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GOLDEN GATE UNIVERSITY SCHOOL OF LAW

THE CAVEAT

VOLUME XVII ISSUE 3

EDITOR'S PREAMBLE

"The courts of this country should not be the place where the resolution of disputes begin. They should be the places where disputes end - after alternative methods of resolving disputes have been considered and tried."

– Sandra Day O'Connor

Lawyers and students often think of Alternative Dispute Resolution (ADR) as a "touchy-feely" subject which works in family law or neighborhood disputes. Yet with the increasing sluggishness of the court system, limited funds to appoint new judges or build more courtrooms, ADR is becoming an option more readily embraced by the legal profession.

John Seitman, President of the State Bar of California stated in his Inaugural Address on September 15, 1991, "I would like to see a pilot project in California in which every civil case is sent after filing to mediation or arbitration or other appropriate dispute resolution methods...We should begin at once to consider a draft Rule of Professional Conduct which would require attorneys to inform clients of dispute resolution options."

In some ways it is unfortunate that ADR is the acronym for "Alternative" Dispute Resolution. The word "alternative" often gives the impression that ADR is exclusive of litigation when in reality it is another tool with which lawyers can assist clients, in addition to litigation. Perhaps if ADR were to stand for "Appropriate Dispute Resolution" or even "Adaptable, or Amicable Dispute Resolution" these phrases would be more illustrative of the technique.

ADR is akin to a new product line in the lawyer's existing inventory of skills and can be marketed as such. ADR allows the lawyer to treat the "whole client" not just the legal problem. Lawyers are able to be advocates for a wide variety of other client interests which may include preserving an underlying business or personal relationship between parties, or addressing long term goals not fixed by short-term legal remedies. ADR allows the lawyer to deal with a myriad of issues which cannot be encompassed within a win/lose judicial determination on the facts.

Participation in ADR is becoming recommended by a number of jurisdictions and individual judges. Lawyers and students can actively learn ADR techniques by volunteering at local ADR centers, using continuing legal education programs or enrolling in law school courses. ADR techniques can enhance all types of negotiations whether with clients, other lawyers or judges, and are not limited to use only in arbitration or mediation sessions.

The comments of Justice Sandra Day O'Connor and California State Bar President John Seitman, epitomize the legal community's clear enthusiasm of ADR. Such high-ranking approval is an incentive not only to participate in ADR but to become good at it.

In this issue, **Focus On: Alternative Dispute Resolution** explores the most frequently asked questions regrading ADR including concerns about confidentiality, showing weakness, financial interests and the impact of ADR on a subsequent trial. ■

INSIDE...

HANDS ON:

WORKING "FOR EXPERIENCE"

Should You Work on a Job "For Experience" ?
(Before Opening A Firm or Making a Commitment)

By Jay Foonberg

Notwithstanding that you have a license to practice law and have been declared competent to practice law by your Supreme Court, you probably have some doubts about your ability to competently represent clients in court and give advice.

• **Working in Private Practice:**

Your "experience" may consist of doing research or making minor court appearances or preparing lesser documents. You will have relatively little client contact in most firms. The associates or partners to whom you are assigned will have relatively little time to spend with you discussing the case or "grading" what you turn in. Lack of supervision and review is a common complaint of new associates. If the firm had a lot of free time available to supervise and teach, it wouldn't need associates.

Except in a very few firms, there is relatively little formal training. The "experience" you are seeking usually consists of access to the firm's form files, a few minutes of advice now and then from a slightly senior associate, and even less advice from a partner. It is my opinion that there is no great detriment in developing your own forms using form books available from the law library. In litigation matters the clerks of court and other attorneys from whom you get work give you a least as much counseling as you would have gotten in a firm.

The limited amount of supervision you would receive in six months to a year on a job does not in most cases justify delaying starting your own practice. The attorney who makes a commitment of one to five years in accepting a first job is taking a great risk and should be sure such a step will really be beneficial.

