

The Metropolitan Corporate Counsel

www.metrocorpcounsel.com

Volume 17, No. 11

© 2009 The Metropolitan Corporate Counsel, Inc.

November 2009

Controlling Legal Costs – Law Firms

ADR And ECA: Keys To Successful Dispute Resolution

The Editor interviews **Bennett G. Picker**, Senior Counsel (and a full-time mediator and arbitrator), Stradley Ronon Stevens & Young, LLP.

Editor's Note: In 2007, The International Institute for Conflict Prevention & Resolution (CPR) presented the organization's inaugural "Law Firm Award (Award) for Excellence in Alternative Dispute Resolution (ADR)" to Philadelphia-headquartered Stradley Ronon Stevens & Young, LLP. In presenting the Award to Stradley Ronon, CPR's CEO Kathleen A. Bryan stated, "they have set a successful benchmark for addressing resolution, prevention and management of major disputes in multi-practice areas." The Award Review Committee, comprised of corporate counsel from GE, duPont, Abbott Labs, Northrup Grumman, Johnson & Johnson and Microsoft, as well as law school faculty, agreed that Stradley Ronon demonstrated a firm-wide commitment and culture promoting the principles of conflict resolution. In this interview, Bennett G. Picker, who was then Chair of Stradley Ronon's ADR Practice Group and accepted the Award on behalf of the firm, describes in this interview how his firm's recognized excellence in ADR contributes to its ability to work with clients who use the holistic approach embodied in early case assessment (ECA) that is described by CPR's CEO Kathy Bryan in her interview on the front cover of our August 2009 issue and set forth in more detail in CPR's ECA Guidelines (CPR's ECA Toolkit).

Mr. Picker is a Fellow of both the International Academy of Mediators and the American College of Civil Trial Mediators. He serves on the panels of the American Arbitration Association and

CPR and serves as a member of the Executive Committee of the American Arbitration Association's Board of Directors. Mr. Picker is the author of *Mediation Practice Guide: A Handbook For Resolving Business Disputes (Second Edition)* published in 2003 by the ABA Section on Dispute Resolution.



Bennett G. Picker

Editor: Ben, how did you develop an interest in ADR?

Picker: My first mediation almost 25 years ago intrigued me. Because I gained an understanding of the ways that a mediator identified and overcame barriers to resolution that were invisible to the parties and counsel, I found mediation to be transformative in my professional life and then sought out a program of mediation training to learn more about the process. I was convinced early on that the flexible and intensely personal process of mediation offered a very real potential for clients to resolve disputes based upon their underlying business interests.

Editor: How has your firm been able to achieve such a high level of buy-in for ADR?

Picker: With a lot of hard work, we have achieved total buy-in for ADR in a way that has redefined the very fabric of the firm. Our ADR Practice Group is charged with providing sophisticated ADR advice in such core areas as litigation, corporate transactions, employment, banking and bankruptcy, estates, environmental, intel-

lectual property and insurance. In order to devote my full time to serving as a mediator, arbitrator and trainer after a decade of chairing our group, I turned over the leadership of the Group to two of my partners who are extremely knowledgeable and passionate about ADR, Lee Rosengard and Kevin Casey.

Editor: What are the ADR goals of the firm and its ADR Practice Group and how do they tie into ECA?

Picker: Our goal is to have every attorney consider the use of alternative dispute resolution as an integral part of the practice of law and the advice we give to our clients. We regularly employ ADR strategies and practices to enable us to achieve results that further our clients' business goals, reduce the expense and delay associated with resolving disputes and avoid distractions to management which prevent our clients from focusing on their business objectives.

Our approach also encompasses the design of systems to avoid and manage disputes and embraces a sophisticated pursuit of a full range of dispute resolution options, including negotiation, litigation, mediation, arbitration and customized ADR options. As part of the team working with our clients on ECAs, members of ADR Practice Group would contribute the same skills. Using standards that would be very useful in an ECA, they have been trained to screen disputes for ADR suitability and to explore the facts, the underlying interests, legal rights, business and other relationships, and potential outcomes.

Editor: Does the Award's recognition of the firm's expansive firm-wide training

Please email the interviewee at bpicker@stradley.com with questions about this interview.

in ADR reflect the nature and scope of training it can provide with respect to ECA.

