Stephen P. Younger: A Seasoned Neutral Shares His Insights

*The Editor interviews **Stephen P. Younger**, a Partner at Patterson, Belknap, Webb & Tyler LLP where he concentrates in commercial litigation and ADR.*

Editor: Steve, tell us about your role as an ADR practitioner?

Younger: As the firm's ADR point person, I advise both litigators and corporate lawyers on how best to use ADR. I also make recommendations to my colleagues on selecting neutrals, ADR providers and the best rules for particular ADR settings. I give a periodic lecture to my corporate law colleagues on structuring ADR clauses and I maintain a library of ADR clauses for use as reference tools. I also serve as a neutral both in mediation and arbitration.

Editor: Is the ADR point person function still unique?

Younger: It is growing more common. When I started in this role, I was one of the few ADR point people at firms. Now I have a fair number of colleagues. We know each other and share notes and experiences from time to time.

The primary reasons for the growth of ADR are that litigation is becoming more expensive and time-consuming, and clients — particularly corporate clients — are seeking more efficient ways to resolve disputes. There is also a demand for ADR use from the courts in order to help clear their dockets.

Editor: I imagine the nature of your practice has enabled you to assess the merits of many mediators.

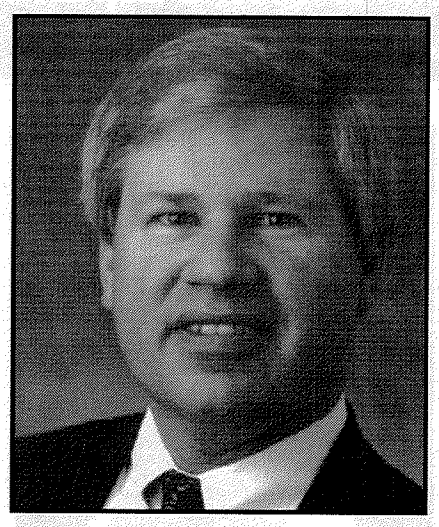
Younger: Often when clients are faced with the choice of a neutral, they do not know how to find the right person. There are various styles of mediators. Having been involved in this field for a long time, certain names on a list will stand out to me as good neutrals who may be particularly well suited for a particular kind of dispute. Most complaints I have heard about ADR involve neutrals that were not suited for the particular assignment.

Editor: How successful are court-annexed ADR procedures?

Younger: Court-annexed ADR has been one of the major initiatives in ADR over the last five to 10 years. In states like California, Florida and Texas, ADR became more popular after the court system integrated it into its own processes. This trend has more recently arrived to New York and other states in the Northeast. Lawyers involved in court-annexed ADR have grown to like the process and often recommend it for other clients.

Editor: Is it necessary to initiate a lawsuit to benefit from court-annexed ADR?

Younger: You have to be in court to have access to a court-annexed program. I have seen cases filed in certain jurisdictions so parties can take advantage of judicial ADR programs. One thing that people do not realize is that court neutrals are free in most jurisdictions. In many cases, distinguished lawyers volunteer for these programs.



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Some court-annexed programs allow a semblance of choice of mediators, but in most cases, the courts arbitrarily select a mediator from a list.

Editor: How successful have court-annexed programs been?

Younger: State and federal court-annexed ADR programs have 65 to 70 percent success rates. Private mediation programs have somewhat higher success rates because the parties have chosen the program voluntarily.

Editor: Have the commercial courts been successful in using court-annexed mediation?

Younger: The ADR program established in the Commercial Division in New York County has been a model for Commercial Divisions in other counties of the state. Most Commercial Division judges have seen the success of their court-annexed programs and seek out opportinities to send cases there.

Editor: What mediation techniques are useful to resolve disputes?

Younger: Mediation is bounded only by the creativity and imagination of the parties and the neutral. In mediation, the parties are encouraged to speak their mind, giving each side an understanding of what the other's position is.

Each side then evaluates the risks and costs of litigation. Each side usually evaluates the risks differently, and that difference is what prevents cases from being settled. That information about risk assessment tends not to be shared by the parties.

Parties usually share basic information – such as issues and arguments of the case. But in most mediations, the actual risk evaluation is done privately or with only the mediator. The mediator then has to determine how to foster a resolution.

