ADR: A SILVER LINING WITHIN THE LEGAL INDUSTRY'S "NEW NORMAL"

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Most pundits of the legal industry agree that the Great Recession of 2008-2009 changed the practice and the business of law forever. A number of widely read reports has identified these seemingly permanent changes as the "new normal." The new normal has had a marked impact on the alternative dispute resolution (ADR) industry, but much of that impact comes directly from the new dynamics between law firms and their clients. ADR providers have been keen observers of these trends and are learning to react creatively and nimbly in order to stay relevant and financially healthy, and to continue to provide the best service possible.

Within the law firm environment, changes representing the new normal include a flattening, or decline, in demand for outside legal services, sustained pressure on billing rates, increased involvement by inside counsel, increased use of outsourced legal services and a higher use of alternative fee arrangements. Of course, these are just some of the shifts from the heady days of the pre-2008 legal industry, and they have indeed led to a new dynamic, where law firms must run themselves more like businesses. This requires a much more intensive and introspective look at how legal services are delivered and how to better serve a corporate clientele, who are operating under the same post-recession economic constraints.

It is worth noting that some of the trends mentioned above are part of a normal cyclical process, while others may be more permanent. True, double-digit growth in revenue and profits per partner in larger law firms was the norm in the 2001-2007 time frame, but that wasn't always the case. Clearly, there is more room in boom years for rate increases and perhaps higher use of outside counsel and even less scrutiny over the bills that they produce. However, not all firms realized that same growth, and in previous years, some law firms saw lean times.

What seems most certain is that the current set of dynamics defining the new normal isn't likely to change any time soon. We are now arguably in the seventh year of a slow-growth economy, where most large law firms are eking out single-digit revenue gains based primarily on rate increases, lateral partner hires and geographic expansion and mergers, and the next few years don't look any different.

The recession has also hit the public sector hard, leading in many jurisdictions to the closing of courthouses, courtrooms and court-annexed dispute resolution programs; staff furloughs; and significant delays in the time it takes to get a civil trial into court. In California, Chief Justice Tani Cantil-Sakauye recently said that "we are not dying, but we are certainly on life support" and that "[w]e believe that we are operating in an entirely new environment, where we will never see what we saw and had three to five years ago."

Whether some of these trends are temporary or permanent, a relevant question is whether ADR

has been affected the same way as other parts of the legal industry. ADR has become an integral part of the U.S. civil justice system over the past few decades. The vast majority of civil cases end in settlement through the use of mediation or some type of negotiation.

The short answer is that the ADR industry has in fact been impacted, but not always in the same ways as law firms. Of course, most of the same financial pressures having to do with rates and in some cases demand and billable hours are at play. On the other hand, many ADR providers charge and collect a significant portion of their billings in advance and thus do not have the same challenges in realized rates compared to billed or standard rates.

The current environment has spurred ADR organizations to provide attorneys and their clients a variety of options, or tools, if you will, that can help navigate the new legal landscape. It's not all a bed full of roses from the ADR side, but it is worth viewing some of the changes in the ADR sector from a silver lining perspective.

The increased influence of corporate counsel and the economic discipline being exercised by their companies has led to a palpable trend toward settling disputes earlier and in some instances keeping cases "in the drawer." The latter is happening, where there is no incentive on the part of at least one of the parties in a dispute to rush toward settlement. However, as business moves more and more quickly these days, ADR remains a relevant avenue for disputes that need resolution sooner rather than later. Many ADR providers are educating attorneys about the variety of ADR processes that might be available to them early in the cycle of a case, or even prior to the start of litigation. These processes include structured negotiations, use of project neutrals, early case assessment, neutral evaluations and even something as simple as starting the mediation discussion with the other side earlier than they would have a decade ago.

We certainly are seeing more in-house counsel present at hearings, and they are much more involved with their outside counsel in selecting the neutral. This trend has provided outside attorneys with an opportunity to partner more closely with their clients during the dispute process. Savvy attorneys are taking advantage of their knowledge of ADR and utilizing it to provide their in-house clients with what is often the "best value" in dispensing with a case. In addition, as outside attorneys become more aligned with their clients' business interests, they are able to share crucial advice about how to pursue business outcomes that would be available only through mediation, not in court.

Some would assume that the massive budget cuts in many court systems would be enough to drive business to the ADR market and counteract any downward pressure on demand. The assumption is that as court dates extend further and further into the future and the duration of cases is extended, parties will run to ADR providers as a faster and cheaper alternative. But the fact is that at least one party is often happy to sit back and wait.

However, waiting is not always an option, and attorneys and ADR providers are becoming creative in how mediators and arbitrators in the private sector can alleviate some of the pressure in the courts. In California, for instance, we are seeing an increase in the use of general and special references. There are often forgotten processes in the California Code that allow the parties or the court to appoint a neutral from a private provider to determine all issues in the case and then report a statement of decision, or in the case of special references, neutrals can be used as discovery referees, which can help alleviate some of the burden from the court. These processes can keep the case moving toward resolution.

The maturity of the ADR market has also put increased pressure on arbitration providers as more and more outside counsel are concerned that private arbitration is not always faster and cheaper than litigation. A major cause of this is the insistence by at least one party to in some ways mimic the court system, particularly as it pertains to the discovery process. The desire to reduce time and cost also leads to more cancelled arbitrations, as the incentive to settle earlier increases.

For arbitrations that move forward, there are still many benefits to be realized. Attorneys are beginning to take more control of the process by hiring an arbitrator who is a firm manager, beginning at the outset of the case with an organized scheduling conference. For most, it offers finality when it is necessary; for others, it is more interest in an optional appeal procedure, another trend we are seeing with very large arbitrations. The best part of arbitration remains its flexibility to craft the process to meet the unique needs of the case—everything from choice in decision maker or venue to the use of expedited procedures. Sophisticated attorneys utilize this process when subject matter expertise and control are key.

Not only is the ADR market much more mature than it was several years ago, it is also more saturated. As competition among ADR providers becomes more intense, some providers have responded by cutting rates or offering discounts. While this has potential implications for neutrality, it seems to be appearing more and more in some corners of the ADR market. A focus on discounts, however, can come at the expense of higher quality. The quality of the panel continues to be a differentiator within the marketplace, and there will always be a strong market for the best neutrals, whether they are retired federal judges or former attorney neutrals who have significant subject matter experience. Those ADR providers who host these mediators and arbitrators, as well as the attorneys who utilize their services, will continue to benefit from their knowledge, skill and talent in finding workable solutions and final outcomes.

Just as with law firms, ADR providers are held to a similar survival standard. Those who adapt will live to enjoy the spoils, as limited as they may be, of another year. Those who remain rigid will see client loyalty wane and revenues and profits fall. The essential element for both is learning to differentiate. Skilled use of ADR processes and exceptional neutrals is one way for attorneys to differentiate themselves to clients, and there's usually a silver lining when that happens. ■

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1 Perhaps the earliest mention of this was in the Hildebrandt Institute Blog. Tricia Pelton, The New Normal: Collaboration between Corporates, Law Firms and LPO Providers," *Hildebrandt Institute Blog*, Nov, 15, 2012, hildebrandtblog.com/2012/11/15/the-new-normal-collaboration-between-corporates-law-firms-and-lpo-providers/.