
# DELIVERING STRATEGIC SOLUTIONS ACCA'S 2000 ANNUAL MEETING

# ADR: NEW CHALLENGES, NEW ROLES AND NEW OPPORTUNITIES

The Phyllis W. Beck Chair and Law Symposium
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It is my distinct pleasure to participate in these sessions recognizing the contributions of two outstanding professionals and very special friends — Judge Phyllis Beck and Professor Carrie Menkel-Meadow. For over a decade, Judge Phyllis Beck and I have worked together as members of the Advisory Board of Pennsylvanians for Modern Courts, an organization responsible for meaningful judicial reform in Pennsylvania. While many throughout the state have contributed to this success, it is Judge Beck who has made the greatest difference.

In recent years, I have also had the good fortune to work with Professor Carrie Menkel-Meadow. Professor Menkel-Meadow has been one of the leading forces in the rapidly changing world of dispute resolution. I shall comment more about her contributions later.

I have been asked to comment on today's theme — "Redefining Lawyers' Work"— from the perspective of one who has substantially redefined his own work over the past decade. In a sense, I am here as "Exhibit A" — just one example of the thousands of lawyers throughout the country who have seen their roles change dramatically in recent years.

My own professional world is the world of dispute resolution. Since the mid-sixties, I have been engaged in the adversarial system of litigation. My cases have involved the range of issues that arise in the world of commerce; my expertise is in the process of litigation. Invariably, my cases have involved certain predictable rhythms — the rhythms of developing legal theories, taking discovery, filing dispositive motions and preparing for trial. Occasionally, my client's matters have been resolved at trial or on appeal. Most controversies, however, have been resolved through the process of settlement.

The skills of a trial lawyer should not be minimized. Indeed, there is no substitute for good case preparation and strong trial skills. Discovery and motion practice remain important tools in litigation. When there is a need to establish a precedent, to file an injunction or to protect a strategic interest, for example, litigation may well be the best choice. When there is a need for a prompt decision based upon the rights of the parties, the advantages of arbitration should also be considered.

In the world of business disputes, however, our universe is changing rapidly. While the adversarial system remains the model for establishing "truth" and rights, our clients' perspectives have shifted dramatically when it comes to business disputes. Of course, we need to recognize that even a trial cannot establish the facts, or truth, but only the "trial facts." In most business disputes, however, clients now seek solutions that focus as much upon the underlying interests as upon truth or rights. Speed and cost are often the paramount concerns. As a consequence, many of today's models for resolution are founded as much upon business school models as they are upon law school models.

Those of us on the front line of dispute resolution can feel the velocity of change. Only several years ago, the suggestion to mediate a dispute often had to be coupled with an explanation of the process. Experienced lawyers frequently confused mediation with arbitration. Mediation now is becoming commonplace and is gaining momentum as an enormously powerful tool to resolve disputes early, cost-effectively and fairly.

Today, my lens upon the world of dispute resolution is much wider, my approach far more strategic. I am spending far more time with my clients discussing their interests and objectives. Depending upon their needs, the path to resolution might still be negotiation or litigation. It might also be arbitration, mediation or even a customized ADR process. Success begins with an evaluation of the problem or dispute and continues with the development of a strategy in each next case which meets the goals and objectives of the client.

We have come to refer to this kind of strategic approach as "alternative dispute resolution" — Professor Menkel-Meadow would prefer the word "appropriate," I would prefer the word "active" - or "ADR". In its broadest sense, ADR suggests a culture that (1) takes a proactive approach to avoid disputes and (2) embraces a full range of options to resolve them. Such an approach presents an enormous challenge to a legal profession that historically has been resistant to change. But change we must, given the mandates of our courts, our governmental agencies, our rules of professional conduct, and, ultimately, our clients.

In a sense, I am fortunate. I have understood the need for a problem-solving approach to litigation for years, in part, because my earliest years at the bar involved a mix of litigation and transactional work and, in part, because of a good working relationship with corporate counsel who have shared with me their issues and concerns. I am also fortunate to be part of a law firm — Stradley Ronon Stevens & Young — that appreciates and fully supports the need for an ADR approach to dispute resolution. Mandatory ADR training required of all partners and associates serves as just one example of this commitment.

How has the changing landscape of dispute resolution impacted my daily professional life? As chair of Stradley's ten person, interdisciplinary ADR Practice Group, my colleagues and I regularly explore new strategies and innovative approaches to dispute resolution. Time permits me to offer only a few glimpses.