• **Working in Civil Service:**

Attorneys in civil service receive pay and fringe benefits equal to or in excess of those attorneys in private practice for the first few years. Objections to civil service are twofold:

1. *Limited Range of Professional Challenge.* In some jobs one can get five years experience in five years. In other jobs one gets the same six months' experience ten times over. Some civil service jobs fall into the second category. 2. *The Pay Trap:* At the end of one, two, or five years, a lawyer in civil service has earned and is usually earning more than a counterpart in private practice. One often is limited in subsequent pay increases. The lawyer in private practice, however, can increase earnings without limitation. Even though a civil service lawyer can't go much farther in compensation, there are substantial pay and fringe benefits that would be reduced in private practice. The job security of civil service, lack of client pressures, little or no night or weekend work, generous retirement and medical plans, all combine to make it appealing to some lawyers.

• **In House Counsel:**

Traditional law firms often price themselves out of the corporate legal market through over-pricing services. A house counsel generally can provide many, if not all, of the same services as the traditional law firm at much less cost. Business consumers of legal services are now forming and enlarging their in-house legal staff. It has been said that a traditional law firm has a variety of clients with a variety of problems. House counsel has a single client with a variety of problems. This is definitely a growth area.

• **Legal Assistants & Paralegals:**

In law school you learn **why** law is practiced. As a legal assistant you can learn **how** law is practiced. A legal assistant can and should do everything a lawyer does except make court appearances and decisions concerning legal rights and responsibilities. Accordingly, as a legal assistant you may get training and supervision that new associates in a firm do not get.

• **"Rent-A-Lawyer" Temporary Agencies:**

There are agencies that serve as a clearinghouse between lawyers seeking part-time or additional work and firms that need a lawyer for a particular case of for a limited period of time. Often a firm wants to take on a case for a particular client rather than refer it to another law firm, even though it cannot handle it without increasing its permanent staffing. These firms go to an agency to match needs and availability. Some bar associations run these agencies. Typically, the lawyer is paid between $30 and $60 per hour and the agency gets an additional 10 percent fee. It may be worthwhile to familiarize yourself with as many of these agencies as you can. Be sure there is a written definition of responsibility for malpractice coverage. There is a sort of "grab bag" element of luck in terms of the work being of value to you.

• **Government:**

Government, both state and local, has been in the past and will be in the future a major consumer of legal talent. It has been estimated that government, at levels from local to federal, employs between 10 and 15 percent of all lawyers. There are as many different jobs as there are government agencies. Some of these agencies hire lawyers in areas where one might not ordinarily consider an attorney.

• **Mediators & Arbitrators:**

Many people and companies are now turning to mediation or arbitration. Many large corporations submit to arbitration and mediation of consumer complaints. If you have some special skill outside of legal training, you may be able to serve as a well-compensated arbitrator or mediator. A telephone call to your local American Arbitration Association (AAA) office is a good starting point.

(Reprinted from ABA Career Series: How to Start & Build a Law Practice)

GGU MAYORAL DEBATE FOCUSES ON SUBSTANTIVE ISSUES

by Joan Cox

Students, professors, and the general public surged into Auditorium B on Friday night, October 4, to attend Golden Gate University's first San Francisco Mayoral Debate. The event was hosted by the School of Law's Student Bar Association, whose purpose was to demonstrate their commitment to the community of San Francisco and to increase GGU's credibility within the legal community at large.

Attending were candidates Angela Alioto, Richard Hongisto, Tom Hsieh, and Frank Jordan, the four of the five most viable mayoral candidates according to a poll conducted in early September, were invited to attend. Incumbant Mayor Art Agnos declined to attend due to a prior fundraiser. However, the debate was effectively "crashed" by socialist candidate Gloria LaRiva, who strode down the aisle and began addressing the audience before being invited to join the debate by Supervisor Angela Alioto.

