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Q&A

By Jeff Storey

Noah Hanft

NOAH HANFT, 62, retired in April from MasterCard, where he was general counsel and chief franchise officer, to become the new president and CEO for the International Institution of Conflict Prevention & Resolution.

The nonprofit institute, established in 1979, promotes techniques for more effective alternatives to increasingly costly and burdensome litgation. It functions as a kind of think tank with a goal of enhancing a global culture of conflict resolution.

Hanft received his J.D. degree from Brooklyn Law School and has a LL.M. in trade regulations from New York University School of Law. He began his career at the Legal Aid Society, and joined MasterCard in 1984. Except for three years at AT&T Universal Card Services, he worked there until his retirement this year.

Hanft has extensive experience in alternative dispute resolution (ADR). He is passionate about the institute's mission and optimistic about its prospects.

The organization has more than 280 members, up 10 percent since Hanft took the helm, including Fortune 500 organizations, top law firms, leading judges, government officials, neutrals and academics.

Law firm members sign a statement recognizing that "for many disputes there may be methods more effective for resolution than traditional litigation. 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."

The firms pledge to have attorneys knowledgeable about ADR and to discuss with clients, where appropriate, the availability of ADR techniques, "so the client can make an informed choice concerning resolution of the dispute."

NYLJ / RICK KOPSTEIN

Q. You began your career as a Legal Aid attorney. Why did you leave? What lessons did you carry with you into corporate practice?

A. Leaving the Legal Aid Society was not easy. After five very fulfilling years, with great trial experience, I wanted to broaden my scope and pursue an interest in intellectual property. To that end, I had almost completed an LL.M. in Trade Regulations at New York University School of Law when I joined Ladas & Parry. To this day, I have a great appreciation for the work of Legal Aid and am proud to serve on its board of directors.

After dealing with people's lives and liberty, it is easier to put business disputes into perspective. Also, plea bargaining in many ways is the criminal variant of dispute resolution. More often than not, the best disposition for both the individual facing criminal charges and the prosecution is a negotiated plea arrangement. And probably the most significant learning from my years as a Legal Aid lawyer is the ability to think on your feet and also to be able to connect with people (jurors)

who you've never met and be a credible and effective advocate for your client.

Q: When did you become interested in ADR? Why did it appeal to you?

A: My interest in ADR developed even before I thought of it as ADR. Although when I went in house to MasterCard in 1984 I had a litigation mindset, I came to believe that finding resolutions was far more productive than protracted legal battles. Of course, I did find myself engaged in my share of marathon legal struggles, particularly in the antitrust arena, but in the end I was able to resolve virtually all of our matters through a mediation process.

I was very fortunate in that I had the opportunity to work with three great mediators: Kenneth Feinberg, Eric Green and Layn Phillips. I found the mediation process, the focus on addressing the interests of the parties as opposed purely to their legal rights and obligations, to be refreshing. Even more important, as much as I love being the sole winner, an effective mediation will often give rise to a win-win resolution. In contrast to a judgment, which is a result driven by legal rights and obligations, the ideal mediated resolution is the product of creative exploration of solutions that best address the needs of all parties.

Q: Was MasterCard successful during your tenure in resolving conflict through ADR rather than litigation?

A: Yes. We utilized mediation in a broad variety of cases. Literally, every case that was mediated was resolved; some before the institution of litigation and some after. Most importantly, the earlier the mediation began the better the outcome and the best chance to preserve and continue ongoing relationships. The most notable success was the resolution of the long-standing dispute relative to the establishment of merchant fees for payment card transactions. The parties to this class action included MasterCard and Visa, nearly every major card issuing bank and class representatives appearing on behalf of every merchant in the U.S. accepting MasterCard and Visa. Although the dollars at issue were enormous and the differences between the parties as close to insurmountable as imaginable, we were able to reach a mediated settlement. This was because we started a mediation process early on and found common ground after several years of relentless mediation efforts. This was accomplished prior to most of the key preliminary motions even being ruled upon. Although not all of the parties were thrilled with the settlement, we resolved the case thereby avoiding months of costly and fractious litigation. Moreover, the terms of settlement clearly illustrated the advantages of mediation. Indeed, both sides secured rights and protections that a judgment at trial could not have afforded.

Q: Why did you take the job at CPR? What are your goals for the organization?

A: I took the job simply because at this point in my career I want to make a difference where I can and because I believe in the mission of CPR. I believe that if the business community recognizes and embraces dispute resolution as a priority, many millions of dollars could be saved and more importantly, the tenor of how global business is conducted would be dramatically improved.

What attracted me to CPR is its heritage of truly focusing on the best way to resolve disputes which led it to being the preeminent service provider in both arbitration and mediation. If it were just a service provider, I would not have had the same interest. At the same time, if it were simply a think tank, the inability to utilize my business background would, I think, have frustrated me. So I see my goals for the job at both a somewhat lofty and mission-driven level and at the same time a very practical one. I'd like to ensure and accelerate CPR's innovation initiatives to continually explore and implement new and better ways for business to take on dispute resolution. On a very practical level, having been a general counsel, I think one of the most important responsibilities of a GC is to excel at preventing, mitigating and resolving disputes. My aim is to provide the tools, resources and training to allow in-house counsel to do just that.

