

Program C

ADR and the Corporate Client

Program Overview

In this program lawyers, judges and court ADR staff will learn directly from corporate clients about corporate executive and legal staff's perspectives on ADR and their expectations of counsel and the courts regarding ADR-related issues. This program provides a forum for discussing ADR-related issues affecting courts, lawyers and corporate clients. These issues include the following:

1. The impact of costs of litigation on management decisions regarding the following:
 - Insurance coverage, including director and officer, product and advertising liability, both in providing actual defense coverage (insurance company lawyers or paying for private counsel) and ultimate liability coverage
 - Critical business decisions, such as mergers, licensing agreements and sale of the company or the companies assets
 - Budget
 - Day-to-day operations
2. A business climate that discourages litigation (Since the 1990s, corporate management has challenged, or in some cases mandated that, in-house counsel control litigation costs, a trend that has led to the increased use of ADR by corporations. Note also the management attitude toward the justice system that recently led to the Tort Reform Act driven by Silicon Valley executives.)

This program is comprised of panel presentations by corporate counsel and executives of corporations that appear as parties before the district's judges, followed by a question and response period in which the audience will have the opportunity to interact with the panelists.

Program Objectives

1. To explore corporate attitudes and approaches to ADR in general
2. To educate judges and court administrators about corporate parties' perspectives regarding ADR programs and how the programs serve or disserve corporate parties
3. To understand the role of in-house counsel in ADR decisions
4. To educate lawyers about what corporate clients need from their lawyers regarding ADR
5. To understand what corporate clients need from mediators or settlement judges
6. To consider special problems in mediating with corporations
 - Authority to settle
 - Selecting a corporate representative
 - Preparing for mediation – creating a negotiation strategy with client involvement

- How to “humanize” the corporate party, especially when the relationship and/or one-to-one interaction is important to one or both of the parties

Time for the Program

Activity	Time for 60-minute program	Time for 90-minute program
Introductory comments	10 minutes	10 minutes
Panel presentations	35 minutes	55 minutes
Questions and responses	10 minutes	20 minutes
Concluding remarks	5 minutes	5 minutes
Total time	60 minutes	90 minutes

Program Presenters

1. **Moderator:** A moderator with experience in ADR issues, perhaps a lawyer who represents corporate clients in litigation and in the district’s ADR processes
2. **Panelists:** Program organizers should invite knowledgeable, articulate and entertaining speakers, who might include the following:
 - One or two representatives of corporations that appear in litigation and ADR processes in the district (It will be helpful if the corporation has signed the Center for Public Resources’ ADR Pledge and if the representative has had considerable experience with judicial settlement conferences as well as ADR processes. A copy of the ADR Pledge can be found at the CPR website, <http://www.cpradr.org>.)
 - CEOs, CFOs or other corporate executives who have participated in ADR as the "authority-to-settle" person and can offer insights into the non-lawyer perspective in participating in ADR processes
 - Corporate counsel or directors of litigation, who can speak with authority about the issues because they have direct involvement with managing litigation or directing policy concerning it
 - A lawyer who represents large corporate clients in litigation and ADR processes in the district
 - A plaintiff’s lawyer with substantial experience representing individuals, such as plaintiffs in employment cases or small businesses in suits against larger corporations, who has participated in the district’s ADR program (One role of such a panelist could be to respond to what the corporate panelists say, so that the audience can hear how the ideas and approaches the corporations favor might be received by, or affect, their common litigation opponents and to add a sense of balance to the presentations.)
 - A presenter who can speak from the insurance company perspective
 - A neutral with significant experience mediating or arbitrating disputes involving corporate parties

Room Set-up and Seating

The panelists and moderator should sit on a dais or stage in order to be visible to participants. Participants should be seated theater style.

