

ADR DEPARTMENTS IN LAW FIRMS

Law firms have responded slowly to the challenges and opportunities presented by the demands of their clients for alternative dispute resolution (ADR) services. “ADR” literally suggests alternatives to the most traditional mode of dispute resolution: litigation. Examples of “typical” ADR procedures include negotiation, mediation, arbitration, early neutral evaluation, mini-trial, and summary jury trial. (See Figure 1.) In a broader sense, however, ADR suggests a strategic approach to dispute resolution that incorporates strategies to avoid disputes and the full range of options to resolve disputes once they arise. Therefore, ADR also includes, for example, Decision Tree Analysis (DTA) and the process of designing systems to avoid and manage disputes. By now, most know that the advantages of ADR include the potential to avoid the distractions of litigation, dispose of disputes early, retain the benefits of privacy and confidentiality and, perhaps most important, achieve business solutions that serve the bottom-line interests of the client including substantial savings in litigation costs. Nevertheless, a firm-wide ADR culture remains the exception.

In addressing the topic of “ADR Departments in Law Firms,” this article poses--and explores answers to--several questions. These questions are: (1) Why Should a Firm Establish an ADR Department; (2) What is the Definition of “ADR” in a Law Firm; (3) Who Should Populate a Firm ADR Department (& What Are Their Roles); (4) What Are the Main Problems that a Firm ADR Department Faces; and (5) How Should a Firm ADR Department Implement an ADR Program?

Question #1: Why Should a Firm Establish an ADR Department?

Until recent years, the rhetoric about ADR far exceeded the actual implementation of ADR procedures in practice. A number of forces have converged, however, to make the growing movement toward ADR a sufficient reality such that the law firm without ADR capability is at a competitive disadvantage. A few of these forces are relatively easily identified.

First, the majority of state and most federal courts have adopted court-annexed ADR on a mandatory or voluntary basis, requiring counsel to be at least familiar with ADR procedures. Second, many governmental agencies have incorporated ADR into their regulations and contracts. ADR acumen is now a prerequisite to dealing with many agencies.

Third, some states have amended the rules of professional conduct governing attorneys to require attorneys to be knowledgeable about ADR procedures and to recommend such procedures, where appropriate, to their clients. These states impose an ethical obligation on attorneys to advise the client about all reasonable options, especially in the litigation context. Moreover, all attorneys have a general obligation to counsel their clients regarding the full spectrum of ADR options; the attorney who fails to do so falls short of the obligation to provide complete and competent advice to the client.

The law firm’s own corporate clients have had the greatest impact, however, in promoting the use of ADR strategies and options. Thus, clients represent a fourth factor pushing the ADR movement in law firms. Certain industries (e.g., aerospace and the defense industry) have a relatively uniform commitment to ADR. Clients in these industries cannot and will not retain counsel without ADR expertise. More generally, corporate clients “like” ADR because it

has the potential to avoid the cost, disruption, and delay of litigation and is more flexible than litigation in process and results. In short, client demand for ADR services continues to grow.

Acting individually through their general counsel and together in industry associations and organizations such as the American Bar Association (ABA), the American Arbitration Association (AAA), the CPR International Institute for Conflict Prevention & Resolution (CPR), and the Association of Corporate Counsel (ACC), corporations have embarked on a mission to institutionalize ADR as an essential part of the dispute-resolution process. To remain competitive in an increasingly aggressive and global marketplace, businesses seek to save time and money in dispute resolution. In turn, law firms that want to remain competitive must offer their clients ways to contain legal fees. Businesses also seek to assert control and to manage disputes so as to achieve more predictable and productive outcomes. Therefore, many corporations now require their outside law firms to be knowledgeable and competent with respect to ADR procedures. Some of these corporations specifically address ADR in their retention policies. Some corporations undoubtedly use ADR capabilities and results in rating law firms and deciding who to retain.

Thus, the law firm that assumes a leadership role in providing ADR services gains a significant competitive advantage in the legal marketplace. An ADR department can help a law firm distinguish itself, or at least prevent the adverse inferences that clients or potential clients might draw if the law firm lacked an ADR practice. In fact, the law firm of the future will have to be proficient in the use of ADR procedures to stay competitive and responsive to its client's needs. Most disputes are resolved using ADR procedures; should not every firm be facile with them?

Question #2: What is the Definition of “ADR” in a Law Firm?

It may be helpful to define what ADR is in law firms. Law firm ADR can take several forms, including ADR advocacy, the role as settlement counsel, transactional ADR, the role as ADR process counsel, and practice as a neutral. These forms may be viewed as the five “branches” of ADR.

1. ADR Advocacy

Representation of clients in specific ADR proceedings is clearly a revenue-generating practice. For example, an arbitration involving high stakes can be leveraged as much as a piece of litigation. Moreover, in jurisdictions with mandatory court-ordered ADR, failing to know and use ADR to benefit a client may be tantamount to malpractice.

2. Settlement Counsel

Related to the function of ADR advocacy is the role of “settlement counsel” supporting litigation counsel as part of the litigation team. More and more often lawyers are being engaged as settlement counsel to monitor ongoing litigation and develop early exit strategies. When police bargain for a confession from a suspect, they often separate the “good cop” role from the “bad cop” role. An analogous separation of roles, in this context between specialized settlement counsel and the needed litigation counsel, often plays well in resolving major lawsuits. The

settlement counsel can bring unique skills to bear on a single, critical objective: early and optimal resolution of the dispute.