To avoid the mudslinging of prior debates, the SBA's format for this debate focused the candidates on substance. Four invited panelists representing different San Francisco interests quizzed the candidates on some of the major issues confronting San Francisco today. Kevin Pursglove of National Public Radio affiliate KQED-FM, moderated the exchange.

Issues which were addressed included health, homelessness, business development, the neighborhoods, AIDS, and even the candidates' political background and philosophical beliefs. Predictably, answers ranged from the very conservative to the radical. Scott Hauge of the S.F. Small Business Network asked about what they have done to improve the business climate in San Francisco, Alioto cited recent VDT legislation which she helped amend to its present form. Hongisto revealed a reorganization plan for city government he recently developed which would consolidate 54 city departments into 30. Hsieh shared ongoing opposition to the $150 fee assessed on small business owners since the 1989 earthquake. Jordan cited his establishment of seminars and workshops in all nine police districts aimed at getting to know the neighborhoods.

A question from AnthonyVon der Muhll of the S.F. Coalition on Homelessness was even more specific. He announced a plan to alleviate homelessness with a price tag of $15 million and asked each candidate whether they, as Mayor, would budget the expense. Alioto neatly sidestepped the question, saying she would need to conduct a thorough investigation into any plan before giving it a yea or nay. Jordan also avoided a direct answer to the question, saying he would advocate doubling the proposed Mission Bay project from its current 7,500 units to 15,000 units of low to moderate income housing. Hongisto came the closest to an affirmative answer, saying the $700 million in savings generated from his consolidation plan would enable him to earmark $15 million to be spent in the area of reducing homelessness. Hsieh mentioned his previous experience as an architect and asserted that he could develop his own plan for affordable housing. And Gloria LaRiva proposed the city confiscate abandoned housing, just as it confiscates abandoned cars, and reallocate the housing to the poor.

At the end of the debate, each candidate delivered a 3-minute speech. Each thanked the Golden Gate community for spending a Friday evening with them, and for their interest in the future of San Francisco, and each expounded on those qualities that prove them most qualified to be Mayor. Now the ball's in our court. ■

GGU LOBBIES ABA/LSD TO OPPOSE SUPREME COURT ABORTION DECISION

by Michelle Shuster, Pres., GGU ABA/LSD

In May of 1991, the U.S. Supreme Court ruled that state regulations prohibiting federally funded health care and family planning centers from even discussing abortion as an option for pregnant clients did not violate the Constitution. Rust v. Sullivan, 111 S.Ct. 1759 (1991).

In response, I took issue with the full ABA/LSD at its annual assembly this past August in Atlanta, GA, by co-sponsoring a resolution, 91-32, asking the ABA/LSD to take an affirmative stance on the matter. (The ABA/LSD had been following the ABA's neutrality stance.) The resolution asked the ABA/LSD to express their deep concern over the Rust decision, and support for any federal legislation that would clarify the original congressional intent that Title X funds be used to provide accurate and unbiased information on reproductive helath care for economically disadvantaged women. The resolution also asked that the ABA/LSD express its serious concern that Rust v. Sullivan limits the First Amendment right to free speech for health care professionals.

Stressing that the proposed resolution was not an "abortion resolution" but was about access to information and education, we ultimately prevailed by a large majority. The ABA passed a similar resolution at its concurrent meeting. Hopefully, the lobbying strength of the ABA we will help us eradicate the effects of Rust v. Sullivan.

LAW SCHOOL SECESSION: DO THE RIGHT THING

by Susan Kalra

In light of Golden Gate University's recent probationary status by W.A.S.C., there are many arguments both for and against creating a School of Law separate from the University. The relationship between the University and the School of Law can be thought of as a marriage between two institutions. This union has come a long way from its early years when the school was a citizenship school and has continued to develop into its current state, with campuses worldwide. Like marriage partners, the University and the School of Law share similar goals -- to provide a quality education to a diverse student body while trying to meet the changing needs of the surrounding business community. Now that one partner is faced with a difficulty, is it time to end the marriage?

