

JAMS DISPUTE RESOLUTION ALERT

An Update on Developments
in Mediation and Arbitration



Why ADR Can Help Address the Rising Tide of Copyright Litigation



We could be seeing a new trend in the rise of copyright litigation in the United States, particularly when it comes to video and other electronic media. In fact, copyright disputes could soon outnumber patent infringement matters, which have long been the most common.

“Patent litigation has been hot for over a decade and is beginning to show signs of waning,” said Darin Klemchuk, founder and managing partner with the IP litigation firm Klemchuk Kubasta in Dallas.

For several reasons, as patent litigation drops off, copyright disputes could rise significantly, said Klemchuk.

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ADR CONVERSATIONS

How the Failure to Settle Affects the Workplace for Both Employees and Companies

The following interview was conducted with Rowena Crosbie, President of Tero International in Des Moines, Iowa, and Ellen Kandell, President of Alternative Resolutions in Silver Spring, Maryland. This article will explore the use of ADR in the workplace, causes of disputes and how failed mediations or other forms of workplace conflict resolution impact employees, supervisors and companies.

In your experience, do most companies have formal internal conflict resolution programs, or do most rely on ad hoc processes? Do those that have internal programs use company employees in resolution processes, or do they outsource the process to ADR providers?

Rowena Crosbie said, “The clients we serve across the U.S. and internationally generally do not have a formalized process, but rather rely on an ad hoc process to resolve most employment related disputes.”

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Rowena Crosbie,
President, Tero
International

They use their human resources department to address conflict using a process or protocol that is spelled out in their employee handbook, Crosbie said, adding, “Some organizations have formal

grievance processes for employees to follow if their issue cannot be addressed through normal channels. Formal mediation agreements are primarily reserved for vendor and client contracts.”



Ellen Kandell,
President, Alternative
Resolutions

Ellen Kandell said for the most part only “large companies such as Lockheed Martin, Coca-Cola and Black & Decker have formal, multi-tiered dispute resolution processes for employment

disputes, while the majority of smaller companies use ad hoc procedures and outside neutrals to assist in resolving workplace disputes.” Much of the reason for this is resources, including the ability to train and use in-house employees to conduct dispute resolution and the ability to plan far out in advance of a dispute arising, she suggested.

The workplace includes individuals from all types of backgrounds and with all types of experiences, at both the employee and management levels.

What are the most common conflicts or disputes that arise in today’s workplace?

Crosbie explained that “the topic at hand in a conflict is rarely the true issue and most conflicts can be traced to other issues and many relate to differences in people. When deeply held values are challenged, which can be related to diversity, conflict frequently ensues. Personality conflicts are another example of a source of conflict that is tied to difference.”

Kandell echoed Crosbie’s assessment, saying that while an employee may file an age discrimination case or hostile workplace complaint, “a lot of the issues that arise in the workplace relate to respect and communication, and fundamentally, tone of voice ends up being the true underlying reason behind an employee filing a complaint, which happens in both the private and public sector workplaces.”

Are there types of disputes or conflicts that are more suitable for informal conflict resolution, while others are more suitable for formal ADR processes, including mediation?

Crosbie suggested that “if employees and leaders are trained in win/win negotiation or influence skills, most conflicts can be handled before they reach the threshold of conflict, that is, the presence of unproductive emotions by one or more parties.” However, “if left unchecked, emotions can heighten, and it is at that point that a neutral third party is sometimes required,” she said.

Kandell agreed, saying whether a dispute is amenable to mediation or likely to be resolved in mediation is “not a function of the type of case.

Rather, the people and facts of the case drive the success or failure of a case, coupled with the expertise of the mediator.”

When a dispute or conflict reaches the stage where mediation is necessary, what seems to be the most effective way to get the parties to buy into the process?

Crosbie said, “People, in general, have a need to feel valued and understood. This is especially true in conflict, when unproductive emotions characterize the interaction. Addressing the human or emotional needs as well as the issue is critical. A highly trained mediator will separate the people from the problem, seek to uncover underlying issues and acknowledge common ground before moving to solutions.”

According to Kandell, “the convening process is key, and if a mediator conducts this process, he or she can build trust among the parties and increase the likelihood of success for the parties.”

This rarely happens in ad hoc systems, so while it may cost more, companies should consider committing the extra resources and increasing the likelihood of a positive outcome, which goes a long way toward reducing the problems that can stem from a failed mediation, Kandell suggested.

What, in your years of experience, seems to cause mediations or other non-binding ADR processes to fail in workplace disputes?

Kandell said, “Mediation may fail because the case is too far along when it is attempted and if a company decides to take a hard line with a particular case.” In addition, “if

“If employees and leaders are trained in win/win negotiation or influence skills, most conflicts can be handled before they reach the threshold of conflict.”

–Rowena Crosbie

money is not a factor in the mediation process, parties may dig in their heels. However, when money is a big factor, parties have an incentive to settle to reduce transactional costs or if there is outside pressure from the company to settle the case to limit costs down the line related to lost productivity.”

When a mediation does fail, what steps do companies take to address the dispute? Do they resort to binding processes or outsource the dispute to ADR providers?

Kandell said when the parties fail to reach a settlement in mediation in an informal process, they generally move to a more formalized ADR process such as arbitration, or if it was a court-ordered mediation, they would return to the litigation track. However, time and time again, parties end up reaching settlement days or weeks later due to the groundwork laid in mediation, she noted. Other times after a failed mediation, “a company will put more money on the table to induce settlement, or outside pressure from higher up the chain of command may lead to a settlement,” she suggested.

What impact does a failed mediation have on the employees involved in the dispute and on those employees that are not a party to the dispute?

Crosbie said, “Unresolved baggage is a problem in workplaces and in households, and the impact can be far reaching to anyone who is impacted or touched by either party of the dispute, which can include lost productivity in the workplace.”

Kandell said when a mediation fails, it’s more unlikely that an employee will be willing to try it again in a future dispute, and that may lead them to discourage others from relying on the process to resolve their workplace disputes.

What impact, from a productivity, monetary or workplace-harmony standpoint, does a failed mediation have on the company?

According to Crosbie, “The monetary impact varies depending on the dispute and includes things like fees for the mediator and time invested in the dispute. The greater cost in most cases is the lost opportunity of not operating in a collaborative environment.”

Can a lessons-learned process assist with reducing the number of failed mediations and help increase the success rate of employment mediations?

Kandell said it can. “Smart companies are looking at conflict as an opportunity for growth and learning.” When the post-conflict phase is handled proactively and openly, companies can use the opportunity to form conflict management councils that can assist in dealing with future conflicts” in a more constructive manner, which can help reduce future conflicts or mitigate those that do occur.

Crosbie suggested that “people can acquire the skills of working together

collaboratively, which are learned behaviors and don’t come naturally to any of us.”

How can companies organize their workplace to limit the number of conflicts that require intervention on the part of third parties and reduce the overall fiscal impact of employment-related disputes?

Crosbie said, “Teach people how to separate people from the problem and get to underlying issues themselves so that third parties aren’t required.”

Kandell suggested that companies can “use outside consultants to help them address conflict in a more constructive and clearer manner by identifying where they arise, how much money they are costing the company and what impacts they are having in the company overall.” This can lead to the “establishment of a pilot program that trains employees to handle conflict resolution, creation of a peer review process and a process for identifying when it is necessary to seek help from outside neutrals or ADR providers,” she said. ●

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–Ellen Kandell