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Experts Identify ADR Trends And Best Practices

The Editor interviews Robert B. Davidson, Executive Director, JAMS Arbitration Practice; The Honorable William A. Dreier, Member, Norris, McLaughlin & Marcus, P.A.; The Honorable H. Curtis Meanor, Member, Podvey, Meanor, Catenacci, Hildner, Cocoziello & Chatham; Larry Parker, Director of Corporate Communications, American Arbitration Association; Bennett G. Picker, Partner, Stradley Ronon Stevens & Young, LLP and Chair of firm's ADR Practice Group, and Mark A. Welge, President, Welge Dispute Solutions, LLC.

Editor: In which areas do you anticipate that the use of ADR techniques will grow in the coming year?

Davidson: JAMS has experienced consistent growth in the arbitration and mediation of domestic and international complex business disputes. We have seen significant increases in the areas of insurance and reinsurance coverage, and multi-party disputes of all kinds, particularly contract and construction claims, contracts of a technical nature (often IP-related), and class actions.

There has also been marked growth in international arbitration and mediation. Last year JAMS became a founding member of the International Mediation Services Alliance (known as MEDAL) with the leading mediation providers in Europe. While arbitration has been an accepted and common ADR technique outside of the United States, the mediation of complex disputes is just gaining acceptance.

Growth in all of these areas is attributable to both the increased level of skill exhibited by neutrals and the increasing experience of in-house and outside counsel in the use of ADR techniques.

Dreier: We're seeing larger disputes being

referred to mediation, particularly to resolve international matters. For example, the new AAA International Centre for Dispute Resolution often refers major cases to mediation, even if they are already in arbitration. Resolving these larger cases through mediation generally consumes considerably less time and money than if they had been handled by litigation.

In the arbitration area, I also see that corporate America has awakened to the fact that we have a vehicle other than the court system to resolve major cases. Not only does resolving cases through arbitration incur less expense than litigation, but also it enables the parties to avoid the publicity of a court case. The confidentiality element of arbitration is attracting more and more cases.

Meanor: I expect that companies will increasingly use ADR to resolve intellectual property disputes. Because the Internet makes it easier for users to copy books, music and software, there has been an increase in the number of copyright infringement cases. The time and expense it takes to litigate these cases makes ADR a more viable mechanism than litigation for resolution.

ADR can help ensure that the case is heard by a neutral with considerable intellectual property experience. An experienced neutral, who can sift through the information and make a decision more efficiently than a judge who does not handle IP matters on a regular basis, contributes to the speed of reaching resolution.

Parker: ADR users will continue to seek benchmarks and leading practices for dispute resolution. As part of our mission of service and education in the ADR field, AAA has studied what we call Dispute-WiseSM Business Management practices

extensively since 2003. Our studies show businesses that are most successful tend to focus on dispute resolution techniques that are more likely to preserve relationships with customers, employees and suppliers. The same studies indicate that what the AAA calls "dispute-savvy" businesses often choose arbitration, mediation, and other ADR methods with the goal of quickly and effectively resolving disputes to the best of both parties' satisfaction.

Picker: One likely area of growth in 2006 will be the increasing use of mediation (as opposed to arbitration) of patent disputes. For many years, patent disputes have been regarded as too important or too strategic to warrant mediation, especially early in the life of a dispute. In the past few years, however, companies and patent practitioners have begun to realize that mediation offers an opportunity to achieve significant benefits. Given this fact and the recent proliferation of patent disputes, CPR and AAA have formed patent dispute resolution panels and the U.S. Court of Appeals for the Federal Circuit has just adopted a mediation program.

We are also likely to see significant growth in the use of mediation in regions such as the mid-west, northeast and mid-Atlantic states as they begin to catch up with Florida, California and Texas (which have led the way for the rest of the nation). Additionally, in an increasingly global marketplace, we are likely to see an increasing use of mediation to resolve disputes in cross-border transactions, especially in Europe, Latin America and China.

Welge: I anticipate growing use of mediation and arbitration of intellectual property disputes. This growth will be fueled by: the expansion of those and other ADR techniques as a generally favored option to litigation; the increased establishment of court-adjunctive ADR programs such as

those already used at the federal district court level and by the U.S. Court of Appeals for the Third and Federal Circuits' appellate ADR programs; the adoption of the RUAA by more state legislatures; the increased focus on and assistance with IP cases afforded by ADR administrators, such as the National Arbitration Forum, National Arbitration and Mediation, American Arbitration Association, CPR Institute for Dispute Resolution and International Chamber of Commerce; and the increased use of ADR clauses in IP contracts, licensing agreements and R&D ventures. The complexity of IP disputes and the costs and time necessary to litigate them militate in favor of using ADR.

