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ADR IN THE LAW FIRM: A PRACTICAL VIEWPOINT

Alternative dispute resolution (ADR) has become the new watchword of the legal community. Virtually all lawyers have heard of the concept but the amount of knowledge concerning it varies widely among them. Reactions to its injection into the arena of conflict resolution and avoidance have been varied.

Some law firms have chosen to supplement their traditional law practice by providing ADR services. These firms are clearly in the minority, although other firms are beginning to "jump on the bandwagon." This comment is primarily addressed to those firms that are either considering the integration of ADR into their practice or are hesitant to do so.

It is often said that something may "sound good in theory but it doesn't work well in practice." This feeling may be responsible for some firms' reluctance to offer ADR as an available service for their clients. In response to this attitude, an attempt has been made to obtain information from a cross-section of those people and firms who offer ADR and can attest to it "working well in practice."

Six law firms were contacted concerning implementation of their ADR programs. Representatives from those firms, some of whom are nationally-known speakers and proponents of the ADR movement, spoke freely about their individual law firms' ADR services, their personal feelings regarding the establishment of an ADR practice, and ADR in general.¹ The following attorneys were contacted: J. Michael Keating, Jr. of Tillinghast, Collins & Graham in Providence, Rhode Island; Marguerite S. Millhauser of Steptoe & Johnson in Washington, D.C.; Ronald Manka of Lathrop, Koontz & Norquist in Kansas City, Missouri; Charles Barker of Jenner & Block in Chicago, Illinois; Lynne J. Omlie of Howrey & Simon in Washington, D.C.; and Frederic C. Nelson of Thelen, Marrin, Johnson & Bridges in San Francisco, California.

The firms mentioned in this comment are not the only law firms in the country that have begun to stress ADR in their practice. Instead, the firms are representative of the variety of approaches taken in the implementation of ADR. The ideas and procedures espoused by these attorneys are not necessarily the most appropriate or the only means of ADR implementation

1. All information, comments, and opinions in this comment from the attorneys about themselves, ADR, and their respective law firms were obtained through telephone interviews unless otherwise indicated.

for a particular firm. The goal of this comment is to expose the reader to various perceptions of ADR in the law firm setting, allowing the reader to decide for himself what approach, if any, is best for his firm.

Admittedly, the suggestions and perceptions of the individual attorneys are merely opinions, but it is important to realize that these lawyers have had practical experience in utilizing various ADR techniques and approaches and are thus knowledgeable about what may or may not work.

The viewpoints varied among the attorneys interviewed, but a common thread running through their comments is the belief that offering alternatives to litigation is necessary in order to provide clients with the best possible service. The manner in which that service is provided is secondary to the need for its availability to the client.

This comment is divided into three major sections. In Part I, the attorneys explain how ADR concepts are employed within their respective firms. Part II is advisory in nature, with the attorneys expressing their opinions and beliefs regarding how ADR should be integrated into a law firm practice. In Part III, the attorneys express some of their perceptions and viewpoints regarding ADR in general.

I. EXAMPLES OF ADR IMPLEMENTATION APPROACHES

Approaches to implementing ADR into law firm practice have been varied. Some firms such as Tillinghast, Collins of Providence and Steptoe & Johnson of Washington, D.C. have ADR specialists whose sole responsibilities involve ADR-related activities. Other firms such as Lathrop, Koontz of Kansas City and Jenner & Block of Chicago have established ADR committees or departments. Members of such committees may play purely advisory roles or they may be actively involved in the resolution of individual disputes. Still other firms such as Howrey & Simon of Washington, D.C. and Thelen, Marrin of San Francisco have chosen to implement a more generalized approach where lawyers throughout the firm are encouraged to use ADR procedures when and if they believe them suitable in a particular situation.

A. *Providing ADR Services*

J. Michael Keating, Jr.,² who joined the Tillinghast firm as an ADR specialist, has over fifteen years of ADR experience. Because he is an ADR specialist, Keating's role in the firm is unique. Half of his time is spent serving in such third-party roles as special master in cases with the local

2. Telephone interview with J. Michael Keating, Jr., ADR specialist at Tillinghast, Collins & Graham in Providence, Rhode Island (Nov. 10, 1986).

federal district court, mediator in interpersonal disputes ranging from divorce to corporate matters, and arbitrator in labor arbitrations. Keating spends the other half of his time working with the firm's clients. This work can be divided into three general areas.

