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Lawyers as Problem Solvers: Alternative Dispute Resolution

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If you want to grow your law practice and your reputation, to be known as a problem solver, and to keep pace in today's value-driven consumer and business culture, consider enhancing and promoting your skills in Alternative Dispute Resolution (ADR).

HOW DOES ADR COMPARE TO LITIGATION?

ADR is a broad term that covers virtually every means of resolving conflict other than litigation. Most ADR involves a private, informal, non-adversarial process. Often in ADR, the conflict is framed as a shared problem to be solved, the parties have broad freedom to customize the procedure, and information is shared voluntarily. The law may or may not be a significant factor in the outcome. In most ADR, the parties are the decision-makers and are not limited to traditional legal remedies. Rather, the parties jointly create a solution that satisfies their interests.

Even when litigation is practiced efficiently and cost-effectively, it is almost always more expensive than a successful ADR process addressing the same issues.

The best-known forms of ADR are mediation and arbitration, but there are many others, including neutral case evaluation, facilitation, ombuds services, and project dispute panels. Arbitration and mediation come in various forms and styles and can be customized to suit the situation. Other forms of ADR include combinations of mediation and arbitration.

In"med-arb," mediation is followed by arbitration of any remaining issues. In "arb-med," an arbitration hearing takes place, but the decision is withheld while the parties attempt to reach settlement through mediation.

CLIENTS WANT SOLUTIONS, NOT VICTORIES

Today, potential clients—both individuals and organizations—are more knowledgeable, result-oriented, and price-conscious than ever. They come to law firms for expert help resolving problems that are already costing them dearly in distracted management, lost business, damaged relationships, and missed opportunities. They want lawyers who will help them move through their conflicts wisely and pragmatically so that they can return their focus to living their lives and running their businesses. For these clients, "winning" often means resolving the dispute in a way that satisfies their business and personal interests. They do not necessarily want or need a victory in court, especially if that would require a large expenditure of time, money, and other resources.

More and more, clients see the adversarial system as one that, by design, divides a fixed-sized pie among three hungry competitors—a plaintiff, a defendant, and a lawyer or law firm. These clients, therefore, aren't looking for a lawyer for whom "conflict resolution" means beating the other side or pressuring them to "give in" or "come to reason."

These clients are inherently skeptical of threatening litigation as settlement "leverage" because they have learned that litigation is expensive and unpredictable and that most cases never go to trial anyway. Today's savvier clients understand, at least generally, that ADR offers the possibility of expanding the pie and preserving a greater portion of this larger pie for the parties to share.

THE LEGAL PROFESSION IS MORE COMPETITIVE THAN EVER

Another reason more lawyers are embracing ADR is that the practice of law is more competitive than ever. Services formerly reserved to private-practice lawyers billing by the hour are now being provided more cheaply by non-lawyers, being automated, being "commoditized," and being sold and delivered à la carte online.

In this new world, lawyers who want to be known as the "go-to" problem solvers for business, government, and family conflicts, who want to enjoy long-term relationships with clients, and who want to receive high-quality referrals must be able to attract not just clients who want to "win" in the sense of someone else losing, but also the many clients who have a more flexible attitude toward what an acceptable solution might be.

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More and more, lawyers are successful not because they are great litigators, but because they are great litigation avoiders. Helping clients prevent disputes and, for the disputes that do arise, resolving them in efficient and satisfying ways, are what many potential clients now think of when they think of "dispute resolution." For many clients, litigation is now the "alternative"—one they want to avoid.

VIRGINIA LAWYERS ARE EXPECTED TO DISCUSS ADR WITH THEIR CLIENTS

If appealing to a larger pool of potential clients and satisfying the clients who retain you were not reasons enough, the Virginia Rules of Professional Conduct remind us of our duty to inform clients of the range of options available for solving their problems and the importance of honoring the clients' goals for the representation. Specifically, Comment 1 to Rule 1.2 provides that every Virginia lawyer "shall advise the client about the advantages, disadvantages, and availability of dispute resolution processes that might be appropriate in pursuing these objectives." The same comment continues:

> "[A] clear distinction between objectives and means sometimes cannot be drawn, and in many cases the client-lawyer relationship partakes of a joint undertaking. In questions of means, the lawyer should assume responsibility for technical and legal tactical issues, but should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected."

Of course, this does not mean that lawyers must choose ADR for every client problem or dispute. But Virginia lawyers plainly have a duty to advise clients of alternatives to litigation. Considering all the ADR methods available, the range of matters and situations for which one or another ADR process may be suitable is very broad. Rule 1.2 contemplates that lawyers will be familiar with these methods and prepared to advise their clients about them.

CONCLUSION

The authors sometimes wonder whether, given a blank slate, we would invent the modern American adversarial system. Knowing what we now do know about what works and what people want when it comes to addressing conflict, would we create the expensive, complex, and often misunderstood litigation system we have today?

Or would we create a system that recognizes that conflict is a natural part of life, that focuses on aiding relationships, and empowering and supporting parties to create their own solutions in efficient and satisfying ways, and that makes it a primary obligation of lawyers to seek solutions that heal and add value?

Litigation is not likely to go the way of the buggy whip. We are not likely to do away with the adversarial system anytime soon. Nor should we. That system is sometimes the most effective, and sometimes the only, way to protect a client's interests. But today, relatively few clients are looking to hire a modern-day gladiator to vanquish an opponent. Rather, most are looking for wise, balanced counsel and cost-effective, pragmatic solutions.

If you have a headache, you don't typically begin the search for medical help with a visit to the neurosurgeon. Yes, some headaches will require brain surgery, but most will be cured with far less invasive, costly, risky, time-consuming, and destructive interventions. Litigation is the "brain surgery" of our legal system. Today's clients get that. That is why they often prefer to work with lawyers who offer the realistic possibility of a "cure" through the use of the rich assortment of constructive and creative approaches known as "Alternative Dispute Resolution." ■