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ADR – Legal Service Providers And Law Firms

The Growing Popularity Of ADR

The Editor interviews Curtis Brown, General Counsel, The National Arbitration Forum; The Honorable William A. Dreier, Member, Norris, McLaughlin & Marcus, P.A. and former Presiding Judge of the Appellate Division of the Superior Court of New Jersey; Keith R. McMurdy, Principal and Chair of the Employee Benefits Group, Grotta, Glassman & Hoffman, P.C.; The Honorable H. Curtis Meanor, Senior member of Podvey, Meanor, Catenacci, Hildner, Cocozziello & Chattman and former Judge of the Superior Court of New Jersey, Law and Appellate Divisions, as well as former Judge of the United States District Court for the District of New Jersey; Jeffrey D. Paquin, a Senior Partner of Paquin Victor LLP; Elizabeth Champnoi, District Vice President, American Arbitration Association, and Mark A. Welge, President, Welge Dispute Solutions, LLC.

Editor: Why are companies using ADR more often than they were a few years ago?

Welge: The reasons for its popularity are as varied as the types of ADR being used. A 2003 survey by the Litigation Section of the American Bar Association reported that 78 percent of the respondents found arbitration to be more efficient than litigation in resolving conflict. Because the process is controlled by the parties, mediation can reach more issues and resolve them more creatively than litigation.

McMurdy: Companies find ADR to be far more attractive than litigation because of the costs and risks associated with the protracted nature of litigation. Most ADR methods require at most three

to six months for the parties to resolve their dispute. The speed of ADR is in sharp contrast with the two to three years that it typically takes to try a case in the courts.

Champnoi: The American Arbitration Association's experience is that companies managing their disputes using the full range of ADR options experience lower legal department budgets and manage their in-house legal costs with a higher degree of efficiency. Companies also appreciate the benefits associated with prompt and flexible dispute resolution options. There has also been an increasing trend towards including ADR provisions in international deals and cross-border transactions.

Meanor: Many companies are now using arbitration to resolve intellectual property disputes, particularly regarding claims of patent infringement. In some industries the advance of technology is so rapid that the length of time it takes to litigate a case in the federal courts outlasts the useful life of the technology at issue. Also, the fees to the arbitrators usually are less than the cost of litigation – particularly those incurred in lengthy discovery.

Paquin: The reduction of costs and expenses associated with using certain forms of ADR include attorneys' fees, indemnity or settlement costs and other expenses. The early resolution of matters through ADR usage may also reduce "soft costs," such as the expenses associated with time that business professionals, human resources professionals, in-house attorneys, and other employees in a corporation spend on litigation and prolonged conflict. In addition to cost

savings, corporations regularly report other advantages of using ADR, such as a reduction in the dispute cycle time, improved satisfaction with the dispute resolution process by all participants, maintaining confidentiality, fairer outcomes, improved morale in the context of employment ADR and improved company reputation.

One of the challenges in documenting the advantages and benefits of ADR is in measuring related metrics objectively. Through our firm's role in serving as the Executive Director of the Chief Litigation Counsel Association, we conduct an annual survey of the members' litigation and conflict management practices – the members are primarily Fortune 100 companies – and without revealing the confidential details of the survey results, we can state that all of the perceived advantages and benefits of using ADR, such as cost savings, have in fact been experienced and documented by large corporations, and they have tracked and measured these improvements objectively.

Dreier: Litigation is attendant with a lot of headaches, as well as costs. ADR offers businesses a faster, less expensive solution. Trained ADR professionals can help businesses to solve disputes with employees, suppliers, customers, professionals, advisors and other parties – in short, any of the myriad of problems faced in the business world that often end up in time-consuming, expensive litigation. In litigation, the parties have to rely on their luck in drawing a judge who may have familiarity with the subject area relevant to their dispute. ADR is having the ability to choose the mediator or arbitrator with full knowledge of his or her background, training, experience

and proven track record.

Brown: ADR makes experienced, trained neutrals available to the parties. Their understanding of the legal issues before them and flexibility in helping to craft a resolution provides an ADR process that is more expedient than the courts. Expediency resonates not only with large, sophisticated parties, but also with the “little guys” who want an accessible forum in which they can be heard as well. Auto accident cases are a good example. Those cases might be resolved by arbitration. Or, they might be resolved by a form of mediation that is expedited to look very much like a “settlement day” or “settlement week” for insurance-related cases that traditionally took place at a local courthouse.

