Corporate clients are no longer willing or able to underwrite the costs of litigation. In-house counsel are looking for cost-effective alternatives, and law firms will have to provide them in order to survive. But how does a law firm break out of the traditional mold to offer such alternatives? How will the litigation department react? How will the other practice groups incorporate the idea of alternative dispute resolution into their client services?

**ADR: A Separate Discipline?**

Alternative dispute resolution, or ADR, is an umbrella term for a panoply of techniques, some well established, others emerging and evolving, that can be used to resolve conflict without resort to litigation, and without exposure to the increasingly insupportable costs in time, money, and emotional stress that almost always accompany a protracted court battle. In the three decades or so since ADR became part of the industry lexicon, it has been seen primarily as a “cross-practice” that can be used incidentally by one or more practice groups within a firm should a circumstance arise where it seems appropriate or necessary to explore the possibility of peaceful resolution of an existing or potential dispute. Others may look upon ADR as another tool in the litigation department’s arsenal—where it is likely to get sparing use. In many cases, it has been relegated to sole practitioners, who go out on their own to practice ADR, perhaps due to a lack of support within the law firm structure.

The fact is that ADR, through its many diverse components, is indeed a separate discipline and should be recognized and treated as such. If it is left to other firm departments to utilize ADR on an ad hoc basis, the firm will develop neither a specialty nor a reputation for seeking alternative, cost-effective resolutions for its clients. If it is left to the litigators, it is likely to be used only when mandated by the court or by a contract dispute resolution clause. Indeed, if law firms don’t support both their lawyers who have an ADR sensibility and are drawn to this work and its clients whose voices continue to be raised in opposition to existing law firm practices, then they will watch those lawyers peel off from their firms and take with them what could be a substantial source of business and client goodwill. Establishing a full-service, separate ADR department within the law firm, staffed with lawyers who possess this specialized knowledge and training, will prevent such defections and respond to the growing call for more affordable and less taxing dispute resolution.

**Filling the Void**

The legal profession has always been quick to step into a void and provide needed services in newly developing areas. Just look at the proliferation of environmental lawyers in the last 10 years, or the burgeoning bankruptcy practices responding to today’s economic realities. Yet with ADR, there’s always been a bit of a pushback against the use of techniques that, to a bottom-line-oriented management committee, can appear to be a direct hit against litigation revenues. So why should a firm commit to an alternative dispute resolution practice? How can it overcome the

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**By Norman Solovay**

The mandate that issued from the last Board meeting could not have been clearer—litigation costs must be brought under control. The belt-tightening that is the stuff of global headlines has just hit your desk. As general counsel, you need to focus on new ways to handle the numerous disputes, large and small, that are brought to you every day. You realize that you need to add an alternative dispute resolution specialist to your outside counsel team, and now! How will you find the right person?

The partners’ meeting just broke up and panic is setting in. Law firms across the country are laying off associates, and even partners have reason to worry about job security. In recent years clients have become increasingly unwilling, and now in many cases have become unable, to pay the skyrocketing costs of full-blown litigation. You realize that you need to develop and market alternative dispute resolution skills as a core offering of your firm if you want not only to survive the current economic downturn, but be a real player in the future for legal disputes. How do you go about building such an expertise?

Both the in-house counsel and the law firm face the same dilemma. Legal needs are changing dramatically.
It is helpful to position a new ADR practice as an enhancement of existing firm services.

may sound harsh, but anyone who has worked in litigation knows that a protracted battle, extensive discovery and motion practice, and drawn-out, position-based settlement attempts are all great revenue builders. Every lawyer also knows the well-publicized statistic that more than 98 percent of all cases filed are resolved before trial—but many of them only after long, grueling machinations that exact a tremendous price on the client both financially and emotionally.

It is just this type of practice to which corporate counsel must find alternatives. Their ability to carry out one of their primary job responsibilities, resolving both internal and external disputes, is experiencing a financial constraint like never before. In-house counsel need to know that their lawyers are trained, experienced, and committed to alternative techniques that are likely to resolve their issues with significant savings. Yet it is the rare law firm website that actively suggests an exploration of ADR possibilities whenever and whenever feasible.

