

## Lawyer-Versus-Lawyer Litigation: Is There an Alternative?

In an era of intensified competition and more business-like behavior within the legal profession, many lawyers have shed more than their kid gloves. . . . At the same time, battles over money, power, policy, and strategy are more common, more strident, and more likely to create permanent rifts than in days past when partnerships were for life. In a word, the law firm divorce rate is burgeoning—as is the whole role of attorneys for the lawyers getting divorced.<sup>1</sup>

### I. INTRODUCTION

There has been an explosion in the number of state and federal civil case filings in the United States during the 1980's. Not surprisingly, lawyer-versus-lawyer litigation has also increased significantly during this period. As a result, a movement has recently begun among city and state bar associations to establish programs of alternative dispute resolution to address the increasing number of intra-attorney disputes. These programs have been developed to combat the high costs and long delays historically associated with the litigation process, and to protect clients and attorneys' ongoing work. The disputing attorneys, the clients whom they represent, and the judicial system stand to profit from the increased use of these cost and time efficient private dispute resolution programs.

The characteristics of these lawyer dispute resolution programs vary both in procedure and substance. For instance, some of the programs offer mediation as an alternative to the arbitration process, while in others, mediation is a prerequisite. Moreover, several programs provide a select group of experienced arbitrators and mediators for participants in the program. These programs vary to a great extent, and although some are more technically advanced than others, their common goal is to advocate a cost effective process to solve disputes between attorneys, while at the same time relieving the already overburdened court system of additional time-consuming litigation.

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1. Graham, *Can Ugly Litigation Be Avoided When Firms Undergo Divorce?*, *Legal Times*, Oct. 8, 1984, at 1.

## II. LAW FIRM BREAKUPS - A DISTURBING TREND

The increasing number of disputes between lawyers is directly related to the growing number of law firm "divorces" (breakups or dissolutions) in the United States. Law firms breakup or dissolve for a myriad of reasons. Each divorce differs to some extent depending on factors unique to the attorneys involved. While an exhaustive list of reasons is beyond the focus of this Note, an analysis of several of the more prominent reasons for law firm breakups will aid in understanding the need for, and usefulness of, arbitration and mediation programs geared towards settling disputes between lawyers.

Partnership agreements have traditionally consisted of a lifetime commitment, until death or retirement, by the partners. In today's legal society, however, the ease and regularity in which partners can move from one firm to another is a leading reason why law firms breakup and dissolve.<sup>2</sup> This lateral mobility can be extremely devastating to a law firm when a group of partners, not just individuals, leave the partnership.<sup>3</sup> These mass breakaways have forced law firms into crisis management.<sup>4</sup> The law firms are forced to handle these "divorces" with a minimum amount of damage to client rosters, ongoing services, reputations, and morale.<sup>5</sup> Moreover, when a key partner or partners leave, the firm may lose profitable work, find itself with a void in a certain area of practice, or even worse, be forced to dissolve.<sup>6</sup>

The recent story of Demov Morris, a fifty-two attorney New York law firm, is an example of the devastating effects the departure of a key partner can have upon the entire law firm. Richard Weidman, a partner specializing in real estate, brought large clients such as Citibank and Chemical Bank to this law firm. As a result, Mr. Weidman's reputation grew and more clients sought to retain him. However, Demov Morris' size and limited resources prevented the firm from handling these sizeable projects that required heavy staffing.<sup>7</sup>

In February 1987, Mr. Weidman left Demov Morris for a larger New York law firm. In the process, he took \$3.5 million in annual business, approximately twenty percent of the firm's revenue, and twenty-five of

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2. Hildebrandt, *Is Dissolution the Answer When Law Firms Break Up?*, N.Y. L.J., Mar. 10, 1987, at 4.

3. Committee Rep., *Proposal for Association-Sponsored Arbitration of Disputes Among Lawyers*, 42 Rec. N.Y.C. B.A. 877 (Dec. 1987) (quoting Graham, *Bustin' Loose: How Abruptly Must Partners Go?* Legal Times, Dec. 10, 1984, at 2).

4. Hildebrandt, *supra* note 2.

5. Committee Rep., *supra* note 3, at 877-78.

6. Hildebrandt, *supra* note 2.

7. Dockser, *Midsize Law Firms Struggle to Survive*, Wall St. J., Oct. 19, 1988, at B1.

the firm's attorneys with him. Demov Morris failed to find enough new attorneys or a suitable merger to fill the void. Within a month, another prominent partner left Demov Morris and took most of the remaining attorneys. Shortly thereafter, due to the increased lateral mobility among partners, Demov Morris was dissolved.<sup>8</sup>

In addition to the problems associated with lateral mobility, another reason for the increased number of law firm breakups is the fact that midsize corporate law firms, consisting of approximately fifteen to one hundred attorneys, are struggling to survive.<sup>9</sup> The problems facing midsize law firms stem from changing economics and changing values in the legal community. Squeezed by rising costs, many midsize law firms, such as Demov Morris, are forced to seek more profitable work, which usually entails attracting major companies as clients. These law firms, however, cannot afford to provide the human and technological resources needed by large corporate clients.<sup>10</sup>