Instructions for the Program

1. **Opening Presentation (10 minutes):** The moderator introduces the panelists and the topic by making introductory comments about the topic and presenting an overview of the program objectives and agenda.
2. **Panelists' Presentations (35 or 55 minutes, depending upon whether this program is scheduled for 60 or 90 minutes):** Each panelist makes a five to ten minute presentation. Program organizers should encourage panelists to use visual aids and to submit written materials to distribute to the participants. In order to allow panelists to prepare adequately and to avoid redundancy, panelists, once selected, should tell program organizers the topics they would like to address. Suggested topics include the following:
 - a. The corporation's attitudes and approaches to ADR in general, especially any institutionalized ADR policies (For example, some companies require their lawyers to sign the CPR Lawyer Pledge or to be trained in mediation. Others use ADR for resolving internal problems or disputes – with employees, between employees, between units – or in contexts other than litigation, such as in transactional work or in connection with real estate needs.)
 - b. How ADR has proved to be most effective – and the types of corporate disputes that are most amenable to ADR
 - c. Examples of creative solutions developed in ADR that go beyond money
 - d. The company's perspective on court-connected ADR programs, including how they serve or fail to serve corporate parties
 - e. Suggestions for how the court's ADR program might better serve corporate clients
 - f. The role of in-house counsel in ADR decisions
 - g. What corporations need from or require of their lawyers regarding ADR
 - h. What companies need or look for in selecting mediators or settlement judges
 - i. How ADR can be used to defuse distrust of the corporate litigant and build the corporation's credibility with individual plaintiffs and their lawyers (For example, corporations sometimes prefer neutrals who are primarily identified with the plaintiffs' bar, because hiring a neutral with this background may increase the individual plaintiffs' trust in the process.)
 - j. What are considered to be the most important special problems in mediating with corporations, perhaps including the following:
 - Authority to settle
 - Selecting a corporate representative
 - Preparing for mediation – creating a negotiation strategy with client involvement

- Using ADR to provide the opportunity for individual parties or small business parties to have the experience that they have been understood, respected and taken seriously
 - “ How to “humanize” the corporate party, when the relationship and/or one-to-one interaction is important to one or both of the parties
3. Questions and Responses (10 or 20 minutes, depending upon whether this program is scheduled for 60 or 90 minutes): Assuming the panelists have engaged the audience and raised interesting issues in their presentations, this discussion will likely be lively and generate more discussion and questions than the panelists have time to answer. The following list describes several approaches the moderator might employ in facilitating this part of the program:
- a. Moderator invites participants to direct questions to particular panelists;
 - b. Volunteer collects written questions, which contain the names of the panelists to whom the question is addressed, and gives them to the moderator, who distributes them to the panelists. The panelists take turns reading and answering the questions; or
 - c. Sample questions to get the discussion started if the audience is not responsive
 - Are there other issues related to representing or mediating with the corporate client that you would like to hear the panelists address?
 - Lawyers who represent corporate clients, what are your biggest challenges in ADR and how can the court better assist you in meeting them on behalf of your client?
 - Corporate lawyers, at what point in the life of a case do you address the question of whether ADR is appropriate? Do your clients request ADR?

Written Materials

1. ADR and the Corporate Client: Suggestions for Panelists
2. Any articles or other written materials panelists have prepared, either for publication in advance of the program or specially for inclusion in the program materials

Resources

Publications

1. Lande, John, “Getting the Faith: Why Business Lawyers and Executives Believe in Mediation,” 5 Harv. Negotiation L. Rev. 137 (2000).
2. Lipsky, David and Seeber, Ronald L., “In Search of Control: The Corporate Embrace of ADR,” 1 U. Pa. J. Lab. & Emp. L. 133 (Spring 1998).
3. Mazadoorian, Harry N., “Building an ADR Program: What Works, What Doesn’t,” Business Law Today, ABA Section of Business Law (March/April 1999).

Videos

The following videos are available for purchase from the Center for Public Resources, <http://www.cpadr.org>.

