

ADR a 'burgeoning' sector, but it isn't a legal cure-all

Experts warn against knee-jerk desire to avoid pricey litigation

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Attorney Howard S. Goldman's clients, mostly owners of small businesses and closely held companies, have deep-seated fears of the big bills and long battles that can come from litigation.

"Litigation for most clients is ugly. It's costly, and it's time-consuming," says Goldman, a partner with Goldman & Pease in Needham.

That's why Goldman isn't surprised when clients opt to settle outside the courts using alternative dispute resolution.

"It's a burgeoning industry right now, to have arbitration and mediation services," Goldman said.

It's no secret that Americans are eager to sue. What's lost in that stereotype, though, is the fact that individual and corporate citizens alike are perfectly willing to settle, too. In fact, lawyers frequently quote industry statistics that say most cases — well over 90 percent — settle before they go to a judge or jury.

While that statistic has been steady over the years, legal experts said the number of disputes settled through mediation or arbitration is on the rise. Clients, their lawyers and the courts increasingly see alternative dispute resolution, or ADR, as a quicker, cheaper and less acrimonious way to resolve differences.

"It has become far more prevalent than it used to be. And it's not only grown in terms of use but in terms of sophistication," said Steve Manchel, a partner in **Manchel & Brennan PC** in Newton.

Lawyers said no single event has prompted this growth. Rather, several factors have contributed to the increasing popularity of arbitration, a court-like procedure in which arbitrators issue a binding ruling; and mediation, a nonbinding process where mediators help broker agreements.

One factor is a push from the courts, with some judges suggesting plaintiffs and defendants consider this route first. Another factor stems from contracts, in which businesses increasingly stipulate that the parties settle disputes through arbitration or mediation. A third factor is simply increasing awareness of ADR among attorneys and their clients.

"Lawyers are more familiar with the process and can suggest mediation without seeming weak, which is something that they might have felt 10 or 15 years ago," said Bette J. Roth, an attorney who now works as a mediator and arbitrator. "They see it now as part of the process to try to get the case resolved."



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Attorney Bette J. Roth, who works as a mediator, said lawyers are more willing to suggest alternative dispute resolution than they were 10 years ago.

Litigation attorney Gary Greenberg, co-managing shareholder of Greenberg Traurig LLP, said it's a case of success breeding success.

As more attorneys and their clients use ADR and report good experiences, the more others are willing to go that route. And as demand increases, an increasing number of experienced judges and lawyers are offering their services as mediators and arbitrators. That, in turn, has prompted even more people to consider ADR when problems arise, as they find arbitrators and mediators with extensive knowledge in their industries or with the right disposition to help the two sides find common ground.

Greenberg, like others, said clients appreciate that ADR can resolve disputes quicker than the courts. Clients and their attorneys also like their ability to handpick the individuals who will work with them to reach a settlement. They like the ability to keep disputes out of the media, too, something they can do with ADR but not with an open courtroom. They also can avoid some of the harsher aspects and emotional tolls that drawn-out litigation can exact.

Then there's the savings element. Roth said clients can save tens of thousands of dollars by using ADR rather than the courts to settle a case.

Despite the increasing use of ADR, statistics showing how many cases are resolved this way versus through lawyer-negotiated settlements or court verdicts are hard to come by.

Ned Leibensperger, president of the Boston Bar

Association and a partner at McDermott Will & Emery LLP, said he believes that lawyers are using ADR more frequently than in the past. But, like others, he doesn't have any hard evidence of that or how that trend might affect the number of cases settled in court.

Leibensperger recently appointed a task force to gather data from the Boston-area state and federal courts to explore these issues. He expects the task force to report back this summer.

Experienced lawyers said ADR is not a panacea.

"The reason you might not want to mediate is you might want discovery, you might want more documents, you feel you have a case that would resonate with a jury, and you might do better with discovery or with a jury," Greenberg said.

Even proponents of mediation said they're cautious about when they agree to ADR. Manchel, for example, spoke against what he sees as a knee-jerk reaction to go to mediation.

"For me, the biggest issue is not whether to use mediation but when," he explained. He said a growing number of lawyers and their clients offer mediation early in the process, before either side has had a chance to gather key information. If mediation doesn't resolve those cases, Manchel said he has "essentially given them free discovery."

That's why he believes mediation and litigation go "hand in hand." And while ADR is more popular than in the past, it will not fully replace lawyer-negotiated settlements or, for a sliver of cases, the need for trials.