Editor: Please describe some of the forms of ADR.

Dreier: Mediation and arbitration are the two principal forms most familiar to lawyers, with non-binding arbitration being a hybrid. When the arbitrator’s decision is not binding, the process serves as a reality check for the parties. That reality check, in turn, often aids in early settlement of the case. Remember, even in non-binding arbitration, the results are only as good as your arbitrator, the efforts that both sides put into presenting their cases, and the open-mindedness of the parties when viewing the results.

Brown: The beauty and promise of effective ADR is that the process focuses on finding a solution to the parties’ legal issues, not in pushing one form of ADR over another. The right solution for a particular party might be a three-day arbitration. In another case, the right solution might be a two-hour expedited mediation.

Shampnoi: Arbitration is the submission of a dispute to one or more impartial persons, or “neutrals,” for a final and binding decision. Through contractual provisions, the parties may control many procedural aspects of the process. The neutral is typically a professional who has specific industry expertise related to the dispute and is considered a practicing expert in both ADR and his or her sub-

ject matter area.

Mediation is a voluntary, confidential process in which parties in a dispute work together with a neutral facilitator – a mediator – who helps them reach a settlement. The mediator’s role could be facilitative and/or evaluative – it’s up to the parties to craft their mutually-acceptable resolution.

Paquin: Mediation, an interests-based ADR process, allows the parties to control the process and reach an agreement with the guidance of the mediator. With arbitration, a rights-based ADR process, the parties relinquish much of the control of the process and the decision to the arbitrator or panel of arbitrators. There are many other forms of ADR, such as ombuds, facilitation, early neutral evaluation, peer review, dispute review boards, mini-trials, summary jury trials, and private judging. In addition, there are many ADR process hybrids, such as medaloa (a combination of mediation and “last offer” arbitration). We are also seeing an increase in the systematic or programmatic use of ADR by corporations and other organizations in the employment, consumer, commercial, or other areas.

Welge: Depending on the context of the parties’ dispute, the right solution might be a combination of mediation and arbitration. For example, the parties may mediate the dispute, agreeing ahead of time that if the dispute doesn’t settle, arbitration follows immediately. The parties can agree to use the same person to mediate and then arbitrate the conflict, but the process is most effective when different neutrals are used for each. The arbitrator sits in for the positional portion of the mediation, not for the negotiations, so that his or her judgment is not colored by what the parties’ demand and offer in settlement. However, the arbitrator doesn’t need to rehear factual presentations at the arbitration stage that he or she has already heard during the mediation. The process is very efficient and cost-effective.

Meanor: It is by no means unusual for counsel to convene one or more experienced arbitrators to conduct mock hearings or mock oral arguments. This is quite prevalent in major litigation that is

currently underway. For example, the litigation of a patent case is preceded by a *Markman* hearing to resolve any disputes over a construction of patent claims. The construction of such claims is an issue for the judge and not for the jury. Many experienced patent counsel engage in mock *Markman* hearings before one or more arbitrators who have had considerable patent experience.

There are also mock trials. In major cases, it is not uncommon for several groups of people to be selected to serve on multiple juries. The case is then presented with some live testimony and summations of the facts by counsel. An experienced arbitrator, usually a former judge, gives the jury a brief charge on the law. Any number of people may serve on juries, and those individuals may be divided up into different groups so that a comparison can be made as to how different mock juries decide the case.

McMurdy: We recently used a form of ADR called a summary jury trial for a case involving seven plaintiffs who alleged sexual harassment and discrimination. The judge gave each side one day to present its case and the jury three hours to deliberate. At the conclusion, each juror was polled and asked for feedback about his or her verdict. Before the judge ordered the summary jury trial, we had set aside four and a half weeks for the full trial. In addition to boxes and boxes of documentary evidence, we had 25 witnesses on both sides. The summary trial was conducted the week before the full trial date, and we settled before courtroom proceedings commenced at a cost that our client was prepared to live with. Would we have done better in trial? I don’t know. At least our client did not have to sit through four and a half weeks of trial wondering what the outcome would be.

Editor: What factors should be considered in determining which ADR mechanism would be appropriate for a particular matter?

