Chicago Lawyer **July 8, 2008**

An early resolution for disputes

By John Flynn Rooney

When The Toro Co. launched its own mediation program to handle products liability claims in the early 1990s, company officials wanted to move away from a scorched-earth policy to defend against those claims.

Miguel A. Olivella Jr., a Tallahassee, Fla., lawyer helped create Toro's program. Toro now takes a different tack in dealing with claimants, he said.

"Rather than treat them as the enemy to start out, they prefer to deal with these people as customers," Olivella said. "A lot of companies aren't willing to do that. A lot of companies — view the claimant as the enemy."

The expansion of alternative dispute resolution (ADR) is occurring in Chicago, as well as nationally and internationally in places such as Europe and South America, said lawyers who work as neutrals.

Toro and a growing number of corporations along with government agencies have created their own ADR programs to handle disputes that normally would be resolved through litigation, according to lawyers and neutrals involved in those programs.

About 1,400 products liability claims were handled through Toro's ADR program since its inception, said Andrew R. Byers, senior manager, corporate product integrity for Toro, based in Bloomington, Minn.

"We have not taken a case to the courtroom since 1994," Byers added.

About two-thirds of the claims were resolved by claims coordinators who have authority to settle claims after visiting with injured customers, according to Byers. The remaining third of the claims land in mediation and are settled before trial, he said.

"It's just been a no-brainer," Byers said of the ADR program. "It's been wildly successful."

The program has also led to cost savings for Toro.

The average expense for handling a products liability claim has dropped from $115,000 in the early 1990s to $43,000, according to Byers. The average payout per claim fell from $68,368 in 1991 to $32,200 currently, he added.

"Literally, almost everything gets settled amicably before litigation," said Olivella, who also is involved with a similar ADR program for DuPont.

Other companies that have created their own ADR programs include Johnson & Johnson and The Home Depot, according to Olivella.

A recent eLaw Forum survey based on litigation data compiled over eight years found that Fortune 500 corporations prepare each civil case as if it were going to trial but then settle short of trial. Only 3 percent of the civil cases result in trials and about half of those matters result in a final court judgment, the survey found.

"The whole litigation process is built around a trial and it rarely ever results in a trial," said Dale E. Kleber, who runs Accord ADR Services, based in Downers Grove.

"If you aren't going to perform the play, it doesn't make a lot of sense to hire the actors, design the costumes and construct the sets," Kleber added.

"ADR should not be the alternative for resolving disputes," Kleber said. "It should be the primary method and litigation should be the alternative."

A change in ways

The eLaw Forum survey found that annual cost of litigation for Fortune 500 companies is about $210 billion.

One of the reasons for the declining number of civil trials is that corporations realize the benefits of early resolution of disputes, said Joel F. Henning, legal consultant for Hildebrandt International.

"There is really much more sophistication among corporations as to the cost benefits of going to trial contrasted to early resolution, including ADR and conventional settlements, Henning said.

Alternative dispute resolution, especially in the commercial area, has really taken off during the past eight to 10 years, said John W. "Jack" Cooley, a former U.S. magistrate judge and current neutral with JAMS, The Resolution Experts.

Retired and former judges who act as mediators and arbitrators, also known as neutrals, primarily populate the alternative dispute resolution field. Court systems have ADR programs and there are several private ADR firms in Illinois, also including ADR Systems, Resolute Systems LLC, and the American Arbitration Association. Some private mediators work alone, including Donald P. O'Connell, former chief judge of the Cook County Circuit Court.

Arbitration can be binding or non-binding, with one to three panel members. Mediation usually involves a sole neutral working with the parties by using a form of shuttle diplomacy. If mediation breaks down, either party can choose to take the case back to court.

ADR is used in civil cases ranging from tort to divorce.

Mediation offers an "opportunity for people to work through their case in a completely risk-free environment," said Richard E. Neville, a retired Cook County Circuit Court judge and current neutral for JAMS. "It's the only place in our system where you can do that. It's totally privileged, totally confidential."

Kleber said, "The bottom line is that litigation is incredibly expensive. It's very risky because juries are highly unpredictable and the courtroom is not the optimal place to handle complex issues and commercial intricacies. Mediation allows the business parties to regain control over their business disputes."

Making it work

For example, after Hurricane Katrina and two other hurricanes slammed into the Gulf Coast during September 2005, Zurich Insurance swung into action.

