracted disputes that will handicap the franchise relationship until resolved. While an ECA report generally should be in writing, it can take many different forms depending on the needs of the company.

1. Preliminary Review and Assessment of Available Facts and Law

Initial review should start with identifying the existing or potential points of dispute, interviewing witnesses, and reviewing key documents that shed light on the problem(s) or issue(s), including emails.

Explained earlier, the first step is determining the key internal players (e.g., finance for a royalty issue, the sales group for a misrepresentation issue, or the finance and the supply team if the complaint is about rebates).

The next step, gathering key documents, does not mean an exhaustive search of all possible files and email, but a tailored collection and review of the information needed to obtain Sufficient Knowledge. If, for example, the claim is that a sales representative made a financial performance representation, the franchisor might look at all e-mails between the sales representative and the franchisee, and one should pull the disclosure file to determine whether properly executed disclaimers were obtained.61

It is important, however, not to let numerous emails or other documents consume the process entirely, as the nature of ECA is case assessment and not simply data assessment.62 A balance must be struck, taking into consideration the size of the potential matter and recognizing that strategic assessments are the primary goal. A thorough review of the

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61 Under the Federal Rules of Civil Procedure and many state rules, parties need to preserve documents once they are on notice of a dispute or litigation is reasonably foreseeable. While that requires identifying all classes of potentially relevant documents to preserve, that is a different process from this Step-1, a limited culling of key documents.

underlying history should be done, and legal research should be conducted if necessary. Thorough review of the facts will be limited in some ways; for example, documents and witnesses for the opposing side may not be available.

The goal is to understand the case fully, which means looking for harmful as well as helpful documents. Knowing the weaknesses of a position allows for more accurate case valuation.

Interviewing the key players gets out the harmful facts as well as the helpful ones. Everyone should understand that bad news ultimately comes out sooner or later, preferably sooner for ECA purposes.

2. **Damages Assessment, Including Legal Fees and Costs**

Surprisingly often overlooked, a damages assessment is immensely important to an ECA. Proper assessment may need the consultation of experts. Aside from the expected recovery (or payout) and the out-of-pocket costs and legal fees, contractual provisions regarding indemnification and available insurance coverage can be relevant. If insurance coverage is available either for a defense or payment of a claim or both, then the economics of the dispute change.

3. **Forum and Venue Issues**

Part of the ECA includes assessing the judge, venue, and opposing counsel that may be relevant to the dispute. If there is potential for a jury decision, researching verdicts in the jurisdiction and likely jury charges is important. Local counsel can provide invaluable knowledge in this area.

4. **Non-economic Factors and Historical Information Regarding the Opposing Party**

Aside from a damages assessment, this is the second most overlooked aspect of many ECAs. In assessing other relationships with the present adversary, it is important to explore possible business solutions not necessarily related to the dispute. Other important aspects to take into account, particularly in the franchise arena, are the parties’ reputation and precedent issues for the system, impact on other potential litigation, any industry trends, and relevant disclosure requirements.

5. **Assessment of Each Party’s Objectives**

Another part of the ECA process is to develop an understanding of respective leverage. The goal is to reach the most advantageous resolution for the company through a fair process, and exercising leverage is fully consistent with this. Business objectives and risks for the disputes must be assessed, as the objectives and risk-tolerance should provide the framework within which everything else is considered.

An assessment of objectives must be more in depth than “simply win”. An assessment of objectives should prioritize and balance numerous factors, such as litigation cost, precedent, “copycat” exposure, regulatory issues, insurance coverage, marketplace reputation, and the ongoing business relationship where applicable.
6. Settlement Range and Non-Monetary Solutions

Analysis of the settlement range should be focused. Though it may be understandably tough when dealing with “early” case assessments, counsel should give specific settlement ranges with rationales. Aside from monetary solutions, a good ECA will involve thinking creatively upfront and analyzing non-monetary solutions before any litigation is filed or formal EDR procedures are undertaken.

