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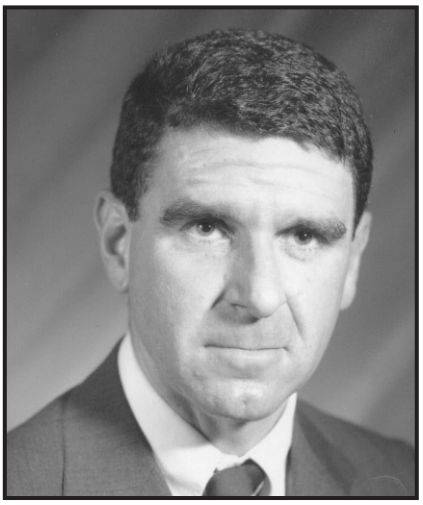
Finding The Most Efficient Forum For Resolving Disputes In Today's Corporate World

The Editor interviews ***The Honorable William A. Dreier,*** *Presiding Judge, Superior Court of New Jersey, Appellate Division (Retired), a Member of Norris, McLaughlin & Marcus, P.A., and* ***Richard K. Jeydel,*** *Secretary & General Counsel, Kanematsu USA Inc. Questions about this article can be addressed to Judge Dreier at (908) 722-0700 or wadreier@nmmlaw.com or Mr. Jeydel at (212) 704-9482 or rjeydel@kanematsuusa.com.*

The Honorable William A. Dreier



Richard K. Jeydel

Editor: How do arbitration and mediation differ?

Dreier: Arbitration is basically like litigation but before a neutral or panel of neutrals chosen by the parties based on the qualifications they think will be the best suited for the case. Very often the neutral is a retired judge or practitioner, but sometimes a non-lawyer with special expertise is selected. The parties can also select the American Arbitration Association (AAA) or other rules that they think will work best.

Like arbitration, mediation enables the parties to select the neutral to hear the case. Unlike in arbitration, the neutral in mediation will not decide the case but rather will bring the two sides together to facilitate their agreement on a settlement.

If the case involves just dollars, reaching settlement is sometimes hard to do. Most often, however, major commercial disputes involve things other than just dollars. The parties may have future contracts that enable the settlement to encompass remedies outside the options available in the courtroom. As a result, the parties come away not feeling that they have won or lost but rather relatively good about the result. Leading discussions back and forth between the parties to reach a conclusion satisfactory to both sides requires tact, diplomacy and perseverance on the part of the mediator.

Editor: What are the characteristics of a good mediator? Do considerations differ when selecting an arbitrator?

Dreier: The mediator must have the characteristics that engender the confidence of both sides and must be willing to put in the hard work necessary to understand the case. The mediator must also have absolute integrity and impartiality. A good mediator also must have received extensive training to understand the psychology of the settlement process.

As well as a mediator's ability to apply psychology as well as the law involved, an arbitrator must know the AAA or other rules chosen by the parties for the arbitration and how to apply them. An arbitrator also has to know how to focus the proceedings so that they do not go on and on and on.

Editor: Please tell our readers about the formation of The Resolution Group.

Dreier: Several years ago, Bob Margulies, president of the Justice Marie L. Garibaldi American Inn of Court for Alternative Dispute Resolution and member of the New Jersey Supreme Court CDR Committee, and I began discussions about ways to bring together some of the area's top mediators. Although thousands of lawyers and retired judges have been saying they are mediators, we wanted to find experts who were sophisticated in handling high-level, high-risk commercial cases and had significant training in facilitated mediation. Our thought was to form a group so that outsiders would know that pre-screening had

validated the qualifications of the group's members.

We're very proud of the result – the formation of The Resolution Group, which is comprised of three former N.J. Supreme Court Justices, a retired Chief Judge of the Third Circuit, two former Presiding Judges of the Appellate Division, a former Assignment Judge from New Jersey's largest county and a highly-respected Chancery Judge, along with six practicing lawyers who are active mediators and arbitrators, three of whom have received the prestigious Boskey Award as ADR Practitioner of the Year.

Editor: Please describe The Resolution Group's collective expertise.