Editor: What best practices can in-house counsel use to enhance the ADR experience for their clients?

Davidson: First, in-house counsel should educate themselves, their outside counsel, and their in-house staffs on the various ADR techniques available to resolve disputes at various stages. They should not assume that they are conversant with all the available techniques simply because they appreciate the fact that mediation or arbitration is an option. ADR techniques have been refined to the point where they have become much more sophisticated and, therefore, much more effective.

Second, in-house counsel should explore ways in which these techniques can or should be invoked in a neutral manner, one that is not believed to signal weakness or an inappropriate eagerness to settle. Our experience demonstrates that the fear of showing weakness is usually far greater than the reality would warrant. Mediation has become such an accepted part of resolving complex disputes that suggesting mediation should not be a problem. Concerns can also be ameliorated by the inclusion of so-called "step clauses" in contracts which call for negotiation or mediation as a condition precedent to arbitration or litigation.

Dreier: Clients have to be educated about how ADR differs from the traditional courtroom approach to resolving disputes. Among the myriad differences between mediation and litigation are the confidentiality I mentioned before, informality of the proceedings, and the ability to speak your mind without fear that your state-

ments will be used against you in litigation as it develops.

With respect to arbitration, in-house counsel have to train their clients and work with any outside counsel they retain as they would with court proceedings. They need to be aware that arbitration typically requires less discovery and proceedings are more informal than in litigation.

Very important is the choice of the mediator or arbitrator. Especially in larger proceedings, the neutral should have sufficient specialized knowledge related to the type of case being handled. The case will proceed much faster and more efficiently if the neutral does not have to learn terminology and the basics of the field. The neutral's expertise can then be applied to resolving the dispute rather than to learning a field on a very short notice.

Meanor: In-house counsel should always tailor ADR clauses to fit their client's specific needs. It's generally very helpful to begin ADR with a round of mediation. If the case moves to arbitration, the parties should not select the arbitrator because a considerable amount of time can be wasted on the selection process. In order to prevent this, ADR clauses should state that the arbitrator be selected by the ADR service provider. This can include any of the recognized arbitration service providers such as CPR, JAMS, AAA, or National Arbitration Forum. The selection would be subject to specific qualifications set forth by the parties in the ADR clauses.

In my experience, I have found that parties should agree to have one arbitrator sit on their case rather than a panel of experts. This makes the process more efficient because there is less cost and less administrative coordination than if two or more arbitrators are involved.

Parker: The Dispute-Wise studies found that the most dispute-savvy businesses considered the full spectrum of legal disputes as a portfolio – where the focus was not on "winning" each individual dispute through protracted litigation but on "winning" back the loyalty of Stakeholders who will stay with you for the long haul if you treat them with fair-mindedness and integrity when disputes inevitably occur.

Other best practices include:

1. Integrating legal operations into the core business. As one in-house counsel said perceptively, "As a company, we can

have 5 percent of our assets tied up in litigation, or 2 percent in litigation and the other 3 percent in R&D. To my chagrin, I am not a profit center – but I can save money."

2. Always seeking to settle cases earlier rather than later. For example, use "triage" to quickly settle cases that might be "winnable" in litigation, but are not worth the resources or cost to goodwill to do so. And use the feedback from ADR outcomes to develop policies that can help prevent many disputes altogether in the future.

Picker: To achieve the greatest benefits from an ADR approach to dispute resolution (including the saving of time and money, the preservation of relationships and the potential for creative business-driven solutions), a company should have in place a well defined program of conflict management. The foundation of any such program should be a specific plan to avoid disputes and to identify and resolve disputes at the earliest possible stage. In order to achieve these benefits, in-house counsel need to be a champion for ADR within the company, secure the buy-in of management, commit the necessary resources for ADR education and training, commit to a sophisticated and individualized approach to ADR provisions in contracts and insist that outside counsel address ADR in meaningful ways.

Welge: In-house counsel can best enhance the use of ADR techniques to resolve IP disputes by carefully crafting mediation and arbitration clauses into their IP contracts. Kevin Casey presented a thorough checklist to consider in drafting arbitration clauses for IP matters in his November 2005 article for *The Metropolitan Corporate Counsel*. I would add to that excellent list a number of other pointers for in-house counsel. First is the necessity of carefully documenting the dispute. Supportive documentation is crucial to the arbitration process. Second, preparation is key to mediation or arbitration. An important part of preparation for any ADR process is a thoughtfully devised strategic plan and well-articulated goals. What are my expectations for the process? What relief must be obtained? What is my BATNA (Best Alternative To A Negotiated Agreement) and WATNA (Worst Alternative To A Negotiated Agreement)?