Fork in the Road

Why a lawyer-ADR provider may want to stay with the firm

By David A. Hoffman

Among Yogi Berra's many sage words is his famous quip: "When you come to a fork in the road, take it." Those of us who practice in law firms but devote much of our time to serving as mediators and arbitrators seem to have taken Yogi's advice to heart.

In the last 20 years, hundreds, perhaps thousands, of lawyers in the United States have chosen to add mediation and arbitration to the services they provide. Some are so busy as ADR providers that they are faced with a choice: stay in the firms where they practice or set up shop on their own.

Practitioner's Notebook

I chose to stay at the Boston firm I joined after law school, but when asked why I made that choice, it occurred to me that my reasons for "taking the fork in the road" may be different from those of the many lawyers who are doing the same thing. For example, a major factor in such a decision is the market for ADR services, which differs markedly from one state to the next. (In some states mediation is mandatory, and the market for mediation services is robust, but elsewhere, ADR is in its infancy, and the demand is weak.)

In addition, law firms differ in their receptivity to ADR — some see the value in providing ADR services, others do not. I offer these comments not as an argument for staying — or even as a description of why thousands of lawyers are doing so — but instead as a personal account of what led me to continue my practice as a mediator and arbitrator in a private firm.

Colleagues

Law firms, like other workplaces, resemble families in certain respects. I tend to think of the lawyers who mentored me as relatives, whose guidance I seek from time to time. I also rely on the more junior lawyers in the firm and support staff. I look to these members of my professional "family" for moral support, guidance, encouragement, friendship and comraderie. Mediating and arbitrating can be lonely work; my contact with colleagues throughout the day is nurturing. The rituals of law firm life have become part of the rhythm of my life.

Economic security

Even in times of financial uncertainty, most large law firms provide their members a measure of economic stability. If the firm compensates its members on a rolling average basis, financial bumps and pot-holes are flattened. If the market for one type of service dies, work can be reallocated within the firm.

Practicing law

I still represent clients, primarily in family law and employment matters. This work accounts for about 25% of my practice, with the remainder a combination of mediation and arbitration. I continue to practice law for two reasons. First, much of my mediation practice comes from court-connected cases in which the hourly rates are capped at levels well below the fees that the firm charges for my time. Law practice helps me balance the books.

Second, as fascinating as the practice of dispute resolution is, I value the close relationships I have with my clients, the ability to stand entirely by their side, to be their ally, confidante, and in some cases, friend. As a mediator and arbitrator, my client is fairness — not a bad client to have. The disadvantage is that I must maintain an appropriate distance from the parties in order to do my job effectively and practice ethically.

A vantage point on the legal world

Working in a law firm gives me an inside view of the world of legal disputes. I have access to information about the practice of law — from internal memos and attending in-house workshops and meetings — that would be otherwise unobtainable. In most of the cases that I mediate, lawyers are involved on both sides of the case; as a member of a firm, buffeted by the same winds of change those lawyers weather each day, I know the constraints under which they operate, and that is often useful in the dispute resolution process.

Information resources

Most of my ADR cases involve legal disputes, and law is, at least in part, a knowledge industry. The firm is a rich environment in that regard. Hill & Barlow's library circulates daily and weekly advance sheets with informa-

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Photo: Fayfoto

tion about developments in the areas in which we practice. I follow developments in ADR, family law, employment, construction, product liability, professional liability, personal injury and a few other fields. To duplicate these subscriptions on my own would cost a fortune. Could I practice as a mediator or arbitrator without such information? Absolutely. Is there a benefit from keeping abreast of changes in the law? I think so.

Physical and technological resources

Any mediator or arbitrator needs offices, conference rooms and reception areas in which to practice. These are easily obtainable in any city, but the firm provides me with the ability to use several conference rooms at once, in a highly complicated multi-party case, or a single compact room, depending on my needs.

There are technological tools that I would find difficult or expensive to duplicate. These range from a sophisticated phone system with conferencing capabilities to computer projection equipment that enables me to craft settlement agreements in real time and project them on a screen while the parties and I edit them. Hill & Barlow's technology staff keeps these services (and others, such as conflicts, billing, and scheduling software) functioning in a way that minimizes my headaches and maximizes my efficiency.

Human resources

The firm supports my work as a teacher and writer — activities that give me the opportunity to reflect on, and learn from, my ADR and law practice. For the past five years I have taught law school courses on negotiation, ADR, mediation and family law practice. I co-authored a book on ADR and wrote several articles. Could I do these things without logistical support from paralegals, secretaries, and computer wizards of various kinds? Probably, but with much more hair-pulling on my part.

Practicing law and ADR, while teaching and writing, requires expert juggling skills or a wonderfully supportive staff. Because I lack the former, I count my blessings that I work in a firm that provides the latter.

Referrals

One of the benefits of law firm life is the referral network — one of the principal reasons for organizing a professional services firm. Naturally, I cannot provide mediation or arbitration services in a current case for a current client. But if one of my colleagues at Hill & Barlow is asked if they know of a good mediator or arbitrator, there is a good chance they will mention my name or the name of some other member of our ADR Practice Group.