Settlement counsel is considered part of the litigation team. Business people generally avoid litigation; it is only when sufficient disappointment, distrust, frustration, or anger combine that business litigation occurs. What the billable hour does not take into consideration is the dissipation of emotional content and resurgence of economic concerns. It creates a trap whereby the law firm stays focused on the litigation war it was engaged to fight, while the client's focus shifts from the war back to its business. A substantial case justifies the early designation of an individual lawyer to act as settlement counsel. Settlement counsel seeks to understand and monitor the client's changing interests and develop innovative strategies and tactics in order to better serve those interests.

Settlement counsel typically are experienced trial lawyers able to become intimately and quickly familiar with the subject matter of a dispute. They are also specialists in the methodology of DTA and in the science and art of interest-based negotiation. Ideally, they are also experienced in the techniques of mediation advocacy, and may even be familiar enough with the mediators in their community or field to advise and represent the client in achieving mediated resolutions in cases that warrant mediation. Most important, settlement counsel are not the litigation counsel for the case.

By design, the goal of settlement counsel is limited. If they do not achieve a settlement quickly, they pass the case entirely to the litigation counsel, along with the full benefit of their early analysis. Their role is revealed to the adversary from the outset. Given their acknowledged and limited role, settlement counsel can afford to use cooperative techniques to foster early resolution. No lack of resolve is conveyed by that effort. Settlement counsel can demand and measure a response in kind from the adversary, and exact a unique penalty if the desired response does not follow: their own departure. The adversary knows from the outset that, if through recalcitrance the goal of early settlement is not achieved, transfer to a new lawyer (the "bad cop") will result--and litigation counsel is single-mindedly focused on an entirely different goal, namely victory at trial.

Is it workable to run a parallel track with litigation and settlement counsel, who are different lawyers, from the same firm? Such in-firm "competition" requires cooperation. Generally, the relationship between litigation counsel and settlement counsel is characterized more by cooperation than by competition. To achieve such cooperation, the concept of a separate settlement counsel during litigation must take into account personality types. Certain personality types make for good litigators, i.e., litigators tend to be the "captain of the ship" and insist on total control. Settlement counsel may have a difficult charge attempting to communicate and integrate with such a personality. The "captain of the ship" litigator may be more cooperative, however, once he or she appreciates the tactical potential of aggressive ADR, the luxury of being able to move toward trial without diversion, and the danger that if he or she does not select the firm's own settlement counsel, the client may work around the firm and retain alternative settlement counsel.

3. Transactional ADR

A transactional ADR practice includes the development and, where appropriate, effective use of ADR clauses in contracts and other agreements. ADR practitioners can assist business attorneys in drafting more sophisticated mediation and arbitration provisions in connection with business transactions. Depending upon the transaction, a multi-tiered approach requiring neutral fact-finding, executive negotiations, and mediation as a predicate to either arbitration or litigation might be considered. At least one large company has carefully audited the various types of agreements that it enters and evaluated the ADR approach most likely to successfully resolve disputes that might arise under each type of agreement. (See Figure 2.)

Dispute resolution clauses should be inserted in early drafts of agreements where they can be given the full attention they deserve. Unfortunately, business attorneys and their clients typically do not want to spend a lot of time negotiating which ADR provisions to incorporate in their contracts. They certainly do not want to spend time designing an entire ADR procedure.

4. ADR Process Counsel

Closely related to the transactional ADR practice is the role of designing and selecting ADR procedures for both individualized cases and industry groups. Especially in the employment context, firms are developing ADR systems designs for preventing disputes as much as resolving them. Such systems move beyond the “win-lose” environment of litigation to the full range of ADR options available to avoid disputes and solve a client’s problems. Nearly one-third of the cases on the federal civil docket are employment related. These cases are costly to defend. The key to employment ADR is designing procedures to permit employees to air grievances early, before they become full-blown disputes.

In addition to designing ADR processes, ADR counsel often function to help others in the firm and their clients to select the type of ADR procedure most suitable to a particular situation. A “suitability screen,” combined with expert counsel, may help determine the best ADR option. Litigation may sometimes constitute the best alternative in a specific case, for example where there is a need for an injunction, a need to protect an important strategic interest, or a need to establish precedent. In most business disputes, however, ADR can be an enormously powerful tool to resolve disputes early, cost-effectively, and fairly.

5. Practice As a Neutral

On an hourly rate basis, neutral work can be lucrative for a senior individual (and, if the individual is part of a firm, therefore for the firm). A steady diet of neutral work is usually not a successful strategy, however, for a junior lawyer who wants to “rise to the top” of a large law firm. At least three reasons support this view. First, there is a perceived lack of opportunity for leverage. Law-firm economics prompt the belief that neutrals cannot effectively leverage their time to cover the overhead of a large firm. Second, at least two types of conflict problems can arise: (a) conflicts that prevent taking an assignment as a neutral; and (b) the “downstream” conflicts that preclude the firm from accepting a potentially major assignment after the neutral engaged in a relatively small, often one-time only, activity. Consider the ethical difficulties, for example, that can result from a repeat business relationship between an ADR neutral and, for example, an insurance company involving a high volume of small cases being referred. Finally,

“one-time only” neutral work does not lend itself to continuing client relationships. Practice as a neutral may lend itself to continuing client relationships but of a different sort: the clients are generally other lawyers who come to appreciate a particular neutral’s way of solving problems.