The first area involves planning for the dispute before it arises. Keating tries to ensure that all contracts written by the firm contain ADR clauses. In connection with these clauses, he also urges the parties to name mediators or arbitrators in advance and to develop ways in which any future disputes between the parties can be handled.

Keating's second area of work within the firm involves assisting the firm's institutional clients in identifying and developing better systems for dealing with complaints and conflicts within their own companies. He helps design methods of handling the disputes and then trains the company personnel who will be involved in the resolution process.

The third area involves persuading clients to consider means of resolving disputes other than by litigation. Keating says that although most other firms involved in ADR focus on this aspect, it is probably the least important in his firm. Resolution of disputes at Tillinghast is done on a case-by-case basis. The firm lawyers have been instructed as to the applicable criteria in identifying possible candidates for ADR. Therefore, when an attorney believes a situation may be amenable to ADR, he can discuss it with Keating.

Marguerite A. Millhauser,³ a partner at Steptoe & Johnson in Washington, D.C., decided in 1985 to devote all her time to ADR-related activities. As an ADR specialist, much of her work concerns speaking with clients about various alternative dispute methods, helping the lawyers think through the available procedures, and at times, initiating discussion with the other parties concerning alternative methods of resolving the dispute.

Steptoe & Johnson has no formal screening process.⁴ The attorneys and their clients decide whether to try ADR on a case-by-case basis.⁵ Clients receive information concerning the uses and benefits of various ADR procedures and suggestions as to which ones would be applicable to their particular situations.⁶ If the clients are willing, plans to implement the ADR procedures are arranged and the opposing parties are contacted at the appropriate times.⁷

3. Telephone interview with Marguerite A. Millhauser, ADR specialist at Steptoe & Johnson in Washington, D.C. (Jan. 8, 1987).

4. Millhauser, *An Approach to Integrating Alternative Dispute Resolution into Law Firm Practice* in THE CENTER FOR PUBLIC RESOURCES, CONTAINING LEGAL COSTS: ADR STRATEGIES FOR CORPORATIONS, LAW FIRMS, AND GOVERNMENT (forthcoming Butterworth Legal Publications 1987).

5. *Id.*

6. *Id.* at 146.

7. *Id.*

Stephoe & Johnson uses a two-track system in handling its clients' cases, according to Millhauser. Litigators continue to prepare the case for trial while Millhauser initiates discussion of an alternative method. This impresses upon the client and the opposing party that the suggestion of an alternative to litigation does not indicate a weak posture but rather another approach to resolving the dispute.⁸ In fact, Millhauser suggests that "[a]s a practical matter, in many cases it is necessary to continue the litigation effort or at least present the possibility of litigation in order for the opposing party to consider or agree to an alternative mechanism."⁹

Because Millhauser is removed from the litigatory aspects of the case, she is able to view the problem in a more objective manner.¹⁰ This enables her to focus on how to "shape future conduct" rather than concentrating on how the dispute arose.¹¹

Millhauser also believes it is important for clients to think about possible ways of resolving conflicts before a dispute arises.¹² The inclusion of ADR clauses in contracts or agreements, for example, "forces the parties to think in advance about the kinds of problems that could develop, who is best equipped to handle those problems, what approach is likely to be most successful given the nature of the controversy, and the concerns of the people charged with responsibility for resolution."¹³

Ronald Manka¹⁴ of Lathrop, Koontz & Norquist in Kansas City developed his interest in ADR while on a three-year leave from the firm. During that time, he assumed legal and managerial responsibilities with one of the firm's major corporate clients. After realizing the expense and time involved in corporate litigation, Manka organized six ADR proceedings, all of which were successful. He returned to the law firm "convinced that ADR is an excellent tool and that a full-service commercial law firm like ours needed those capabilities." The firm then formed an ADR committee with Manka as its chairman.

The ADR committee at Lathrop, Koontz consists of both litigators and corporate lawyers. The litigators on the committee make it possible for the committee to become familiar with almost every piece of litigation within the firm. The goal is for the members to be able to promote ADR at the appropriate times during the litigation process.

Attorneys at Lathrop, Koontz may introduce ADR into their cases in one of two ways. An attorney may choose to have a committee member help

8. *Id.* at 145.