Dreier: With very broad ranges of experience, the group collectively has seen virtually every type of dispute, including those arising in the areas of general business, commercial, construction, contract, education, employment, engineering, environmental, franchise, health care, insurance, intellectual property, international, labor management, partnership, personal injury, probate, products liability, professional malpractice, public policy, real estate, securities and telecommunications.

Editor: What contributes to making mediation a cost saver rather than an expensive waste of time?

Dreier: A good mediator will talk with the parties about their willingness to reach a negotiated conclusion. If one or the other party does not really want to resolve an issue, then everyone's time is being wasted.

Editor: How can costs associated with mediation or arbitration be most effectively managed?

Jeydel: The key to cost control is to match the neutral to the dispute. This may be more art than science, but there are a number of common errors that I see time and again. In the mediation context, there is a school of thought which proclaims that subject matter expertise is of no importance, and that masters of the technique require nothing more than that. I disagree. As an in-house attorney regularly representing clients in private and court-annexed mediations, I have come to the firm belief that familiarity with the underlying business area or type of transaction, as well as the applicable law, can make all the difference in building credibility with all participants and getting the job done efficiently. Arbitration costs can be limited dramatically by drafting a provision that carefully limits discovery, requires realistic times to hearing and award and, perhaps most important, using an established provider with rules and procedures that have stood the test of time. We use the AAA and its International Centre for Dispute Resolution. (A number of the Resolution Group's members are AAA panelists.) I know that I will be able to choose from a pool of qualified, trained, readily available neutrals, and that I can shape the size and attributes of the panel to meet the needs of the case.

Editor: What issues should be considered by in-house counsel when handling a multi-party case?

Jeydel: Multi-party cases present unique challenges in both arbitration and mediation. I would want to know that a mediator for such a case has had considerable experience (and success) in dealing with the shifting alignments and other complexities of such negotiations before selecting her or him. Because joinder and consolidation are, in most jurisdictions, far less readily available in arbitration than in court, careful thought must be given to this issue when drafting. At times, multiple actions are unavoidable, but our experience has been that having the main disputants in a forum of our own choosing is far preferable to letting ancillary parties place the entire matter in their home forum.

Editor: How important is it to have contract clauses specifying the use of ADR?

Jeydel: I believe that it is vital to have carefully considered ADR provisions in every contract, including all preprinted forms, such as confirmations of purchase and sale. Once the dispute occurs, negotiating such terms in a calm and fair manner can be virtually impossible. We always start with the basic AAA language. Frequently, we will "layer" techniques, starting, for example, with direct negotiations, and going from there to mediation and binding arbitration if the preceding attempt has not resolved all issues within a stated period of time.

Editor: What role does decision-tree and other technology play in ADR?

Jeydel: There are a number of large law departments, such as GE's, that use sophisticated quantitative or selection filters in deciding how to resolve their disputes. Certainly, in the presentation of cases to a neutral, technology of the types now commonly found in court are in general use. However, because the great virtues of ADR lie in its efficiency and speed, it is important to understand that early mediation and reduced discovery reduce process costs over time for all departments, large or small. For most cases, I have been able to eliminate depositions and interrogatories, court reporters and pretrial submissions. With the multijurisdictional practice rules now coming into place, it is also possible to use counsel of choice instead of local attorneys not otherwise involved with your client or the type of matter at hand.

Editor: What new developments do you anticipate in the ADR field?

Jeydel: Our area has been relatively slow to utilize ADR. I hear and argue cases throughout the United States and internationally, and believe that mediation, arbitration and a number of other methods will be growing in use here and elsewhere because the experience has been so positive where the techniques are more firmly established. One of the challenges is to bridge the gap, both in firms and corporate law departments, between the transactional attorneys who draft (or don't draft) the governing provisions, and the litigators implementing them. In the future, there will be a more widespread recognition that mediation and arbitration are not just "alternatives," but the most cost-effective means of resolving essentially all corporate disputes.

Editor: Thank you for telling our readers about The Resolution Group. Where can they learn more about its services?

Dreier: Disputants can retain any member of The Resolution Group or seek a referral from the panel. The Resolution Group's structure provides no fee sharing or added administrative costs. Each provider will bill directly for services performed at the individual's usual market rate. More information is available at www.resolvethedispute.com.