Alternative dispute resolution: What you don't know can hurt you

By STUART M. WIDMAN

You probably think you are a "reasonably prudent" lawyer. Read this and think again, because unless you know and counsel clients about alternative dispute resolution (ADR), you may be breaching your ethical duties and committing malpractice.

ADR refers to the rainbow of procedures, other than traditional courtroom litigation, that persons can use to resolve their disputes. It includes arbitration, mediation, mini-trials, early neutral evaluation, summary jury trials and many other hybrids.[1] It is generally recognized as a way to reduce the cost and delay of litigation.

ADR is gaining in popularity as court opinions and rules endorse it as a preferred means to resolve claims. Even Congress has embraced it for administrative proceedings[2] and has required it to be utilized in the federal courts.[3] The demands for it and opportunities to use it are growing geometrically.[4]

Nonetheless, most attorneys (not to mention their clients) are ignorant about ADR and hesitate to use it. Attorneys see it as a threat to their income, and, at minimum, a change from tradition. This emotional resistance is understandable, but very risky. Lawyers in Illinois who fail to use ADR or counsel a client about ADR may expose themselves to malpractice suits and claims before the Attorney Registration and Disciplinary Commission (ARDC).

This liability could arise from the duties and obligations imposed by the Illinois Rules of Professional Conduct (the "rules"), Illinois State Bar Association ethical rulings, and rules and cases from other jurisdictions. The rules have few express provisions, but many implied provisions, that require lawyers to utilize ADR. This article discusses those rules and other reasons why, in order to protect one's license and fees, attorneys must advise clients of and use ADR. To be a "reasonably prudent" lawyer, ADR must now be part of your everyday practice arsenal.

Money and time

The preamble to the rules makes it clear that a lawyer has an obligation to (1) resolve a client's disputes in the most cost-effective way and shortest time possible, and (2) protect the client's best interests.[5] Accordingly, the rules include a lawyer's obligation to consider a client's economic posture in evaluating a case or handling a matter. Rule 2.1. specifically states, that in representing the client, a lawyer may consider things "such as moral, *economic*, social and political factors." (Emphasis added.) Thus, a cost- and time-effective solution that is in the client's best interest is one that enhances the client's bottom line. (See also, Rule 1.3., requiring reasonable diligence and promptness in representing a client.)

ADR is recognized as a less costly and more expeditious way to resolve disputes. First, since a trial often is avoided, fees and costs, as well as the client's opportunity costs, may be saved. Second, since ADR may substantially abbreviate discovery (for example, there may not be depositions in arbitration), those costs are also avoided. Finally, it usually takes substantially less time to get to hearing through ADR. ADR fulfills the economic and time imperatives of the rules.

A simple example of considering the economic and time elements arises each time one fixes the ad damnum in a smaller case. Should you sue for $14,000 and participate in the mandatory arbitration program in Cook and other counties; or should you sue for $16,000 and try to avoid it? (The threshold will likely go up shortly.) The choice could have an economic and time impact on the client: a mandatory arbitration should be more quickly and less expensively resolved. Under the rules, that damages issue must consciously be addressed. You should, therefore, consider and advise the client of the economic and time considerations of using ADR.

Informed decisions

Rule 1.4. regarding communication also implicitly obligates lawyers to use ADR. Rule 1.4.(b) says "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." As interpreted by ISBA rulings,[6] the rule requires you to tell your client the options to litigation. Unless you do advise your client of the option of ADR, you may be viewed as not effectively informing your client so that she or he can make an informed strategic decision of how to resolve a dispute.

That view of Rule 1.4. is bolstered when read in connection with Rules 3.2. and 1.2. Rule 3.2. says a lawyer "shall make reasonable efforts to expedite litigation . . ." To do so, a lawyer must consider and advise the client about ADR. Similarly, Rule 1.2., entitled "Scope of Representation," says that a lawyer "*shall* consult with the client as to the means by which the objectives of representation are to be pursued." (Emphasis added.) "Means" must encompass ADR, one of the options to resolve a dispute. Thus, you should (1) educate your client about the various ADR options, (2) discuss with your client whether to use ADR, and if so, which procedure, and (3) jointly determine how to use that procedure — what tactics to apply. That may be construed as a continuing obligation.

There are no Illinois cases which address this issue. However, a 1980 California case, *Garris v. Severson*, 252 Cal.Rep. 204, 205 Cal.App.3d 283 (1988), touches upon this "informed consent" issue. There, the attorney failed to advise his client about the possibility of settling a case. The client sued. Summary judgment was originally entered in favor of the attorneys, but it was reversed on appeal. The appellate court held that there were fact questions about whether there was adequate disclosure and a truly informed decision by the client. The court delineated the duties in a malpractice case: "to advise and counsel clients as to all facts necessary to enable the client to make an informed decision." The court expanded upon that duty when settlement is possible:

"The fact that a client initially is opposed to settlement does not excuse the duty to advise and counsel about settlement if such advice and counsel is otherwise appropriate. After all, the lawyer's superior skill and knowledge is what the client is paying for. The lawyer's job is to bring rationality, objectivity and experience to bear on the matter." 252 Cal.Rptr. at 207.

