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ADR — Roundtable

Strategies For Successful Interaction With ADR Neutrals

*The Editor interviews **The Hon. William A. Dreier**, Partner, Norris McLaughlin & Marcus, P.A.; **Judge H. Curtis Meanor**, Partner, Podvey, Meanor, Catenacci, Hildner, Cociello & Chatman; **Christine Newhall**, Senior Vice President, American Arbitration Association; **John E. Osborn**, Partner, John E. Osborn P.C.; **Lawrence F. Ranallo**, Partner, PricewaterhouseCoopers LLP; **Brian Rauer**, General Counsel and Executive Director, Mid-Hudson Office, Better Business Bureau; **The Hon. Kathleen A. Roberts (Ret.)**, Mediator, Arbitrator and Special Discovery Master, JAMS; and **David J. Schaibley**, Director of Neutral Services, National Arbitration Forum.*

Editor: What key topics should be covered when contracting with an ADR neutral?

Dreier: When contracting with an ADR neutral, there are six principal areas to be covered:

Background: The parties should understand the neutral's qualifications, experience, training, attitude towards the mediation or arbitration, special expertise in the subject area, and successes in prior cases.

Conflicts: There should be a search for and clearing of any possible conflicts.

Scheduling: The parties should explore the neutral's availability and his/her flexibility in the scheduling of hearing dates and availability to supervise discovery, if needed.

Fees: There should be a frank discussion and an agreement concerning fees (including any cancellation policy and how fees will be shared between or among the parties).

Duties: The written agreement should define the neutral's duties, and if arbitration is contemplated, incorporate the governing law and procedures, state the issues submitted, and resolve the many optional provisions of the governing law.

Cooperation: The parties should agree to keep open minds, have decision makers present, produce documents, and give all reasonable courtesy to the other side.

Newhall: First and foremost, the parties must have full knowledge of any and all current and previous relationships between the neutral and the case participants, and this information should be disclosed at the very outset of the relationship. Such disclosures do not necessarily disqualify a neutral from service, and

having this information available up front avoids the situation of having a party object to the neutral's service later on in the relationship, should any undisclosed connections become known. Beyond that, the typical factors one considers in hiring a professional also apply: relevant expertise and experience, reputation, terms of compensation, and scope of services.

Meanor: It is important to know the detailed background of the neutral. This will tell you a lot about his or her other suitability for your dispute. It is also important to check references to those who have appeared before the neutral. Does the neutral follow the law; are the Rules of Evidence likely to be substantially controlling; is discovery, when necessary, apt to be limited or extensive? How soon after the close of the hearing can a decision be expected? Examination of these factors, plus an extensive search for any conflicts, will give the parties a sound basis for neutral selection.

Rauer: When retaining the services of an ADR neutral, avoid additional conflict down the road by setting the ground rules and structure at the outset. Among myriad issues to consider, confirm the fee structure, including daily/hourly rates, any potential facility/room fees and any additional charges that may accrue throughout the process. Conduct a thorough conflict of interest check, avoiding even the appearance of potential partiality; both parties must approach the process with this comfort level. The confidentiality of the procedure, including submitted documents and the neutral's generated notes, must also be clarified. Confirm the style employed by the neutral; for example, in mediation, a facilitative approach may be specifically sought by the parties in lieu of an evaluative or transformative model. Should an evaluative mediator be retained in that instance, the process may needlessly suffer. This factor, coupled with any desired subject matter expertise, should be mutually agreed upon before the consummation of any retention agreement. Any successful relationship between a neutral and the disputing parties must be grounded in a sense of trust, fairness, competence and a concomitant belief in the effectiveness of the process itself. Both parties must therefore support the neutral selection process, his or her qualifications and the overall approach.

Schaibley: Businesses need to consider several factors, including selection of a professional ADR administrator, neutral qualifications, and compliance with the law.

First, parties should choose a highly competent ADR administrator with a rule set that courts have consistently upheld. An inadequate or incomplete rule set will result in parties wasting time and money arguing over what went wrong. Best practices rules result in fair, efficient, and affordable experiences with ADR.

Second, parties can fulfill their expectation of having an experienced and wise neutral by selecting an ADR administrator that maintains an expert national panel. Parties should seek out an organization that provides a roster of highly experienced legal professionals in their local community with an excellent reputation for integrity.

Third, to ensure predictable results, an arbitrator must follow the law, and the arbitration agreement or arbitration rules should require that the arbitration award be grounded in applicable substantive law. This ensures the correct decision is made, avoids a split-the-baby result, and reduces grounds to attack the award.

Ranallo: I recommend clients focus on seven key questions: (1) Will the neutral be utilizing a concurring neutral or partner review process? This will help to avoid renegade opinions. (2) Does the neutral have industry expertise or will the neutral consult with an industry expert? (3) How will the neutral work toward timely closure of the dispute process and how often in the neutral's experience has a deadline for determination been missed? (4) How will the neutral handle requests for discovery of additional information? (5) How will the neutral ensure the cost effectiveness of the process? (6) Will the neutral conduct onsite field work? (7) How does the neutral prevent *ex parte* communication? The answers to these questions will help identify a neutral that will increase both the efficiency and the effectiveness of the proceeding.

Osborn: Our practice focuses on the litigation of complex construction, environmental and real estate matters. Because the outcome of these cases is often determined by the interpretation and analysis of engineering, scientific and technological information, many

attorneys in our field would choose an ADR neutral principally based upon his or her technical background. In our experience, the neutral's technical background should very seldom be the primary topic considered when contracting an ADR neutral. We believe that technical background is secondary because, when it comes down to it, the most effective neutral is one who has extraordinary listening skills, in depth ADR experience and training, and well developed coping and problem-solving abilities.