There are several reasons to answer that question in the affirmative. First, though we share a home, we live separate lives. The W.A.S.C. report was critical of the University governance because there is little interaction between the School of Law and the rest of the University. The report stated, "They might just as well be on separate planets." Second, the School of Law is financially stable: the W.A.S.C. report indicates that the School of Law will be operating at a surplus for the next five years.

Further, both the W.A.S.C. report and the School of Law's Self-Study express concerns over the physical environment. The Self-Study states that the school should have more "practical" classrooms, such as the Moot Court room. It would also like to see more space allocated to the Law Library as well as more equipment, such as word-processing terminals. Many students have expressed the need for a law student lounge. By leaving the now, when the real estate market is favorable, the School of Law could create an environment that would meet both its and W.A.S.C.'s desires and needs.

Finally, there is no reason why the law school cannot be independent from the University and still have a successful, competitive program. For example, California Western School of Law in San Diego is ABA accredited but not W.A.S.C. accredited. According to California Western's administration, they have no need for W.A.S.C. approval because they have no undergraduate program. Students are eligible to receive all forms of federal financial aid, as well as scholarships. Graduates are eligible to sit for the Bar exam and are working in diverse areas of the law. There are private scholarships available as well.

While these arguments support breaking up this long-term union, there are other arguments, perhaps more compelling, for remaining under the umbrella of the University. The University and the School of Law share a number of important goals and benefits. Both provide a flexible opportunity for quality graduate eduction. Both benefit from the joint degree programs and the excellent faculty which teach in those programs. Furthermore, both benefit from the building itself and the advantages of our prime downtown location.

Secession from the University would be premature and probably unnecessary. The University is aware of its need to comply with W.A.S.C.'s requirements in order to regain full accreditation. The University is aware that the changes will be difficult, because the administration and governing bodies will have to change the way they operate and interact with the University. Yet they have indicated both a desire and a willingness to do just that. The Board of Trustees is working with a consultant to help them meet W.A.S.C.'s standards. W.A.S.C.'s review will not be until 1994, so the University has three years to meet these objectives.

Further, even if the University loses its W.A.S.C. accreditation, it will not spell death for the School of Law. The ABA is recognized as the sole accrediting agency for law schools. Graduation from an ABA approved school is the requirement for taking the Bar exam and for admission to practice in a particular state. While W.A.S.C. accreditation is one factor the ABA considers in granting its accreditation, it is by no means the only one. According to the American Bar Association Section of Legal Education the ABA would not pull its accreditations solely because W.A.S.C. has pulled theirs.

Another argument concerns duty and responsibility. When the School of Law had financial difficulties, the University did not "divorce" the School of Law, but instead offered its assistance. In the 1980's the School of Law fell on difficult times, and the University loaned the School of Law moneywhich we are now paying back.

Lastly, Golden Gate University has a unique mission. The University tries to develop new programs that will meet the demands of the ever-changing and technologically advancing job market in the Bay Area. W.A.S.C. seems to have a "mold" that learning institutions must fit. It seems that if an institution is going to place its graduates in these new areas, it needs to have the freedom to break out of that mold.

So, is it time to break up a 90 year marriage? I think the answer, at least for now, is no.

(CAVEAT encourages student discussion and input into this important question, and invites you to address this or any other issue in letters to the editor. MJD.)

GGU PRESIDENT OTTO BUTZ ANNOUNCES RETIREMENT

by Miles Dolinger

Dr. Otto Butz, Golden Gate University figurehead and President for the last 21 years, surprised the Board of Trustees at last month's board meeting by announcing his retirement, effective at the end of this academic year, in June, 1992.

If the recent WASC accredidation crisis was not the principle reason behind Dr. Butz's retirement, it was certainly a consideration. In the aftermath of WASC negotiations, which resulted in GGU keeping its accredidation, albeit on a probationary basis, Dr. Butz recognized the need for someone committed to the "long haul" to satisfy WASC requirements to retain full accreditation, according to a brief interview with David Gregory, Chairman of the University's Board of Trustees. However, Mr. Gregory emphasized that the WASC situation probably only added to Dr. Butz's feeling that the time for his retirement was ripe, given Dr. Butz's age and long tenure as President.