As a neutral, I employ what I call reality testing. I do this by questioning the key assumptions that have led to each side's risk assessment.

Most parties appreciate having a neutral test their assumptions; most of us overvalue our own cases. What makes mediation work is the willingness of the parties to share confidences with the neutral – and this only happens if they are convinced that the mediator is truly neutral.

The beauty of mediation is that an advocate can tell a mediator a particular fact and ask the mediator to keep it in confidence. This often enables the mediator to see where a case may be heading and propose a solution that neither side would have proposed otherwise. I try to seek out creative options for resolution in mediation, looking not just at the dollar amount involved but at other business solutions as well. When a mediator puts something out on the table, it is more acceptable than a proposal made by an advocate, which may be viewed suspiciously. When negotiations break down, the mediator can be helpful in determining the underlying reason for the impasse and then steering the parties in a different direction.

Editor: I've heard some corporate counsel complain that arbitration is becoming more like litigation in terms of cost and delay.

Younger: Some in the corporate community have had bad experiences with arbitrations that have gone on too long or cost too much — or they have had poor quality neutrals. Once you get to the arbitration hearing, arbitration is as expensive as conventional litigation.

However, in the pre-hearing phase, you can save a huge amount of money by using arbitration instead of litigation. That is because most arbitrations do not involve depositions. Depositions are the most expensive aspect of pre-trial discovery in conventional lawsuits.

The key is to have a good set of procedures drafted into an arbitration clause in a contract. Some lawyers draft these clauses with lots of bells and whistles when what is needed is greater simplicity. What costs money in litigation is time and, if the procedures are not overly complex, arbitration can be much quicker than conventional litigation.

Editor: Some foreign general counsel have said they try to insert arbitration clauses into contracts because they want to avoid the uncertainties of the U.S. court system.

Younger: Arbitration is more conservative and more flexible than litigation. The typical arbitration award is not the runaway award that people are afraid of getting from a jury in a trial — and you can by agreement limit the arbitrator's choices.

What we call "baseball arbitration" has become popular. In this process, the arbitrator's choice is limited to choosing one of two numbers — either that proposed by the claimant or that proposed by the respondent. This means that each side vies to come up with a number that will seem most reasonable to the arbitrator. That takes a lot of risk out of the process. Claimants know they will get at least something, but possibly not as much as they would like. Respondents know that they will not face an outrageous award.

Current rules make punitive damages available in arbitration, but they are not granted with as much frequency as in jury cases. Arbitrators tend not to be driven as much by the kinds of passions that drive juries to big punitive damages awards. So with arbitration, the risk of getting a big punitive damages award levied against you is lower.

Editor: What efforts are being made to make sure arbitration is really less expensive and time-consuming?

Younger: This issue is of particular interest to the corporate community because they are the principal users of arbitration. For example, CPR formed a blue-ribbon commission aimed at improving arbitration. The work of the commission was covered in a book, *Commercial Arbitration at its Best,* by Tom Stipanowich, now president of CPR. The AAA recently followed suit with a group of roundtable discussions among arbitration users on how to improve arbitration services.

There are a few critical areas that are really important. We need to promote quality neutrals and to reduce the time, expense and volume of discovery.

Arbitral bodies need to come up with mechanisms to remind the parties, as the arbitration process goes forward, that they should be alert to exploring opportunities to settle rather than just wait for the arbitration to run its course. Sometimes this objective can be accomplished by offering mediation at various points in the arbitration. The most popular arbitration clause that I use is something called "two step" or "med-arb." Parties first go to mediation. If the case has not been resolved within a short period of time, the case then proceeds to arbitration. The beauty of this clause is it takes out some of the delay factor that can serve as a negotiating edge in a conventional mediation.

Editor: Have there been new developments on the issue of appealing arbitration awards?

Younger: Most courts have taken a deferential view toward arbitration awards, so there is only a limited set of grounds for reviewing them. The courts have ruled that these standards can be expanded by consent to allow in effect a court appeal of the award. An alternative has been the use of private appeals. For example, CPR has an appellate review body that can handle appeals less expensively. Appellants can pick from members on an established CPR panel, most of whom are former judges. Practitioners should remember that these appeals processes add a layer of additional expense so they should be used sparingly and usually in bet-the-company cases.