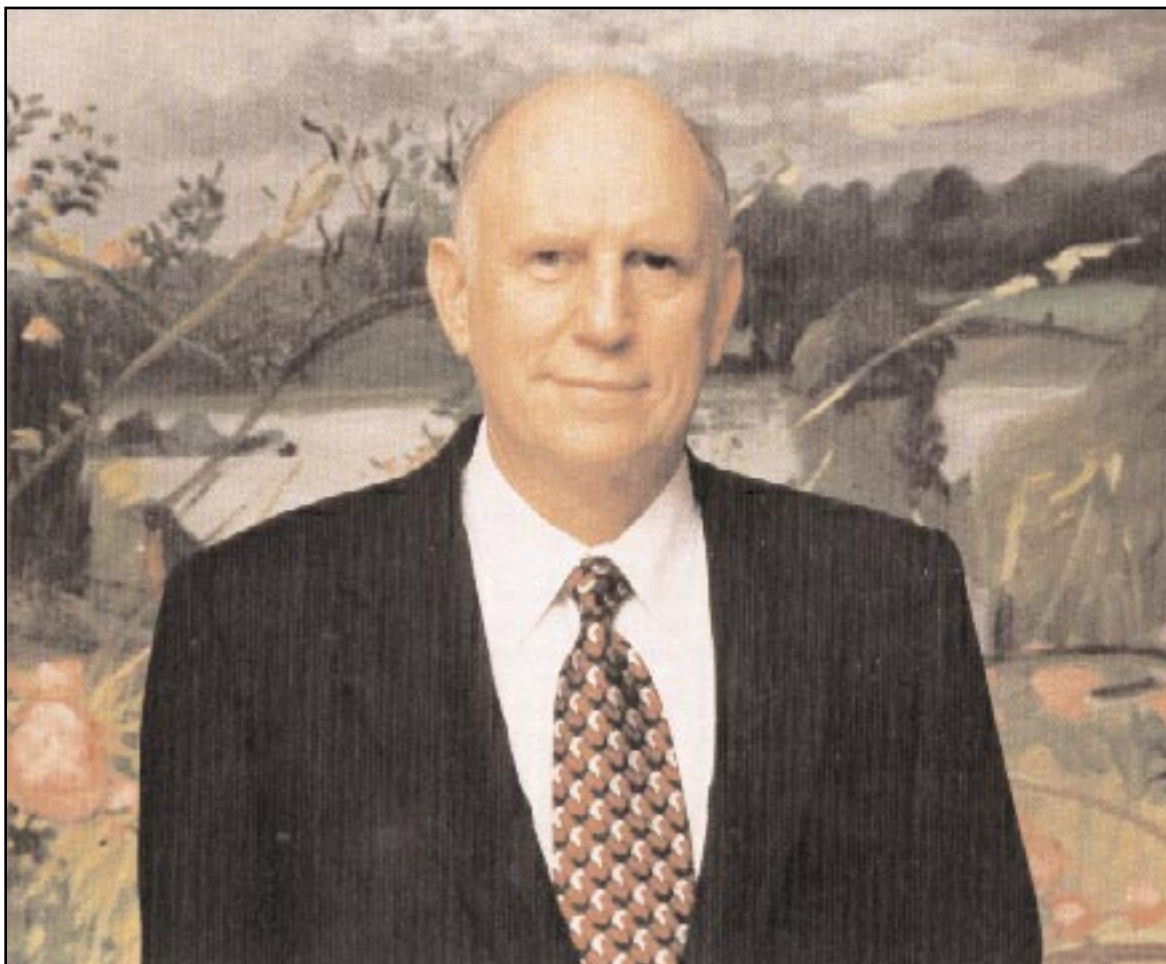


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Bennett G. Picker
Partner, Stradley Ronon
Stevens & Young, LLP

Negotiation vs. litigation

His cause: making the case for Alternate Dispute Resolution

TODD BISHOP
STAFF WRITER

The situation was complicated enough to frustrate – and fund – an army of litigators. Dozens of lawsuits, hundreds of plaintiffs, more than 80 law firms and three distinct groups of defendants, most of them pointing fingers and lodging claims, all of them stuck in a legal morass.

These were the cases that followed the devastating 1991 fire at Philadelphia’s One Meridian Plaza, and Bennett G. Picker

would draw from them an unlikely piece of inspiration, one that would help alter the course of his career in the law.

The critical event came many months into the process, when Picker, a lawyer representing an alarm company, watched the work of a facilitator who was called upon to help one group of defendants set aside their differences and fight the suits together.

Picker, a seasoned litigator, had been involved before in such processes, and he had taken a particular interest in them. But this time, in the context of what were extraordinarily complicated disputes, he

viewed the facilitator’s work in a new light.

“I think that I realized for the first time the power of mediation in the Meridian fire cases,” Picker, now a partner with Philadelphia’s Stradley Ronon Stevens & Young, recalls. “I saw the way this facilitator was able to bring the parties together. It showed me that a cooperative negotiation is far more productive than a confrontational negotiation.”

The cases went on to settle for a combined reported total of at least \$175 million, including lawyers’ fees and costs. All sides claimed victory, and many of those involved credited the facilitator for solving the stalemate among

ADR: Attorney assumes leading role in pushing for alternative to litigation

the group of defendants.

Picker, meanwhile, went on to become an advocate and practitioner of alternative dispute resolution, or ADR. The process he witnessed in the Meridian cases is an example.

In the years since, Picker, 58, has become chair of Stradley Ronon's alternative dispute resolution practice group; written a widely praised book on the subject; become an internationally recognized ADR speaker; and begun serving as a neutral party in as many as 20 cases each year, limiting his load so as to continue representing clients in complex and commercial litigation and, of course, alternative dispute resolution.