7. Development of a Plan and Strategy

It is important to develop a plan prior to incurring significant expenses relating to the dispute. Of course a preliminary litigation strategy will be important if there is no realistic settlement plan, but all the EDR options should also be taken into account.

ECA should provide a good idea of what is currently known. One final step is to come up with a list of what is not known, including what, if anything, is needed to properly assess the facts, law and your and the other side’s leverage. It will be hard to avoid the standard approach, which is the need to know everything about what the other side has done and to see every relevant document. That is counterproductive to the process. Given the accepted wisdom that most cases turn on a small number of key documents, the goal should be to identify only information needed to attain Sufficient Knowledge.

8. The Report

The final step is the initial legal analysis. Some disputes will be factual, but others will raise issues of contract interpretation or otherwise require looking into specific case law, such as disputes regarding the effect of an integration clause or the enforceability of a non-competition covenant.

The analysis should be neutral and evaluative, not advocacy. The purpose is to allow for a realistic assessment by the decision makers and the structuring of resolution strategy. It should cover the following:

a. Short factual summary;

b. Short discussion of legal issues and governing law;

c. Leverage – both sides;

d. Respective desired business outcome;

e. Range of outcomes; and

f. What if any additional information and documents are needed internally and from the other side for Sufficient Knowledge, and why.
B. Flow Chart of Process

Below is a flow chart that diagrams the myriad and order of processes, team players (including area of involvement) and intended outcome of the ECA.

![Flow Chart of Process]

C. Most Common Objections to ECA

Instituting an ECA process may seem intuitive, but there are common objections to its formalization as a distinct and comprehensive procedure. Not only are many of these common objections based on incorrect assumptions, but in fact the opposite of the assumption is often true.

Objection #1: No need to formalize a process that already exists – More paperwork

Response: While many in-house and outside lawyers already conduct some form of ECA, a thorough analysis in writing leads to more critical and focused thinking towards an EDR or litigation strategy. Additionally, an informal ECA often ignores damages or non-economic factors, and the analysis tends to be more superficial.

Objection #2: Just another litigation expense – Not worth it

Response: While there may be concerns of increased costs, many companies have shown that ECA actually leads to better decisions about EDR strategies, cost savings on outside counsel, and litigation judgments. The truth is ECA often leads to earlier resolution with
lower costs. The alternative is generally later settlement with greater litigation costs. At a minimum, ECA can result in a more targeted EDR and/or litigation strategy.

The following is excerpted from an article appearing in Corporate Counsel regarding a Fortune 50 Company’s successful and cost-effective use of ECA as developed with the aid of the law firm of one of this paper’s writers.

When a lawsuit comes to the attention of XYZ’s litigation group the Early Case Assessment (ECA) process springs into action. The matter gets logged into the legal department’s tracking system. Within 60 days to 90 days, lawyers assigned to the case identify and interview witnesses: collect, review and report on relevant documents and assess the risks. The attorneys can also tap into a system designed by the legal department’s technology team and pull up any legislation or case law that could affect the dispute. Ultimately the litigation team can decide, early on whether it’s best to settle or take the case to trial.

The ECA is quintessential XYZ Legal, combining legal know-how with state-of-the-art tech (and a geeky name) to make the lawyers’ job more efficient. It’s also part of a core philosophy at the Fortune 50 company – a belief in the power of preventive law. Early case assessment, tracking cases’ cycle time (how quickly they are resolved), and using alternative dispute resolution methods (such as arbitration and mediation) have resulted in a dramatic drop in litigation and fees over the last four years, XYZ says its litigation costs fell from nearly 50% in a three-year span. “We spend a lot of money right up front [analyzing cases] but I can’t imagine an instance where knowledge of a case doesn’t pay for itself,” says XYZ’s vice president and senior counsel-litigation and legal policy.

