

ADR LAW NOTES



Legal Developments, Issues and Other Matters of Interest Concerning Alternative Dispute Resolution

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NEUTRAL TERRITORY

By Marie Beaudette

Ten years ago, taking a job as a neutral often meant slowing down from the hectic pace of a law firm partnership or the stress of the bench. But today, demand for alternative dispute resolution services has shot up as the federal government and scores of companies are turning in greater numbers to neutrals to help them solve disputes. “The field has moved from being an interesting hobby for volunteers to being a business that is supporting neutrals full time and is dealing with very complex litigation,” says Linda Singer, a neutral in D.C.-based ADR Associates. And while the growth has occurred nationwide, ADR providers say Washington, D.C., has, in many ways, been at the forefront.

Irvine, Calif.-based JAMS, the country’s largest for-profit ADR provider, has beefed up its presence in the District by moving into prime office space, hiring several high-profile neutrals, and acquiring ADR Associates. Company wide annual revenue at JAMS has increased from \$50 million in 1998 to \$70 million in 2003. The group projects \$80 million in revenue for 2004.

Not to be left behind, the nonprofit American Arbitration Association (AAA), the largest ADR provider in the country, with more than 20,000 neutrals, claims an increase in demand over the past several years, in part a result of the economic downturn that began in 2000. The collapse of numerous Northern Virginia technology companies, many of which had written mandatory arbitration provisions into employment contracts and partnership agreements, gave AAA’s D.C.-area panel a “major increase” in large-case filings, says P. Jean Baker, the head of the D.C. office.

These local developments reflect a growing national trend. Government agencies such as the Department of Justice (DOJ) and the Equal Employment Opportunity Commission (EEOC) are turning to arbitration and mediation, and many companies are

telling consumers that they need to sign mandatory arbitration agreements if they want to do business with them. And courts are insisting that arbitration be attempted before a costly court battle begins.

A major reason for the increase of ADR in Washington has been its use in government agencies. In 1990, Congress passed the Administrative Dispute Resolution Act, which mandated that all federal agencies create internal ADR programs. Since then, and especially over the past five years, the use of arbitration and mediation to solve disputes involving the government has increased drastically.

The Justice Department has seen an 82 percent increase in the number of cases resolved using ADR over the past seven years. In 1995, the department processed 509 cases using ADR, and in 2002, that number leapt to 2,866 according to the department’s Office of Dispute Resolution. Justice is using ADR to settle routine internal employment discrimination cases, personal injury suits against the government, and other disputes.

A DOJ survey in 2000 of 828 Civil Division cases in which ADR was used shows that the government saved an average of \$10,700 per case in litigation costs, such as witness fees and travel, and resolved cases six months earlier than normal. “We have found that ADR enables us to do our job better, to do it more quickly, more effectively, and less expensively,” says Jeffrey Senger, senior counsel in the Office of Dispute Resolution.

Other agencies such as the EEOC have instituted their own initiatives to encourage the use of ADR. Since 1999, the commission has mediated more than 50,000 employment discrimination cases, with a success rate of about 70 percent. In 2002, it began asking companies to commit to mediation of cases as an alternative to litigation. So far, more than 20 national companies have signed on.

While the government’s use of ADR is extending to more, and bigger, cases, so is the private sector’s.

Adversaries are coming to ADR providers with complicated issues, from patent disputes to class action filings. Baker says that after 10 years as an AAA neutral, she just last year got her first multibillion-dollar filing – a complex pharmaceutical matter. “One of the ongoing challenges of the local managers of a region is to keep up with the new trends and the case filings,” she says.

And JAMS’ von Kann says the company, which, since it’s founding in 1979, has specialized in complicated cases, has seen an increase in the number of high-stakes filings as well. “These aren’t just small matters that are on the periphery anymore,” he says. “The cases we’re seeing are getting bigger and bigger.”

Mitchell Dolin, a partner in Covington & Burling’s arbitration practice, says there has been a dramatic increase in the number of complex cases resolved by ADR procedures. It’s no longer “one-shot, courthouse-steps mediation,” he says. Instead, there are “mediators who are working on very complex problems with multiple parties and sticking with it.” With this, says Baker, has come demand for more-skilled neutrals. “The users are less concerned about what it costs, but very concerned about the quality of the neutrals hearing their cases,” she says. ADR providers vie for top law firm partners ready to move on or judges stepping down from the bench.

Dolin agrees with Baker. “The really top-notch mediators are in incredible demand,” he says. And highly skilled neutrals can make a good living. At JAMS, neutrals that specialize in large, complex cases set their own rates and pull in anywhere from \$300 per hour to \$10,000 per day.

While the number of large disputes has shot up, smaller disputes – for example, a customer’s complaint that he has been overcharged by his credit card company – are being resolved more often using ADR as well. Scores of companies, from cell phone providers to cable companies, have recently added ADR provisions, for years a staple of credit card and stock brokerage contracts, to their service agreements.

Criticism of the trend abounds, with many consumers’ rights advocates calling ADR provisions unfair. For this reason, ADR providers have revised their guidelines for handling consumer matters. “It’s fine if Kodak and Microsoft want to have a mediation or arbitration,” says von Kann. “But what do you do if your employment contract or mortgage has a provision where you didn’t have any choice?”

JAMS won’t take consumer cases if certain standards of fairness to the consumer are not met. For example, consumers have the right to have the hearing near their homes, and arbitration costs, aside from the initial filing fee, must be paid by the company. The increase in work for ADR providers has caused law firms to beef up their alternative dispute resolution practices, adding lawyers trained to represent clients in arbitration and mediation proceedings.

Indeed, D.C. lawyers in ADR practice groups say lawyers today are not shunning ADR procedures, but instead realizing that it may be the best way for clients to save time and money, and avoid nasty court battles that can sever important business relationships. Arbitration is also confidential, allowing companies to shield certain details from the public. Decisions are usually reached more quickly than in a courtroom, and there is a limited right to seek judicial review of a decision made in a binding arbitration.

Law firms with strong international practices or international clients have seen a substantial increase in international arbitrations. Multinational corporations often arbitrate to avoid a battle over jurisdiction. Mark Wegener, a partner in Howrey Simon Arnold & White’s arbitration practice, says more and more lawyers are advising their clients to consider ADR, and more clients are demanding that their lawyers explore the option. “There’s always been a primitive urge in litigators and in some clients not to propose settlement talks,” he says. “That’s just gone. Real litigators mediate now.” As a middle ground to litigation and arbitration, mediations have increased because they offer clients the chance to find a mutually acceptable solution without binding them to a decision, says Wegener.

Covington’s Dolin says there are differences between representing a client in a courtroom and in mediation. “The main target of my advocacy is the other side’s decision-maker,” he says. Credibility, he says, is also more important in mediation, because everything happens at a “closer range” than in a courtroom. Wegener says the growth of the ADR market has forced lawyers to re-evaluate the way they do their jobs, and add arbitration and mediation to their repertoire of legal solutions. “I don’t think you can be an effective litigator today and fully serve your clients without a knowledge of ADR,” says Wegener.

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