Zurich, which insures businesses such as hotels and restaurants with multiple locations, including hospitals and churches, had a regular adjustment process in effect. But Zurich officials decided to enhance the normal adjustment process and created the Gulf Coast Claims Alternative Dispute Resolution Program, said Rick J. Morgan, Zurich's senior vice president, property.

"The way we approached it was trying to help the customer rather than going through the adversarial system in America," said Domenick C. DiCicco, who helped launch Zurich's program and is currently chief legal officer for the company's North American Commercial Division.

The Zurich program involves three steps. As part of the program, Zurich retained Kenneth R. Feinberg, a Washington, D.C., lawyer who served as special master of the Federal September 11

Victims Fund of 2001, as the administrator of its Gulf Coast program.

The initial step involves a meeting between a Zurich representative and the policyholder to address issues that are delaying payout of a claim. If agreement is reached, the policyholder is paid immediately.

If no final agreement occurs, the policyholders are then asked if they are willing to participate in non-binding mediation. Feinberg chooses the mediators from a list of neutrals he compiled along with Zurich officials.

If the first two steps are unsuccessful, the final step involves binding arbitration.

"We had no cases that went to binding arbitration," Morgan said.

There were about 20,000 claims against Zurich stemming from the Gulf Coast hurricanes and related damage, according to Morgan.

"Slightly over 98 percent of our claims from Katrina were resolved," Morgan said.

Most of the claims were closed through the normal claims process and slightly more than 1,000 claims went through the ADR program, according to Morgan. Many of those matters were resolved in the initial face-to-face meeting, he added.

About 100 cases were resolved via mediation, Morgan said.

Richard E. King, a New Orleans lawyer who represents Zurich at mediation sessions, said the ADR program has worked well.

"They were really ahead of the curve," added King, a shareholder of Galloway, Johnson, Tompkins, Burr & Smith, who added that about 3 percent of the claims remain pending.

"There were a lot of emotions involved," King said. "I think the program helped alleviate a lot of those emotions by having the face-to-face meetings with the insureds."

Brian D. Katz, another New Orleans attorney, represented a business that owned about a dozen combination gas stations and convenience stores in various locations throughout Greater New Orleans that sustained damage during the storm.

The parties held mediation sessions over a two-day period earlier this year and successfully resolved the claims, according to Katz, a principal of Herman, Herman, Katz & Cotlar.

"I think Zurich was smart in essentially trying to manage the mediation in terms of controlling costs by creating a program in-house, rather than using an established mediation group," Katz said.

Other insurance companies tried to resolve claims stemming from the storm by meeting claimants face-to-face without a mediator, according to Katz. "In some cases it worked and in some it didn't," Katz continued. "In a more complicated scenario like we had with Zurich, the process worked perfectly."

DiCicco said of Zurich's ADR program, "I think it was a very creative way to avoid a lot of the negative aspects of litigation."

Zurich officials are leaning toward making the ADR system a part of the overall claims resolution process, DiCicco said.

"We're very close to a pilot program," DiCicco added.

A significant tool

Rick Quist, an attorney with AT&T, said he has used mediation since he started practicing law in the mid-1980s.

AT&T has regularly used mediation to resolve personal-injury matters and large commercial disputes since 2001, Quist added. Company officials have found mediation especially effective in tort matters.

"Mediation meets our needs more effectively in the vast majority of matters in which we use ADR," Quist said. "We do not exclude arbitration. But mediation is used more frequently."

Mediation "is percolating down to the middle-tier and lower-tier companies," Neville said.

"I see in Chicago a greater acceptance by the legal community of mediation as a significant tool to effectively represent their clients," Neville added. "I also see that mediation is becoming more accepted in areas that traditionally it hasn't been, such as divorce."

"I'm finding it much easier to get lawyers to put all their cards on the table — so they can get a better view of their case," he said.

Thomas F. Gibbons, who has served as a neutral primarily in labor and employment matters, said a rising number of companies have created ADR programs. Those companies include UPS and GE Health Systems.

"We're seeing large organizations embrace the approach," continued Gibbons, Dean of Northwestern University's School of Continuing Studies. "I'm seeing that increasingly in the employment setting."

Jennifer W. Morrow, vice president of commercial services for Chicago-based ADR Systems, said she has seen increased interest by general counsels and human resource executives who seek out more proactive means of managing and resolving conflict.