Picker: When we began our initiative, we brought in Professor Dwight Golann, then at the Harvard Program on Negotiation, to conduct a program of mandatory training for all of our partners. Members of our ADR Practice Group then trained our associates in both formal and informal sessions which we have continued to this day. What may set Stradley Ronon apart is the extent to which we have changed the firm's culture. Many firms are still reluctant to use alternate methods of dispute resolution because they perceive that ADR or an early negotiated settlement may be a threat to a profit center – litigation. In fact, as a result of our years of experience with ADR, we recognize that strong litigation skills and an outcome achieved by ADR or arriving at an early settlement are entirely complementary. Most corporate counsel want outstanding trial lawyers who think strategically and also appreciate the opportunities offered by both ADR and ECA. More specifically, the sophisticated tools used in ECAs will permit our firm to enhance the ADR training we offer to our lawyers.

Editor: The firm's ADR Practice Group was also cited for partnering with clients to deliver educational programs and for disseminating information more generally.

Picker: We have together with clients provided training programs on issues such as drafting dispute resolution clauses, mediation advocacy, negotiation and international arbitration to numerous companies throughout the region, and as far away as Georgia and Texas. We usually customize our corporate programs to address a company's specific interests and concerns. More generally, our practice group members over the past decade have authored more than 50 articles for leading business and legal periodicals. We will be publishing a Stradley Ronon ADR deskbook to collect some of the best of these articles. Our ADR Practice Group members have also provided education and training programs at numerous law schools, ADR organizations and companies throughout the nation and in the UK. Because of this experience the

firm is ideally situated to utilize ECA and particularly CPR's ECA Toolkit.

Editor: As you know, CPR's CEO Kathy Bryan has emphasized the value of a holistic approach to dispute resolution and created a Corporate Early Case Assessment Commission, which developed CPR's ECA Guidelines to assist corporate law departments in implementing ECA. How do you feel about this development?

Picker: I am extremely pleased by the roadmap offered by CPR and believe that, in adopting such a user-friendly set of tools, CPR has taken its ADR Pledge to the next level. As you may recall, the CPR Pledge, adopted by most major law firms and the largest corporations in America, encouraged the use of ADR. Now, for those serious about ADR and a problem solving approach to dispute resolution, there is a program and specific measures that will permit corporate clients, working with their law firms, to make informed assessments about settlement possibilities early in the timeline of a dispute before "advocacy bias" becomes entrenched.

Editor: Does the increasing cost of e-discovery present yet another reason why ECA has become so important?

Picker: It is clear from other articles in this Special Section on Controlling Legal Costs that a powerful force behind the current interest in ECA is that in many disputes the cost of e-discovery must be weighed against the value of the case. Therefore, it is prudent for one or both parties to a dispute to use some form of ECA to determine the value of the case and obtain a reasonably accurate idea of the cost of e-discovery. I applaud CPR for identifying this need and doing something about it. Given this reality and the enthusiastic support of ECA by CPR, it is likely that more and more corporations will use ECA. I would anticipate that firms like ours with strong ADR practices will increasingly be involved with ECA because many of the disciplines applicable to the decision to use ADR are the same as those involved in an ECA.

Editor: As a result of your demonstrated ability to anticipate future trends, do you feel that CPR should put a major emphasis on the adoption

of ECA on the theory that, if more corporations utilize ECA there would be greater likelihood that both parties to a dispute would use ECA and therefore benefit from the greater understanding gained through ECA about the strengths and weaknesses of their respective cases?

Picker: Yes. I see ECA as the next major trend in ADR. Corporations and law firms have been espousing the benefits of ADR and mediation for years without necessarily taking affirmative steps in every dispute to implement such an approach. I also agree that corporations using the ECA program mandating early litigation risk assessments, including costs of litigation, will be in a much better position to make early settlement decisions based upon realistic assessments of strengths and weaknesses.

As a mediator, I can tell you that in almost every mediation I have to deal with the phenomenon of "advocacy bias" resulting from the traditional approach of focusing solely upon one's strengths and falling in love with one's own facts and arguments. Studies by the Harvard POM show that "advocacy bias" may be the principal barrier to resolution of a dispute, whether the parties are engaged in direct and unassisted negotiations or facilitated negotiations with the assistance of a mediator.

Equally important, the ECA approach will mandate a focus upon relationships, internal company short-term and long-term needs, and other priority business interests of both sides in a dispute. As a consequence, parties are far more likely to engage in a problem-solving approach to a business dispute.

Editor: Does the adoption of ECA affect the relationship between law firms and their corporate clients?

Picker: Those law firms that promote ECA and engage in the full process with their clients will undoubtedly enhance their relationships with existing clients and attract new clients. By engaging in a collaborative process with their clients to consider the client's business interests and long-term goals and objectives, law firms will better understand their clients' businesses and goals and will be in a position to further these goals when future issues arise.