6. Part of Overall Representation

Although five separate “branches” of ADR have been highlighted above, the law firm should not view an ADR practice as any one of these branches. Rather, the firm should consider its ADR practice as the entire “tree,” consisting of one or several branches. Standing alone, the ADR tree can be as or more profitable than other practice areas. Even if viewed as a “loss leader,” however, ADR may be a necessary practice area for a law firm. Aggressive ADR is becoming an essential part of litigation, not something that is done instead of litigation. Clients seeking litigation services are demanding that their outside counsel demonstrate ADR knowledge. Thus, ADR can often function as an activity that supplements litigation or transactional work, and makes such work more profitable. Ultimately, the marketplace will reward those firms that are competent providers of ADR services in all five branches of ADR.

Question #3: Who Should Populate a Firm ADR Department (& What Are Their Roles)?

The ADR department in a law firm typically has a mandate. That mandate is to: develop expertise in the firm about different ADR procedures and how and when to implement them, provide leadership in promoting the use of ADR, and take the lead in the actual conduct of ADR procedures for cases handled by the firm. In order to fulfill this mandate, the ADR department should provide, on an ongoing basis, the following services to the firm and its clients: (1) information as to advantages and disadvantages of available ADR procedures and practices; (2) education and training; (3) coordination of the firm with various outside ADR organizations; and (4) counsel to the firm and its clients on particular ADR cases. The question becomes which attorneys in a firm are best able to perform these services.

At the outset, an ADR planning committee should be organized to answer this question by creating a structure for the ADR practice. Several models are popular, including a litigation department ADR practice, a cross-department ADR practice involving litigators and transactional lawyers, or a separate ADR department practice. Some firms choose not to create an ADR department separate from their litigation and corporate departments; rather, they organize ADR under a committee as a service to the whole firm. Some firms, especially smaller firms, might designate one person as an advocate for the ADR practice. Most firms do not ask any lawyer to devote full time and energy to ADR, however, primarily as a matter of economics. (The economics of an ADR practice are addressed below.)

Most firms, especially larger firms, create a separate ADR department or practice group. They typically appoint a senior partner as a “point person” or “ADR Counsel” to lead the department and spearhead ADR practice development. Without a designated person to develop an organized approach to ADR, it is often difficult to overcome traditional preferences for litigation and the department will be less likely to succeed.

Guidelines should be developed to determine which firm attorneys to invite as participants in the ADR department, in client ADR consultations, and in other activities of the ADR department. Some view litigation as a subset of dispute resolution and would have the

ADR department include the firm's litigators. Such a structural change to the law firm may meet resistance--or it may not. Experience teaches that a key is to motivate people across departmental lines and encourage the establishment of ADR policies and practices. Experience also teaches that the problem-solving approach to dispute resolution can be extraordinarily stimulating and rewarding; once attorneys become familiar with ADR and its many benefits, there is usually no shortage of voluntary requests to participate as a member of the ADR department.

An ADR department should meet regularly to compare notes among its members, discuss cutting-edge ADR issues, and disseminate ADR articles and other information (e.g., a substantive, quarterly ADR newsletter). The ADR department should provide a firm resource to address ADR issues. Members of the department should function as a liaison to other practice groups and outsiders, conduct ADR training, oversee the firm's ADR program, and serve as an ADR provider. In short, the ADR department members collectively must perform the services (outlined above) necessary to fulfill the mandate of an ADR department.

Question #4: What Are the Main Problems that a Firm ADR Department Faces?

Nothing is perfect. There are significant impediments to the proliferation of ADR practices in law firms. At least five impediments are: institutional inertia or resistance to change, client skepticism, potential ethical conflicts, law firm economics (compensation, staffing, and training), and financial disincentives (law firm pricing and services). The truth is that ADR is accepted in the abstract by everyone and in the concrete by relatively few.

1. Institutional Resistance to Change

At a very basic level, the process of introducing ADR into law firms is an exercise in effecting change. Therefore, the transition has many of the characteristics of efforts to facilitate change in other situations. Advocates express enthusiasm and sometimes overzealous endorsement. Those who are reluctant oppose the change. In some quarters, skepticism and wariness abound; in others, apathy and disinterest predominate.

The most insidious foes to ADR remain the twin pillars of "I don't know" and "I don't care." Professional and attitudinal biases tend to create institutional inertia, especially in major private law firms which are naturally conservative and resistant to change. Perhaps the most imposing impediment to ADR in large firms is raised by the firms' own attorneys. Although colleagues voice theoretical support for ADR, they tend to become ambivalent when the occasion to use it arises. Misconceptions about ADR procedures and case selection criteria, widespread lack of knowledge about ADR, and outright opposition by certain litigators in the firm (who prefer litigation as a familiar, predictable, and exclusive dispute resolution method) also contribute to resistance.

Wherever change is involved, external motivators are usually needed to catapult the reluctant from the realm of the known to the realm of the new. With ADR, the talk of saving costs convinces some. The opportunity to be innovative attracts others. Organizational expectations catalyze still others. The judiciary is another and potentially even more potent force inspiring interest, attention, and use. As more courts and individual judges begin asking parties

to participate in ADR procedures, use of ADR will move from being an option to being a necessity.