Picker, in short, has become something of a guru on the subject of ADR, and he is active in efforts to illustrate its merits to the business and legal communities, both in this country and abroad.

"I believe Ben is one of the true experts in the field – especially in the field of mediation," said Jack L. Foltz, vice president and general counsel of Philadelphia-based Sunoco Inc. and immediate past chair of the American Corporate Counsel Association.

Foltz and Picker are collaborating to produce a chapter on ADR for a multi-volume series on strategic corporate partnering that is to be published through a joint venture of the West Group and the corporate counsel association.

In writing and speaking on the subject, Picker advocates ADR as a means to prevent disputes and deal with those that arise in a way that is faster and cheaper, and more closely addresses business interests.

"The way that ADR seeks to define the 'win' is to look beyond who's right and who's wrong, and to look at the underlying interests in a dispute to determine whether there isn't some business-driven solution that works," Picker said. "In many cases, mediation provides solutions that simply aren't available in court."

At the same time, Picker cautions that the various forms of ADR are not always the right choice in certain situations – for instance, when an injunction or a precedent is needed, or when a client needs to protect a strategic interest. In such cases, Picker explains, litigation could very well prove to be the wiser choice.

So the proper approach, he says, is to evaluate each case to determine a client's objectives before pursuing whichever options make sense. That said, Picker advocates the liberal use of ADR techniques in the right situations.

Lawyers and clients making such decisions have at their disposal a variety of ADR tools, but the two principal options are binding arbitration and mediation. A number of ADR hybrids have also emerged, some of them mixing elements of mediation, arbitration and other approaches.

Mediation, which is considered by many purists to be a more favorable form of ADR than binding arbitration, is a voluntary,

informal process through which a neutral third party facilitates negotiations and works to resolve a dispute between parties. Mediation, by its general nature, is non-binding, a fact not clear to everyone.

Part of Picker's motivation for writing his book, in fact, was his experience listening to veteran litigators ask for an explanation of the process of "binding mediation." Although the point could be debated, most agree that there is really no such thing.

'Ultimately and finally it's the corporations ... of America that are insisting on business solutions for business problems.'

Bennett Picker

Such questions, he realized, were a symptom of the fact that most lawyers were not familiar with ADR at sophisticated levels. His book, as a result, was designed in large part to serve as a primer on the subject.

Picker's "Mediation Practice Guide: A Handbook for Resolving Business Disputes" was published last year by the American Bar Association's Section of Dispute Resolution and Pike & Fischer. It was nominated this year for book of the year by the CPR Institute for Dispute Resolution.

Colleagues said Picker's book and its favorable reception helped to establish his position in the movement.

"Ben had long been recognized as a supporter of ADR and as a cornerstone of the ADR practice, but the book provided broader exposure and solidified his role," said Lee A. Rosengard, co-chair of the ADR practice group at Stradley Ronon.

The firm created the ADR practice group in 1996, placing it under the leadership of Picker and Rosengard, when Picker joined Stradley Ronon. (His former firm, Bolger, Picker, Hankin and Tannenbaum, though financially strong, dissolved after the partners realized that their clients needed the kind of depth that would be available if the lawyers joined larger firms.)

The firm's ADR practice group was a rarity in the legal profession at the time of its creation, and it remains so today.

The interdisciplinary practice group comprises nine lawyers, who work with clients and other lawyers on a wide variety of ADR-related matters. Lawyers in the group are specially trained in developing systems to avoid disputes and using ADR to avoid disputes.

Other initiatives undertaken by the group have for alternative to litigation included developing a suitability screen that allows a

lawyer to figure out which resolution techniques – whether they involve mediation or another tool – are the most appropriate in certain situations. The group's efforts have also included advocating clauses in contracts that provide for ADR techniques before arbitration or litigation arise.

The practice group also advises corporate counsel and serves as a guide for lawyers and others unfamiliar with the intricacies of ADR.

Not all lawyers, however, are as enthusiastic about ADR as are Picker and his colleagues in the practice group. The process of litigation is a concept cemented firmly in the heart and bottom line of the lawyer.

"Trial lawyers love the process," Picker said. "I have tried my good share of cases and it's very exciting to win in court. But I think that ADR, in a sense, is an effort to redefine what it means to win."

Phillip Armstrong, an assistant general counsel for Georgia-Pacific Corp. who described Picker as a mentor, expressed the same sentiment in a different way: "Some lawyers are so bent on feeling that they've got to beat the tar out of the other side that they lose sight of that big picture."

Not to mention ADR's potential impact on billable hours and, consequently, revenue. After all, two big promises of ADR are the avoidance of disputes and the faster resolution of them if they arise.

"There's sort of a natural conflict that takes place if you think about it," Armstrong said. "It sort of flies in the face of what [lawyers] have been trained to do and what they have historically done."

Several forces are countering this inherent resistance to ADR in the legal profession. They include court-mandated programs that direct litigants to attempt to resolve their disputes through alternative means. Such programs are at work in places including U.S. District Court in Philadelphia.

It is businesses, however, that are at the front of the movement, for all of the reasons that supporters such as Picker advocate alternative means of resolving disputes. Since the vast majority of cases settle anyway, they argue, why not reach that point sooner in the process?

"Ultimately and finally," Picker said, "it's the corporations and businesses of America that are insisting on business solutions for business problems."

Because of that, he contends, the ready use of ADR will become more and more necessary for those engaged in the business of law.

"I think there's enormous opportunity for any law firm that embraces ADR," Picker said.

"The future landscape for dispute resolution will definitely include litigation, but it won't start with litigation. It will start with the basic premise that there's a problem to be solved and that ADR offers a whole range of tools for lawyers and clients." •