The article goes on to state:

We were particularly impressed by the company’s ECA system, which tackles a case’s potential problems at the onset. It requires attorneys to determine the risks, direction, and strategy of a case from the start. With its requirements for early identification of witnesses and data collection, XYZ says, ECA has helped contribute to the dramatic drop in litigation and fees. Case cycle time too, has been reduced in that period from an average of 19 months to only 9.2 months. “There’s no doubt in my mind that being very good about assessment has saved

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63 Michele L. Stump & Jay Patton, Litigation: Effective use of early case assessment, Inside Counsel (Feb. 6, 2014), http://www.insidecounsel.com/2014/02/06/litigation-effective-use-of-early-case-assessment?page=2&slreturn=1496235822 (If developed and implemented properly, an ECA protocol can be an effective way to manage and, ultimately, reduce litigation driven legal spend.).

64 Jill Nowrocki, All Systems Go, Corporate Counsel (Apr. 18, 2007).
“You only fight what you need to fight.”

Objection #3: Analysis is too preliminary to be useful

Response: If an ECA is done properly, according to steps listed above, it can be an immensely useful tool, even early in the process. Spending extra time to more fully understand damages and non-economic factors is appropriate, because these two factors often drive settlement and litigation strategy.

Objection #4: Not helpful in highly complicated cases given volume of information

Response: ECA is usually most helpful when used in highly complicated cases. Developing a useful EDR and/or litigation strategy is even more important when the case is complex.

D. Most Common Problems

There are several challenges to conducting a proper ECA. A superficial or non-existent damage analysis will significantly handicap the effectiveness of an ECA report. It is also important that an ECA report not be too long, and it should contain an executive summary for busy executives. Tailoring the ECA to the recipient will increase its effectiveness and usefulness. It is also important that there be a commitment to writing. To be effective, an ECA must be focused and the process disciplined. The writing also needs to contain a commitment to a position with regard to liability and range of potential damages.

ECA must take into account its limitations, which include a lack of access to the other side’s documents and witnesses. An ECA is by definition conducted early in the process, so there will be unknown variables. When new information is learned it is important to update and continue to consider the ECA. The ECA should be consistently used as a tool to drive settlement and litigation strategy with appropriate updates.

Lastly, ECA should be used as a tool in a continuing effort for the team, composed of both in-house and outside lawyers, seeking a swift resolution to a dispute.

E. Relationship to Litigation Counseling and Use of Settlement Counsel

ECA should not replace litigation counseling, but it can provide a process to facilitate the best strategic approach to resolve a conflict. If they are well informed of the stakes, both economic and non-economic, all members of a litigation team will be better able to decide what decisions to make as the dispute moves forward. Hence, a properly done ECA is a vital tool to both litigation and settlement counsel.

65 Id.

F. Formal vs. Informal

Many companies perform some type of ECA, but it is often merely an informal process. Informal ECAs tend to be unwritten,\textsuperscript{67} and because of this they are generally less focused and comprehensive. Formalized ECAs will utilize written memoranda.\textsuperscript{68} This supports more critical thinking and is less likely to ignore damages or non-economic factors. When the process is formalized and includes non-economic factors, it is more likely to reach business goals, rather than simply litigation-based goals. Putting it on paper causes everyone involved to focus and reach consensus.

VI. DEVELOPING AND USING INTERNAL PROCESSES FOR AVOIDING, IDENTIFYING AND RESOLVING DISPUTES

One often overlooked element of early dispute resolution processes is the opportunity to resolve potential disputes before they become actual disputes. The following are some ways franchise systems approach this opportunity. Not every approach will work in each franchise system, but franchisors should consider these or similar approaches as part of the design of an overall dispute resolution strategy.