9. *Id.*

10. *Id.* at 144.

11. *Id.* at 149.

12. *Id.* at 151.

13. *Id.* at 152.

14. Telephone interview with Ronald Manka, partner at Lathrop, Koontz & Norquist in Kansas City, Missouri (Nov. 17, 1986).

only with the ADR aspects of the case, or the attorney may choose to have one of the litigator/committee members help with the overall handling of the case while looking for ADR alternatives.

Manka feels it is important to offer the attorneys in the firm a choice of approaches. Some litigators "because of the gladiator role they're put into, find they are having to compromise the posture they wanted to take in the case" in order to participate in some of the ADR procedures. At Lathrop, Koontz, they have the alternative of either bringing in someone solely to help with the ADR procedures or using someone who will "keep the tough litigation posture as part of ADR."

Lathrop, Koontz does primarily products liability and commercial litigation so Manka believes the use of ADR fits very well within the firm. Mini-trials have been the most common ADR procedure utilized at the firm. Manka has not tried this procedure in personal injury cases but rather has concentrated the use of mini-trials in commercial litigation. However, the firm is experimenting with a prototype plan to use some ADR procedures in personal injury cases.

Manka prefers the form of mini-trial that does not utilize a neutral third party. The firm has found that a neutral is not necessary if at least one of the principal negotiators was not directly involved in the situation that gave rise to the dispute. When that person is "above the fray," he is more capable of looking at the situation objectively. If all of the principal negotiators were involved in the initial disagreement, it becomes important to bring in a strong neutral third party.

Manka is a corporate lawyer and is therefore aware of the need for ADR clauses to be written into contracts. The firm writes ADR clauses in various ways, ranging from a simple statement of the parties' intentions to try a particular ADR technique to a complicated agreement with multi-step procedures.

Jenner & Block in Chicago has chosen to set up a separate ADR department, according to Charles Barker,¹⁵ partner and department member. He explains that when the firm initially organized its department, the litigation lawyer would continue to litigate the matter while someone in the ADR department would be trying to settle by negotiation. The firm found that this approach was not well-received by its clients. Thus, the role of the ADR department members changed primarily to an advisory one. If a firm lawyer is considering an ADR procedure, he may seek advice from a department member regarding such matters as what procedure is appropriate, how the procedure is to be handled, and how to find a mediator (if it is a mediation). Although the procedure may be handled by one of the depart-

15. Telephone interview with Charles Barker, partner at Jenner & Block in Chicago, Illinois (Nov. 11, 1986).

ment members, more often it is the original lawyer who retains responsibility.

Attorneys at Jenner & Block are involved in various ADR activities. The firm conducts mini-trials. Some firm lawyers serve as arbitrators, neutral advisors, and facilitators. The firm trains and advises clients on negotiation strategy with the belief that the client, not the lawyer, does the actual negotiating. ADR influences other activities at the firm, such as the preparation of litigation budgets and the evaluation of litigation costs through decision-tree analyses when preparing for negotiation or another ADR procedure.

"ADR is really a state of mind. It doesn't necessarily have to be embodied in a peculiar procedure," according to Barker. For example, how settlement negotiations in a litigation case are approached and what theory, if any, that is used to negotiate may or may not be formed by the ADR movement. Barker believes that at Jenner & Block an increasing number of the firm's lawyers are being influenced by ADR in their negotiation approach.

Howrey & Simon in Washington, D.C. does not have a separate ADR department, according to senior associate Lynne J. Omlie.¹⁶ Instead, she considers ADR to be a joint effort by everyone in the firm. "I think all the attorneys here are sensitized to an ADR approach and are conscious of our clients' needs of settling disputes with minimal amount of expense and loss of executive time."

The firm's attorneys are very active in mini-trials and other ADR proceedings. They use some of the traditional ADR techniques as well as develop innovative ideas to be used with the standard procedures. One of the partners in the firm, James F. Davis, was the neutral advisor in the first mini-trial in 1977 between Telecredit, Inc. and TRW, Inc.¹⁷ Since that time, he has served as neutral advisor for a number of mini-trials and arbitration proceedings, many involving technical issues such as patents and trademarks.