2. Client Skepticism

Although skepticism was more of a problem historically than now, proponents of ADR occasionally encounter some remnants of client skepticism to ADR. Some clients fear that ADR, particularly non-binding ADR, will actually increase their legal bills because resolution is not assured. And if one party to a dispute wants to use ADR, the other side often does not--so why would one party even suggest ADR (especially if the adversary might view the mere suggestion as a sign of weakness)? A perception among some lawyers resistant to ADR is that clients want their attorneys to act mainly as gladiators and do not welcome suggestions of alternative strategies. This perception is undoubtedly true for some clients. An oft-cited objection to ADR is the client's reluctance to tip its hand and educate opponents on their best arguments and legal theories. (In fact, clients have fewer secrets than they think. Moreover, in federal court litigation, secrets do not remain hidden for long. Sooner or later, each party must disclose its case.)

3. Potential Ethical Conflicts

The possibility of conflicts is one reason why many firms are reluctant to offer ADR services (at least neutral services). Typically, members of the firm's litigation and transaction departments voice concerns because they do not want ADR representation to raise conflicts that may preclude representing clients in a future litigation or transaction. Service as a neutral is more difficult at larger firms in this respect. Such concerns have prompted many lawyers interested in ADR to leave big firm practice for entrepreneurial pursuits. Some have formed ADR "boutiques."

4. Law Firm Economics; Compensation, Staffing, and Training.

An up-front investment of time and money is necessary for a firm to implement, then operate, an ADR program successfully. Some of the steps required for implementation are outlined in the last section of this article. The investment inherent in these steps, especially those directed to staffing and training needs, can be significant.

But the rewards can also be significant. Some of these rewards are identified above in response to Question #1. One of the more attractive economic rewards is that ADR advocacy can be an unsung revenue source for attorneys who act as counsel representing clients in ADR proceedings. Moreover, although court-related ADR work is often done on a pro bono basis, firm provision of neutrals for private ADR proceedings can be a significant source of billings. Senior attorneys experienced in ADR can attract large cases and command high-end neutrals' fees by virtue of their status.

A typical economic problem is how to integrate ADR into firms that make their money and compensate their partners through high-leveraged litigation. Compensation systems that formally or informally reward lawyers for hours billed, as opposed to results, create a significant impediment to implementing and expanding an ADR practice. The key is to adopt creative fee arrangements with clients. Such arrangements should reward individual partners who are

successful at earning cost-savings premiums generated by the ADR pricing structures discussed in the next subsection.

5. Financial Disincentives; Pricing and Services

Litigation is a process for resolving disputes and, because clients generally pay for that process by the billable hour, it is in the best interest of lawyers to work the process slowly. Stated alternatively, when law firms sell hours, it is in their interest to sell process rather than results. Early settlement of litigation via an ADR procedure strikes fear in law firms because it removes the litigation “pot-of-gold.” In contrast, however, clients are interested in getting the “best” resolution of the dispute as soon as possible at the lowest cost. Clients paying by the hour are distrustful of the process; they want a result achieved using as few billable hours as possible. The perceived conflict of interest, between the client’s desire to resolve the dispute and the lawyer’s economic interests, characterizes the hourly billing rate as the villain.

In essence, a focus on the hourly billing rate can discourage early and amicable resolution of disputes. The firm suffers losses when early settlement is achieved under a billable hour scheme. Specifically, as ADR results in a trend toward earlier settlement, considerable income will be lost without the implementation of more innovative and constructive billing strategies. Law firms face risks, however, in transferring from the billable hour scheme and developing financial incentives for ADR. Therefore, a new financial model for ADR is critical to address those risks.

The financial disincentives can be solved with a pricing scheme that rewards ADR. The ADR department should explore alternative fee arrangements with clients to economically encourage the use of ADR. Consider bonuses for early resolution through ADR or contingent fee schemes. Charge for the result achieved (a result-oriented fee arrangement) as opposed to the time expended. Include a fee enhancement for the early settlement of certain disputes through ADR; early settlement multipliers can make fee premiums sizable.

Consider such alternative fee arrangements as budget billing or task-based billing. The litigators in the firm would pursue the litigation while at the same time the ADR department within the firm would pursue resolution through ADR. Under one scenario, the client might offer the firm a bonus of about 20 percent of the total expected legal fees for an acceptable early settlement. Alternatively, if the ADR lawyer is successful, the firm’s fee would equal the difference between the total budget for the matter and the amount actually paid to date by the client. This pricing structure would provide an incentive to use ADR to resolve the dispute as early as possible in order to earn the “cost-savings premium.”

Law firms should devise pricing structures that make ADR as or more profitable than litigation. In general, law firms find that alternative billing arrangements are an effective marketing tool. Practices vary, depending on the client, the firm, and the project. Some options being tried include: (1) volume discounts, (2) blended rates that apply one hourly rate for all lawyers regardless of seniority, (3) flat fees for specific substantive matters or defined pieces of litigation such as motions and briefs, (4) discounted hourly rates, (5) caps on total hours billed, and (6) tiered contingency fees with the percentage return for the law firm linked to the size of the award.

The complete economic picture also must include more collateral economic benefits than direct payment for ADR services. When a client winds up in an ADR proceeding because of a clause that counsel helped them write, for example, they often call that counsel to represent them in the ADR proceeding. A CPR survey done about ten years ago looked at 124 leading law firms. The survey revealed a link between formalizing the ADR practice and achieving financial success. More specifically, about one quarter of firms surveyed stated that they brought in new clients, or generated additional business from existing clients, as a result of their ADR practices. ADR can achieve “better” results than litigation, yielding more profitable and happier clients. Thus, it is in a firm’s long-term economic interest to implement an ADR practice because satisfied clients are more likely to provide repeat business and send referrals. Not surprisingly, therefore, perhaps the most commonly cited collateral benefit of ADR is its ability to attract and retain clients.