As counselors, we regularly work with our clients to take a more sophisticated approach to dispute resolution clauses in contracts. Inserting these clauses in early drafts of agreements, where they can be given the full attention they deserve, we frequently provide for a multi-tiered approach calling for neutral fact-finding, executive negotiations and mediation as a predicate to either arbitration or litigation. The choice will depend upon the client and the transaction. Franchise disputes, supply agreements and patent license agreements, for example, each call for very different strategies.

For those disputes that do arise, we have developed a suitability screen to provide for a focused analysis of the most appropriate dispute resolution alternatives. We also regularly address questions such as "How do we propose mediation to a reluctant adversary?" or "Does this dispute call for a mediator who is more facilitative or more evaluative?"

As advocates (I prefer "representatives") in ADR settings, we recognize that preparing the case is quite different from preparing for litigation. In a mediation, for example, we invariably begin with a traditional rights analysis — an understanding of the legally cognizable claims and defenses. Equally important, however, is an understanding of the client's (and the adversary's) industries, their business operations, their interests, and their objectives. In preparing for mediation, we need to prepare the client for questions that a witness almost never would be asked in a courtroom — questions such as "How do you feel about this dispute?" Or "what do you need the most?" Or "what are some of your weaknesses?" Or "can you state the case from the other side's point of view?" Once in mediation, it is important to execute a well thought out, yet flexible, negotiating plan. Many attorneys are unprepared for mediation as they believe there is no downside since mediation is non-binding. These attorneys lose enormous opportunities for their clients.

In recent years, we have undertaken new assignments which place a premium on creative lawyering or what Professor Menkel-Meadow calls "thinking out of the box." We have been engaged on several occasions to serve as "ADR process counsel" — that is, to monitor ongoing litigation and develop early exist strategies. We have also been asked to develop employment ADR systems — designs for avoiding disputes as much as resolving them. Permitting employees to air their grievances early so they do not become full-blown disputes, these programs often employ procedures such as ombudspersons and peer review and provide for mediation and arbitration as final steps.

We have also worked with corporate counsel to develop early case assessment programs and to provide ADR education and training. Working together with our clients and with organizations such as the CPR Institute for Dispute Resolution, the American Arbitration Association, the American Bar Association and the American Corporate Counsel Association, we believe we have given new meaning to the concept of "partnering" with our clients.

I should add that we have had a great deal of fun in the process. Meeting regularly, we compare notes, discuss cutting-edge ADR issues and publish a substantive, quarterly ADR newsletter. We have also conducted numerous educational programs and in-house client briefings on ADR.

My own professional world also has included substantial time as a mediator, primarily in complex business disputes. In many respects, I have found serving as a mediator to be at least as demanding as trying a case. I am called upon to apply the skills of a litigator, a negotiator, an advocate, a counselor, a diplomat and a psychologist. Serving as a mediator has its own set of challenges, such as the need to recall after the sixth or seventh hour precisely what information is and is not confidential (and what can and cannot be shared with the other side); the need to explore the depths of personal and business relationships; and the need for the endless amounts of perseverance and optimism necessary to bring parties together. At the same time, the rewards are great. I can recall a mediation between two healthcare institutions where, in twenty straight hours, we resolved not only every disputed issue, but also unrelated issues ripe for future disagreement. In working to facilitate an agreement the parties regarded as fair and just, my sense of personal accomplishment was as great as in any major victory in litigation.

For the entire legal profession, the new world of dispute resolution provides both exciting new challenges and new opportunities. It also requires new approaches and new skills. For all of us, first and foremost, there is a need to change our traditional approach to resolving disputes, even a need to change our basic attitudes. Perhaps the legendary coach of Temple’s great basketball teams, John Chaney, said it best. Coach Chaney said "winning is an attitude". He might well have been speaking about dispute resolution and ADR. We need to redefine the very meaning of what it is to "win". Consistent with what our clients want and deserve, the ultimate "win" requires our understanding of the client’s interests and goals and our ability to solve their problems.

For lawyers, this means new approaches that initially seem almost counter-intuitive. For example, the recovery of large sums of money is usually regarded as the ultimate "win" for plaintiffs in commercial cases. Yet, Wall Street values long-term streams of revenue even more highly than large sums of cash. Perhaps the restructuring of a long-term relationship would offer a better result. Once in mediation, lawyers usually try to exert a high degree of control over the process, not unlike in a deposition or at trial. However, direct involvement of the client in the mediation process is often the best way to succeed. Lawyers also frequently engage in a "we-they" approach to negotiations that rarely results in a zero-sum gain. Lawyers need to have a better understanding of the importance of integrative bargaining, where lawyers can sit on the same side of the table and try to "expand the pie".