A. Involving the Franchisee Association or Advisory Council

Many franchise systems have either an independent franchisee association or a franchisor-sanctioned or franchisor-organized franchise advisory council, or both. Some franchise systems utilize these associations or councils as an aid in avoiding disputes or resolving them before they escalate. Absent a company-wide focus on EDR it might not be so obvious that treating the Association or Council as the pulse of the franchisee body can often function as the canary in the coal mine. If the same issue comes up repeatedly in the meetings of such bodies, whether from one or multiple sources, that can be an indication that the issue might turn into an actual dispute. Conversely, if a franchisor has identified an issue that it knows may meet resistance or it wants help presenting it to the franchisee body, raising that issue with the association or council and getting either its buy-in or input from its members can overcome many obstacles.

Some franchise systems also utilize individual members or committees of their associations or councils as “peer counselors”. If a franchisee is having difficulty succeeding in the franchise program or is having a particular problem with a process or program, the franchisor may engage the help of a peer counselor or mentor to provide guidance. Some may even have “certified training outlets” where one franchisee can provide training to another for a fee. All such programs must be carefully structured and properly documented, but they can be a useful tool to solve problems early and thus avoid disputes.

B. Utilizing an Impact Policy

One common area of franchise disputes is the granting of a new franchise that appears to an existing franchisee to be an encroachment on or unduly impacting the existing


\textsuperscript{68} Id. (describing the formal ECA as committed to writing).
franchisee’s business. Even in franchise systems that have strong contractual provisions insulating them from claims of this type (such as by offering areas of protection or defined territories and explicitly reserving all other rights) such concerns and disputes may arise. To allay the concerns of existing franchisees, many franchise systems will have “impact policies”. These may be include either mandatory or voluntary analysis of relevant markets and historical sales and specifying potential impact, while offering compensatory measures if the impact exceeds the levels anticipated by the analysis. Or they may merely provide for required notice to surrounding franchisees of the intent to grant a new franchise, with or without an offer to give the existing franchisee an opportunity to acquire the territory or location. At minimum, most franchise systems see value in being mindful of potential impact and taking any appropriate steps to minimize the potential risk.

C. **Ombudsman and Similar Processes**

An approach to early dispute resolution (or avoidance) that is not often used but has a great deal of potential in the right setting is the use of an in-house franchisee advocate or ombudsman. Instead of relying on outside “neutrals” to work with management and the franchisees to address disputes, an employee or representative of the franchisor will act as a facilitator in resolving disputes and issues between the functional areas of the franchisor and a franchisee, or between franchisees.

The premise on which such programs are built is that the in-house advocate/facilitator/ombudsman is respectful of and loyal to the brand and will promote the obligations of each party to work toward mutual success. The advocate/facilitator/ombudsman process would typically involve confidential dispute resolution, though the process may specify types of issue that can only be resolved by broader knowledge of the issue and the claimants. Such programs may be limited to smaller dollar disputes or non-monetary disputes, and the advocate/facilitator/ombudsman may be given a budget to resolve some types of disputes with cash payments. As a go-between in disputes with the franchisor or between franchisees, an advocate/facilitator/ombudsman who is knowledgeable about the system, the business, and the negotiation process can often achieve a satisfactory resolution in confidential, informal, and quick way. Companies that use such programs find they have the twin benefits of reducing litigation and also solving business problems that might otherwise impair the success of the enterprise.

In such programs, if the dispute or issue cannot be resolved confidentially and informally, the advocate/facilitator/ombudsman may give the parties the option of escalating the dispute into a regular dispute management program at the company. This might mean presentation of a formal claim, referral to mediation, or initiating some other formal process such as arbitration.

Advocate/facilitator/ombudsman programs may not be right for every company, and their success is certainly dependent on a number of factors:

- **The right person:** The advocate/facilitator/ombudsman must have significant connection to and knowledge of the franchisor, the brand, the franchise system, and the industry, as well as significant negotiation skills.

- **The right reporting relationship:** To be credible, the advocate/facilitator/ ombudsman has to be at a high enough level in the organization and reporting to a high enough level of the organization to be seen as effective.
• Buy-in from relevant constituencies: To be effective, the program must have the support of senior management, the law department, outside counsel, and the franchisee body.