In the ADR context, *Garris* means that a client may initially reject ADR, but the lawyer has an obligation to discuss it again. The lawyer must make sure that the client makes a continuing informed decision not to use it.

ARDC rulings also address full disclosure in settlement. Those ARDC rulings have punished lawyers because they settled a case for an offer that was previously rejected by the client, or settled without the client's approval.[7] In each, the settlement process went awry, and the lawyer was at fault. The same stricture could apply if a lawyer fails to inform a client about ADR, which can be viewed as a settlement technique.

Illinois attorneys cannot seek refuge from this informed consent issue under the recent decision of *Collins v. Reynard, et al.*[8] There, the Illinois Supreme Court held that *Moorman Manufacturing Co. v. National Tank Co.*, 91 Ill.2d 69 (1982), applied to malpractice actions, so you generally cannot have a tort claim in a malpractice action. However, one of the exceptions to the *Moorman* rule is for negligent or intentional misrepresentation. A malpractice action for failure to advise a client of ADR could be cast as negligent misrepresentation and, therefore, fall within an exception to *Collins v. Reynard*. The risk remains.

Federal court and other sources

Notably, the Illinois Supreme Court and the ARDC are not alone in making rules and rendering opinions on this. The Northern District of Illinois recently passed and implemented its Rules of Professional Conduct. Effective Nov. 12, 1991, they follow the Illinois rules. Moreover, many of the comments expanded upon the duties discussed above. For example, the comment to Rule 1.2., covering the means by which matters are to be resolved, even more clearly puts the onus on lawyers to use ADR. It states ". . . in questions of means, the lawyer should assume *responsibility* for technical and legal tactical issues." (Emphasis added.) Thus, it is the lawyers' obligation to know what those other means and tactics are and how to use them. Similarly, the comments on Rule 1.4.(b) covering "informed decisions" emphasize the broadened responsibility of lawyers to consult with the client about tactics to resolve a case. Thus, if you practice in federal court here and do not know ADR, you are taking a risk. The risk will increase, too, now that Congress has adopted the Civil Justice Reform Act,[9] which requires district courts to implement ADR programs. The prudent lawyer will know and use ADR whether she or he practices in state or federal court.

There are guidelines and rules from other states that also impose the use of ADR. For example, the Colorado Supreme Court has amended the Code of Professional Responsibility to require lawyers to advise clients about alternative forms of dispute resolution. Nine

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Calendar

AUGUST 22

Annual picnic
Sponsor: Cook County Bar Association
Noon-8 p.m., Union Pier, Michigan at the Noor Beachfront Residence
$20 for families, Food and beverages included
Info: Joseph Wilson at 312-236-4848

Two free seminars - Paralegal and Court Reporting Careers
Sponsor: National Court Reporters Association
9:30 a.m.-noon, Elmhurst campus of

Sponsor: Wolf&Company
Bull Valley Golf Club, Woodstock
Info: Gail Joyce at 708-574-4601

AUGUST 25

Annual Luncheon - New Dangers of Being n Federal Court
Sponsor: Federal Bar Association Chicago Chapter
11:45 a.m. Reception; 12:15 p.m. luncheon; Empire Room of the Palmer House, 17 E. Monroe St. $35 for members; $40 for non-members.
Speaker: Professor Michael E. Tigar
Info: William R. Coulson at

Take the opportunities where you find them

By MICHAEL E. NEBEN

What's so special about Ernest and Julio Gallo anyway? It is their wine? To be honest, I'm more comfortable buying it in a grocery store than ordering in a restaurant (which provides some insight into the sort of restaurants I frequent . . . bon appetite!). Is it their advertising? Frank Bartles and Ed Jaymes were fun . . . while they lasted. What is it then?

In-house counsel

By MICHAEL E. NEBEN

Michael E. Neben is senior counsel for Aon Corp., where he has primary responsibility for the legal affairs of one of Aon's five major operating divisions. He is a member of the Corporate Law Departments Committee of The Chicago Bar Association and a director of the Chicago Chapter of the American Corporate Counsel Association.

Perhaps it's that Gallo hires lawyers to fill jobs typically filled by MBAs. Come to think of it, maybe I'll start serving White Grenache at parties after all.

