
How ADR Has Changed the Practice of Law – or Has It? Join Our Dialogue

by Jeanne F. Franklin

ADR has become commonplace to the point where some lawyers express concern about what has happened to the jury trial.¹ There is little doubt that scholarship, laws, and lawyer ethical rules that support using alternative dispute resolution have expanded the ways lawyers can serve clients. Yet, touted as “quicker, quieter, and cheaper,” practicing ADR is not necessarily easier for the lawyer, whether serving as an advocate for the clients or as the neutral. Many of us still have things to learn about its use. However the best ways to go about doing that might not be so obvious.

Young lawyers want more ADR information and guidance to shape their success. And perhaps because ADR has so permeated legal practice, new or renewed questions are surfacing. There are important questions about basics that no lawyer should be ashamed to ask. More challenging are those emanating from the growth of the field; the tests of time and experience are giving rise to perceptions of possible trends and recognition of issues by practitioners.

What follows is a sample of questions heard in various venues, some more private than others (e.g., law firm hallways). Perhaps you will peruse them to see if any of them resonate with you and if you have answers. At the end, this article states a question relevant to the title and introductory paragraph and provides its answer.

- How is ADR really working for our clients? How does financial compromise feel time and again when the parties are supposedly

“getting to yes”² but it feels frankly more like “sharing the loss?”

- How does one minimize your or a client’s perceived downsides of mediation or arbitration? For example, can a lawyer take the neutral side and express views about what doesn’t seem to be right in the process?
- Do lawyers have control over the choice of mediator? How best should a lawyer exercise that prerogative? What credentials make up the profile of a good mediator or arbitrator?
- We want to understand better how arbitrators or panels reach a ruling – what should lawyers know when representing a client in arbitration to be on the winning side?
- If it does not always seem easy, without appearing weak or losing client trust, to try to establish early dialogue with opposing counsel to preserve the ability to resolve by other than litigation, how have others done this? Does it work?
- If confidentiality protections applicable to mediation by virtue of Virginia statute apply to mediation conducted even before the legal claim has been filed, what are the pros and cons of engaging in mediation earlier in the life of a dispute before there is a lawsuit?
- How can exchange of information in mediation be accomplished in such early mediation to allow a fair, informed settlement?
- While there might not have been significant cause for concern ten or so years ago about durability or enforcement of mediated resolutions, increasing litigation about mediation on a national level in the last decade might give us some pause. Are there steps or details we lawyers should attend to so that the agreements we negotiate are durable?
- Assuming it is a good idea to commit in advance to an ADR process before there is even a breach or dispute, how should lawyers approach doing that without discouraging the clients? What services offer standard clauses? Is it a good idea to use standard clauses or are there traps for the unwary?

Moving from questions about practice tips and strategies to some broader or policy questions:

- What are patterns of ADR practice among Virginia lawyers? Is there anything to be learned from such patterns?
- Does the public reporting of mediation settlements in dollar figures have an effect on our perception of what mediation process is about and become a self-fulfilling prophecy? Does it drive the idea that mediation is always about money and getting the most or giving the least, or that it always follows knuckle-baring discovery?
- What is the meaning and significance of data about trial statistics and about use of ADR?

There are many more questions from whence the foregoing came. Last but not least for our purposes is this:

- Where do lawyers go to find out answers to these and more questions about this area of legal practice?

The Joint ADR Committee is a collaborative entity of the Virginia State Bar and The Virginia Bar Association. It is a substantive committee of, by and for Virginia lawyers of all ages. Like other substantive sections and committees, its work is done by volunteers; per agreement with the VSB, it is staffed by the VBA. Its history is luminous in terms of advancing this field of practice and it continues to focus on education, networking for shared learning, and review of policy and legislative issues, disseminating such information to its members.³ Licensure by the VSB or membership in The VBA, the voluntary bar, is the only eligibility requirement.

The committee's council has realized that most lawyers do not seem to know this is a valuable practice resource that assists lawyers in a broad range of practice areas. Its record of cutting edge CLE continues and now it can offer more through an online shop. It posts materials of value on the committee website including those developed years ago that remain relevant. Most recently, updates and current lawyer questions are highlighted through the recently launched blog: www.vba.org/allthingsadr.

Knowing that ADR is an access to justice issue for many Virginians who cannot afford litigation or even a lawyer, the committee is also looking into ways to make ADR more accessible. It wants to encourage lawyers to become certified as mediators and trained arbitrators and then promote their public pro bono service as neutrals. This also can provide practice experience for lawyer-neutrals.

In the end, while ADR has impacted legal practice, core aspects of legal practice have not changed. Lawyers want the same things they always have – to be successful for their clients, to be good at how they accomplish that, and for the client to recognize and be pleased with the lawyer's service. We think that the impact of ADR now and in the future on legal and law firm practice, our system of justice, and our own careers is worthy of further focused discussion. Won't you join the committee and enhance such important conversations?⁴

Endnotes:

- 1 This statement is not meant by the author to assume or assert a causal effect between the growth of ADR and declining numbers of jury trials.
- 2 This term in quotation marks derives from the title of a book, *Getting to Yes by Roger Fisher and William Ury, considered to be a foundation for the growth of interest-based mediation and negotiation.*
- 3 Activity includes vetting or advising on legislative content and informing our members of potential legislation should they wish to take a position on an issue as a citizen lobbyist; we also can seek the superb lobby services of the Virginia Bar Association. Achieving passage of Virginia's ADR statutes and this year's effort espousing amendments with respect to mediation of J&DR matters are examples of how VBA carries the water on legislative initiatives affecting this field of practice and in collaboration with others such as the Virginia Mediation Network.
- 4 To find out how easy it is to join the Joint ADR Committee, simply go to www.vba.org/adr which is the website for the committee. Click and join instructions are found there. Or call the VSB or VBA to ask for help.

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Jeanne F. Franklin served as chair of the VSB-VBA Joint ADR Committee in 2014. In her ADR practice, she mediates disputes, facilitates client planning and conflict resolution discussions, and trains health providers and lawyers regarding ADR skills and processes useful for handling tensions and disputes. She is a past president of the Virginia Bar Association, a governing board member of the VSB's Section on The Education of Lawyers, named to the Virginia Business Legal Elite, and a winner of the VBA's William B. Spong, Jr. Professionalism Award.