Brown: The foremost consideration of any attorney is representing his or her client’s interests within an appropriate timeframe. With only two percent of civil cases ever reaching trial in this country, the vast majority resolve by negotiation

or a decision by an agreed upon, neutral third party's decision. ADR can make the resolution happen sooner rather than later, provided that the ADR mechanism is administered effectively for the particular matter. The big lesson is that ADR isn't reserved for just big, commercial matters anymore. Courts are full of smaller, more "everyday" matters, and as an extension of the courts, ADR administrators are starting to see those cases, too. The National Center for State Courts says 70 percent of all contract cases in state courts involve someone collecting a debt. The court dockets across the country are full of these cases, and since judges no doubt need more time and more resources, this is a place where ADR can perform a real duty by handling the cases that clog the courts.

Welge: At the outset, the parties need to decide whether to use a facilitative process, such as mediation, or an adjudicative process, like arbitration. The degree of control over the process and the need for confidentiality are just two of the many other factors to be considered in determining which type of ADR to use, or whether to even use ADR.

Shampnoi: In assessing the options, parties need to consider what they hope to accomplish and what the most important aspect of the process is for them. For example, if a corporation wishes to preserve relationships, a less antagonistic process such as mediation is generally preferable. If a company is looking for a creative settlement, mediation provides flexibility. If a disputant is looking for a final and binding decision, arbitration is clearly a better option. Perhaps a company wants to minimize its external legal costs. In that situation the company might attempt mediation first and then arbitration. If a party knows that discovery is necessary, but would prefer an expert neutral so that a judge does not have to be educated on the specific technical matter at hand, arbitration would be preferred. The bottom line is that corporate counsel must thoroughly assess its needs and objectives relative to the dispute at hand and choose an ADR mechanism accordingly.

McMurdy: Cost and risk can be significant factors. If you have a high risk, high

cost scenario, you might consider ADR as an option for resolving the dispute as quickly and as cheaply as possible. Another factor to consider is how impartiality can be ensured. Many ADR attempts fail because the parties cannot agree on the process of how they will pick the impartial mediator or arbitrator.

Dreier: Timing is another important factor. Mediation can be very helpful early in a case. Even if a quick settlement is not reached, the process can help to narrow issues. Whether or not preceded by mediation, arbitration can help speed up the resolution of the dispute. If you don't want to go through extensive discovery, you can require the arbitrator to dispose of the case in 20 or 30 days. That's something you can't do in court given the other demands on the court's docket.

Paquin: There are numerous factors that corporate counsel should consider in determining which ADR mechanism would be appropriate for a particular matter, such as the dollar amount in controversy, the time frame available for the resolution process, whether attorneys are involved in handling the ADR process, the substantive nature of the dispute, the geographic factors related to the dispute, the sophistication of the parties, party funds available to financially support the cost of a certain ADR process, whether the parties have a "one off" relationship or a continuing relationship, whether the parties desire a process that will ensure a final resolution and the number of parties involved. Our firm, among others, can help counsel to identify ADR selection screening and suitability tools and provide guidance in determining which ADR mechanism is most appropriate for a particular controversy.

Meanor: Some cases must be litigated. A dispute involving a serious question of constitutionality is not an appropriate subject for either mediation or arbitration. Where the validity of a patent is seriously in issue, there is little room for mediation or arbitration. However, most cases are apt candidates, at least for mediation, if not arbitration. In any commercial, personal injury or employment case, mediation can be an appropriate vehicle. Careful selection of a mediator who has both the subject matter experi-

ence with the particular type of case at hand and sufficient articulating ability and patience to work comfortably with both sides can often lead to a satisfactory resolution, thus eliminating the risk and expense of further litigation.

Editor: What contributes to the effectiveness of an ADR program?

Paquin: The effective design, implementation and administration of a contemporary ADR program requires that a thorough needs assessment be performed at the outset. The program must fit the company's unique culture and have the "buy-in" of senior management and the other stakeholders in the corporation. All aspects of the ADR program must be documented, an initial and continuing communication and marketing plan must be in place, and the initial and continuing training and education must be developed and delivered. In connection with its administration, the ADR program must be tracked, measured, evaluated and refined.

Shampnoi: The company's counsel and management need to ask such questions as: Is preserving valuable business relationships our main objective? What ADR options are appropriate to our specific book of business, industry or professional practice? Is our industry or dispute so technically sophisticated that we would benefit from having an expert neutral determine our matter? (For example, having a patent expert arbitrate a patent dispute avoids having to educate a judge on the specific technical matters at hand.) Do we prefer to save time and money and have a single neutral hearing our dispute? Do we feel that the cost benefit of using one neutral is outweighed by the need to have several technical experts contribute their expertise to resolving our complex, multi-faceted dispute? Once the company has addressed the issues unique to its situation, a more effective program can be tailored to meet its specific needs.