Thelen, Marrin, Johnson, & Bridges in San Francisco does not utilize the separate ADR department approach either, according to partner Frederic C. Nelson.¹⁸ Instead, the firm has adopted a more generalized approach. The firm advises its lawyers of the importance of ADR and of the criteria that sometimes signals a good case for an ADR procedure. Then the individual lawyers are allowed to decide when and if ADR should be used in a particular situation. The firm has participated in various types of ADR methods such as arbitration, mediation, and mini-trials. Presently much of Thelen, Marrin's ADR emphasis focuses on construction and general contract disputes, although the firm is open to expansion into other areas.

16. Telephone interview with Lynne J. Omlie, senior associate at Howrey & Simon in Washington, D.C. (Nov. 13, 1986).

17. For a personal account of the mini-trial proceedings, see Davis, *A New Approach to Resolving Costly Litigation*, 61 J. PAT. OFF. SOC'Y 482 (1979).

18. Telephone interview with Frederic C. Nelson, partner at Thelen, Marrin, Johnson & Bridges in San Francisco, California (Nov. 5, 1986).

B. Promoting ADR Services

If a firm's ADR practice is to thrive, someone must inform the firm's attorneys and clients of the availability and usefulness of ADR. Promotional activities of firms vary from formal ADR seminars to publicity campaigns to informal, in-office counseling.

Two of the firms interviewed have conducted ADR seminars to promote their ADR practice. Omlie helped organize a seminar for Howrey & Simon's clients in 1984.¹⁹ Leading ADR experts and firm members with experience in ADR procedures participated in the day-long event. Omlie says the event was well-attended and well-received by the clients.

Thelen, Marrin also has conducted an informational seminar. Various topics were addressed, including the use of the mini-trial. Nelson says two of the primary reasons for the seminar were the timeliness of the topic and client interest.²⁰

Both Tillinghast and Keating have taken steps to promote Keating's ADR specialty. When Keating joined the firm, Tillinghast sent a circular to the local legal community explaining the nature of his services. To heighten the public's awareness of ADR, Keating has written many articles concerning ADR and his experiences in the field. Keating believes a recent mini-trial, the first to be conducted in Rhode Island, will be helpful in spreading the word about the benefits of ADR. The mini-trial, which involved one of Tillinghast's clients, made a long arbitration proceeding unnecessary. "The clients were delighted with it and that kind of breakthrough, I think, will help in other instances to train and educate people within the firm about what ADR is and what it can do for them."

When the ADR committee was created at Jenner & Block, a press release was sent to all members of the firm and to the public at large. Barker, a negotiation theory specialist at Jenner, has conducted two continuing legal education (CLE) seminars on negotiation theory for the firm's lawyers. The ADR committee also circulates relevant articles and information about ADR to other members of the firm.

At Steptoe & Johnson, Millhauser says the firm provides clients with a memorandum containing information about various procedures that are available in lieu of litigation. The memorandum contains a brief overview of arbitration, private judging, mediation, mini-trials, and settlement negotiations. Also included are articles describing how actual cases have been handled and information concerning how techniques can be adapted to fit

19. For a reprint of the seminar's agenda, see *Howrey & Simon Looks at State-of-the-Art in Mini-trials*, ALTERNATIVES TO THE HIGH COST OF LITIGATION, Oct. 1984, at 1, 3.

20. *Thelen Marrin Hosts Seminar*, ALTERNATIVES TO THE HIGH COST OF LITIGATION, Nov. 1985, at 6.

particular situations. To inform firm attorneys about ADR, Millhauser speaks at partnership meetings, gives training sessions, and dispenses ADR materials.

At Lathrop, Koontz clients receive information concerning ADR primarily through individual attorney-client contact. However, according to Manka, the firm is in the process of having four internal training seminars for its lawyers and plans to conduct an ADR seminar for its major litigation clients in the near future.

II. GUIDELINES FOR ADR IMPLEMENTATION

Actually being involved in an ADR practice makes it easier to pinpoint which implementation procedures work and which ones do not. Therefore, advice from attorneys in the ADR field may be helpful to firms considering whether to offer ADR services.

Barker outlined several steps that he believes should be taken by a firm that is considering the implementation of ADR into its practice: (1) find some members of the firm who are willing to invest time obtaining knowledge and experience in the various ADR procedures. He believes those people should not be associates but rather partners who have credibility both within the firm and with the firm's clients; (2) make a concerted effort to educate the clients about ADR; (3) maintain a record of experiences in ADR for use in illustrating to other clients how ADR has been used in the past; and (4) provide firm lawyers access to ADR materials, resources, and form files.