Law firms ultimately adopt and implement ADR for economic reasons. Those that develop an effective ADR capacity and employ it consistently will have a competitive advantage over those that do not. Even if ADR looks unprofitable, firms must recognize the intangible benefits that may help a firm attract and retain clients. Clients are happier using ADR because it meets their long term as well as short term interests. The key financial incentive for law firm use of ADR is improved client relations.

Question #5: How Should a Firm ADR Department Implement an ADR Program?

If one concedes that law firms need to integrate ADR techniques into the meld of legal services offered to clients, how should they proceed? There are three critical steps: (1) acquire a broad understanding of ADR; (2) market the prevention and early settlements of disputes; and (3) begin to educate clients about conflict and potential alternative ways to resolve conflict. CPR has developed a six-step program for law firms seeking to systematically include ADR in the dispute management services offered to clients. *See C. Cronin-Harris, Building ADR into the Law Firm*, CPR Institute for Dispute Resolution (1997) (note the name change to CPR International Institute for Conflict Prevention & Resolution). This article has incorporated, and supplemented, the steps of the CPR program.

1. Generate Internal ADR Structures and Policies

Multistep ADR maximizes speed and cost savings by applying negotiation and non-binding processes such as mediation before parties resort to more costly arbitration or litigation. By offering multistep ADR expertise, firms can remain competitive and satisfy corporate clients’ demands for efficient dispute resolution. To assure competitiveness, a firm should build formal ADR structures and policies to foster ADR use and mitigate the strong pull of the litigation culture.

- A. Establish an ADR Planning Committee with Executive and Management Members.
- B. Select Departments Where ADR Services Will Be Emphasized.
 - i. The ADR department should solicit advice from other departments about ADR procedures that would be most useful to their clients.

- ii. The ADR department should enlist help from other departments in drafting ADR agreements.
- C. Hold ADR Department Meetings and Invite Broadly. Have one-on-one conversations with individual lawyers to communicate the ADR movement to lawyers within the firm.
- D. Promulgate a Law Firm ADR Policy Statement.
- i. Sign “The Pledge” formulated by CPR (www.cpradr.org) which states:

“We recognize that for many disputes there may be methods more effective for resolution than traditional litigation. Alternative dispute resolution (ADR) procedures – used in conjunction with litigation or independently – can significantly reduce the cost and burdens of litigation and result in solutions not available in court. In recognition of the foregoing, we subscribe to the following statements of policy on behalf of our firm. First, appropriate lawyers in our firm will be knowledgeable about ADR. Second, where appropriate, the responsible attorney will discuss with the client the availability of ADR procedures so the client can make an informed choice concerning resolution of the dispute.”

To date, over 1,500 law firms have signed this pledge, including 400 of the nation’s 500 largest firms. (As an aside, the number of signatories to CPR’s corresponding corporate ADR pledge, over 4,000 operating companies, provides evidence that clients want ADR services.) All attorneys should be informed, and reminded periodically, of the firm’s pledge to use ADR.
 - ii. Issue firm guidelines identifying ADR goals and resources. Circulate periodic follow-up internal memoranda.
 - iii. Include in the firm’s new matter questionnaire a few key questions about ADR suitability.
 - iv. Consider placing a policy statement about ADR in the firm’s retainer agreements.
- E. Conduct Limited Pilot Programs to Test and Refine ADR Programs.

- F. Facilitate Integration Within the Firm. Supplement the firm's educational and promotional efforts with a "formal survey" of lawyers that the ADR department completes. Designed to elicit the ADR experiences and expertise of the firm's attorneys, the survey serves several purposes. First, it can help the ADR department identify those of the firm's legal departments that are unrepresented in the ADR practice. The survey can familiarize the department with the ADR knowledge of other departments. The survey should be drafted in familiar and specific terms, asking the firm attorneys if they have ever been an arbitrator, drafted an ADR contract clause, used a rent-a-judge statute, etc. Thus, one of the survey's goals is to raise the comfort level of the firm's lawyers by revealing to them that ADR is a tool they already know about and use. Finally, the department can distill from the survey results a "specialization directory" of the ADR expertise of lawyers. The directory might list the different ADR processes in which the attorneys have been engaged or ADR roles they have played. The specialization directory is mainly for use within the firm.

2. Education: Tailor ADR Training and Resources to the Firm's Culture

Full use of ADR necessitates highly skilled ADR practitioners who are trained in ADR processes and have access to easy-to-use resources tailored to the firm's culture. One mission of an ADR department must be to educate the attorneys within the firm about when ADR can work, what the ethical requirements of it are, and how attorneys can cultivate excellent client relations through ADR. Firm attorneys need to be educated as to how they can expand their practices through a sophisticated understanding of ADR. To successfully implement an ADR program, firms also must educate their clients about ADR. These goals can be achieved by holding in-house courses, sponsoring client seminars, staging a mock proceeding such as a mediation, inviting ADR providers to make presentations, and disseminating information to attorneys about outside legal education courses.