Brown: Keys to ensuring an effective ADR program include well-communicated and agreed upon ground rules, access to experienced and trained neutrals, expedient administration, a cost structure that fits the type of case and,

from an administrator's perspective, a willingness to find solutions that work for all parties to the particular dispute rather than a one-size-fits-all approach.

Welge: The company needs to put the ADR program and policy in writing for all to see and to ensure that management and employees get a copy. Each person's role in the ADR program should be clearly defined and understood. The company ought to give serious consideration to the types and methods of ADR that will be used and in what sequence. Everyone should be trained in how to access and use the ADR program. The effectiveness of the program needs to be periodically evaluated and tweaked, if necessary.

McMurdy: The program should be structured for repetitive use with predictable results. For example, if a company includes ADR in all of its employment contracts, the provision should spell out how the process will be conducted. Ambiguity will cause the parties' energies to be dissipated by debates over what type of ADR to use and what rules to follow.

Dreier: The program must have upper management support. Otherwise, lower level attorneys may feel that they can't go wrong by taking the well trodden path to the courthouse. Upper management should also provide guidance as to which organizations to use for a reliable pool of experienced arbitrators or mediators. You may choose an expert in the field, a retired judge, someone chosen from a private, pre-screened referral list or an appointment by a court or administrative organization. When you have a choice, be sure you know the arbitrator's or mediator's background and experience with the particular type of controversy, and his or her reputation for fairness, procedural flexibility and prompt decisions. When checking referrals ask about

such personal characteristics as patience, flexibility, creativity, optimism and respect for attorneys and the law.

Meanor: The mediator must be a good listener in order to absorb the positions of the contending parties. The mediator should also have a significant knowledge of the type of legal issues involved in the case at hand. A mediator should, thus, be able to point out the strengths and weaknesses of each party's case. Arbitration, of course, has the usual advantages of privacy, expedition and cost-saving. It is also essential that an arbitrator make a prompt decision and limit discovery only to that which is absolutely necessary. Of course, one of the significant advantages of arbitration is that the parties are able to select the arbitrator and perhaps concentrate their selection efforts on obtaining an arbitrator with particularized knowledge and experience in the field at issue.

Editor: Please give an example of how technology can facilitate the dispute resolution process.

Shamnoi: In the ADR context, technology can facilitate dispute resolution by streamlining aspects of the case administration process. For example, online filing and case management tools allow users the ability to file cases online, share and manage documents, select neutrals, access the arbitration organization's rules and procedures, calculate fees, and pay online. In addition, personalized online services allow neutrals to update their online profile and resume, view past and present cases assigned to them, and use an online calendar to schedule hearings.

Meanor: In arbitrations, preliminary issues pertaining to discovery and other matters can be resolved swiftly through the use of modern technology. An arbitrator engaged in the resolution of a preliminary dispute can require the

positions of the parties to be given to him or her by e-mail or facsimile, and the arbitrator can respond by using the same technology. With respect to both mediation and arbitration, e-mail and facsimile can expedite the exchange of briefs and copies of exhibits and can be used to establish available hearing dates.

Dreier: In arbitration proceedings, it is very helpful to have a court reporter who can give the arbitrator and parties real time transcripts. It makes the arbitrator's jobs easier, and decisions are made much faster because the record is right there for everyone to see.

McMurdy: Online services enable parties to settle their disputes without having to meet each other face to face. Each party receives an email invitation to pick from a range of settlement figures. If the parties' responses are within compatible ranges, they receive another email with a refined range of high and low figures. On the other hand, if the parties' responses are too far apart, they are asked to repeat the initial process. Neither party has to reveal their actual figures until they're ready to settle.

Welge: Another example is a software tool that helps parties conduct decision-tree analyses. Loaded onto the mediator's or parties' laptops, the tool can be used to narrow settlement ranges. Particularly in personal injury cases, structured settlement specialists increasingly come with sophisticated software that allows variables to be inputted and proposals prepared right on the spot.

Brown: New Jersey is an example of a state enjoying the cost benefits and efficiencies of an online no-fault insurance arbitration program. The program supports not only online filing, but also online case management. I anticipate that we'll be seeing the number of jurisdictions deploying an online ADR environment to grow exponentially.