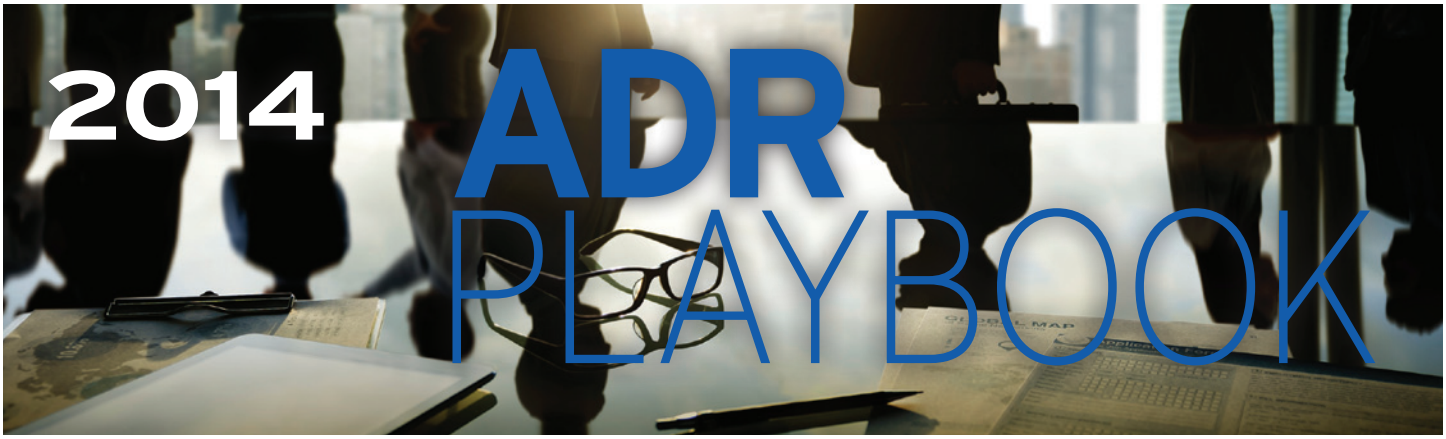
October 27, 2014

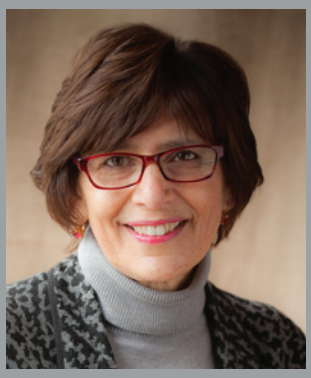
LAW BUSINESS TECHNOLOGY
BUSINESS TECHNOLOGY LAW
TECHNOLOGY LAW BUSINESS
THE RECORDER
daily at www.therecorder.com
An ALM Publication



Yesterday, Today and Tomorrow: ADR in Review

Practically overnight, 'ADR' became the term on every lawyer's lips, and what it mostly meant then was 'judicial arbitration' – a one-day preview of the evidence before an attentive colleague who, more often than not, issued a well-reasoned award.

Hon. Lynn Duryee (Ret.)



Hon. Lynn Duryee (ret) is a neutral with JAMS at its San Francisco Resolution Center. She serves as a mediator, arbitrator and referee in disputes across multiple practice areas. Prior to joining JAMS in March, she spent 21 years as a Trial Court Judge, Supervising Civil Judge and Supervising Criminal Judge to JAMS.

Yes, judicial settlement conferences existed last century, and what frightful experiences they were. Jittery lawyers were separately summoned into unwelcoming judge's chambers while litigants languished anxiously in the hall, excluded from high-level discussions about their case. Omniscient judges wasted not a moment discussing legal arguments or parties' interests; instead they used the allotted 10 minutes to bludgeon the lawyer with horror stories about juries and verdicts and all the ways the case could and would be lost at trial. Ultimately, the judge would tell the lawyer how the case should resolve and would order him to go forth and obtain the client's consent. Judges routinely scheduled six such settlement conferences in a single afternoon, and in this way they did settle many cases.

