

PRACTICE ALERT

New ADR Professional and Ethical Requirements

Alternative Dispute resolution processes are firmly established under federal and state laws. Competent legal representation therefore requires attorneys to be familiar with those laws and ADR issues, and to advise clients as to ADR alternatives. See Rules 1.1, 1.2(a) and 1.4(b).

Rule 1:40-1 (effective September 5, 2000) provides that State complementary dispute resolution programs are an integral part of the judicial process, and states specifically that "attorneys have a responsibility to become familiar with available CDR programs and inform their clients of them."

A WAKE-UP CALL FOR TRANSACTIONAL LAWYERS

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Our profession has come far, in my observation, along the road to recognition of the positive attributes of the techniques of Alternative Dispute Resolution (ADR). However, even if that be true, we should not yet congratulate ourselves, for the sad truth is that we still have miles to go.

In this jurisdiction, at least, there is a prevailing perception that litigators are reluctant to embrace ADR. I am aware, however, of many exceptions to that stereotypical view. In fact, I submit that it may be a "bum rap" on our litigating brethren, for it does not acknowledge the failure of transactional lawyers, again with exceptions, to consider, accept, learn and use the ADR skills which have come to full recognition and respect in the world of commerce and in state and federal courts.

The following question is addressed to the individual members of the Bar of this state: *During the past year, how many proposed or executed contracts, prepared or reviewed within your responsibility while you have been acting for a client, include a comprehensive dispute resolution provision?*

As a transactional lawyer, past Chair of NJSBA's Dispute Resolution Section and a

long time advocate for education of the Bar about the full spectrum of choices, in addition to litigation, for resolution of disputes, I am perhaps hypersensitive to this issue. It is my experience in negotiation of agreements that if I do not raise the issue, it is never discussed. Yet, if the question of including a clause providing for ADR is placed on the table by me, it is usually accepted as valid and the techniques of negotiation, mediation and arbitration are addressed, tailored appropriately to the subject matter, and then incorporated into the contract under negotiation. This compels me to conclude that transactional lawyers, as a rule, currently do not consider or accept use of ADR to be appropriate for discussion between attorney and client while a contract is in negotiation.

This should be corrected. The failure of an attorney, a transactional lawyer of either broad or narrow experience, to inform a client of the considerations, pro and con, of non-courtroom alternatives for dispute resolution, should be regarded as a serious deficiency; almost as serious a deficiency as overlooking or forgetting a clause concerning remedies in the event of default.

Now, this may strike some readers as an extreme position. I assure you it is not intended as such. My purpose is to arrest the attention of the transactional Bar by confronting colleagues in a straightforward way urging them to avoid a potential professional deficiency.

Rule 1:40-1 of the Rules Governing the Courts of the State of New Jersey, in the September 1, 2001 Amendment, states, inter alia, "Attorneys have a responsibility to become familiar with available CDR Programs and inform their clients of them." True, the Rule of Court, cited above, is not generally applicable to the practice of law but is intended to be, ". . . available in the Superior Court and Municipal Courts and constitute an integral part of the judicial process . . . ". However, by custom and practice coupled with this newly amended R. 1:40-1 providing for complementary Dispute Resolution programs in the New Jersey Court System, there is underway a change in practice moving toward, and fostering, a general expectation among clients that attorneys will bring for discussion and decision in any contract negotiation, the manner of dispute resolution in addition to all substantive questions involved.

Please understand that the message here is not that every contract must have an ADR provision. The message is, rather, that in every transaction good practice requires that there should be a discussion of the issue between lawyer and client, so that they may together make an informed judgment about the appropriateness of seeking agreement with the other contracting party about non-courtroom dispute resolution.

The issues which arise in real estate transactions involving improved real estate or project construction are uniquely suited to dispute resolution outside of the courtroom by negotiation, or through the aid of a neutral in mediation, or finally, if mediation does not succeed, by arbitration using neutrals with experience in the subject matter in dispute. Sections and Divisions of the Bar Associations, which are home to transactional lawyers, fail

their educational responsibilities, if they do not work to raise the bar for the Bar to gain the necessary knowledge and understanding to discharge the responsibility of individual lawyers to become familiar with the entire spectrum of dispute resolution choices, and to recognize the subject as suitable for client understanding and decision.

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ADR INTERNET RESOURCES

American Arbitration Association
www.adr.org

American Bar Association Section of Dispute Resolution
www.abanet.org/dispute

ADR Resources
www.adrr.com

ADR World
www.adrworld.com

Association for Conflict Resolution
www.acresolution.org

CPR Institute for Dispute Resolution
www.cpradr.org

JAMS-Endispute
www.jamsadr.com

National Arbitration Forum
www.ARBITRATION-FORUM.com

The Conflict Resolution Information Center
www.crimfo.org

Mediation Information and Resource Center
www.mediate.com

State of New Jersey Judiciary Complementary Dispute Resolution
www.judiciary.state.nj.us/services/cdr.htm

NJ Association of Professional Mediators
www.njapm.org