• A well-documented and institutionalized program: It may take a while for franchisees and corporate departments alike to trust such a program, but thoughtful program design, clear and easy-to-understand documentation of the program, and frequent and meaningful communication about it are all key.

• Ongoing evaluation and tweaking: As with any EDR program, it is essential that results of advocate/facilitator/ombudsman programs be monitored to assure that the programs are both cost-effective and effective for the business. This will foster the sense of trust and buy-in that is essential to long-term program success.

D. Mandatory Pre-Suit Mediation

A more common EDR tool utilized in franchise systems is mandatory pre-suit mediation, requiring both parties to submit a dispute to mediation before engaging in litigation or arbitration. This requirement will typically be a provision of the franchise agreement itself. Most such provisions contain carve-outs favorable to the franchisor, such as the ability to seek injunctive relief for trademark infringement and to pursue immediately certain collection matters. Unless the process calls for the franchisor to bear the cost of the mediation, the burden on the franchisee may be too great to encourage the franchisee to make full use of the process.

VII. APPLYING EDR PROCESSES TO MULTI-PARTY, SYSTEMWIDE, OR POTENTIAL CLASS ACTION DISPUTES

Early dispute resolution may not be appropriate for all multi-party or systemwide disputes. The complexity or the stakes may be too high to place a premium on swift and economical resolution. Nonetheless, EDR principles can still be used, though modified to reflect the characteristics of the dispute.

Resolution of multi-party or systemwide disputes presents special challenges of grouping, sequencing, and personal dynamics. Discussing these concepts is easier with a hypothetical. So assume for this discussion that

(i) a franchisor and a franchisee are litigating a termination case where the franchisor is seeking past-due royalties and future royalties as lost profits;

(ii) the franchisee has filed a counterclaim that the termination was done in bad faith; and

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69 This section is adapted from Peter Klarfeld, Michael Lewis, and Peter Silverman, Mediating Franchise Disputes, ABA 32nd Annual Forum on Franchising W-12 (2009).

70 For a general discussion of multi-party mediation in a non-franchise setting, see James C. Freund, Three’s a Crowd – How to Resolve a Knotty Multi-Party Dispute Through Mediation, 64 Bus. Law. 359 (Feb. 2009); and James C. Freund, Anatomy of a Mediation (PLI 2012).
(iii) in discovery, the franchisee’s counsel learns that the franchisor made misleading written earnings claims outside the FDD to their client and other franchisees.

The system’s 80 franchisees, most of whom are reasonably successful, join together to retain the litigating franchisee’s counsel to represent them as a group.71 But they are not all seeking the same outcome. Some want individual damages or other concessions; some want rescission; some want systemwide changes; some owe back-royalties to the franchisor or are close to default and would like to be relieved of their liabilities; and a handful are in litigation or are protesting recent terminations. The parties decide to apply EDR principles to resolve the situation, but recognize that the complexity of the matter and the high stakes will likely require adapting the rules to make them work in a system-wide dispute.

With this many differing interests, the parties initially need to classify the franchisees into groups based on their differing legal situations under the applicable statute(s) of limitations. Once this is done, each side can perform the early case assessment and document and information exchange as would be done with individual disputes. One major difference from an individual dispute is that more time will be required to handle the different analyses based on different situations, and the franchisees’ counsel will need more time to facilitate document and information sharing with multiple franchisees. The majority of the documents and information exchange may be focused on the group of franchisees who seek to use the discovery rule, as that issue is very fact-sensitive. Given the complexity of handling multiple parties, a mediator would likely be needed to facilitate these initial steps.

The next step, case valuation, also requires addressing the groups separately. Liability may be easy to predict for those within the statute of limitations, and for those clearly beyond it. The analysis would be more difficult for those who plan to use the discovery rule. Damages analyses also require breaking down the franchisees by groups, and analyzing potential damages under rescission or benefit of the bargain. Each side would need to consider various litigation scenarios to project the likely attorneys’ fees each would incur.