It is helpful to position a new ADR practice as an enhancement of existing firm services. Not only will clients appreciate being given more options, but lawyers in other practice areas should find it a tremendous asset to be able to offer more options to clients who find themselves facing a legal dispute. This is particularly true of corporate lawyers, whose clients almost always have a vested interest in preserving and enhancing their business relationships. ADR is particularly well-suited to resolving disputes where the parties desire a continued relationship. Traditional litigation can be so divisive and emotionally charged as the parties dig into their respective positions and hunker down for the long fight that business realities, and ongoing relationships between the parties, are often sacrificed. ADR also can be helpful in getting through a tough spot in a negotiation. Mediation has been successful in resolving issues that otherwise might have caused transaction negotiations to break down. Issues may arise in the course of a corporate transaction that could be resolved by mediation. The same will be true in other areas of the firm. All the firm’s lawyers will benefit from being able to offer their clients a choice of exploring options with the ADR department, instead of going directly to litigation or shutting down negotiations. There will almost always be an ADR technique that can be tried before committing to litigation or giving up on a deal.

What’s So “Specialized” About ADR?

Sometimes the members of a firm’s litigation department in particular will balk at the idea of a separate and discrete “alternative dispute resolution” practice within their firm. Whereas transactions belong to the corporate department, wills and trusts to T&E, and bankruptcy filings to their own discrete practice area, disputes have always been the exclusive domain of the litigators. Moreover, since the vast majority of cases do eventually settle, it is not surprising to hear litigators say that they engage in settlement discussions all the time, and query why they need to involve someone else—and give away their own business—to do something that is already an integral part of their practice.

This oversimplification misunderstands the entire purpose and process of alternative dispute resolution. Yes, it is true that “settlement,” as opposed to “war,” is a goal of all ADR techniques. But the specialized expertise of an ADR practitioner is found in the process used to achieve the clients’ goals, which are viewed more broadly to include not only a settlement of the dispute before them, but a resolution that seeks to preserve ongoing relationships and foster cooperation for the long term. These are things that are not easily achieved by the standard, position-based settlement negotiations that typically occur at various stages of a litigated dispute. Furthermore, settlement talks engaged in by litigators are of a different nature and quality than those engaged in by a lawyer committed only to finding a peaceful resolution to the dispute. Asking a lawyer to engage simultaneously in litigation strategy and settlement discussion creates a dissonance, and some would say even a conflict of interest, that is not easily overcome. A separate ADR practitioner, operating without such distractions, has a much clearer path to resolution.

In a recent widely acclaimed book by Canadian law professor Julie Macfarlane titled The New Lawyer: How Settlement Is Transforming the Practice of Law, the reality of the resistance of corporate and personal clients alike to spending large amounts of time and money on litigation is shown to be resulting in the increasing use of negotiation, mediation, and collaboration in resolving lawsuits. Professor Macfarlane makes the following observation, which should be the watchword for law firms looking to respond to the changing market:

[As] settlement processes become more mainstream and accepted, the expectation of skillful [ADR] performance, and its market value, rises. Firms . . . begin to market themselves as mediation or alternative dispute resolution “specialists” as this expertise becomes a valuable commodity.

Practical objections require practical solutions. Developing a valuable commodity that can enhance existing client
relationships and bring in new ones is an obvious first line of defense against lawyers who cry foul at the thought of having disputes that could carry on in litigation for years diverted to an ADR department designed to resolve them far more quickly and efficiently. The value lies in the client relationship. While there will always be those clients who want the aggressive pit bull litigator duking it out on their behalf, far more often our clients want resolution, not war, and smaller legal bills, not larger. Our ability to deliver is rewarded in client loyalty. Our inability to do so, particularly in the current economy, is likely to result in client dissatisfaction and alienation.

Do the Right Thing

There is one more reason to consider doing things the easier, softer way. Cooperative resolution not only eases the burdens of our clients, it is rewarding for us as lawyers in its own right. Mohandas Ghandi, speaking about his experience encouraging a settlement by a client of a commercial dispute, said:

My joy was boundless. I had learnt the true practice of law. I had learnt to find out the better side of human nature and to enter men's hearts. I realized the true function of a lawyer was to unite parties riven asunder. The lesson was so indelibly burnt into me that a large part of my time during the twenty years of my practice as a lawyer was occupied in bringing about private compromises of hundreds of cases. I lost nothing thereby—not even money, certainly not my soul.

