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## Resolving Disputes With A Focus On Your Client's Business Needs

*The Editor interviews Kathy Bryan, President and CEO, CPR International Institute for Conflict Prevention & Resolution; The Honorable William A. Dreier, Partner, Norris McLaughlin & Marcus P.A.; The Honorable H. Curtis Meanor, Partner, Podvey, Meanor, Catenacci, Hildner, Coccoziello & Chatman; and Eric Tuchmann, General Counsel and Corporate Secretary, American Arbitration Association.*

### **Editor:** What are the key components of a successful ADR program?

**Bryan:** The key ADR program component that encourages alternative dispute resolution use is to require individuals responsible for and deeply involved in cases to think outside the procedural and strategic box at an early stage in the dispute. An objective perspective helps managers and disputants see the forest rather than being overcome by the trees. Using an ADR screen, which is simply a point at which disputants are forced to assess the case and the viability of early resolution, helps the trial team's strategy. A screen helps the inside counsel think more programmatically about the organization's matters. Early case assessment provides an independent strategy check, regardless of the merits of the issues.

There are a number of other critical ADR program elements such as education, developing appropriate templates, sharing of best practices, and creating a feedback loop to ensure that the dispute's root cause is examined. A comprehensive program should include a cradle-to-grave anticipatory approach from the start of every business relationship, and it should continue through to the dispute's conclusion.

**Dreier:** Preparation, preparation, preparation. Preparation begins not only with gathering the evidence, but also with framing a strategy. Litigators often focus their trial strategy on past wrongs and correcting them. ADR teams help the client to focus on the ongoing interests of the corporation – such as preserving the corporation's good name and product image as well as lowering the overall litigation costs.

Rather than preparing just to win a case, ADR enables the parties to adjust the case to resolve the dispute with remedies that are not available in court. Preparation means having a good evaluation of the case so that you can assess what you should be seeking to get and what you should be giving up. Your assessment helps you measure what the dispute is worth against the corporation's long-term interests.

Preparation includes ensuring that top management is behind the ADR program. Their commitment should be instilled into the corporate culture, which requires some training both of management and lawyers.

Selection of mediators is another important aspect of preparation. You should set a pre-selection process for neutrals. Sometimes mediation and arbitration require different skills. Understanding the differences is part of the preparation.

Preparation requires providing ADR clauses in your contracts that cover timing, selection of the neutral, forum, rules to be followed and other critical elements so that you are not blindsided, especially if you are in the international arena.

**Meanor:** A successful ADR program has several key components. First and fore-

most, it is essential to engage an experienced neutral familiar with the subject matter of the case, if technical, and the governing legal principles. Look for a neutral who enjoys a reputation for having the intellectual curiosity and diligence to do the homework necessary to understand each party's position related to the issues in dispute. In addition, the neutral must be able to communicate with the parties.

Second, an ADR program contributes to the speed of reaching resolution. Engaging an experienced neutral can help expedite the hearing and prompt resolution of a dispute. With the expertise needed to sift through the information, the neutral can make a decision more quickly than a judge who may not have handled similar cases in the past. Neutrals who have served as judges have knowledge of techniques to expedite discovery, which can help make ADR much cheaper and faster than going to court. Similarly, former judges know how to run a hearing, which helps add additional efficiency and speed.

Third, ADR assures that the parties' dispute and its resolution remain confidential unlike the public forums characteristic of the judicial process.

**Tuchmann:** Successful ADR programs are most frequently characterized by their ability to resolve disputes in a just manner, and in a way that is quicker and less expensive than litigation. With arbitration, the management of the proceedings and a high quality arbitration award are assured by the selection of an experienced and qualified arbitrator. In fact, one of the most common reasons parties have their arbitrations administered by the American Arbitration Association is because of the

trained, experienced neutrals on our national roster of arbitrators. Speed and cost savings are obtained through the selection of an appropriate arbitrator, and also because parties have substantial control and flexibility regarding the design of the arbitration, including discovery and scheduling.

Other important factors can also influence key components of an ADR program. While mediation should always be considered for inclusion in a dispute resolution program, it is particularly important to do so in cases where ongoing personnel or other business relationships exist between the parties. The extent to which disputes are resolved confidentially can be of critical importance in certain disputes and, with international transactions, the neutrality of the decision-maker and the enforcement of any resulting arbitration award take precedence.

**Editor: How can the success of an ADR program be measured?**

**Bryan:** The bottom line is the bottom line: the best measurement is cost savings. Cost savings, however, are often difficult to measure except for routine cases following typical patterns. Nevertheless, other measures analyze trends

over time that can show whether the company actually benefits from ADR. These measures include the speed of resolution, enhanced business relationships, a reduction in discovery cost or burden, the total number of successful mediations or settlements, project cycle time improvements, improved employee relations and client satisfaction.

Mediation may be perceived as unsuccessful when one session doesn't produce a settlement. Veteran practitioners, however, know that mediation promotes a solution that better meets business needs than when another party, be it a judge or arbitrator, decides – especially in complex cases. There are many ways over the course of the case that even a failed mediation can enhance the parties' common ground and set the stage for resolution. It is the quality of the settlement in the end that is the most important measurement.

**Dreier:** The success of an ADR program should be measured over a period of a few years to see how it affects the litigation budget. Most companies will find that an ADR program can cut their litigation budgets anywhere from 30 to 50 percent or more.

There are also public relations benefits. The corporation will not be in the headlines as a defendant in a lawsuit.

ADR is private, so you are able to preserve the corporate image. That is very important.

**Meanor:** Companies that use ADR over a period of time enjoy a number of benefits. Their matters are resolved by experienced neutrals who focus on the parties' long-term interests. They enjoy promptness in having their positions heard and reaching resolution. As well as savings of time, savings of costs result from the percentage of settlements achieved in mediation before the expenses of trial preparation are incurred. Another measure of success is the lack of court challenges, or a very small number of them, to ADR decisions.

**Tuchmann:** The success of an ADR program should be evaluated from both a quantitative and qualitative perspective. First, organizations should consider whether the number of disputes, and the duration and cost of those disputes, has decreased over the period of time in which the ADR program has been in place. Second, participants should be consulted to determine their level of satisfaction with the ADR process, with the manner in which the matter was resolved, and with the quality of the arbitrator or mediator.