- A. Address Common ADR Obstacles: Consider practices to erode common ADR obstacles including ADR unfamiliarity, leverage and profitability concerns, discretion to ignore ADR, and preferences for adversarial processes. To educate about the benefits of ADR, training programs should be offered to facilitate understanding of the full range of options available to avoid, manage, and resolve disputes. Training should cover a wide range of topics, including mediation, arbitration, court ADR options, and contract clauses.
- B. Enlist Support of the Firm's ADR Practitioners: Enlist practitioners who occasionally use arbitration or court ADR in expanding ADR offerings.
- C. Provide ADR Training: Provide a well-developed ADR training program that conveys the firm's selected ADR goals, stresses ADR skills, and offers opportunities to gain ADR experience. The obvious starting point for any law firm ADR program is education. The firm should sponsor regular, firm-wide, ADR seminars for all attorneys (and in doing so also help satisfy CLE requirements). The firm might consider using an outside provider to present the programs. Organizations such as the ABA, CPR, AAA, and JAMS can either provide or recommend highly qualified persons to conduct training programs.

- D. Provide ADR Resources: Develop an ADR library and ADR desk references.
 - i. Establish an ADR library. Make available books, periodicals, treatises, model policies, forms (contracts, ADR procedures, and briefs), and other reference tools to help attorneys understand the important ADR issues and facilitate implementation of ADR practices.
 - ii. Create ADR desk books with model ADR clauses, ADR procedures, practice tools, and ADR resources.
 - iii. Develop separate arbitration and mediation manuals to encourage multistep ADR use.
 - iv. Circulate ADR periodicals and useful articles to communicate ADR developments.

- E. Participate in Activities External to the Firm.
 - i. Write for external publications, create a firm ADR newsletter, or both.
 - ii. External activities include white papers, one-on-one conferences with clients, seminars, and speeches before business groups.
 - iii. Participate actively in organizations that offer ADR services, such as the ABA, CPR, AAA, and JAMS, and on the ADR committees of bar associations.

- F. Encourage ADR Research: Employ existing computer facilities to encourage ADR research.
 - i. Use internal computer networks to house ADR procedures, forms, and research material.
 - ii. Encourage electronic-mail inquiries for ADR assistance within the firm.
 - iii. Create a database containing information about neutrals to track and assess proposed neutrals in the future.
 - iv. Encourage use of on-line ADR research databases to access ADR materials including: the National Arbitration Forum (www.arb-forum.com); the AAA (www.adr.org); CPR (www.cpradr.org); JAMS (www.jamsadr.com); the World Intellectual Property Organization (www.arbiter.wipo.int); the International Chamber of Commerce (www.iccwbo.org); and the United Nations Commission on International Trade Law (www.uncitral.org).

3. Require Systematic ADR Case Analysis

Attorneys retain a great deal of discretion in selecting and proposing resolution options in individual cases. Tendencies to fall back on familiar adversarial patterns let appropriate ADR cases fall through the cracks. Attorneys should be encouraged to counsel clients about ADR and, where appropriate, to recommend ADR options. To inform discretion, develop tools that routinely prompt attorneys to consider ADR options.

- A. Institute a system that requires early consideration of ADR in all matters. Evaluate each case for ADR and document that evaluation in the file. A form can be developed which seeks ADR-related information. Perhaps triggered by information on the form, the ADR department would discuss ADR issues in specific matters with the responsible lawyer.
- B. Develop a “suitability screen” to assist in determining whether a case is appropriate for ADR. Attached as an Appendix is one example, the Stradley, Ronon, Stevens & Young ADR Suitability Screen. The ADR program should not require recommending or even discussing ADR with clients in every matter. In other words, ADR should not be mandatory. Rightful resistance will be encountered if the firm were to direct its trial lawyers to attempt ADR in all cases, even all cases of a particular type.
- C. Promote ADR Contract Clauses: Encourage transactional lawyers to consult with ADR counsel when drafting contracts.

4. Promote a Full Spectrum of ADR Services

Firms should promote their expertise in mediation and other non-binding ADR procedures, as well as in arbitration, to clients seeking ADR and to those not yet fully conversant with it. They should do so via marketing, through client education and financial practices that encourage ADR, and by offering a full range of ADR services.

- A. Market the Firm’s ADR Services: Select the ADR services that the firm is best equipped to provide, such as advising clients, analyzing litigation risks, serving as an advocate in ADR proceedings, and acting as an ADR neutral.
- B. Educate Clients in ADR.
- C. Establish ADR Billing Policies: Construct proactive ADR financial arrangements to encourage volume ADR services, early settlement, and attorney enthusiasm for ADR use.
- D. Offer a Full Spectrum of ADR Advocacy and Counseling Services.
 - i. Emphasize mediation and other non-binding ADR processes.
 - ii. Refine arbitration skills.

- iii. Offer ADR systems design consulting to clients. See the subsection on “ADR Process Counsel” above in response to Question #2.
 - iv. Work with clients to develop early case assessment programs.
 - v. Provide settlement-track services to new clients embroiled in unsatisfactory litigation with other firms or to existing clients already being represented by the firm in litigation. See the subsection on “Settlement Counsel” above in response to Question #2.
- E. Provide ADR Neutral Services. Encourage all attorneys to serve as mediators and arbitrators in order to gain hands-on experience with ADR.