Some consider the newer forms of ADR to signal a spiritual renaissance of the legal profession. Perhaps that is because, in many cases, it is simply the right thing to do.

Building a Successful ADR Practice

Good negotiating skills are a great starting point for an ADR practitioner, but they are just that—a starting point. And if a lawyer is accustomed to position-based negotiation, even those basic skills will require adaptation. ADR finds its foundation in interest-based negotiation. Identified and described in the seminal work on the subject, Getting to Yes, by Roger Fisher and William L. Ury, interest-based negotiation looks underneath the entrenched positions of the parties to better understand their needs, motives, and objectives, and uses that information to creatively generate options that are responsive to those needs. It requires a completely different skill set than positional bargaining, and may not fit comfortably with a career litigator's developed tactics for getting the best deal for his or her client.

It is precisely for this reason that ADR deserves a separate place within the law firm structure. The lawyers who are drawn to ADR are likely to have a temperament, possess skills, and have relationships with their adversaries of a sharply different nature than their litigation counterparts. To assume that the firm's litigators can simply step into the role of an ADR practitioner is a mistake. Rather, a firm should seek out the type of lawyer for whom this work is attractive, not just something they need to try before getting out the next set of motion papers.

The lawyers in the ADR department, in turn, need to take advantage of the many training opportunities that exist in various forms of ADR. CLE courses abound in the areas of mediation and arbitration, both for those who wish to advocate for their clients in a mediation or arbitration setting, as well as those who wish to act as the neutral in such proceedings. Becoming a neutral requires a higher level of training, and commitment to that training says a great deal to a potential client about the lawyer's, and the firm's, commitment to the ADR process. Perhaps even more specialized is collaborative law, once confined to the practice of family law but now finding its footing in the civil arena as well. As more law firms get on board with ADR departments, we can expect to see a concurrent growth in cases that can and will be handled through collaborative or cooperative processes.

Hiring an ADR Firm

In searching for a law firm that will address the goal of litigation cost containment through the use of alternative dispute resolution techniques, in-house counsel should, first and foremost, find a firm that has made a commitment to a discrete ADR department. This speaks volumes about the firm's honest desire to be part of the solution to the crushing costs of litigation in today's world. Then, ask about the extent of services offered in the ADR department, look for a depth of understanding about various techniques and processes, and inquire about the level of training and experience of the lawyers practicing in the department. Is the lawyer taking care to explain everything carefully and patiently? Is he or she involving you in the process and decisions from the very start? The client's involvement and understanding are key, and the relationship between client and lawyer will provide a window into how that lawyer will work cooperatively in an ADR setting to resolve conflict with another party.

It is almost always appropriate to try some sort of alternative dispute resolution technique before heading to court
end up there, despite the best efforts of their ADR lawyer. It is not appropriate for an ADR lawyer to stay engaged in alternative techniques past the point where they are of use to the client, even if it is out of a strong sense of commitment to peaceful resolution.

Finally, make ADR a protocol of your in-house practice. If it is company policy to always explore ADR options before litigating, then adversarial parties are less inclined to believe that an offer of ADR is in any way a sign of weakness. Many Fortune 500 companies and others have made commitments to a peaceful approach to corporate disputes. Membership in organizations such as the CPR Institute, the International Institute for Conflict Prevention and Resolution, makes a strong statement about corporate standard practice, and will serve to deflect criticism or negative assumptions that might otherwise arise in those unfamiliar with the promise of ADR.

Conclusion

The marketplace is demanding the services that can be offered by alternative dispute resolution professionals. Law firms, slow to embrace a new way of looking at conflict as well as their own business model, have remained behind the curve in offering the specialized services that are needed. Discrete ADR departments within a firm can provide a greater choice of services for clients, work cooperatively with other departments, and over time develop a firm reputation for constructive and cooperative dispute resolution.

No less a figure than Abraham Lincoln has seen the promise in such a practice. He said:

Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses and waste of time. As a peacemaker, the lawyer has a superior opportunity of being a good man. There will still be business enough.