1. *Mediation in Action* video is available without CLE accreditation and involves a commercial contract dispute and demonstrates a complete mediation with counsel and client participation in 36 minutes with commentary on mediation phases.
2. *Out of Court – The Mini-trial* is a 30-minute videotape that demonstrates how a mini-trial is utilized to successfully resolve a dispute that resulted from a transnational shipping accident.
3. *Resolution through Mediation* is available without CLE accreditation and is a 28-minute videotape, produced by the International Trademark Association in cooperation with the CPR Institute, and depicts the resolution of a seemingly intractable trademark dispute between a Russian distillery and an American manufacturer and distributor of alcoholic products. A study guide accompanies the videotape.

Organizations and websites

1. Association of Corporate Counsel: www.acca.com
2. ABA Corporate ADR Committee:
<http://www.abanet.org/dispute/committees/corporatecom.html>
(The committee's mission is to be the link between the ABA Dispute Resolution Section and the corporate community. The committee creates opportunities for information sharing, education, discussion and networking for lawyers and neutrals for corporations and in-house counsel.)

ADR and the Corporate Client *Suggestions for Panelists*

The Presentation: Each panelist will make a five- to ten-minute presentation. We encourage you to make it lively and to use visual aids and submit written materials to distribute to the participants. Please be mindful of the time and know that if you go overtime, you will take away the time from the panelists who follow you.

The Topics: Well in advance of the program, please consider the topic(s) you would like to address and inform the program organizers of your chosen topic so that they can avoid overlap and redundancy in the presentations. Below is a list of suggested topics, but please feel free to choose any topic that relates to the program, so long as you clear your choice with the program organizers.

1. The corporation's attitudes and approaches to ADR in general, especially any institutionalized ADR policies. For example, some companies require their lawyers to sign the CPR Lawyer Pledge (see <http://www.cpradr.org>) or to be trained in mediation. Others use ADR for resolving internal problems or disputes – with employees, between employees, between units – or in contexts other than litigation, such as in transactional work or in connection with real estate needs.
2. How ADR has proved to be most effective – and the types of corporate disputes that are most amenable to ADR
3. Examples of creative solutions developed in ADR that go beyond money
4. The company's perspective on court-connected ADR programs, including how they serve or fail to serve corporate parties
5. Suggestions for how the court's ADR program might better serve corporate clients
6. The role of in-house counsel in ADR decisions
7. What corporations need from or require of their lawyers regarding ADR
8. What companies need or look for in selecting mediators or settlement judges
9. How ADR can be used to defuse distrust of the corporate litigant and build the corporation's credibility with individual plaintiffs and their lawyers. For example, corporations sometimes prefer neutrals that are primarily identified with the plaintiffs' bar, because hiring a neutral with this background may increase the individual plaintiffs' trust in the process.
10. What are considered to be the most important special problems in mediating with corporations, perhaps including:
 - Authority to settle
 - Selecting a corporate representative
 - Preparing for mediation – creating a negotiation strategy with client involvement
 - “Humanizing” the corporate client in cases where relationship matters

ADR and the Corporate Client Feedback Form

After you have reviewed this module or used it to plan and/or present a program, we would appreciate your feedback. Please fax (415-556-6179) or mail this completed form to Robin Donoghue, Asst. Circuit Executive – Legal Affairs, Office of the Circuit Executive, 95 Seventh Street, Suite 429, San Francisco, California 94103-1526. Please feel free to attach additional pages.

Name: _____

Tel. no.: _____ E-mail address: _____

Location of the program: _____

1. How did you use the module?

2. If you presented a program, was the program well received?

What factors likely account for its success or lack of success?

- Presenters? Please explain.
- Content? Please explain.
- Format? Please explain.

3. How can we improve the module?

4. How can we improve the Program Guide?

5. What additional topics about ADR and the corporate client do you suggest the panelists consider in preparation for their presentations – and then address in the program?

6. Please suggest topics for future ADR program modules.