Barker believes that whether a firm should have ADR experts depends upon the individual firm and its clients. Since law firm decisions are "client-driven," the degree of involvement of the ADR department members should be based upon the clients' interest in ADR. In some cases it may just be a matter of "educating the client that there's something out there that's desirable."

Omlie suggests that the "most expeditious and least expensive" way to approach implementation is to have an all-day seminar for both clients and lawyers of the firm in order to educate them about ADR. The seminar should include speakers who can explain the various techniques and "shadow-box some of the steps so that everybody's familiar with what happens."

Nelson advises law firms considering implementation of ADR not to "make a bigger deal out of it than it really is." Although the techniques are new, ADR is nothing revolutionary. It is just a "catchy name." He suggests that firm lawyers be advised of the various methods so they will not be caught unaware if a client inquires about ADR.

Millhauser believes that firms trying to integrate ADR into their law practice should remember that "ADR is not an incidental appendage to litigation."²¹ It requires special skill and knowledge so that clients may be

21. Millhauser, *supra* note 4, at 143.

correctly informed about the various aspects of ADR and how they can be used to benefit the client.²² "Establishment of a separate source for providing ADR advice and counsel can help avoid assimilation of ADR into general litigation strategy. It also highlights the importance of ADR advice and counseling outside of the litigation context."²³

Manka considers the most important step in establishing an ADR emphasis within a firm is by having "a champion in the firm, sort of like a Ron Manka." He would recommend a committee over a one-man champion because it's "very much a missionary role at this time" and it helps if other people are "backing you up as you're spreading the gospel." However, Manka feels that having a committee instead of a one-man champion is not essential to the growth of ADR in a firm. What is important is to have at least one person within the firm who will take major responsibility for promoting ADR.

Manka also believes that a firm that does not have a separate department or specialist, maintaining that its lawyers all have a generalized knowledge of ADR, is "just playing lip service to it." He feels that a firm cannot truthfully say all of its lawyers are experts in ADR. Specialization requires knowledge and study to understand the practice of the various techniques. "It would be like saying 'We don't have any EPA experts in our firm. All of our lawyers are experts in EPA.'" He would caution a firm about representing to its clients that all of its attorneys are ADR specialists. "I doubt if ADR will work in that law firm." Keating agrees with Manka in the belief that "it's preferable to have somebody experienced in combining all the different techniques and approaches in ADR."

Keating also believes that the "legal profession's view of ADR is pretty one-dimensional and pretty shallow." Therefore, he recommends that a firm take a "broader view" of ADR, somewhat similar to that at Tillinghast. ADR in the "broad sense" consists of approaches involving negotiation and mediation which are alternatives to the adjudicatory process. ADR in the "narrow sense" involves procedures such as arbitration, summary jury trials, court-annexed arbitration, and to some extent mini-trials.²⁴ These procedures are meant to be cheaper and faster means of "preserving the adversarial process." Keating does not believe there is "much of a real commitment on the part of the legal profession at this point to anything more than the alternative in the narrow sense." This, he believes, is a mistake. Instead, firms should be aware of and sensitive to the broader implications of ADR.

22. *Id.*

23. *Id.* at 151.

24. For a more expanded discussion of ADR in the broad and narrow senses, see Keating, *Alternative Dispute Resolution: An Evolving Legal Specialty*, R.I.B.J. 9 (Feb. 1986).

The developmental pattern of ADR within most firms has led to this narrow focus, explains Keating. Usually a litigator who is a partner or senior associate becomes interested primarily in the aspects of ADR that are adjudicatory in nature. He or she then tries to implement those ideas and methods into the practice of the firm, resulting in an ADR program that is narrow in focus.

Keating believes that law firms need to be more willing to hire young attorneys who are interested in the broader aspects of ADR and "work them into the fabric of the firm." He believes it is possible for an associate in a mid-to-large law firm to practice ADR in a broad sense and, until that becomes a full-time practice, also practice traditional law.