Visibility and credibility

Most importantly, practicing in a well-respected law firm provides visibility and credibility which, as a relatively junior member of the bar (law school class of 1984), ordinarily take much longer to acquire. My ADR clients make certain assumptions about me, my integrity and my ability — whether deserved or undeserved — based solely on the fact that a reputable firm has kept me on board for 14 years and even promoted me to partnership. What are those assumptions? I can think of a few: (a) that I know how to maintain confidences and adhere to ethical standards; (b) that I am comfortable handling cases in which the stakes are high and the legal issues complex; and (c) that I have a strong work ethic.

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Disadvantages

There are two major disadvantages of practicing ADR in a law firm setting: conflicts of interest and the overhead associated with operating a firm.

The conflicts issues are of two kinds: (a) upstream conflicts resulting from the firm's prior cases, and (b) downstream conflicts which my cases create for other members of the firm. With respect to the former, the firm's computer provides me with a list of the relevant prior cases; after making appropriate disclosures to the parties in the mediation or arbitration, they almost invariably tell me that they have no objection.

With respect to the latter, my mediation and arbitration cases are usually over quickly and thus present no long-term obstacle to the firm's handling cases for one of the parties. In most cases, my prior work must be disclosed, but I am aware of only two instances in which my work has cost the firm a client that wished to retain us.

As far as overhead is concerned, the costs of running a large firm are substantial, and it is likely that my overhead as a solo practitioner would be lower. On the other hand, I would have to devote substantial time and attention to managing the financial and administrative aspects of my practice. There was a time in my life when I ran a small business and found those aspects of entrepreneurship appealing. I am now quite grateful that a very capable staff at the firm handles billing, insurance, bookkeeping, taxes, employee benefits (including my own), facilities manage-

ment, relations with vendors, mailing and copying and — perhaps most importantly in this day and age — maintaining and improving my computer equipment. I have very little interest in handling these items, or even supervising someone else who handles them.

Advantages and disadvantages for the firm

I think — and I have often been told — my ADR work brings with it a number of benefits for the firm. First, I know a lot of mediators and arbitrators. I attend professional meetings with them. I hear them lecture and lead seminars about their approaches to dispute resolution. Getting to know them personally is one of the great pleasures of my work, because, for the most part, they are among the most decent, fair-minded, and down-to-earth people I know. That kind of personal knowledge of the people in the field makes me a useful resource for the lawyers at Hill & Barlow who are trying to evaluate a list of potential ADR providers in a particular case. I receive such inquiries from lawyers in the firm on a more or less weekly basis.

Second, when my colleagues at Hill & Barlow are drafting agreements, there is usually some type of dispute resolution mechanism built into the agreement, and I am frequently called upon for advice about such clauses.

Finally, our clients occasionally wish to implement a far-reaching dispute resolution system of some kind, and I am the lawyer who is usually called upon for advice.

These advantages must be weighed, however, against significant disadvantages — primarily the economic costs of an ADR practice. Law firms are under continuing economic pressure. Costs continue to rise, with continuing increases in the price of office space, high-tech phones, faxes and computers and higher staff costs. Billing rates for lawyers in large firms have increased to the point where a significant gap exists between very able ADR providers working inside such firms and those practicing on their own. I have to keep my own hourly rate, which is set by the firm, in a reasonable relationship to the market set by other providers.

In addition, court-based ADR programs generally set up fee structures which cap the hourly rate that a mediator or arbitrator can charge. Unless they are modified, such structures will force many experienced providers to drop out of court-connected programs or leave their firms. At present, these programs provide the majority of referrals in some cities, and probably will continue to do so for the foreseeable future. (Because many of my cases come from such programs, fee arrangements are an issue I am currently discussing with program administrators, but with an abundance of mediators looking for opportunities to practice, I do not anticipate a change.)

Finally, even in those cases where I am billing at my full hourly rate, my value to the firm depends in part on my ability to generate business (i.e., rainmaking) and supervise the work of associates and paralegals, thus creating profitable leverage for this firm. An ADR provider who does nothing more than fill his or her plate with work is a less profitable member than one who also supervises and generates work for others. Thus the challenge for those of us who practice ADR inside a firm is either to generate work for others (and it is not an easy task to generate ADR referrals for others, because the parties are usually looking for a specific individual, not a firm) or to persuade firm management that we provide a valuable service to the firm and its clients wholly apart from any rain we may make for our colleagues.

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Bottom line

There is no doubt about the importance of ADR in our legal system. Among the issues to be worked out, however, is whether law firms will be one of the places in which mediators and arbitrators practice. Attorneys have served as arbitrators for many years, but they did so, for the most part, as a minor adjunct to their law practice. It is only in recent years that the growth of mediation in the legal system has led to the development of small cadres of lawyer-mediators and lawyer-arbitrators who devote most or all of their time to the practice, and a larger number who are cultivating it as a substantial part of their professional practice.

My law firm provides a congenial and supportive environment for my practice. This is probably not the right setting for every lawyer who practices ADR. But I find it both stimulating and rewarding to work in a firm where the lawyers are bright, the standards are high and the staff is very capable and motivated. There is also something to be said for loyalty and a feeling of connection to the lawyers at Hill & Barlow who taught me the ropes. Some of those lawyers are now my fellow mediators and arbitrators, and we are learning together how to integrate these two aspects of our work. But, as we stand at the fork in the road, we are mindful of yet another Yogi-ism: "You got to be careful if you don't know where you're going, because you may not get there."