The mediator would then need to work with just the lawyers to develop the critical path for negotiation. Franchisee counsel may want to mediate all the groups together to maximize the opportunity for each group of franchisees to benefit from the leverage of the entire group. The franchisor may demand that each group be mediated separately – believing, for example, that there is no reason to have any discussion with franchisees clearly beyond the statute of limitations. Or the franchisor may want to break down the discovery rule groups into individual cases as each is different. To break the impasse, a mediator would need to focus on satisfying both sides’ general interests – for example, group mediation probably expedites resolution, but steps are needed to protect the franchisor’s interest in addressing individual situations individually. This requires brainstorming a fair process.

The mediator needs to make sure that the overall franchisee group has clear communication channels and delegations of authority for decision-making. Will the overall group

71 A lawyer in this situation faces a host of ethical issues in representing clients with some interests in common and some that are not or that may even clash. Those issues can be further complicated if the attorney takes the matter for a contingency fee. A discussion of the ethical issues of this type of group representation is beyond the scope of this paper. A mediator, though, needs a sophisticated understanding of the benefits, tensions, and challenges that arise from the franchisee group’s having one counsel, and the possibility that new counsel may need to enter if conflicts become too acute for one counsel to represent all parties.
have a decision committee? Will each smaller group have its own decision committee? Who has authority to negotiate? Who has authority to bind?

Once the communication lines and delegations of authority are set, the mediator needs to probe each group’s interest further in terms of business issues and personalities. The mediator also needs to explore resolution issues with the franchisor. Once the mediator understands the basic issues and the personalities, the mediator needs to decide whether, to sequence discussions or to address all issues simultaneously. This is a similar dynamic to the question of whether to have separate mediations for the separate groups.

After making the sequencing decisions, the mediator needs to decide whether to continue shuttle diplomacy or whether to schedule an actual joint mediation session. At some point, shuttle diplomacy loses its effectiveness. Scheduling is difficult. Parties stall and delay. No one faces up to the need to make decisions. If the parties have decided to use the principles of early dispute resolution, the mediator should be able to press parties to move quickly to the formal mediation session.

It is likely that the parties will decide on one or a few different mediation sessions as opposed to 80 individual mediations. The sessions need to be highly structured or they can become chaotic and counterproductive. Sufficient time needs to be set aside, as multi-party mediation often requires an initial multi-day session to make significant progress.

After the initial session, the mediator will likely face new sequencing decisions. The mediator needs to communicate these decisions clearly to all parties so that no group feels it is being ignored or sacrificed. So long as all the parties continue to trust the mediator, the mediator can then focus on resolving the claims of each group on its own terms, or can seek to nail down universal terms that would apply to all franchisees.

VIII. CONCLUSION

While sea changes in legal processes are not easy to create and may take a long time to implement, the authors of this paper believe that lawyers in the franchise sector can boldly step into the EDR process and bring about that change, to the benefit of both franchisors and franchisees. It will take shedding old habits, learning new skills, changing expectations, developing a culture of trust, and overcoming lawyers’ self-interest that is inherent in lengthy, expensive litigation. Because of the collegiality and learning culture of the Forum on Franchising and the IFA Legal Division, the franchise bar is well-suited to making these changes and delivering better value to the franchisor and franchisee clients they serve.
APPENDIX A – A PROPOSED EDR 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 follows:

3. 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.

   a. 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 request for information and documents as much as possible. By the end of the sixth business day, each party shall serve its request, if any, on the other side for information and documents.

   b. 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.

   c. 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.

   d. 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.

   e. Every claim of each party is tolled from the date of initial notice of the dispute until 14 business days following the termination of the EDR process.

   f. During the 30-day period, nothing in this section prevents (i) either party from seeking preliminary or emergency injunctive relief in court [or with the arbitration administrator], or (ii) on three-business-days’ notice, a party from filing for arbitration if the other party does not cooperate in the EDR process.
Peter R. Silverman

Peter Silverman has extensive experience in the area of commercial litigation and general business counsel. He has substantial experience in a number of specialty areas, including franchising, alternative dispute resolution, intellectual property, securities, and antitrust.