Asked to comment on how the University will be affected by the loss of Dr. Butz or if we can expect any changes in its programs or policies, Mr. Gregory replied that there are no plans to change the unique "mission" of the University, which he described as providing the quality educational resources combined with flexibility needed by many students who have competing interests in their lives, such as prior business or family commitments. In light of the WASC criticisms the Board is confident it can meet the WASC requirements and still maintain its "mission," he said. Mr. Gregory complemented Dr. Butz on the enormous contributions he made to the school's growth and capital improvements. He told me that the challenges now posed by WASC deal with updating the University's administrative procedures to accommodate that growth.

The Chairman of the Board says the University will not change with a new president, but you should not discount the great potential for change which necessarily accompanies the appointment of a new president into any organization. Just look at the former USSR.

It seems to me that under Dr. Butz the University has been trying to maintain at least three "missions": 1) An undergraduate business program aimed at foreign students; 2) A flexible, quality graduate-level business school, as Mr. Gregory described; and 3) A self-sustained law school. These are distinct programs which together compose the University. Although they do seem compatible, query whether they are mutually beneficial. The WASC issue does tend to focus attention on the relative success of the three programs, and the possibilities of affecting each other in negative ways. Because "administrative changes" are likely to have a significant effect on these relationships and the University as a whole, the circumstancesdo also seem ripe for an energetic new president to come in and make some positive changes in Golden Gate's "mission."

Regarding the law school's interests in Dr. Butz's retirement, any consequent change in the University's policies affecting the law school will probably be beneficial. My impression is that the University presently has no policy at all regarding the law school, short of leaving it alone. If the law school is at the peak of its success where nothing more could possibly be done to improve it or make it more competitive, then this hands-off policy is probably the wisest. However, if you believe that the law school is not beyond improvement but could, in fact, benefit in some way by more University support or interest, then the new president should be of interest to you. If this is the case, I would encourage you as a $12K/year tuition-paying law student to make your interests known to the new president, once he or she is selected.

PARDON MY ASBESTOS

by Serge Hodgson

To many of us, returning to GGU after the summer break to find dozens of asbestos warnings placed all over the building was a source of great concern, to some it triggered allusions of class actionlitigation jobs for us all, and to still others the warnings served to tip the balance on the side of not going to class. For your safety and information, the Environmental Law Society went to investigate.

Asbestos is a known carcinogen and has been shown to cause lung cancer. Asbestos is toxic when it is inhaled in dust form. However, it does not present a hazard when it is "non-friable," that is, when it is in a form that does not produce dust. Thus, building materials containing asbestos may not present a health hazard if the airborne asbestos particulate concentrations are within excepted safety levels and the asbestos is non-friable. Note that many asbestos containing building materials are not removed but simply encapsulated to prevent the formation of dust particles.

The current asbestos removal project is being conducted in the safest manner possible. The removal is done in sealed rooms where machines produce a vacuum effect, insuring that any leakage will be maintained inside the work area, and high efficiency filters are then used to insure the purity of the discharged air. An independent industrial hygienist is also constantly monitoring the asbestos levels in and about the building, and the results of these tests are available from the University's maintenance office. So breathe easy....

MILITARY BANNED

by Miles Dolinger

Upon recent notice that the Army and Navy were included in Placement Center job listings in violation of University non-discrimination policy, law students took action last month to deny all services of the Career Placement Center, including interviews, job listings and resume referral, to any U.S. military employer.

With firm support from the SBA, LEGALS (Lesbian/Gay Law Students) submitted to the Administration a position statement of their interests in protecting individual rights as threatened by "employers who discriminate against individuals on the basis of their sexual/affectional preference/orientation."