Q: What is CPR's most important function? What makes CPR different from other service providers in the ADR field?

A: Our most important function is to continually push to explore how businesses, both in the U.S. and overseas, can become more effective and efficient in resolving disputes. These efforts take us in different directions but are all aimed at that goal.

An example of CPR's leadership is its active role in important public policy arenas, such as the United Nations Commission on International Trade Law (UNCITRAL). A key objective of UNCITRAL's work is to better enable global commerce by providing a globally recognized framework for dispute resolution that enhances the ability of companies to rely on the rule of law in their business transactions.

CPR is the only ADR provider that is a member of the U.S. delegation to Working Group III, which is focused on development of international Generic Rules for Online Dispute Resolution (ODR) to facilitate dispute resolution that is more streamlined and cost-effective than traditional offline approaches.

Q: What is the value of becoming a CPR member?

A: There are several dimensions to the value of CPR membership. First, CPR provides a company the ability to achieve excellence in ADR and to do so in a cost-effective way. It would cost a company many orders of magnitude more than the cost of membership to replicate CPR's work in identifying best practices and developing the tools, protocols, guidelines and related training that enable a company to achieve those best practices. And that would only get the company to a starting point; it would not assure that the work addresses new issues and legal

requirements as they emerge. Second, CPR membership provides the means for in house counsel to participate in the development of a dynamic and critically important area and learn from others in the CPR community. Finally, CPR membership—specifically, support of the CPR mission to enhance a global culture of dispute resolution—enables companies to help to assure that there is a worldwide capacity to enable them to engage in commerce, knowing that there is effective dispute resolution. Companies can only engage in effective ADR if there is institutional support and sufficient understanding in the business community of the processes involved and benefits that can be achieved. No individual company can drive that understanding. Collectively, CPR and its members play a leading role in developing and sustaining an ADR culture.

Q: CPR has been described as a "think tank" that promotes innovation and best practices in ADR. Can you give some examples of that innovation?

A: There's a long list of innovations reflecting CPR's leadership starting with the CPR pledge in the 1980s wherein corporations and firms commit to seeking alternatives to litigation. This list includes CPR's Economic Litigation Agreement (ELA), many provisions of which were recently adapted by the Commercial Part of the New York State Supreme Court in its Rule 9, early dispute resolution and early case assessment work, our Mini-Trial Procedure, our innovative screened selection process for the selection of neutrals, and CPR's partnership with Georgetown in 2002 to form the Commission on Ethics and Standards in ADR which promulgated the Model Rule for the Lawyer as a Third Party Neutral.

Of particular note is CPR's work in connection with the ELA. Spearheaded by CPR in conjunction with CPR member and former judge, Dan Winslow, ELA reflects CPR's commitment to not only focus on mediation and arbitration, but also to improve litigation. CPR encourages corporations, where they believe litigation is the best approach to resolving a dispute, to explore ELAs as a means of reducing civil litigation costs.

I expect to see more companies considering ELA because it is an intriguing hybrid of civil litigation and arbitration, whereby parties agree to use standard, limited-scope discovery procedures in lieu of conventional discovery and to have an ELA arbitrator decide on any disagreements. Colloquially known as a "litigation prenup," the model agreement includes a mandatory pre-litigation dispute resolution section, which includes a clause calling for executives to negotiate directly with one another.

It is this ability to push the envelope and be a thought leader that distinguishes CPR in the field of dispute resolution, a role we achieve not only through a small but highly dedicated CPR team, but also through our committee structure, where our corporate and law firm members continually challenge each other and themselves to advance ADR in a diverse range of fields, including employment law, mass claims resolution facilities as well as in the patent and construction areas.

Q: Has ADR become more accepted in the years since you left law school and CPR was established? What is the evidence of this?

A: Yes. I graduated law school in 1976 and the practice of mediation did not exist. Corporations did not focus anywhere near as much as they do today on legal costs, efficiencies and alternative ways to manage conflict. Approaching a potential adversary to talk settlement was viewed as a sign of weakness and the thought of introducing a third party to help resolve a dispute was virtually unheard of. Today, in large part due to the efforts of CPR and my predecessors, that sort of macho perspective has been replaced by a far more pragmatic, business-oriented mentality. This is reflected in a burgeoning mediation practice, increasing dispute resolution programs at law schools and progressive corporations embedding dispute resolution in their institutions and, of course, the emergence of CPR supported by many of the most prominent corporations and law firms.

Q: Do many litigators and in-house counsel still balk at settling commercial disputes through mediation and/or arbitration?