Lawyers also need to reflect upon the meaning of Ethical Consideration 7.1 of the ABA Model Rules of Professional Conduct, imposing a duty to represent a client zealously. Effective mediation advocates need to abandon any desire for revenge in favor of a more goal oriented approach if they are to secure the "win" that

best serves their client's interests. In many instances, it is not the lawyer but the angry client who wants revenge. For these clients, every new case becomes a matter of principle until the client receives the lawyer's third or fourth bill — then the client wants to spell the word "principle" differently. Here, even more so, the lawyer has a responsibility to make an early and realistic assessment of the dispute and to serve as an anchor for the client.

For law firms, there is a need to take the long-term view. Many law firms have been reluctant to embrace an ADR approach to dispute resolution. These firms see ADR as an incursion into a significant profit center (i.e., litigation). Professional responsibility aside, the world of ADR is here to stay and those who take a leadership position are likely to gain a significant competitive advantage. At Stradley Ronon, for example, our commitment to ADR has led not only to a volume of ADR related assignments, but also to new relationships with clients who have retained our firm for litigation. Most corporate counsel want their outside litigation counsel to be not only outstanding trial lawyers, but also lawyers who are committed to an ADR approach to dispute resolution. Such an approach will be even more critical in the next decade given the rapid expansion of the accounting firms and management consulting firms into the world of dispute resolution.

For business clients, there is a need to make an up-front investment in training and resources. In order to manage a dispute, clients need to depart from a more ad hoc approach to dispute resolution. Clients need to secure the buy-in of management, to make an up-front investment in training and resources, to develop programs for early case assessments and ongoing management of disputes and to establish systems to track and measure the results.

For law schools, there is a need to recognize that the demands of the marketplace have forever changed the dynamics of dispute resolution. Obviously, an understanding of the adversarial system, stare decisis and the process of litigation remain critical. At the same time, students need to enhance their skills as negotiators and to appreciate, for example, the value of listening or the advantage of making the "first credible offer". Law students also need to understand the suitability and advocacy issues in ADR at more sophisticated levels and to understand the important keys to problem solving.

For the mediation and ADR community, we need to assure quality, especially at a time when so many lawyers without experience are trying their hand as neutrals. Even more experienced mediators need to enhance their skills by exchanging views with their colleagues on issues such as breaking impasse, power imbalance and mediation transparency. There is also a need to define the rules for those serving as neutrals — an area that is mostly uncharted waters.

Fortunately, there are some beacons of light to provide us with guidance in this brave new world of dispute resolution. Institutions such as the CPR Institute for Dispute Resolution, the American Arbitration Association and the American Bar Association are regularly grappling with the need for education, training and guidelines. In addition, a few individuals have made a substantial difference. One of our participants today, Jim Henry, the founder and President of the CPR Institute, is preeminent among them. In large measure, ADR has become a part of the mainstream of our dispute resolution culture in America because of the efforts of the CPR Institute and the personal commitment and vision of Jim Henry. Another of these leaders is Professor Carrie Menkel-Meadow, whose 1984 article in the UCLA Law Review, Carrie Menkel-Meadow, Toward Another View of Legal Negotiation: The Structure of Problem Solving, 31 U.C.L.A. L. Rev. 754 (1984), remains one of the leading treatises on the art and science of negotiating and problem solving. Most recently, Professor Menkel-Meadow has worked to provide us with a roadmap for the future as Chair of the CPR-Georgetown Commission on Ethics and Standards in ADR. The Commission's proposed Model Rule of Professional Conduct for the Lawyer Serving as Third Party Neutral offers substantial guidance in areas such as competence, confidentiality and conflicts. I should add, having recently sat in on one of her classes, that Professor Menkel-Meadow is also an outstanding teacher. I rarely have seen students so attentive in a law school classroom.

While there are many new challenges, there are also new opportunities and new rewards. The world of ADR, unbounded by strict rules of litigation, is limited only by one's imagination. Lawyers are designing new and imaginative approaches to dispute resolution every day. The emerging field of "transformative mediation" in employment disputes, for example, strives not only to resolve the employee's grievance but also to enhance morale in the workplace. "Consensus building", another example, permits the design of a process to avoid escalating confrontations with governmental agencies and stakeholder groups.

For both corporate counsel and the private bar, the problem-solving approach to dispute resolution can be extraordinarily stimulating and rewarding. Each next case requires a fresh new approach, an understanding of the client's business and objectives and far more communication with the client. As we approach the next century, we can move beyond the "win-lose" environment of litigation to the full range of ADR options available to avoid disputes and solve our clients' problems. By making this commitment to ADR, we have the opportunity to add substantial value both to our clients and to our profession.