5. Develop Effective ADR Advocacy Strategies

Successful advocacy requires skillful presentations at ADR sessions. It also demands careful selection of the right ADR process, intelligent tailoring of the proceedings to meet negotiation barriers and case needs, and preliminary preparation of the client to assure success.

- A. Probe Client’s Interest in Using ADR Options.
- B. Get Parties to the ADR Table.
 - i. Insert ADR clauses into business agreements to require ADR use when future disputes arise.
 - ii. Employ ADR suitability screens to analyze new cases. See 3 B. above.
 - iii. Employ DTA to systematically examine issues and liabilities to help isolate acceptable settlement ranges and ADR possibilities.
 - iv. Encourage adversaries to use ADR. Neutral organizations have a good track record of convincing parties of the benefits of ADR. Where adversaries have signed the CPR pledge, parties can be reminded of these commitments.
 - v. Of course, certain situations require litigation: when there is the need to defend a frivolous case, to file an injunction, to establish a precedent, or to protect a strategic interest, litigation may well be the best option.

6. Develop ADR Tracking Practices

Tracking of ADR processes allows objective assessment of the ADR impact and provides statistical data on ADR use, success rates, satisfaction, and client savings to market ADR expertise.

- A. Develop Closed-Case Assessment Routines.
- B. Create A Tracking Form to Assess ADR Use.
- C. Catalogue the Data. Take the time to measure and record the results and to compare them to the cost and time associated with disputes resolved in litigation. It takes time to build a successful program and not every ADR experience will be positive. Over time, however, an ADR approach to dispute resolution should yield substantial benefits.

Conclusion

ADR requires law firms to take a long-term view. Many law firms have been reluctant to embrace an ADR approach to dispute resolution. Some of these firms see ADR as an incursion into a significant profit center: litigation. Indeed, ADR's greatest effect may be on litigation--but as a complement, not as a replacement. Clients increasingly demand an early assessment of the risks and costs of potential litigation and early development of a case management strategy. Most clients want to consult with one law firm proficient in all phases of dispute resolution. Firms ill-equipped to provide advice in all areas, including ADR, will not get the litigation business of such clients.

Each case requires a fresh new approach, an understanding of the client's business and objectives, and far more communication with the client. Professional responsibility aside, the world of ADR is here to stay, and those who take a leadership position likely will gain a significant competitive advantage. This is especially true given the rapid expansion of accounting firms and multi-disciplinary practices into the world of dispute resolution. By making this commitment to ADR, law firms have the opportunity to add substantial value both to their clients and to the legal profession.

