

The Metropolitan Corporate Counsel

Volume 8, No. 8

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August 2000

Project: EDR Part I - Law Firms

Bennett G. Picker: A Professional ADR Practitioner Speaks

The Editor interviews Bennett G. Picker, Partner, Stradley Ronon Stevens & Young, LLP, Chair, ADR Practice Group.

Editor: Why is there so much recent interest in Effective Dispute Resolution (EDR)?

Picker: Because of the enormous value we can add to our clients. Perhaps we should define our terms first. By an EDR approach (or ADR approach), I mean to suggest a dispute resolution culture that encompasses systems to avoid and manage disputes and embraces a full range of options to resolve disputes, including negotiation, mediation, arbitration, and litigation in the appropriate case. As I see it, EDR involves a close working relationship with the client, an understanding of the client's business objectives and an affirmative plan to accomplish them. In a sense, many lawyers have engaged in EDR for years without using the term. But in recent years, we have developed some very sophisticated tools for achieving these results.

Editor: Why did you feel that Stradley would be a good place for an ADR practitioner?

Picker: Before I joined the firm, I had already developed a substantial practice in the field of ADR, as a counselor, an advocate and a mediator. I was at that time chairman of a mid-size firm. I came to Stradley almost five years ago, in part, because its Chairman Bill Sasso made a commitment to developing one of the leading ADR practices in the nation. We began a program of mandatory education and training for all lawyers by bringing in Professor Golann from Boston. We now



Bennett G. Picker

have a 12-person ADR practice group, consisting of men and women from such diverse disciplines within our firm as litigation, employment, corporate law, insurance and intellectual property. Our practice group members act as counselors to the rest of the firm and to our clients and serve as advocates in ADR settings.

Editor: Corporate counsel want their outside counsel to seek an appropriate resolution of a case as soon as possible. Is that what EDR is all about?

Picker: In part. Certainty, some corporate counsel have developed an interest in ADR for the same reason they support tort reform – they simply find litigation too costly and too risky. However, as ADR has developed as a discipline of its own, many corporate counsel have come to recognize the many other benefits that can flow from ADR such as, for example, the business solutions we can achieve in a mediation

which are not available in litigation.

Early screening is, of course, one of the keys to a successful ADR program. At Stradley, we have developed our own suitability screen to help our client decide which option is best. Notwithstanding the compelling interest in early resolution, litigation may well be the best choice if, for example, there is a need for an injunction, a need to protect an important strategic interest or a need to establish precedent. But in most business disputes, ADR can be an enormously powerful tool to resolve disputes early, cost-effectively and fairly.

Editor: You mentioned that your firm developed a suitability screen for determining the approach to particular disputes. What is this?

Picker: It is a checklist 37 questions that deal with the parties and their relationships, the interests that the parties are advancing, the issues involved and outcomes sought. It is intended to be an aid to making the best choice among the alternative approaches, not necessarily to be determinative. Our approach recognizes that the underlying business interests of our client are invariably as important as issues of "truth" or "rights." We find the screen to be very helpful to us and to our clients when deciding whether ADR or litigation is appropriate in a given case.

Editor: Why do you feel that ADR is an important tool in achieving the corporate goal of Effective Dispute Resolution?

Picker: The overarching benefits of ADR are the savings of cost and the ability to achieve business solutions for business dis-

putes. ADR can also provide flexibility – parties can design their own process for resolving a dispute either in a contract before a dispute occurs or after a dispute arises. ADR further provides the benefits of privacy and confidentiality and an opportunity to preserve business relationships.

Editor: What is driving ADR?

Picker: There are many drivers of ADR. Certainly, the courts, especially the federal courts and state courts in jurisdictions such as Florida and Texas; governmental agencies from Justice to the major procurement agencies; and even professional standards. The rules of professional conduct in some states now require attorneys to recommend ADR procedures to clients, where appropriate.

Mostly, it is our clients – the corporations of America – who are driving the movement for ADR. They have taken the pledge of the CPR Institute for Dispute Resolution and have required their outside law firms to do so as well. They are mandating the use of ADR in contracts, more frequently requiring executive-level negotiations, mediation and arbitration. In certain industry sectors, such as chemicals or electronics, there are treaties that encourage the use of ADR to resolve disputes between companies which have signed on.

Organizations such as the American Arbitration Association and the CPR Institute for Dispute Resolution also have made a difference. These organizations have promoted the use of ADR, have sponsored regular programs to provide ADR education and training, and have made available model ADR models and clauses for every conceivable circumstance.

Editor: I noticed you did not mention the law firm.

Picker: Regrettably, law firms have been slow to respond. Perhaps some law firms are concerned about profits. Or maybe some litigators are threatened by ADR. In fact, litigation and ADR are highly complementary. Many law firms, however, have responded with sophisticated ADR programs and these firms are likely to develop more meaningful partnerships with their clients as a result.

Editor: When you talk about ADR is your emphasis on arbitration or mediation?

Picker: The power of ADR is primarily in mediation. Arbitration certainly has an appropriate role in dispute resolution and may be a good choice, for example, where a business anticipates a large volume of small disputes and the major concern is the total payout of costs and legal fees.

In mediation, however, we try not to get too bogged down in posturing about the rights of the parties, but turn our focus to the underlying interests. This is not as simple as it sounds. As an ADR practitioner, we often need to work with the various representatives of the client to align the interests and objectives of the client.