"We were contacted by both counsel and corporate executives and asked to assist with the design and implementation of internal resolution dispute systems," Morrow added, declining to name specific companies due to confidentiality agreements.

In an effort to encourage the use of ADR, the CPR International Institute for Conflict & Resolution based in New York has created a corporate pledge signed by more than 4,000 operating companies.

Previously, a perception existed that a party who suggested arbitration or mediation did so because they had a weak case, Kleber said. The CPR pledge signifies that ADR will be considered as an initial option in every dispute as a standard corporate policy, irrespective of the circumstances of any particular case, he added.

The pledge signed by corporations states, "We recognize that for many disputes there is a less expensive, more effective method of resolution than the traditional lawsuit. Alternative dispute resolution procedures involve collaborative techniques, which can often spare businesses the high costs of litigation.

"In recognition of the foregoing, we subscribe to the following statements of principle on behalf of our company and its domestic subsidiaries:

"In the event of a business dispute between our company and another company which has made or will then make a similar statement, we are prepared to explore with that other party resolution of the dispute through negotiation or ADR techniques before pursuing full-scale litigation.

"If either party believes that the dispute is not suitable for ADR techniques, or if such techniques do not produce results satisfactory to the disputants, either party may proceed with litigation."

More than 1,500 U.S. law firms, including 400 of the nation's largest 500 law firms, have signed a similar pledge.

The law firm statement says, "We recognize that for many disputes there may be methods more effective for resolution than traditional litigation. Alternative dispute resolution (ADR) procedures used in conjunction with litigation or independently can significantly reduce the costs and burdens of litigation and result in solutions not available in court.

"In recognition of the foregoing, we subscribe to the following statements of policy on behalf of our firm.

"First, appropriate lawyers in our firm will be knowledgeable about ADR.

"Second, where appropriate, the responsible attorney will discuss with the client the availability of ADR procedures so the client can make an informed choice concerning resolution of the dispute," the statement concludes.

Different groups

Private corporations are not alone in using their own ADR programs.

The U.S. Postal Service began an ADR program dubbed with the acronym "Redress" in 1998. The program is aimed at resolving employment disputes, according to Therese Lynch, coordinator of dispute resolution for the postal service's Great Lakes area, which comprises five states, including Illinois.

"The parties participate very directly in the process," said Lynn A. Gaffigan, a Lake Forest lawyer who has served as a mediator for the postal service program.

The postal service program requires that if an employee wants to pursue mediation, then a manager must participate in good faith, Lynch said.

The types of cases handled in the postal service program include discrimination and harassment claims, along with various types of discipline, Lynch added.

In 2007, 963 cases were mediated in the Great Lakes area, according to Lynch.

Currently, nearly 82 percent of the employees who file equal employment opportunity complaints voluntarily participate in mediation, Lynch said. Between 50 and 55 percent of the cases mediated are resolved at the mediation session, while another 20 to 25 percent of the employees chose not to file formal complaints after the mediation, she added.

A total of 76 percent of the equal opportunity complaints are closed, either having been resolved in mediation, withdrawn or the complaint did not advance to the formal stage, according to Lynch.

The award-winning postal service program has served as a model for other government agencies, Lynch said.

Alternative dispute resolution is also a tool used by court systems throughout Illinois. Numerous Circuit Courts from one end of the state to the other have ADR programs in place, according to Susan M. Yates, executive director of the Resolution Systems Institute, a Chicago-based organization that supports court-related ADR programs.

Illinois 17th Judicial Circuit, covering Boone and Winnebago counties, provided the state's first arbitration program in 1987 and also had the state's first court-annexed mediation program for commercial cases in Rockford during 1993. There are also mandatory arbitration programs in a number of other counties, including DuPage, Lake, and Will.

The 1st District Appellate Court has a settlement conference program, as does the 7th U.S. Circuit Court of Appeals and U.S. District Court for the Northern District of Illinois.

The U.S. Bankruptcy Court for the Northern District of Illinois offers a mediation program while the Western Division in Rockford provides a mediation program for civil cases.

The Cook County Circuit Court's Law Division launched a court-annexed mediation program four years ago.

The court's Chancery Division began a court-annexed mediation program in early 2007.

