

## WILL LITIGATION BECOME THE ALTERNATIVE FORM OF DISPUTE RESOLUTION?

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For years now, all of us have used the phrase alternative dispute resolution (“ADR”) to describe the use of mediation, arbitration, facilitation, and/or collaboration as alternatives to the litigation process. The sense was that litigation has been, and would always continue to be, the primary vehicle parties used to resolve their disputes. More recently, however, a confluence of factors seems likely to create a noticeable shift in this traditional paradigm.

Led primarily by a profound downturn in the economy, more and more businesses, individuals, general counsel, and agencies are turning away from protracted litigation and are now looking to see what other options exist to resolve their conflicts. Once the benefits of these alternatives become more widely experienced, it is unlikely that litigation will regain its prominence even when the economy improves. Thus, while gradual, this change in the demand for legal services seems to be of a more permanent, rather than transitory, nature. Not too long from now litigation may very well be seen as the real *alternative* dispute resolution process.

### Economic Factors

One of the primary reasons for this change in the legal landscape is the poor economy. Litigation is a costly and time-consuming endeavor. Pursuing a case through trial (and possibly an appeal, a re-trial, and subsequent collection efforts) can take

several years and cost hundreds of thousands of dollars. Rarely is that option in the client's best interests, even in the best of financial times.

Now, in this economic recession, those costs are even more difficult for the parties to bear. The reality is that protracted litigation simply isn't a feasible option for many would-be litigants. Whether it is a couple seeking a divorce, a family arguing over a will, or a large corporation embroiled in a commercial contract dispute, budgets are tighter and other more cost-effective options are being pursued. In fact, this trend is already being seen in the form of more fixed-fee billing and a move away from the traditional billable-hour model. Clients are looking for an attorney who not only serves their interests as an effective advocate, but also someone who can shepherd the dispute to a quicker and cheaper resolution.

### Collaborative Law

Financial concerns are not the only reason behind this move away from litigation. Ceding control of an outcome to complete strangers is not only risky, it is also frequently unsatisfying. Trials do not afford the parties an opportunity to voice many of their concerns, and courts are ultimately constrained by the types of remedies they can order. The dissatisfaction created by the litigation process has led to an increased popularity in other forms of dispute resolution, including Collaborative Law.

Collaborative Law is a voluntary, solution-based process where each client is represented by a trained collaborative attorney in a non-adversarial setting. The goal of a collaborative process is for the clients to address their needs and concerns in a hands-

on manner with the goal of reaching a mutually acceptable, durable agreement. If agreement is not reached, the lawyers must withdraw from representation beyond the collaborative process. Often, allied professionals are used, such as mental health and financial professionals, in a Team effort to move the family toward future-focused resolutions. The collaborative process is designed to reduce conflict and provide professional support and resources as the family restructures in a constructive way.

Since 2004, when only a hand-full of lawyers were trained, the increase in the number of collaborative professionals has grown dramatically. Thriving Collaborative Practice groups can be found in Montgomery, Howard, Carroll, Baltimore and Southern Maryland counties, in addition to Virginia and the District of Columbia. The International Academy of Collaborative Professionals (IACP) has chosen Washington D.C. as the location for its 11th Annual Networking and Educational Forum. Collaborative professionals will be attending from all over the world with our local collaborative professionals as hosts. The durability of Collaborative Law is more than promising. The excitement and commitment among those who practice collaboratively may well lead to the complete transformation of how disputes are approached from the outset.

### Maryland Rules of Professional Conduct

The rise of ADR has not been lost on the courts either. The courts have long recognized the benefits of mediation and arbitration and embraced them as successful ways of reducing the massive backlog of cases in the system. But, more recently, the

courts have stepped up their efforts to encourage the use of ADR and made more explicit their expectation that attorneys will discuss the types of ADR available to their clients.

In 2007, the Maryland Court of Appeals amended Comment 5 to Rule 2.1 of the Rules of Professional Conduct. The comment now instructs attorneys that “when a matter is likely to involve litigation and, in the opinion of the lawyer, one or more forms of alternative dispute resolution are reasonable alternatives to litigation, the lawyer should advise the client about those reasonable alternatives.” Since there are relatively few situations when one could argue that ADR would not constitute a “reasonable alternative to litigation,” the amended comment serves as a reminder that candid discussions about ADR should be occurring at the start of most cases.

#### Where to Go From Here?

For those of us who make livings as seasoned litigators, ADR is too frequently viewed as a threat. This does not need to be the case. For starters, litigation is in no danger of ever going away. There will always be disputes that can only be resolved through the litigation process and a decision made by a judge or a jury.

But, more importantly, the rise of ADR does not translate into a corresponding decrease in the need for attorneys. Parties who avail themselves of the mediation, arbitration, or collaborative processes need the assistance of attorneys for guidance, advocacy, and counseling. Going forward, attorneys who hone their skills at

representing parties through these processes will be best able to retain long-standing clients and to attract new ones.

Mediation, negotiation, facilitation, arbitration, and collaborative law often represent the most appropriate paths for our clients to take – options that not only save them time and money, but also allow for a whole host of additional benefits not found through the traditional litigation process. Protracted litigation should be viewed as the last resort, and a poor economy and increased public awareness about other options seem to be moving us in that direction, now more than ever before. While the acronym “ADR” is likely here to stay, it may not be that long before it starts to be used as a reference to litigation. This is a good thing, and we should all take heed.

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