Peter has been an active arbitrator since 1986 and mediator since 1990. He is a member of the AAA’s Large, Complex Case Arbitration Panel, the CPR Panel of Distinguished Neutrals, and the Ohio Chapter of the National Academy of Distinguished Neutrals. He teaches seminars nationwide and writes widely on alternative dispute resolution.

In 2016 and ten prior years, Franchise Times® recognized him as one of the nation’s top 100 franchise lawyers. Best Lawyers lists him as one of America’s best Arbitration, Commercial Litigation, Franchise Law, Litigation - Intellectual Property, Litigation - Securities, and Mediation lawyers, and Ohio Super Lawyers® and the International Who’s Who of Business Lawyers recognize him in franchise law. In 2017, Chambers USA, named Peter a Recognized Practitioner in Franchising (Nationwide).

Peter currently serves on the Early Dispute Resolution Committee of the ABA Section of Dispute Resolution, and chairs the Dispute Resolution committee of the Ohio State Bar Association. He was chair of the Litigation and Alternative Dispute Resolution Committee and on the Governing Committee of the ABA Forum on Franchising. In 1989, he received the Ernst and Young / Inc. Magazine Entrepreneur of the Year Award for his work in helping business owners start and grow their businesses, and is a member of the University of Toledo and Bowling Green State University Entrepreneurial & Business Excellence Hall Of Fame. In 2014, his business partnership owning the Oasis restaurant chain was also elected to the Entrepreneurial & Business Excellence Hall of Fame. He formerly served on the Toledo City Council, the Toledo School Board, and the Ohio Casino Commission.

Nancy Glisan Gourley

Nancy Glisan Gourley is Vice President-Franchise and Associate General Counsel for LQ Management L.L.C., a wholly owned subsidiary of La Quinta Holdings Inc. (NYSE:LQ). La Quinta is an owner, manager and franchisor of more than 880 hotels in the US, Canada and Latin America. Ms. Gourley is responsible for corporate and franchise legal matters and the Franchise Administration function. Prior to joining La Quinta in 2011, she was Senior Counsel for Hilton Worldwide, Inc., General Counsel for Spatality, Inc., and Corporate Counsel for Accor North America, Inc. Ms. Gourley is an honors graduate of Oklahoma State University and the University of Tulsa College of Law. She practiced law in Tulsa, Oklahoma for 20 years before moving to Dallas and entering the in-house counsel role. She served in various leadership positions in the Oklahoma and Tulsa County Bar Associations, including serving on the Board of Governors of the Oklahoma Bar Association from 2000 to 2003. She has been a member of the ABA Forum on Franchising since 1985, has been a frequent speaker at the Forum, and served on the Governing Committee from 2000 to 2002 as Chair of the Litigation and Dispute Resolution Division.

William K. Whitner

William K Whitner is a business litigator whose focus is on complex civil corporate matters. His wide-ranging substantive commercial experience includes franchise and contract disputes, business tort litigation, and intellectual property litigation. He has represented large
global, national, and local franchisors and manufacturers in state and federal courts and arbitrations around the country on matters involving claims such as trademark and trade dress infringement, wrongful termination, false advertising, breach of restrictive covenants, and misappropriation of trade secrets.

Mr. Whitner is an active member of the Franchising and Litigation Sections of the American Bar Association, a charter fellow of the Litigation Counsel of America, and a fellow of the Lawyers Foundation of Georgia. He has been selected for inclusion in The Best Lawyers in America for franchise law, and is routinely identified by Super Lawyers. He is “AV” rated by Martindale-Hubbell.

Mr. Whitner graduated with honors from Georgetown University and completed his law studies at Yale Law School.