In April, the Circuit Court held a Continuing Education Seminar titled, "Corporate Perspectives on Mediation." Kleber served as the moderator; the panel comprised Quist and lawyers with Zurich and Hyatt Hotels Corp.

"They were all very supportive of mediation," said Cook County Circuit Court Judge Allen S. Goldberg, who helped create the Law Division's Mediation Program.

Figures provided by Goldberg showed that of the 958 cases referred to mediation by March 31, on average, 55 percent of the cases mediated in the program were fully settled and another 6 percent were partially settled.

"There are certain judges who are [referring cases to mediation] a lot and some aren't doing it," Goldberg said.

The number of cases referred to the Law Division's mediation program each month fluctuates.

The figures show that between August and November 2007, a total of 49 cases were referred to the program. No mediations were held during that time, nor were any of those cases settled in the program, according to statistics provided by Goldberg.

When asked why the number of cases resolved through the program have declined, Goldberg responded that lawyers could be bypassing the court system by asking private mediators to hear the matters.

Cook County Circuit Court Chancery Division Presiding Judge Dorothy Kirie Kinnaird said that chancellors referred 246 cases to that division's mediation program from Jan. 1, 2007, through April 30. A total of 51 percent of those matters have been either fully or partially settled, she added.

"The general sense is that the mediation program in Chancery is a huge success," Kinnaird said. "The complex civil matters, which would take months to try, are being settled outside of court through mediation.

"I think because of the early success with our mediation rule, attorneys and litigants are taking

advantage of going to mediation even before filing suit," Kinnaird concluded.

Yates, of the Resolution Systems Institute, said, "In theory, we should be seeing less demand on the court system with more pre-suit resolution."

Marc Becker, president and founder of ADR Systems, said parties are increasingly taking it upon themselves to have disputes mediated in private.

"It's really encouraging to see that people are really starting to embrace the process without being told what to do," Becker added.

By the numbers

ADR Systems' work in commercial cases is up 25 percent in 2008, Morrow said.

Stuart A. Nudelman, who retired as a Cook County Circuit Court judge in 2006 and then joined ADR Systems, said he's had more commercial cases come his way recently.

"It is significant because a lot of private individuals who are involved in business and corporate concerns I think are realizing either a mediation or arbitration is much less costly and much less time-consuming," Nudelman added.

In the commercial matters Nudelman handles, 80 percent result in mediations and 20 percent go through arbitration, he said. When he began as a private neutral, 95 percent of the cases he oversaw were mediations.

"I think more and more lawyers are learning the successful way to mediate a case," Nudelman said. "Whereas, I think their trials' skills are more in tune with arbitration."

William E. Hartgering, who founded the forerunner to JAMS local office here in 1982, said JAMS is conducting more arbitrations than in previous years.

He added, however, "There are clearly more mediations being done than arbitrations. It's simpler, easier and more cost effective."

But about eight years ago, Neville's arbitration caseload as a neutral represented about 5 percent of his work. That number now stands at about 30 percent, he said.

A study undertaken by the American Arbitration Association in 2003 showed that 91 percent of the Fortune 1000 companies that use arbitration did so because it was required in contracts between the parties. In addition to the 91 percent, a significant number of respondents said that the use of arbitration saves time and money.

"Companies have become much more sophisticated in their use of arbitration, including the use of customized arbitration clauses," said Robert Matlin, a AAA vice president based in Chicago. "This allows the parties to a transaction to design their ADR process on the front end when they're still getting along by not using a one-size fits all approach."

Arbitrations remain the bulk of AAA's work in Chicago, according to Matlin.

"We're trying to increase the awareness in the market that we do mediations as well," Matlin concluded.

William A. Von Hoene Jr., Exelon Corp's general counsel, said he has become an increasing skeptic of arbitration.

"It does not, in our experience, save a great deal of money or time," Von Hoene said.

Last year, Exelon's legal department, in conjunction with the business units, generally removed the mandatory arbitration clause in contracts with outside vendors, he said.

"It doesn't mean we won't arbitrate in any circumstance," Von Hoene concluded. "But our experience has been sufficiently mixed that we want to preserve the option to choose arbitration, mediation, or litigation."

As for future trends in ADR, Cooley said he sees more dispute resolutions occurring internationally. Cooley has written six books about conflict resolution.

People are receiving training in mediation in Europe, the Middle East, and South America, according to Cooley.

"That's an indication to me that things are happening world wide," Cooley said. ~