III. PERSONAL OBSERVATIONS OF ADR

Law firms considering the implementation of ADR may have various concerns. They may be interested in the success rate of ADR in particular firms, how clients are benefitted by an ADR proceeding, what cases are more amenable to an ADR technique, why people are reluctant to try ADR, what problems face the ADR movement, and what the future of ADR may be. The following are some personal observations regarding these concerns.

The use of an ADR procedure hopefully means an end to the dispute between the parties. Manka estimates that the resolution success rate at Lathrop, Koontz is about eighty percent once both sides agree to use an ADR procedure. Nelson says that if success is defined as the final resolution of problems, then over one half of the ADR cases at Thelen, Marrin are successful. If success means whether the clients are happy about having been given the option of trying ADR, then the success rate is much higher.

If the case is not resolved by the use of ADR, however, this does not necessarily mean the procedure was conducted in vain. The client may have received benefits regardless of whether settlement resulted from the proceeding. For example, Barker believes exposing clients to the ADR proceeding gives them a more realistic picture of what their case is worth, its flaws and merits, and whether it should be litigated. If the clients have on-going business matters with the firm, having gone through the ADR proceeding makes the clients sensitive to how ADR could be useful in those other matters as well.

Manka does not see a lot of wasted time in an unsuccessful ADR proceeding because most of what is done in preparation for the proceeding would have to be done in preparation for trial anyway. He believes the presentations made at the proceedings are very similar to opening and closing arguments at trial so the client has not been inconvenienced unless the ADR proceeding has taken more time than normal. He also feels the proceeding gives the

parties a better understanding of the opponent's case which may make for an easier settlement later.

If the dispute ultimately goes to trial, Manka considers it helpful to have heard both sides' cases presented in the ADR proceeding. This gives lawyers an opportunity to see which persuasive arguments work best for the client and how the other side is likely to present its case. Manka considers this also to be a disadvantage if the parties' strategies are exposed. However, he believes the "trial-by-trick" days are over and competent attorneys usually figure out the strategies by the time the case goes to trial anyway. Any disadvantage in having the opponent learn of the client's strategy, in his opinion, is outweighed by the advantages of trying the ADR procedure since most civil cases are settled before they reach court.

According to Nelson, the sophisticated client appreciates the fact that ADR was tried even if a settlement was not reached. Nelson advises a firm to "start the dialogue" with the client about ADR and then "give it a shot." Then later during expensive litigation, the attorney can find comfort in knowing he has tried every means possible to settle his client's case in an efficient manner. However, Nelson is quick to point out that ADR is not the solution to every problem. If clients do not want to reach a settlement, then trying ADR is a waste of time.

Keating agrees with this assessment. Litigation is necessary when "one party is too angry or the fault too clear."²⁵

Millhauser considers ADR to be right for almost any case but recognizes that litigation is still necessary when the clients' objectives require it.²⁶ To attempt to use ADR in these situations "will serve to diminish the effectiveness of the various alternatives as well as client enthusiasm to use them."²⁷

Manka believes that timing is important in convincing a client to consider using an ADR technique. "There is a time in the life of a litigation when a suggestion by the lawyer to his client that he should try some other alternative means of resolving it is not what the client wants." The client at that time wishes his lawyer to be a "white knight." When that happens, Manka advises that ADR not be suggested to the client until he is in a mood more conducive to resolving the matter.

Knowing when and if to suggest ADR, therefore, becomes important. Some cases are more amenable to ADR than are others. Barker suggests that ADR is most beneficial in three types of situations: (1) if the parties have "dove-tailing or overlapping interests" that they may or may not be aware of, an all-or-nothing type of court decision may not be in the best interest

25. *Law Firms Suggest Litigation Alternatives—Will Their Practices Suffer?*, ATTORNEYS MARKETING REPORT, May, 1986, at 1, 3 [hereinafter *Law Firms*].

26. Millhauser, *supra* note 4, at 151.

27. *Id.*

of either party; (2) if the parties have an on-going relationship that may be just as important to them as the dispute itself, resolving the dispute in a less adversarial manner may help preserve that relationship; or (3) if the parties are unable or unwilling to perceive the merits and flaws of both sides of the dispute, an ADR proceeding can help the parties better understand both points of view. In all of these cases, ADR procedures can lead to a more rapid and mutually beneficial solution that can help continue an on-going relationship in a way that might not have been possible had the dispute been handled in court.