Coordinator Tony Bastone and the Deans agreed with student concerns and officially changed Career Center policy to prohibit services to any U.S. military employer. As announced in the September 30, 1991 of the Law School News, the Deans cited University policy which already exists: "Hiring practices which discriminate against individuals on the basis of age, race, sex, creed, color, handicap, sexual preference/orientation, veteran status or national/ethnic origin are unacceptable."

Many students will be surprised to find that resumes submitted to Career Services for disbursement to military employers will be returned to them with accompanying explanations of the change in policy. The administration's statement did acknowledge denying a service to interested students, but nonetheless justified its policy on moral grounds. "[A]t various times in our country's past, racial and other forms of discrimination have also been legally permissible, though morally unacceptable. Our existing policy is not qualified by the condition that the employer practice illegal discrimination; rather, it states that any discrimination ... is unacceptable."

Letters to the Editor

Dear Editor:

The upheavel regarding Clarence Thomas's Supreme Court nomination presents a concern that his appointment will result in another vote on the Supreme Court to rollback hardwon gains of the last 20-30 years. . . . Thomas would have the Senators (and the American people) believe that the views he has expressed in the 10 years of speeches before conservative audiences have no bearing on the way he will vote as a Supreme Court justice. (Right-wing ideologue runs to the nearest phone booth and presto, emerges as an impartial justice?!) A favorable vote would mean that the Supreme Court will continue to slam the brakes on efforts to overcome the long legacy of discrimination while giving greater power to the states to interfere with the privacy rights of individuals, including the right to bear or not bear a child.

- David Hershey-Webb, 3d yr.

** CLUB NEWS **

The ENVIRONMENTAL LAW SOCIETY has been extremely busy this semester, holding meetings/activities every Thursday at lunchtime. They held a discussion presentation on endangered species, presented a video on Silicon Valley groundwater poisoning, and entertained a speaker from the Green Party. ELS also hosted a very successful panel on "Careers in Environmental Law" and had a weekend outing to Point Reyes National Seashore. Future activities include more lunchtime speakers, monthly films, a field trip to the Kesterson Reservoir and mountain biking the Marin Headlands. Recycling is coming this month, and stay tuned for GGU/ELS T-Shirts to help get the word out: "It's not just a good idea...!"

LEGALS AT GGU is an organization of Lesbian, Gay and bi-sexual Law Students dedicated to helping its members withstand the rigors of law school. . . . On October 11th and 12th LEGALS sponsored an information, discussion and picnic event to demonstrate support for members of the GGU community who feel they have an orientation which is not strictly heterosexual. . . . The information available on those days is still available by mail on a Strictly Confidential basis. If you have any questions or wish to receive any of this information, call 821-3459 and ask for LEGALS information. . . . Watch for upcoming LEGALS events ...open to all!

In the past several weeks APLSA (Asian Pacific Law Students Association) hosted an Asian Bar Association resume' writing/interviewing workshop, a picnic in conjunction with the APLSAs at Boalt, Hastings and USF, several other social events and even a bake sale. Look out for the APLSA Halloween Happy Hour. . . .

The GGU NATIONAL LAWYERS GUILD (NLG) spent the first month of school organizing against the nomination of Judge Clarence Thomas to the Supreme Court. Activities included gathering over one hundred signatures on postcards to send to the Senate, distribution of informational material and bringing two speakers to school to make the case against Thomas. (Students and faculty were invited to make the case in favor of Thomas but no one came forward.)

PHI DELTA PHI ("Mash Inn") is a legal honor fraternity promoting academic achievement, community service, and social interaction. . . The fraternity is planning its initiation for new members on October 14, 1991 in the Moot Court room. . . . A halloween party is planned and Phi Delta Phi t-shirts will soon be on sale for $10.00.

FOCUS ON: ALTERNATIVE DISPUTE RESOLUTION:

? What is Alternative Dispute Resolution (ADR) ?

