



ATTORNEY'S REPORT

LITIGATION ALTERNATIVES: Is ADR in Your Legal Toolbox?

From negotiation and collaborative law to mediation and arbitration, courts and clients are increasingly turning to alternative dispute resolution (ADR) as a substitute to traditional litigation.

Companies ranging from Toyota to Ernst & Young have adopted ADR programs as a way of reducing their legal costs. In fact, 81 percent of respondents to an American Bar Association survey of Fortune 500 companies said they were actively employing ADR techniques.

Another reason is that judges are increasingly turning to court-supervised ADR to clear congested calendars. A survey by the Institute for Conflict Prevention and Resolution indicated that 78 of the 94 United States federal district courts had some form of court-annexed ADR. Use of ADR mechanisms also appear to be growing in state and local courts.

With the increased focus on ADR activity, the law firm of the future may very well need to be proficient in these techniques to remain competitive.

Why It Works

ADR is not a cure all. But when used properly, these collaborative techniques drastically reduce the amount of time and cost needed to resolve a dispute. In general, ADR:

- Focuses parties on the key issues in dispute.
- Limits or eliminates discovery.
- Limits or eliminates unnecessary motion practice.

In the end, ADR is a more efficient and problem solving oriented process that provides the measure of control and predictability in legal matters that clients are increasingly demanding.

When It Works

ADR is not appropriate in all circumstances. But in his book, *ADR for Financial Institutions*, attorney Robert M. Smith notes some key factors that make a dispute appropriate for resolution by mediation. These include a need for:

- Confidentiality (e.g., a dispute involving trade secrets or copyrights).
- Maintaining business relations between the disputants (i.e., the dispute is with customers, clients, employees or other business partners with whom the client has an ongoing relationship).
- Speed in resolving the dispute.
- Flexibility in procedures or remedies.
- A neutral expert to resolve a technical issue.

By contrast, litigation may be preferable in cases where the client or the opposition views the dispute as a matter of principle, where the parties have no continuing relationship, or where there are no other external factors pushing the parties toward a compromise. Smith suggests the following conditions in which a case may not be suitable for mediation:

- The need to establish judicial precedent.
- The presence of possibly fraudulent claims.
- The presence of one (or more) parties who are unwilling or not ready to compromise their positions or negotiate in good faith.
- Disputants who have not completed enough investigation or discovery. This factor may delay the institution of mediation, but should not deter the disputants from seeking mediation at a later date.

Integrating ADR into Your Firm

Integrating ADR into a law firm can take a variety of forms. The Institute for Conflict Prevention and Resolution suggests several steps:

- **Make it part of the culture.** For example, a firm might require its lawyers to discuss goals and objectives with the client — and whether or not these would be enhanced by an alternate approach — at the inception of a dispute. Likewise, the firm's transactional lawyers might be directed to systematically consider whether ADR clauses are appropriate in the agreements they draft.

Is ADR in Your Legal Toolbox?, Cont'd.

- **Develop separate practice groups.** This could range from renaming a firm's litigation practice group as the "dispute resolution" group to simply developing committees that focus on ADR initiatives.
- **Designate ADR specialists.** Here, a firm might have a committee or individual designated to provide sophisticated counsel to the firm's lawyers and its clients concerning ADR strategies in particular disputes.
- **Develop an ADR library.** A firm might make ADR resources available to its lawyers, such as desk books, manuals, forms, texts, newsletters and journals. Attorneys could also be encouraged to attend off-site ADR training, or the firm itself could contract with vendors to provide on-site training.
- **Develop ADR expertise in specialized areas.** A firm could develop specific ADR strategies and begin offering its services as mediator or arbitrator in areas that are compatible with its existing practice specialties. These may include employment, healthcare, construction, corporate, bankruptcy, insurance and financial services.

The ABA's Dispute Resolution Section has nearly 19,000 members, making it the world's largest association of dispute resolution professionals.

In the end, clients are looking for new and creative ways to resolve their disputes — and seeking attorneys who will help find them. ADR might provide the answer.

Mueller Prost's accounting professionals are ready to help. Contact us at 314.862.2070.

The CPA as Peacemaker

CPAs are well suited to the ADR process. They have the technical, financial and business expertise needed to identify and communicate the issues and possible alternative solutions to the disputants.

The three ways in which CPAs are most often involved are mediation, arbitration and neutral evaluation.

1. The CPA as Mediator: In mediation, the CPA acts as a sole mediator or a co-mediator with an attorney, psychologist or other specialist. The goal is to identify the issues of the dispute, determine and consider ways to resolve the issues, and negotiate a settlement.

2. The CPA as Arbitrator: In arbitration, there are generally three roles for the CPA: sole arbitrator, expert or panelist. As a sole arbitrator, the CPA listens to both sides of a dispute and then renders a decision after weighing the merits of each argument. As an expert, the CPA is engaged by one side in the dispute and may assist in the discovery process, develop opinions and testify at the arbitration hearing. As a panelist, the CPA arbitrates the dispute with co-arbitrators.

3. The CPA as Neutral Evaluator: Another role for the CPA is to act as a neutral consultant to help the disputants and mediators better understand technical matters, such as in complex business litigation (e.g., a contested business valuation). As a neutral evaluator, the CPA works directly with the disputants and their attorneys to render opinions on factual issues.

