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ADR vs. Litigation And In-House Expertise vs. Outside Counsel

The Editor interviews ***The Hon. William A. Dreier****, Member, Norris, McLaughlin & Marcus, P.A. (Presiding Judge, New Jersey Superior Court, Appellate Division, Retired),* ***Ryan Hamilton****, President, Resolute Systems, LLC, and* ***Brian Rauer,*** *General Counsel, Metro NY Better Business Bureau serving the Mid-Hudson/New York State region.*

Editor: Please share with us your thoughts about establishing in-house expertise in arbitration and mediation. Is ADR representation something that general counsel should look for outside counsel to provide, or is there a need for this kind of expertise within the legal department?

Dreier: Should there be in-house or outside expertise in ADR? The answer is "both." Unless the inside counsel is equipped to work in a mediation/litigation mode and handle the matter directly, outside counsel must be retained to represent the company. That attorney should be trained and experienced in dealing with mediation techniques as well as the substantially different task of litigation. But even the best mediation attorney can be horribly frustrated if the in-house counsel is unfamiliar with the dynamics of mediation. While it is best that a senior representative with decision-making authority and the in-house attorney be present at the mediation, often this is not logistically possible. The senior manager who makes the final decision is usually reached through inside counsel, who is asked for an opinion on settlements proposed by outside counsel at the mediation, with only a junior management member there. For this reason, it is vital that the Legal Department be attuned to the benefits and flexibility of a negotiated settlement and the give-and-take process of mediation. General counsel should see that in-house attorneys are trained in mediation and that outside counsel be retained not only for their litigation skills, but also for their proven success in mediation.

Ryan: A company should develop in-house expertise in ADR. The question is to what degree. Many of our corporate clients who are involved in ongoing ADR processes as the result of contracts with customers, suppliers, manufacturers or distributors have dedicated in-house attorneys who handle the mediation and arbitration of these cases. This ability to handle ADR in-house reduces legal costs by not having to hire outside counsel. If a company is only occasionally involved in ADR, outside counsel might be the route to go as they will be more practiced in ADR and familiar with the local mediators and arbitrators. Nevertheless, it does pay for companies to be well versed in the myriad of ADR options so they can direct local counsel to use the most effective procedures, etc. If they have their own contractual programs, working with an independent, experienced program administrator can make it easier for the company to handle these cases in-house.

Editor: Assuming General Counsel has a choice in a particular dispute of litigation or ADR, what are the factors that would point toward the ADR route? Toward litigation?

Dreier: Statistics show that 97 percent to 98 percent of all disputes settle. Therefore resort to mediation to speed up that process and cut the costs attendant on delay is a no-brainer, if cost saving is important. Pre-suit mediation or early intervention mediation in pending matters is essential. If it fails, consensual, tailored arbitration (where the parties can control the choice and expertise of the arbitrator, limit the scope of discovery, set the time of hearing and do away with costly appeals), makes eminently good sense. Interim remedies are also available. Litigation, however, can give a more defined set of discovery and procedural rules, a delay of the time of initial decision and an extended period of appeals before a final reckoning. An adversary can be forced to expend huge amounts, usually non-refundable, before the matter is over; but you must be prepared to do the same. Define your goals and make a choice.

Ryan: When considering ADR vs. litigation in corporate disputes, there are a number of factors to keep in mind. Mediation can be attractive if the company is looking to mitigate risk, control expenses and preserve relationships. Of course, mediation will only work if both sides are willing to negotiate off of their current positions. If the company is denying liability or is absolutely firm on its demand, these would be indicators that the dispute is more appropriate for binding arbitration or litigation. Arbitration offers significant cost savings over litigation, and in the case of complex disputes offers that advantage of the parties being able to select an arbitrator with substantial experience resolving cases in the area of their dispute. If the company determines there is liability and/or identifies the dispute as one to settle, we recommend it explores mediation. Because the parties are in control of the ultimate settlement, this gives the company great flexibility to explore all settlement options without risking bad publicity, adverse judicial outcomes and alienation of customers, suppliers, manufacturers or distributors. Litigation would be the best route if the company is strongly set in its position or needs to set a precedent and wants to go to trial.

Rauer: Forward-thinking in-house counsel are embracing the policy of avoiding unnecessary conflict escalation. The potential financial benefits are self-evident, while additional benefits may accrue down the road. A potential multi-year litigation resolved through Alternative Dispute Resolution within a few months – or even weeks – can, of course, substantially impact your bottom line. But the ancillary benefits may prove far more valuable: customer retention and fostered goodwill; maintenance of a valued business relationship moving forward, whether a corporate partner, vendor or even subsidiary; maintenance of the employer-employee relationship; reputation within the relevant communities; and general public relations. While there are certainly conflicts and issues that may ultimately warrant the litigation route, strongly consider putting a comprehensive corporate DR policy in place to guide the process. Dependent upon the specifics of the dispute and the relationship between the parties, an initial stage of conflict resolution may entail a less formal in-house corporate facilitation procedure. Drawing from the BBB's longstanding experience with the consumer-business relationship, the latter's utilization of a structured, good-faith, neutral and attentive dispute resolution process can engender both goodwill and a continuing loyal customer relationship. Remember that customers often share their experiences with their friends and family; consequently, consider the multiplier effect for customers who feel mistreated, ignored and without viable options to quickly, fairly and effectively resolve their dispute without undue complication. For smaller disputes, their only perceived option may be small claims court. The same holds true for business customers/vendors; a well-designed and trusted dispute resolution program may significantly decrease the perceived – and actual – need for litigation. You may realize strengthened business relationships coupled with an enhanced reputation. The potential benefits to your bottom line are palpable; when you further gauge the ancillary impact, a comprehensive DR policy is simply grounded in good business.

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