ADR refers to a broad range of mechanisms and processes designed to assist parties in resolving differences. These alternative mechanisms are not intended to supplant court adjudication, but rather to supplement it. Primary ADR mechanisms include arbitration and mediation. **Arbitration** typically occurs in two distinct forms: 1) a private, voluntary process where a neutral third-party decision maker, usually with specialized subject expertise, is selected by the disputants and renders a decision that is binding; or 2) a compulsory, non-binding process (often called court-annexed arbitration) which must be resorted to in some jurisdictions prior to going to court. **Mediation** is usually a private, voluntary, informal process where a party-selected neutral assists disputants to reach a mutually acceptable agreement. During mediation there is a wide opportunity to present evidence and arguments and to explore the interests of the parties. The mediator is not empowered to render a decision.

? What Role is There for Lawyers in ADR?

There are three phases where a lawyer /advisor can participate: in the pre-ADR referral process; during the ongoing ADR process; and in the review process after parties have reached a tentative agreement. In the course of the ADR proceeding, a lawyer can often participate as an advocate. In an arbitration hearing counsel for each party uses his or her professional expertise and represents his or her client by presenting arguments and evidence. Likewise, a lawyer can be an advocate for a client in mediation. Parties to mediation are encouraged to seek separate and independent counsel; however the lawyer usually will not attend the mediation sessions with the client. In this case the lawyer performs the role of legal advisor.

? Won't ADR Just Add Another Layer to the Already Complex Judicial System?

ADR, through its various forms and procedures, supplements the formal court system. These additional tools can shorten full-scale, in-court adjudication and often divert cases entirely from the judicial system. Experience has shown a high rate of success in resolving disputes by ADR or, at the very least, in narrowing the issues for ultimate litigation. For example, a court-annexed arbitration program commenced in 1978 in the Eastern District of Pennsylvania showed that by the end of 1984 only 2% of the 7,100 cases terminated in arbitration went to trial.

? Do People Compromise Their Legal Rights or is Due Process Threatened When ADR is Used?

People who knowingly use ADR processes seek effective resolution of their disputes. Preserving the underlying relationship and participating fully in the resolution process may be more important to the disputants than fully vindicating their legal rights. For example, if a tenant has assaulted a landlord because she has become frustrated by the landlord's repeated failure to provide her with heat, the parties may be more interested in a free-ranging proceeding leading to a solution of the underlying problem (i.e. the lack of heat) than they are in a full-blown due process adjudication on the assault charge. Similarly, a person who agrees to be bound by the results of arbitration will be foreclosed from rights to a jury trial and an appeal on a least some issues. This does not, however, result in a denial of due process as long as the choice to forego legal rights in order to obtain another gain, is a voluntary one.

? How Can ADR Proceedings Be Kept Confidential?

There are, several arguments available under the law, which might be used to protect disclosure or admission into evidence. *Prior Agreement* of all parties. *Protective Order* against discovery of confidential proceedings where litigation is pending. This involves a showing to the court that the need to protect confidentiality outweighs the merits of disclosure (Fed. R. Civ. P. 26(c)). *Evidentiary Exclusions* preclude the admission of evidence in court. The common law favors protection of negotiations for compromise and settlement .

? I Have Heard that ADR is Disadvantageous to Lawyers' Financial Interests. Is this True?

Lawyers can have an active role in most ADR proceedings. Good lawyers do not gain compensation by having a stable of inactive cases - they make money by "moving" their cases. ADR can help that process. Even when the parties meet with an arbitrator without their lawyers present, the disputants probably have been advised by separate counsel both during and at the end of the process. Attorneys are still actively involved in representing clients in ADR processes, but in many instances the total time spent per case may decrease. It is, however, a good business practice and an added incentive for a lawyer to handle a case expeditiously because the lawyer is then free to deal with other cases. Most importantly, when clients are satisfied with the disposition of their case, they will refer other potential clients to that lawyer.

? How Do I Neutralize Any Inference of Weakness When I Propose ADR ?