The power of mediation is also readily apparent when considered as an alternative to direct and unassisted negotiations. A skilled mediator can readily identify the specific barriers to resolution, work with the parties to facilitate better communication, especially where emotions are high, challenge unrealistic assessments and suggest their own proposals for resolution.

Editor: How does the ADR practice group relate to other lawyers in the firm and to clients?

Picker: As a practice group, we regularly advise our law firm colleagues and our clients on ADR related issues. When the client elects to use ADR, we act as counsel. We are involved in designing systems in the employment area and the management of disputes generally. We also have been asked to take on assignments as “settlement counsel” in cases where companies are represented by other firms in litigation. There, our role is to focus on negotiation, settlement and ADR strategies, while the role of regular litigation counsel is to focus on getting ready for trial. As settlement counsel, we address issues such as “How do we propose mediation to a reluctant adversary,” “How should we design the mediation process” and “How do we find the mediator best suited for this particular dispute.”

Editor: Could you describe how you assist clients to set up EDR processes

designed to head off disputes?

Picker: “Employment ADR” probably serves as the best example. As you may know, almost one out of three cases in the federal civil docket is now an employment-related case and these cases are costly to defend. The key to employment ADR is designing procedures to permit employees to air their grievances early in order that they do not become full-blown disputes.

We recently worked with a Fortune 500 company to assist them in designing a step-type process to manage and resolve their employment disputes. In the course of advising this client, we talked about peer review, ombudspersons, a second level of review, and other procedures ending up with the final steps of mediation and arbitration.

Most employment cases are really about fairness. If you treat employees fairly and you allow them to air their grievances early, you can head off disputes and vastly improve employee morale.

Editor: Does the ADR group provide training to other members of the firm and for clients in such EDR skills as negotiation and the appropriate use of ADR tools?

Picker: We have sponsored a culture within the firm where we have interdisciplinary meetings that are open to the entire firm. Bob Meade from American Arbitration Association, Richard Shell who wrote a CPR award-winning book on negotiations and John Bickman who is a nationally known mediator have all come to our firm in just the last few months to talk to the entire firm about EDR related issues. When we meet with these kinds of experts, we ask our clients to join with us.

Editor: You mentioned the importance of negotiating skills. Are we doing an adequate job of training lawyers in those skills?

Picker: Very little work is being done at the law schools on negotiation. That is hard to understand, since most business deals occur as the result of negotiations and most disputes are resolved through the

process of negotiations.

Interestingly, there is a significant amount of research and training in the area of negotiations in business schools such as Harvard, MIT, Wharton and Stanford. Studies show that the process is not merely intuitive, that negotiating skills can be learned and that a skilled negotiator will outperform even the average negotiator. We are also learning more about the process of cooperative negotiations and the social psychology of negotiations. For example, we have learned that parties like to protect gains but will take risks – sometimes even unreasonable risks - to avoid losses. We need to do a far better job of training in the art and science of negotiating.

Editor: Would you recommend that law departments have inhouse training in negotiation and mediation?

Picker: Absolutely yes. As corporate America becomes more and more aware of the potential for mediation to resolve disputes, the demand for training in mediation increases. There are a lot of questions. Which client representatives should attend the mediation? Who should speak? What is the best negotiating plan? Should we be negotiating with the mediator? Training and education in the field of negotiation and mediation is appropriate

for corporate counsel whether they are transactional lawyers or dispute resolvers. In the past year, we have offered such programs to companies such as SmithKline Beecham, Sunoco and SBC Communications.

Editor: How should general counsel go about training their people in negotiation and mediation skills?

Picker: There are a dozen law schools and business schools throughout the country including Harvard, Ohio State and Pepperdine, that provide training in negotiation and in mediation. Our firm is providing this kind of education and training right now to a number of businesses throughout the country. Our programs cover mediation process and suitability issues, mediation advocacy, dispute resolution clauses in contracts, negotiations. Doing a training session with clients is a wonderful opportunity to give real meaning to the word “partnering.” We go in, talk to the client, and ask what kinds of problems they have. We discuss what their interests and needs are — from the transactional, litigation and dispute resolution standpoints. We are then in a position to offer a customized program.

Editor: Are you willing at this point to take the Metropolitan Corporate

Counsel’s Project: EDR pledge. That pledge is this “My firm will offer to provide without charge to our existing clients an inhouse all or half day seminar to share with them its experience with the effective use of EDR and will actively promote these seminars?”

Picker: Certainly. This is something that we have been doing that for the past few years and look forward to continuing to do.

Bennett G. Picker is a partner in the law firm of Stradley Ronon Stevens & Young, LLP, where he concentrates his practice in the areas of complex and commercial litigation, and alternative dispute resolution, and serves as chair of the firm’s ADR Practice Group. Mr. Picker is a member of the Panel of Distinguished Neutrals of the CPR Institute for Dispute Resolution, a member of the Commercial Arbitration and Mediation Panels of the American Arbitration association and a Fellow, American Academy of Civil Trial Mediators. He is the author of Mediation Practice Guide - A Handbook for resolving Business disputes, published by the American Bar Association and Pike & Fischer, Inc., a division of the Bureau of National Affairs, Inc. Mr. Picker is a former Chancellor of the Philadelphia Bar Association.