Keating suggests possible criteria in analyzing a case for its ADR potential to be the relationship of the parties, the size of the suit, and the nature of the dispute (whether distributive or multifaceted). A distributive complaint is less likely to be amenable to negotiation and mediation than a complaint with many different issues.

With alternative procedures replacing much of the litigation in the resolution of disputes, some firms, especially those with a large litigation practice, may be concerned that a decrease in that litigation will harm the firm. However, Millhauser says "[i]t's a matter of breadth of service rather than dollars and cents at this point."²⁸

Joan Hall, a partner with Barker at Jenner & Block, has remarked that her firm may lose money from settling cases earlier through ADR techniques but "[t]he old days when the client came into our office and said 'Spare no expense, just win the case,' are gone."²⁹ The firm must adapt to this change by offering other less costly and less time-consuming means of resolving the disputes.³⁰

Manka believes offering ADR solidifies the client-attorney relationship. "When we propose ADR, clients know we're looking out for their best interest, not just running up the fees."³¹ He also hopes that Lathrop, Koontz's emphasis on ADR will strengthen the firm's reputation and bring in more clients.³²

In fact, Manka believes that the failure to offer ADR may hurt a firm in the long run. He sees ADR as a ready-to-be-tapped market and if the law firms do not tap it, non-lawyer groups such as professional arbitrators and Rent-a-judge programs will do so.³³ "Lawyers won't even hear about many clients' problems unless these outside groups fail and our clients end up having to sue anyway."³⁴

28. *Law Firms*, *supra* note 25, at 5.

29. Hall, *Negotiation: Dispute Resolution as an Effective Alternative to Trial*, 6 AM. J. TRIAL ADVOC. 481, 483 (1983).

30. *Id.*

31. *Law Firms*, *supra* note 25, at 4.

32. *Id.*

33. *Id.* at 1.

34. *Id.*

Even though ADR may benefit both the client and the law firm, some clients and attorneys are still reluctant to try ADR. Manka believes that one of the biggest problems in trying to use ADR is that people "may have heard the concept but they really don't know anything about it."

According to Keating, one reason for lawyers' reluctance in using ADR is the fear of appearing weak. He says there is a reluctance to offer settlement suggestions "for fear that it will undermine and corrupt the kind of single-minded adversarial crusader spirit that seems to underlie much litigation." He believes that ADR is perceived as a weak posture because people do not really understand what it is. To help counteract this misconception, Keating acts as Tillinghast's "Charlie Brown." "I can afford to be the wishy-washy one and by doing so be an individual different than the involved litigator." This lessens the feeling that the client's advocate is not going to "fight to the last straw on behalf of the client."

Millhauser agrees with this observation. She says that attorneys at Step-toe & Johnson are sometimes reluctant to use ADR because they are concerned about how they will appear to the client.³⁵ "Many clients come to us only after they've tried everything else, and they're ready to charge ahead with litigation."³⁶ Consequently, attorneys question whether the clients really want anything other than litigation.³⁷

A reason for the clients' reluctance, according to Keating, is that by the time clients have decided to litigate, they are too angry to consider an alternative to litigation. "They're interested in their pound of flesh and it's hard frequently at that point to convince people to do something differently." That anger and annoyance, says Millhauser, makes them distrust the thought of working in good faith with the same people who helped bring about the dispute in the first place.

Manka believes it will take effort and persistence to gain acceptance for ADR because people are skeptical. "The advantage it offers obviously makes it very attractive, but with anything that's new, people have a show-me attitude—"Is it really good?" "

Reluctance and skepticism are not the only problems facing ADR. Millhauser says there has to be a shift in attitude and "mindset" for ADR to be effective.³⁸ She believes that it is important "that ADR is viewed as something more than just another weapon in the arsenal of the litigator and is not going to be subject to the same manipulation and deceptions that currently plague litigation."³⁹ For ADR to work, the participants have to want to work together in developing a mutually satisfactory outcome. The

35. *Id.* at 4.