Proposing ADR preceded by limited discovery reflects confidence, not doubt, in your case. Additionally: 1) Indicate to your opposition that it is your firm's policy to first pursue ADR; 2) Discuss using ADR with clients in initial conferences concerning settlements. Pursuing ADR is not inconsistent with the simultaneous pursuit of one's litigation options. (For more information, contact: Prudence Kestner, Standing Committee on Dispute Resolution, 1800 M St., N.W., Ste 200-S, Washington, D.C. 20036. (202) 331-2258) ■

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PROFILES:

Professor Bader was the 1990 recipient of the American Arbitration Association's award for excellence in training. He has spoken extensively at arbitration conferences and participates in the design and implementation of commercial arbitration training programs. Professor Bader is a member of the national panel of Commercial Arbitrators and Mediators of the American Arbitration Association and specializes in the arbitration and mediation of complex commercial cases. Professor Bader has been a member of the Golden Gate law faculty since 1968 .

Caveat: When did you realize you were interested in ADR?
Bader: Oh, I don't know. I became a member of the American Arbitration Association (AAA) in about 1965 because I was interested in commercial transactions; I was basically a transactional lawyer. I became very heavily involved in ADR about 15 years ago, and that's probably a simple reflection of the growth of arbitration in commercial disputes.
Caveat: Is lack of knowledge about ADR a major problem?
Bader: Well, I guess it is and it isn't. I don't think that really is the problem. It was estimated in the '60's that over 50% of all commercial disputes were being arbitrated. Today, that number is closer to 60-65%. A very large percentage of all commercial disputes of significance are arbitrated. The problem with arbitration and why the figure isn't closer to 100% is that there are a lot of myths about arbitration amongst the bar, such as: Arbitrators don't follow the law; normal rules don't have ay application, so as a lawyer, I'm out of control; I'm a litigator and I'm used to the way things are done in front of a judge, and I don't want to do anything that involves a process that I'm not that familiar with; and so on. Those are the real problems that result in arbitration not being utilized more than it is. Commercial arbitration is just like litigation. You have lawyers over here and lawyers over there. They make opening statements, they examine witnesses, they authenticate documents, they move things into evidence, except they do it without a coat. Other than that, it's very much like litigation. In fact, arbitration properly run is a very comfortable place for lawyers because they do what they do anyplace else.
Caveat: If arbitration is so similar to litigation, what's the point? Why arbitrate?
Bader: There are a bunch of points. First of all, in a commercial context you get an arbitrator who has a great deal of expertise with respect to the nature of the controversy. If it's a large dispute, you are entitled to three arbitrators. You don't have a jury; I don't want to come down on juries, but, the presence of a jury does not necessarily make for the best resolution of a commercial dispute. For example, in a patent problem, at least one panel member will be a primo patent lawyer. It's also a lot faster. The parties to some extent determine how long it takes, depending on how many pre-hearing problems there are. With some exceptions, involving complex issues and a lot of money, you get to hearing very fast. Number three, when you get an award there are no appeals. It is almost impossible to vacate the award of an arbitrator. Fourthly, discovery in arbitration is a totally different issue than in litigation. In arbitration, the parties make up their own rules of procedure. A typical arbitration clause incorporates the commercial artibration rules of the AAA. Rule 10 provides for documentary exchange, but you don't have any depositions. Most commercial litigators will tell you depositions are nice to have, but result in more time and money without much benefit. So there is a lot less game playing with respect to discovery. When you add these things together, it's a lot shorter and more efficient process.
Caveat: How do we correct misconceptions about ADR?
Bader: I think through education. I am a member of the educational committee of the AAA, and we have a dual focus. First is arbitration training so that commercial arbitrators are themselves very aware of the process; they understand absolutely the law, have a mastery of procedure, and can run arbitrations in a manner that results in respect for the process. Secondly the committee attempts to generally educate lawyers through the use of programs and seminars with respect to the process of arbitration, like using such things as the arbitration agreement. We have also made a series of video tapes. We just finished shooting one geared towards the banking industry. ■

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