Roberts: The issues will be different for mediation and arbitration. In mediation, it is important to learn the mediator's approach to mediation – whether the mediator will act primarily as a facilitator of the parties' negotiation or will also predict the outcome of the dispute in court. It is also important to convey to the mediator the perceived obstacles to resolution of the dispute – emotions, personality dynamics, differing assessment of legal or factual issues.

In arbitration, it is important to ensure that the arbitrator's background, skills and experience are a good fit for the case. If the case is to be heard by a sole arbitrator, or if you are selecting an umpire or chair of a panel, it is essential to determine whether the arbitrator has strong managerial skills in order to move the process forward in a fair, efficient and expeditious manner.

Editor: What other factors contribute to successful relationships among an ADR neutral and the disputing parties?

Newhall: Timely and precise communication will contribute significantly to a satisfactory dispute-resolution experience. The neutral should clearly state:

- the nature, extent, method and schedule of any information exchange;

- the mechanism for resolving any procedural disagreements; and

- the agenda or order of proceedings for any conferences, mediation sessions or arbitration hearings.

The participants should also make the utmost effort in adhering to deadlines once a schedule has been established. Postponed hearings are a major concern to both ADR neutrals and the parties who appear before them, and often the cause of a postponement can be traced back to "slipping deadlines" in the preparatory stages leading up to the hearing. Therefore, a realistic pre-hearing schedule and a firm commitment to meeting even the least significant deadlines will reduce this most frustrating aspect of any dispute-resolution process.

Finally, the parties should understand that aside from resolving the dispute, the neutral's role is also to control costs, narrow the issues in dispute, and promptly bring the matter to a conclusion. In order to do so, the participants should be open to using non-traditional methods and available tech-

nologies, making the process a true alternative to litigation.

Meanor: An experienced Neutral will call for advance written presentations, thus eliminating the need for openings or at least lengthy and detailed ones. Arbitration is not war. A good arbitration advocate will approach the task with calmness, brevity and the consciousness that the parties are paying for the Neutral's time. If there is to be a transcript, it should be made clear at the outset whether it is to be the official record. Economy, dispatch, efficiency and privacy are the most desired attributes of arbitration. If both the Neutral and the parties adhere to these goals, the arbitration will be a success.

Roberts: Here, again, the issues will be different for mediation and arbitration. The relationship with the mediator is much more complex and much more dependent on the candid sharing of information regarding the parties' underlying interests and concerns. The mediator can also be used as a "negotiation coach" to assist both sides in communicating effectively to reach a mutually satisfactory agreement.

The success of the relationship between an arbitrator and the parties is dependent on the parties' confidence in the neutrality and impartiality of the arbitrator and the arbitrator's skill in managing the arbitration process. Clients should feel comfortable expressing any concerns they have regarding the arbitration process.

Dreier: To establish rapport between the neutral and the parties, a neutral should spend the time necessary to understand (1) the lines of authority, (2) the roots of the controversy, (3) the physical, technical, economic and human setting in which it arose, (4) the real needs of the parties, and their interests in the outcome, and (5) the resources available to the parties. The parties have to be made to understand the strengths and weaknesses in both their positions and those of their adversaries. Only then will the parties and their counsel come to trust that the Neutral appreciates their situation and can aid them in finding compromises, which might earlier have led to an unwarranted impasse. This trust can be the most important asset a neutral possesses.

Osborn: Successful relationships among the neutral and the parties are often a function of the personality, patience and skill of the mediator. When it comes down to it, if the parties respect the mediator's experience in the industry and the mediator's insights, ability and willingness to listen to each of the parties, the relationship will be successful and a settlement will be achieved.

Perhaps the most critical component of the relationship is the parties' perception of the effectiveness of the mediator to exercise effective closing techniques – to bring the mediation to a settlement. The parties' percep-

tion that the mediator is effective and that their time is not being wasted goes a long way toward settlement.

It is clear that experienced trial attorneys who have been immersed in the settlement process all of their careers make excellent mediators as do lawyers who are narrowly focused on a particular industry – construction, securities, employment or environmental law.

Schaibley: Other factors include the confidence that parties have in the Neutral's impartiality, expertise, and judgment. Parties need to trust a mediator's and arbitrator's judgment. Neutrals who have expertise relating to the subject matter of the controversy and the applicable law are able to develop this trust.

Parties should ensure that selected Neutrals have taken an oath to uphold ethical standards and applicable codes of conduct. The administrator should conduct rigorous conflict of interest checking to ensure the neutral's impartiality and independence. Working through an established national provider that has instituted these procedures will inspire confidence in the selected neutral and the ADR process.

Rauer: At the Better Business Bureau, mediation services are provided without charge to the consumer-business community, thus negating any potential fee issues. However, the Bureau still must ensure that the disputing parties approach the process with a comfort level and belief in our approach and its potential effectiveness. The Bureau stresses its neutrality at the outset and employs a primarily facilitative model; this has proven highly effective with parties seeking prompt tangible resolution of commercial disputes. Indeed, the Bureau's longstanding reputation for promoting trust in the marketplace between consumers and businesses from a truly impartial perspective encourages the parties to work with the BBB in an acknowledged resolution-fostering setting. The establishment of this relationship between the neutral and the disputing parties at the outset has been a significant factor in the Bureau's consistently high resolution rates and mutually satisfied parties.

Ranallo: Timely submission of information in accordance with the agreed upon schedule is key to allowing the neutral sufficient time to consider all available evidence and to keep the process moving towards completion. I also believe it is beneficial to the neutral for the disputing parties to engage consulting subject matter experts. For example, if the dispute involves accounting or tax matters, the parties should consider engaging a certified public accountant or tax specialist as a consulting subject matter expert. This allows submissions or arguments to be in a format that is typically used and understood by the neutral.