

Training Corporate Business Managers on Dispute Resolution

Judy Weintraub & and Harrie Samaras, The Legal Intelligencer

May 5, 2014

ADR

One of the largest time drains of corporate management today is dealing with disputes, whether internal or external to a company. Handling disputes can take as much as 30 percent of management time. (See "Measuring Conflict: Both the Hidden Costs and the Benefits of Conflict Management Interventions," by Cynthia Barnes-Slater and John Ford.) Companies can significantly reduce this lost time by training their managers in two related areas: dispute resolution options and techniques. Understanding dispute resolution options or alternatives to litigation (ADR) can improve a manager's ability to manage dispute risks and to make more effective decisions about how to manage disputes that arise. Likewise, training managers in techniques for resolving disputes will empower them to resolve disputes more quickly and effectively.

This article provides some examples of how ADR can be of value to a company, and why a working knowledge of ADR options and techniques should be a priority for managers.

Institutionalizing Dispute Resolution

In addition to the amount of time that managers spend sidetracked by them, disputes can cause a number of other problems for companies, including lack of productivity, absenteeism, employee turnover, morale issues, and sometimes even theft, sabotage or violence, not to mention legal fees and settlement costs. With training in ADR options such as convening, facilitation and mediation, and the tools and techniques to implement them, managers are able to step in and prevent conflicts from escalating into intractable disputes. An ancillary benefit of training managers in ADR and having them exercise those skills with their employees is that those employees will, in turn, learn skills to spot developing disputes

and to address them early.

Many companies have recognized the benefits of ADR and have adopted a company-wide ADR policy or program for resolving conflicts. Companies such as Georgia-Pacific, General Electric, Swiss Re, E.I. du Pont de Nemours & Co. and Coca-Cola Enterprises have had these programs for years, and have reported that they have saved millions of dollars as a result. For example, David Burt of DuPont's legal team has reported savings resulting from the DuPont ADR program of \$76,000 per personal injury claim, \$61,000 per employment claim, and \$350,000 per business-to-business claim, according to "ADR: The Customer's Perspective," posted in the Business Conflict Blog by F. Peter Phillips on Oct. 21, 2010. ADR programs enable the resolution of disputes early, quickly and amicably, and reduce the drain on company resources caused by unresolved conflicts. Adopting an early dispute resolution program requires senior management's comprehension of ADR options and tools, as well as their unequivocal support for the program, including ensuring that people are trained appropriately in ADR procedures and tools and that the procedures are implemented.

Pre-dispute Strategies: Transactional Options

Dispute resolution clauses are often treated as part of a contract's boilerplate. Including an effective and expeditious means for resolving disputes that might arise can salvage valuable relationships and curtail unnecessary costs. All personnel who have the authority to enter into contracts (e.g., purchasing, R&D, licensing (in and out), sales) should have a solid understanding of ADR options to assess which dispute resolution process would best suit the anticipated needs of the company.

In negotiating or reviewing an ADR clause, the business manager should understand the ramifications of including or excluding all or parts of the clause, whether from their own knowledge or with guidance from counsel. For example, if the other party's contract calls for disputes to be resolved in arbitration by three arbitrators in a distant location, a manager who has no knowledge of dispute resolution options or clauses might not appreciate the ramifications of using arbitration over other possible processes, or using three instead of one arbitrator and at a distant locale. Without an understanding of the rationale behind the terms of the provision, the manager may not recognize the need for varying the provision in the context of a given transaction, or may accept the other party's proposed revision that is contrary to the company's own interest.

Managing Claims and Risk

Managers need to know and understand the procedures to follow when a dispute arises. For example, in a dispute with a customer or vendor, if there is a contract with a dispute resolution clause that calls for written notice of a claim to be given within a certain period of time, in a particular way, to a particular person, then the company could waive its rights by not following the agreed-upon procedure—for example, giving verbal notice or notice outside the time limit. If there is no contract, or the contract does not specify a dispute resolution procedure, the company might have a corporate policy or procedure that should be followed.

Managers should receive periodic training to ensure that they understand their responsibilities, from a contractual standpoint as well as under company policy, when disputes arise.

In addition, having an understanding of the different ADR options, and their pros and cons, can help managers evaluate the best methods for resolving the claim. Even where a pre-dispute resolution clause in a contract sets forth the dispute resolution process(es) to follow, the company should analyze whether that approach remains viable under the present circumstances. Managers cannot perform that analysis appropriately unless they are familiar with the various ADR options, their advantages and disadvantages, as they might apply to the situation.

Many companies utilize an early case assessment framework when disputes arise, to help them gather the facts, evaluate the risks, weigh the options, and develop a strategy. (See our prior article discussing the elements of an early case assessment framework and the steps to implement this framework: "Using Early Case Assessment as a Tool for Triaging Disputes," published March 29, 2013, in *The Legal*.) Without an understanding of the various ADR options, however, managers will not be as capable of utilizing the framework to determine the best course of action for resolving the dispute under consideration.

Being an Educated Participant

Managers who represent their company in an ADR process such as mediation or arbitration need to understand the particular processes and their roles. This knowledge is particularly important with mediation, which encourages the company's representative to take an active role in the proceeding. The representative also plays a key role prior to the mediation or arbitration in selecting the neutral, gathering information, developing a strategy and reviewing written submissions. Knowledge of the process is valuable for providing the requisite support and resources.

In each of these situations, managers would be more effective in performing their responsibilities if they had a basic understanding of ADR, including:

- The basics of mediation and arbitration—what they are and how these procedures differ from each other and from litigation.
- The roles of the advocate, neutral and party representatives in these proceedings.
- The process involved in mediation and arbitration.
- Other dispute resolution options, such as early neutral evaluation, mini-trial and advisory jury trial.
- The pros and cons of the different options.
- Mediation and negotiation tools and techniques to use to resolve disputes quickly.

- Dispute resolution contract provisions.
- The parameters for early dispute resolution programs and early case assessment systems.

ADR is often overlooked in business education and training. Yet disputes in corporations arise continually and they can disrupt the workplace, interfere with valuable relationships, drain resources (monetary and personnel), and have a substantial adverse impact on the business (for example, where they result in an injunction or a significant damage award). It is often the case that the people in the best position to resolve the dispute early or to make the decision not to resolve a dispute and continue on to ADR or litigation are business managers. Shouldn't they have the information and tools they need to do this?

Judy Weintraub and **Harrie Samaras** are co-founders of *Advanced Business Law Resources*, a company offering training in dispute resolution as well as consulting in the development of early dispute resolution programs and early case assessment systems. For more information, see www.ablr.biz.

Reprinted with permission from the May 5, 2014 issue of the Legal Intelligencer. © 2014 ALM Media Properties, LLC. Further duplication without permission is prohibited. All rights reserved.