The Trial Court Delay Reduction Act struck like lightning in 1986, and suddenly the courts – not the lawyers! – were managing civil cases. Have the parties been served, has an answer been filed, is discovery occurring, will the case be ready for trial in 12 months, and, hey, what about this thing called ADR? Practically overnight, "ADR" became the term on every lawyer's lips, and what it mostly meant then was "judicial arbitration" — a one-day preview of the evidence before an attentive colleague who, more often than not, issued a well-reasoned award. But as mediation began to take hold, many arbitrators dispensed with the pesky rules of evidence and started talking informally to participants. Visionaries studied and taught mediation, and within a few years, civil litigators embraced the opportunity to settle cases with neutral colleagues, thus dodging significant litigation expenses.

As private mediation gained in popularity and effectiveness, courts took notice. Forward-thinking courts partnered with skilled neutrals to create mediation programs for early, out-of-court settlements and to improve the courts' Mandatory Settlement Conference programs. Experienced neutrals modeled effective settlement techniques for untrained judges. Some courts took the plunge and formed settlement conference departments, headed by capable judges working alone or with volunteer neutrals. By 2000, it was unthinkable that a civil case would go to trial without some effort at dispute resolution.

Mediation has evolved in the last 20 years, as styles and tools have come in and out of fashion. Joint sessions, once considered the gold standard for convening a mediation, are not used very often anymore. The Mediator's Number, once the magic bullet for settling the impossible case, is now used as infrequently as a pay phone. Today's parties often negotiate in brackets. Tomorrow? Brackets may seem clumsy and dated, replaced by the newest-new mediation app. Skilled mediators – and users of their services, for that matter – are constantly searching for new and better ways to help disputants achieve more satisfying outcomes.

One trend is towards psychological healing. In private mediation settings, as well as in court settlement programs, psychologists are joining judges and lawyers to assist in the process. The goal is to have better listening, deeper understanding and a resolution more profound than "an end to the lawsuit." For many years, the offering of an apology has been instrumental in settling an emotional case; now, some mediators are taking the next step and working with embattled parties on the concept of forgiveness. These mediators coach clients on the process of forgiveness and provide them with a path to release the difficult feelings of the past in order to enable them to move forward with a clean slate.

Another trend in ADR is "mandatory" mediation. While it has existed since 1981 for child-custody disputes, it is relatively new to the civil scene. Real estate contracts, partnership agreements and construction contracts often call for mandatory mediation prior to initiating litigation. The failure to participate in mediation may prevent the party from recovering otherwise recoverable attorney's fees. It can be tricky to treat a voluntary process as mandatory and lawyers are sometimes nervous about pre-filing mandatory mediation because they have not had a chance to conduct discovery. However, parties who achieve settlement before filing, report that while they didn't know everything about both sides of the case, they knew enough to make an intelligent decision.

In Sonoma County and elsewhere, mediation is used to resolve contentious discovery disputes. In 2008, as part of an effort to reduce the judges' backlogs of Law & Motion matters, a consortium of lawyers and judges developed the Discovery Facilitator Program, Sonoma Local Rule 4.14. This program allows litigants to have their discovery disputes resolved with the help of an experienced and volunteer neutral. Parties can see the Discovery Facilitator before or after their discovery motion is filed. Before the program went into place, the judges' calendars were packed with time-consuming discovery motions. Now, Sonoma judges report that they hear no more than a handful of discovery motions each year.

After decades of decreasing in popularity, arbitration is back. Many plaintiff's lawyers are electing arbitration over mediation because of perceived frustration with their opponent's failure to bring decision-makers to the table. With arbitration, the plaintiff's lawyer can put on his case before a neutral and obtain a viewpoint on the value of the case. Even if the other side doesn't put on a defense or files for trial de novo, a thoughtful arbitration award can be helpful down the line when the decision-maker is ready to make a settlement offer.

Finally, judicial standards have changed to keep up with the times. Judicial settlement conferences today bear little resemblance to those scary proceedings of yesteryear. They are now overseen by trained judges and neutrals who devote significant amounts of time to the process. Parties are included in the discussions, and most of the day is devoted to listening to the litigants. As of January 1, 2013, the Canon of Ethics for judges relating to settlement conferences was amended to read: "At all times during such resolution efforts, a judge shall remain impartial and shall not engage in conduct that may reasonably be perceived as coercive." It's official! Bludgeoning, which never seemed like a great option, is not permitted. In any event, good neutrals don't need it – they can help the parties reach the finish line without any bloodshed at all.