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Figure 1

The World of Dispute Resolution

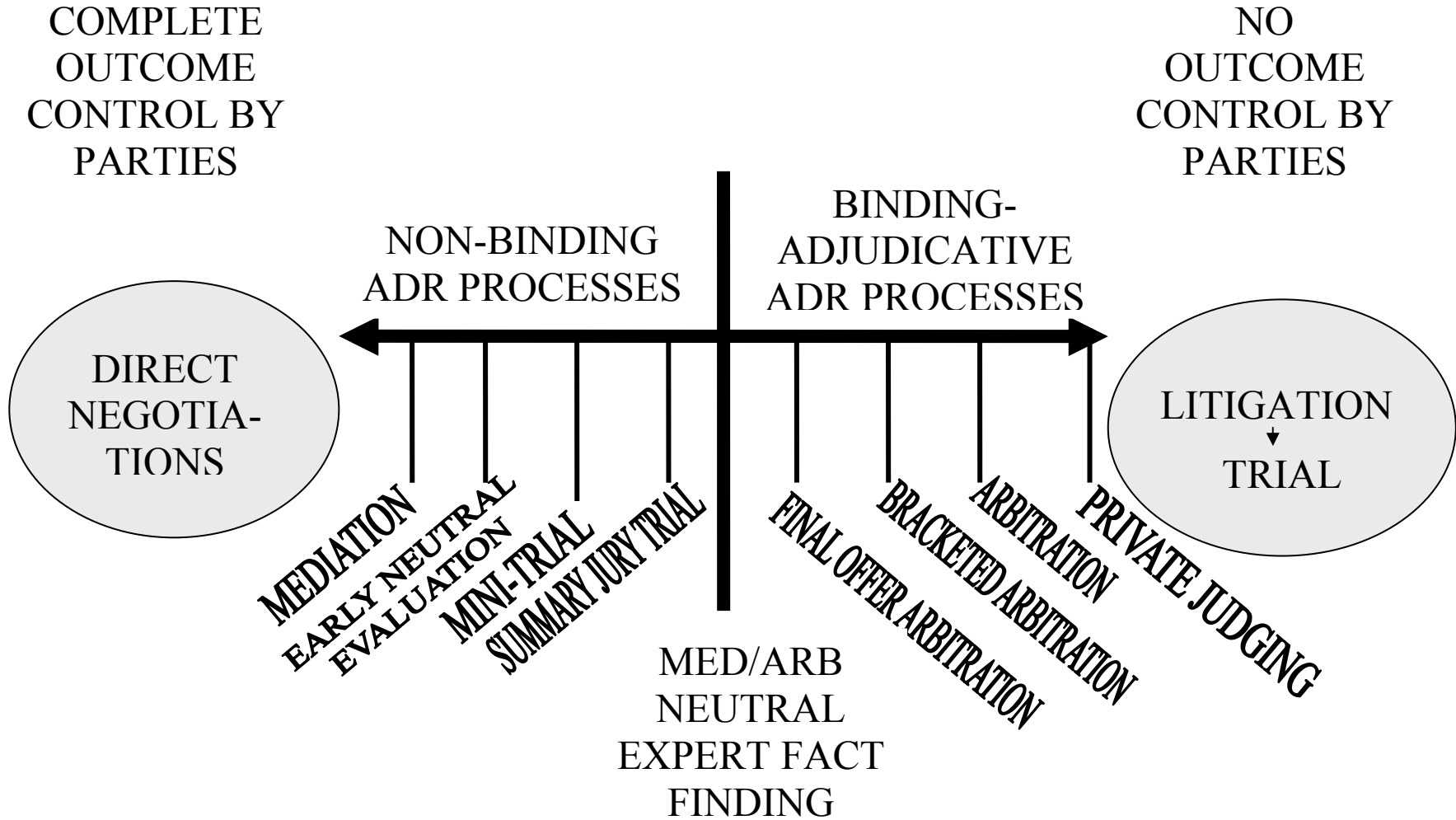


Figure 2 ADR in Agreements

Agreement Type:*	1	2	3	4	5	6	7	8
Negotiation by Managers & Executives (1 or 2 tiers)				√	√	√	√	
Mediation		√	√			√	√	
Arbitration	√		√		√	√		
Litigation		√		√			√	√

* Examples:

- Long-term Supply Agreement
- Patent License Agreement
- Asset Purchase Agreement

APPENDIX
STRADLEY RONON STEVENS & YOUNG, LLP
ADR SUITABILITY SCREEN

This ADR Suitability Screen is designed for use by firm lawyers in advising clients as to whether a business dispute is suitable for resolution through ADR. Although a “yes” answer tends to support an ADR alternative and a “no” answer suggests the opposite, the Suitability Screen is intended to be predictive, not determinative. In addition, answers to some questions may carry more weight than others in a particular case. Further, a “no” answer to certain questions, marked with an asterisk, may not necessarily argue against ADR. Finally, consideration should also be given to how the views of opposing counsel (and not just the opposing party) will affect suitability for resolution by ADR.

The ADR Practice Group stands ready to assist firm lawyers in any evaluation.

I. The Parties and Their Relationships	Yes	No
1. The parties involved are signatories to the CPR pledge or an industry-based ADR pact, or are otherwise committed to exploring ADR alternatives.		
2. Apart from the dispute, the actual or potential business relationships among the parties are significant, and are likely to stay that way.		*
3. The people with authority to resolve the dispute on both sides either are or can be involved in its resolution.		
4. The other side’s view of its case has been colored by an unrealistic appraisal by its counsel; a direct approach to the other side will be helpful.		
5. A presentation by counsel might promote a better understanding of the issues or a more realistic case assessment.		
6. The parties’ decision-makers lack familiarity with the facts or merits of the dispute.		
7. At least one side is genuinely interested in compromise.		
8. At this point, the general attitude of each side toward the other is relatively objective.		
9. A non-binding evaluation from a skilled neutral would help produce a more realistic assessment from either side.		*
10. A mediator or neutral facilitator would help diffuse hostility between lawyers or parties.		
11. There are multiple parties involved, escalating the time and costs of litigation.		*
12. In terms of financial resources, business sophistication and litigation experience, the sides are substantially comparable.		

II. Interests That the Parties Are Advancing		Yes	No
13.	The jurisdiction in which the dispute is pending requires some form of non-binding ADR in this type of case.		
14.	A speedy and inexpensive resolution of the dispute is important to both parties.		
15.	The parties want to avoid publicity.		
16.	The transaction costs of pursuing litigation, compared to what either side can realistically expect to recover or save, are disproportionately large.		*
17.	Confidentiality is an important concern for at least one party.		
18.	The dispute presents risks for either side of damage to reputation, public rejection of a product, potentially greater governmental regulation or some comparable risk.		*
19.	The parties want to reach a business solution rather than an outcome resulting in money damages only.		
20.	Both sides wish to avoid burdensome or intrusive full-blown discovery.		
III. Issues Involved and Outcomes Sought		Yes	No
21.	The issues involved in the dispute are sensitive, involving senior management, disclosure of trade secrets or production of sensitive documents.		*
22.	The issues involved in the dispute are highly technical or complex.		*
23.	The central issues in this dispute are factual, but do not turn on the credibility of key witnesses.		*
24.	One or more sides seek a resolution that a court could not grant, such as a modification of the relationship between or among the parties.		
25.	Either side has something significant left to put on the table to induce settlement.		
26.	The parties wish to control the outcome of the dispute by avoiding binding adjudication and the attendant risk of loss.		
27.	Inflicting significant damage on the other side or securing public vindication is of no interest to either side.		
28.	The parties need a speedy resolution.		*
29.	The dispute is ripe for resolution.		
30.	There are business issues collateral to the dispute that may also be resolved.		*
31.	There is at least some merit to both sides; the claim is not frivolous.		
32.	A public victory will not deter future claims.		

III. Issues Involved and Outcomes Sought (Continued)	Yes	No
33. The dispute is one of a substantial number of pending or potential claims stemming from the same fact pattern or event, and a lower profile, confidential ADR process will reduce the incidence of claims.		
34. There is no need for a decisive legal precedent.		
35. There is no need for injunctive relief.		
36. The likelihood that this case can be resolved by a prompt dispositive motion is speculative.		
37. The chances of winning at trial are unknown or uncertain.		

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