Non-traditional career opportunities for lawyers seem a "win-win" situation in which everyone benefits. In-house lawyers, you would think, should be especially well-positioned to pursue alternative career opportunities given that they already work for the sort of organizations where many of these opportunities may be found. Jobs like strategic planner, corporate policy maker, human resources manager, media planner, lobbyist, securities analyst, management consultant, fund raiser, speech writer, and marketing manager come immediately to mind as positions for which lawyers may be suited. By the way, I understand that Gallo hires lawyers into sales positions (we have great advocacy skills, don't we).

Examining our abilities in isolation — apart from the projects we are routinely called upon to perform — provides insight into the skills, let's call them advantages, we possess as lawyers. We can channel these advantages into many different endeavors which include, but are by no means limited to, legal practice.

Any practice area demands good negotiation, writing and speaking skills. We are constantly called upon to advocate client positions. All of these skills in which we are trained, and that are refined by practicing law, are essential to success in the business world.

Our daily contact with many different people — fellow lawyers in our own offices, opposing counsel and clients, and our own clients to name just a few groups — develops good interpersonal skills. Working with clients develops our ability to "get along" and be a "team player" in the business world. Let's not forget that many of our initial contacts with clients developed into personal relationships despite the stressful situations in which we are sometimes involved with our clients. As a matter of fact, these relationships may themselves be useful from a networking point of view in the pursuit of other opportunities.

We are also accustomed to working under pressure. Our ability to get results under adverse circumstances is, in fact, one of the central reasons why business people involve us in their problems in the first place.

Many of us, whether we choose to recognize it or not, know a lot about different areas of business. We learn from our clients. This knowledge, when combined with the fact it has been gained by solving problems, may prepare us to "cross the aisle" in a wide variety of organizations

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other states are considering similar rules.

The Houston Bar Association also has a mandate that says, "When appropriate, I will counsel my client with respect to mediation, arbitration and other alternative methods of dispute resolution." That is in addition to the Texas creed, a practice guideline, which states: "I will advise my client regarding the availability of mediation [and] arbitration. . . ." Other bar associations and courts around the country are adopting similar requirements because they recognize that ADR is here to stay.

Not just civil litigation

Of course, these obligations apply to practitioners in all areas, not just civil litigation. Transactional matters are covered; administrative law matters are covered; even criminal matters are covered. The rules throughout refer to "representatives" and to "representation." Clearly, lawyers in matters other than civil litigation must also utilize ADR.

Accordingly, a transactional lawyer is subject to possible malpractice or ARDC exposure if she or he does not consider adding ADR provisions to contracts, such as leases and buy-sell agreements. The transactional lawyer must think of dispute resolution in a preventative light, going into the deal. It cannot be left to litigators, as a means to get out of trouble.

Administrative law practitioners also must now know about arbitration, mediation and other ADR techniques. The Administrative Dispute Resolution Act,[10] enacted in 1990, encourages federal agencies to utilize ADR. One cannot evaluate or effectively participate in an administrative agency matter unless one knows ADR.

Conclusion

As ADR becomes more accepted and applied, the threshold of the duty to use it and to counsel clients on it will increase. The future "reasonable" lawyer or "reasonably prudent" lawyer will be familiar with ADR,[11] will counsel clients about it, and is comfortable dealing with it. If you do not want to risk your license and your reputation, know what ADR is and how to use it. What you don't know can hurt you.

Footnotes

[1] Arbitration is where a third-party neutral, acting much like a judge, decides a dispute. In mediation, that neutral will not decide, but rather will aid the parties to reach a settlement. Minitrials are abbreviated presentations of evidence to a panel of one neutral and one representative from each side. After the "hearing," the neutral helps the representatives reach an accord, and the neutral may influence the settlement by evaluating the evidence. A summary jury trial is also a truncated trial, but before an actual jury that will render an advisory verdict to aid settlement. Early neutral evaluation is somewhere between arbitration and mediation; the neutral does not decide, but will assess a case in order to unclog settlement.

[2] See Administrative Dispute Resolution Act, and Negotiated Rule making Procedure Act, both at 5 U.S.C. 581.

[3] See Civil Justice Reform Act, 28 U.S.C. 471-482, esp. 473(a)(6); Arbitration, 28 U.S.C. 651-658.

[4] In a recent (April 13, 1992) Business Week article, 97 percent of the executives polled from major corporations said that they would like to see ADR used more.

[5] The preamble states: "Rather, it is the duty of all lawyers to seek resolution of disputes at the least cost in time, expense and trauma to all parties and to the courts."

[6] Supra.

[7] *In re Dombrowski,* 71 111.2d 445, 376 N.E.2d 1007 (1978); *In re Gavin,* 21 111.2d 237, 171 N.E.2d 588 (1961).

[8] No. 70325 (March 1991). The case is now being reconsidered by the Illinois Supreme Court.

[9] See footnote 3.

[10] See footnote 2.

[11] Rule 1.1.(a) requires that a lawyer be competent and acquire the necessary legal knowledge to represent clients. That includes learning about new areas of the law, such as ADR.