As an Early Neutral Evaluator (ENE), the CPA may be asked to review the factual issues and report findings to the court and the disputants. This helps predict the cost and complexities of a case for litigation, as well as offers preliminary opinions on specific issues.

Source: American Institute of Certified Public Accountants (AICPA)

Please contact your Mueller Prost advisor at 314.862.2070 if you are considering adding a qualified CPA to your case team.

FORENSIC ACCOUNTING AND LITIGATION SUPPORT

Why Timing Matters

When complex financial issues are crucial to a case, attorneys and their clients may decide to bring in a forensic accountant. But getting the most “usability” from forensic accounting in a court of law often depends on whether or not lawyers bring their experts on board early.

For instance, calling in a forensic accounting expert when the discovery process is closed limits access to interviewees, resulting in the inability to obtain highly relevant and useful data. Wait until too late in the process and your forensic accountant is also exerting extra time and effort trying to find defenses and strategies to fit the arguments as they currently stand, instead of working proactively to uncover facts up front and prevent damage from the outset.

Late involvement can also mean that your forensic accountant is scrambling to hastily put together exhibits to support the current position. That opens the door to the possibility of errors, imprecision and testimonial consequences you both would prefer to avoid.

The Benefits of Early Engagement

The good news is that an experienced CPA can provide invaluable support throughout the entire litigation process — from pre-trial discovery and interrogatories to settlement support. In fact, litigation support is more than just a gavel-to-gavel affair. It comes into play long before the trial begins.

When brought in at the earliest stages, an effective forensic accountant can uncover critical issues that may have been overlooked by both the client and the attorneys. A good forensic accountant who is engaged early can help:

- Assist with the examination for discovery, and ensure that crucial financial issues and related documents are identified and can be obtained.
- Educate attorneys regarding complex financial and valuation matters.
- Identify strengths and weaknesses of client theories, and suggest possible courses of action and ways to improve case strategy.
- Identify facts to be obtained during examination for discovery, formulate questions regarding financial evidence and assist in preparing outlines for depositions.
- Assist with asset protection and recovery.
- Determine a range of damages in mediation that can help develop a settlement position.

- Review opposing experts' demands for damages and identify their strengths and weaknesses.
- Attend trial, hear opposing experts' testimony and provide insights for stronger cross-examination.

What Makes a Good Forensic Accountant?

At its most basic, forensic accounting involves applying financial facts to legal situations. A good forensic accountant has a thorough understanding of the legal process, including the rules of evidence and the unique language used in state and federal courts. He or she can help analyze, explain and present financially complex issues in a manner that is helpful to the courts and the parties involved.

To that end, an effective forensic accountant has a truly unique skill set. In addition to being a top-notch CPA, he or she must also be part investigator, part lawyer, part professor and part communications professional. Whether consulting or testifying, a CPA expert should possess several general characteristics:

- **Industry experience** – The expert should obviously have a solid grasp of the financial principles at issue. Equally important, he or she must understand the industry context in which those principles are being applied.
- **Legal experience** – A forensic accountant must understand the various stages of the litigation and investigation process — how and when to create work product, and the legal standards governing the admissibility of opinion testimony at trial.
- **Credentials** – Look for forensic accountants with recognized professional certifications, such as the Accredited in Business Valuation (ABV), Certified in Financial Forensics (CFF) and Certified Fraud Examiner (CFE) credentials. Likewise, look for articles, blog posts and speaking engagements that demonstrate expertise.
- **Technology** – Increasingly, forensic accounting involves in-depth analysis of information contained within and created by computer systems and other digital devices. Therefore, a CPA with access to quality forensic analytics software and programming skills is a plus.

When your litigation strategy hinges on complex financial analysis, Mueller Prost's experienced accounting professionals are ready to help. Please contact our office today at 314.862.2070 to discuss your needs in detail.

Why Corporate Clients Hire Law Firms

What factors most influence corporate law departments in their selection of outside counsel? In a recent survey, Chief Legal Officers were asked to rate a variety of law firm selection influencers on a scale of zero to 10, in which zero equaled "No effect" and 10 equaled "Extremely positive effect."

Not surprisingly, the answers match some of "rainmaking's" tried-and-true tenets: Having a demonstrated understanding of the client's business, and utilizing referrals, recommendations and personal contacts to drive business. Consider these results from the most recent Altman Weil Chief Legal Officer Survey:

LAW FIRM SELECTION INFLUENCERS	Avg. Rating
Demonstrated understanding of your business/industry	9.6
Referrals/recommendations from colleagues	8.6
Personal contact: visits/phone calls/personal notes	6.7
Written material demonstrating lawyer's expertise	6.1
Free seminars, webinars, CLE training for your law department	4.9
Branding as a full-service firm	4.6
Industry events: sponsorships/presentations/attendance	4.1
Website content/firm brochures/advertising	3.6
Directory listings and ratings (traditional and online)	3.3
Membership in law firm networks	3.2
Committee work, community involvement, board memberships	3.2
Direct mail/email communications about a firm	2.9
Social media activity: LinkedIn/Twitter/Facebook/other	2.3
Invitations to social events/sporting events/meals	2.2

The majority of respondents represented public organizations (75.4 percent) with annual revenue in the \$1 billion to \$10 billion range and from two to thirty in-house attorneys.

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The firm offers a full range of professional tax, audit, accounting and management advisory services and collaborates with bankers and commercial lenders to meet client needs.

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