36. *Id.*

37. *Id.*

38. Millhauser, *supra* note 4, at 150.

39. *Id.*

purpose of the ADR procedure should not be to gain an advantage, such as obtaining more information about the other party's case.⁴⁰ "If lawyers and clients go into these proceedings hoping and determined to produce meaningful outcomes, such outcomes will result. If it is tactical advantages that are sought, then new procedures quickly will be reduced to just additional steps in an already burdensome process."⁴¹

Barker believes there is a possibility that the ADR movement has been so "over-hyped" that the results will not meet people's expectations. He also thinks that calling ADR a win-win situation is a "glib mischaracterization of what it is all about." Instead, he suggests that ADR be characterized in such business-like terms as cost-effectiveness, opportunity/cost, or business analyses. These are terms that clients understand because "[w]hat the clients are trying to do is get the most satisfactory outcome possible for the most reasonable cost possible."

Certification is another problem facing ADR, according to Barker. He believes it is "meritorious" to say the field should not be limited to people with certain credentials such as law or counseling degrees. However, he thinks "it is important that the public understand that they get what they pay for and it is quite possible for someone to hold himself out as a purveyor of ADR procedures but really doesn't know what he's doing." When that happens, the client gets "less than an appropriate amount of assistance."

Manka perceives two potential problems in the future of ADR. One problem is the risk that ADR will not be given an opportunity to develop out of its early stages. He believes it will take much more promotion by dispute resolution centers, journals, practitioners, and other followers in order to give ADR the emphasis it needs to become well-accepted.

Manka believes another problem is that as ADR becomes more accepted, there will be a tendency to over-formalize the procedures, building in rules and rigidity. ADR's strength today is its flexibility which enables the practitioner to adapt the technique to the particular dispute. If over-formalization occurs, "people won't really be challenged to think creatively about what is the best technique, and if that happens, you'll stop having the high success rate we now get."

Omlie agrees with this observation. She believes it is important to keep the ADR concept flexible so that people can choose the techniques best suited for their situations. If it becomes systemized with hard and fast rules and complicated procedures, the flexibility that is so crucial will disappear.

Despite problems facing ADR, the future is still promising. Keating likens the future of ADR to the story about the only attorney in town who is starving to death until the arrival of a second attorney which brings pros-

40. *Id.*

41. *Id.*

perity to both. To illustrate, he offers an example. If Keating is the only attorney in the Providence area who is writing ADR clauses into contracts, then he cannot mediate or arbitrate a dispute arising out of those contracts because there would be a conflict of interest. Instead, it is necessary for other attorneys to insert ADR clauses into their clients' contracts so that Keating may serve as mediator or arbitrator in their disputes. He thinks that this kind of long-term building process will facilitate the growth of ADR.

Although Manka admits there are some problems with ADR, he is "very enthusiastic about its result." He thinks it will take work and time to convince lawyers to start applying and attempting to use ADR techniques in virtually all aspects of civil litigation. "It's not just a matter of running up the flag and having everyone instantly salute it." He believes, however, that effort and time spent in promoting ADR will be well worthwhile.

IV. CONCLUSION

Burying one's head in the sand will not make alternative dispute resolution go away. ADR is currently in both the law firm and the non-law firm settings. Unless it is found to be an ineffective or an inappropriate method of avoiding or resolving conflicts, it is here to stay.

Skepticism surrounding ADR can be analogized to that surrounding the introduction of the computer. Impediments to the wide-spread acceptance of computerization were the need to change people's attitudes, to revamp office procedures, and to retrain office personnel. Yet it is generally accepted today that computers reduce time and money required to handle many business needs. Indeed, they are considered indispensable by many businesses. Only time will tell whether this scenario will be repeated for alternative dispute resolution.

In the meantime, how should individual law firms respond to this new idea that is being thrust upon them? A growing number of firms have realized the potential benefits of ADR and have decided to offer those services. Yet many other firms are either consciously choosing to ignore ADR or are taking a "wait and see" approach.

How will those firms that have decided not to implement ADR be affected in the long run? Are they doing a disservice to their clients by not offering this approach? Will the firms suffer not only in their relationships with their present clients, but also in their ability to attract new clients? Will the inexperience and lack of knowledge in ADR reflect negatively on them when asked by other law firms or the courts to participate in certain ADR procedures? These are among the questions firms must ask themselves in deciding whether to offer ADR services.

If law firms were asked about their main objective, undoubtedly most would indicate a desire to provide the best possible service to their clients.

In view of this goal, perhaps the only question relevant to the ADR implementation decision should be, “Can we meet our objective of providing the best possible service to our clients by denying them the opportunity of trying ADR?”

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