A: There is sometimes, but not often, resistance to settling commercial disputes via a mediation process. More often, the resistance is beginning a mediation process at the inception of a dispute or even early on in the litigation process. I believe there is real value in commencing mediation early, even if it doesn't immediately lead to settlement. Often a number of sessions are needed and sometimes even a hiatus, but the benefit of exploring the mutual interests of the parties is valuable as is the ability to understand the strengths and weaknesses of the other side's case, arbitration is a far more controversial issue in that it seems to have developed a strong following amongst some and an equally strong group of detractors. This stems from the oft-articulated complaint that arbitration has become as burdensome as litigation from both a cost and time perspective and also from fear of the finality of an unfounded arbitral award.

In CPR's new Administered Arbitration Rules, we've addressed many of those concerns through a streamlined process, the requirement that the governing law be applied and, if the parties wish, an appellate process through CPR. I think, particularly with the increase in cross-border transactions and improvements in the process, more and more companies will look to arbitration more favorably.

Q: How does CPR win them over? Large fees keep litigation firms going. Why would they be enthusiastic about any approach that reduces those fees?

A: Not every major law firm is a member of CPR but many of the best are and that's because good law firms want satisfied clients which gives rise to repeat business and sticky relationships. As corporate clients increasingly embrace ADR, quality

law firms are adapting by developing expertise in ADR, which is one of the reasons for our robust law firm membership. Many of our corporate members encourage their law firms to join CPR because it not only supports a good cause, but allows them to develop the tools to advise on ADR.

Q: Arbitration is disfavored by some for different reasons. How do CPR's new Administered Arbitration Rules address concerns with arbitration?

A: In addition to concerns regarding the time and cost involved in arbitration, other criticisms that have been raised include questions regarding the neutrality and quality of the process, the degree of confidentiality, and the lack of a process for substantive appeals of awards that are viewed as having been wrongly decided.

CPR's Administered Arbitration Rules very effectively address these and other criticisms of arbitration, due largely to the fact that we didn't create rules and contractual clauses in a vacuum. CPR's rules are developed by experts in the field working with pragmatic in-house counsel experienced with the issues.

For example, the CPR Administered Arbitration Rules incorporate best practices, such as addressing concerns regarding neutrality of panels by providing an option for a screened appointment process so that party-appointed neutrals do not know the identity of the appointing party, addressing concerns regarding the quality of awards by requiring reasoned opinions based on governing law, and protecting the confidentiality of the process by expanding the duty of confidentiality beyond neutrals to include the parties.

In addition, for parties concerned about the risk that an award will be wrongly decided, CPR provides an optional clause that enables the parties to provide for an appellate arbitral procedure using CPR's Panel of Appellate judge arbitrators. CPR's arbitration committee will soon be releasing the CPR Rules for Administered Arbitration of International Disputes, which, once again, were developed by a multinational team of users and neutrals and reflect their combined experience and expertise.

Q: CPR asks companies and law firms to sign a pledge to promote ADR. How many have signed? What does this approach achieve?

A: CPR revolutionized litigation and promoted the adoption of alternate dispute resolution with its Corporate Policy Statement on Alternatives to Litigation beginning in the 1980s. More than 4,000 operating companies and 1,500 law firms have signed the policy statement and committed to consider ADR before filing suit.

CPR's newly released 21st Century Corporate ADR Pledge provides companies an opportunity to focus on a systemic approach to dispute resolution and offers a means to change the culture of litigation that has pervaded Corporate America. Most importantly, the signatories have pledged to do this unilaterally, pledging to seek ways to avoid litigation regardless of whether the opposing party has done so as well.

Companies supporting the pledge can avoid litigation by implementing a systems-based approach that enables them to manage legal cases. By implementing a systems approach, with an emphasis on prevention and early resolution practices and tools, corporations can create a culture of conflict prevention that results in significant and sustainable time and costs savings for everyone.

Q: Does CPR monitor compliance with the pledges? What do you do when a company or law firm acts in a way that is contrary to your mission?

A: The pledge is essentially a moral commitment, so it is not something we can monitor or police. We see our role as encouraging a culture of dispute resolution and disciplining or sanctioning members would be inconsistent with that.

Q: Are younger lawyers more attracted to ADR than previous generations?

A: Yes. We see increasing numbers of young lawyers taking courses and gravitating towards the field. For this reason, we started the Y-ADR program for young attorneys in the field and it's garnered a very large following.

Q: Is special training needed for lawyers to take advantage of ADR? How is CPR meeting this need?

A: CPR is a certified accredited CLE provider, and is committed to providing expert training to its members and the greater legal community by hosting numerous educational programs this year. CPR offers a variety of training programs in conflict management, mediation, arbitration, ADR drafting and counseling, employment ADR and ethics. CPR also provides customized training for its members. Over the next few months, CPR will be offering specialized workshops for members in negotiating skills and mediation by leading mediators in this effort, including Ken Feinberg, Professor Eric Green and Judge Layn Phillips.

Recently, CPR has teamed with the College of Commercial Arbitrators (CCA) to launch a new and exciting training opportunity for CPR's corporate members. The program will be customized to meet the needs, experience and availability of each internal legal department, and will be presented by Fellows of the CCA and CPR. CCA is an invitation-only nonprofit organization of several hundred nationally and internationally recognized commercial arbitrators.

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