A less cordial business ethic has also evolved in recent years which has led to a number of midsize law firm breakups. Large firms are searching for lateral hires. As a result, they are raiding entire departments of midsize law firms. When a midsize law firm loses a partner, as in the case of Demov Morris, the clients usually follow.<sup>11</sup> One study found that within a recent two year period, more than sixty midsize firms, greater than ten percent of the nationwide total, either dissolved or merged.<sup>12</sup> Midsize law firms make up ten percent of all law firms, however, they accounted for twenty-five percent of the field's closings and mergers in recent years.<sup>13</sup>

Disputes concerning firm management, profits and expenses, and clashes of personalities and egos are other common reasons for law firm divorces. Many law firms breakup or dissolve over disagreements on whether to expand.<sup>14</sup> Additionally, firms that expand too rapidly or enter into a noncompatible merger are often susceptible to dissolution.<sup>15</sup> The above were all contributing factors in the highly publicized dissolution of the fourth largest law firm in the United States, Finley, Kumble, Wagner, Underberg, Manley, Myerson, & Casey.<sup>16</sup>

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. Committee Rep., *supra* note 3, at 877.

15. Moss, *When Partners Split*, Pa. Law., June 1988, at 9.

16. Jensen, *Scenes from a Breakup*, Nat'l L. J., Feb. 8, 1988, at 1, col. 1. Mismanagement, personality disputes, power struggles, media attention, banks, overspending, over-expansion, and greedy leaders were all factors that led to the demise of Finley, Kumble, Wagner, Underberg, Manley, Myerson, & Casey. At the time of dissolution, Finley, Kum-

There is also increased emphasis on the law firm as a business. Today, partners are being scrutinized on how well they manage their practices. This emphasis on the bottom line puts a strain on partner relationships and weakens the bonds of professional collegiality.<sup>17</sup> In addition, client loyalties are also waning. There is a growing tendency for clients to spread work among different law firms. This is causing many firms to measure the impact of client dependencies and to adjust their entities' structures accordingly. In turn, these firms are searching for lateral hires, mergers, or acquisitions.<sup>18</sup> Finally, many partners have cited burn-out and increased compensation potential in other employment areas as major reasons for leaving the profession.<sup>19</sup>

### III. PARTNERSHIP AGREEMENTS: THE KEY TO AVOIDING DISPUTES

The nonexistence or ineffectiveness of a law firm's partnership agreement, or corporate regulations, is an important reason why so many lawyers fail to resolve their differences with other partners in a reasonable and amicable manner.<sup>20</sup> In a profession that demands the utmost technical precision in order to protect client interests, it is ironic that about one-half of the law firms in the United States operate without a partnership agreement to govern the affairs of the firm and the relationships among the partners.<sup>21</sup> Some reasons for not having a partnership agreement include the following: (1) the partners get along with each other and any problems that arise can be settled on an ad hoc basis; (2) the partners cannot agree to the terms of the agreement; and (3) the partners simply do not have the time nor the energy needed to develop such a crucial working document.<sup>22</sup>

Items commonly disputed by attorneys involved in a law firm breakup include resignation payments, accounts receivable, work-in-progress (especially contingent fees),<sup>23</sup> noncompete clauses, notices of withdrawal, and capital contributions. Additionally, the value of the law firm's lease

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ble had 245 partners, 2000 associates and staff members, and an astonishing debt of \$83 million. *Id.* at 46.

17. Hildebrandt, *supra* note 2.

18. *Id.*

19. *Id.*

20. Santangelo & Malone, *Partnership Agreements: Don't Dance Around the Issues*, TRIAL, April 1988, at 58.

21. *Id.*

22. *Id.*

23. Kahn, *Some Practical Aspects of Law Firm Dissolution or Break-Up*, 16 COLO. LAW. 1419, 1420 (1987).

is a major source of dispute,<sup>24</sup> as are retirement benefits, such as pension and profit sharing plans.<sup>25</sup> If these areas of dispute are not addressed in the partnership agreement, they have the potential of providing for a large reservoir of litigation.

The importance of a clear, concise, and workable document is never truly understood until the partners in a law firm are faced with a breakup or dissolution. Although not a cure-all, a written agreement is helpful because many issues will be foreclosed from dispute by the document.<sup>26</sup> According to Bradford W. Hildebrandt and Robert Weil, nationwide law firm consultants, a clear partnership agreement will smooth the departure of defecting partners while also protecting the interests of the firm in a currently volatile market.<sup>27</sup> "Like a good constitution, it should require only occasional amendment."<sup>28</sup>

#### IV. DISPUTE RESOLUTION PROGRAMS

Several dispute resolution programs have been developed throughout the country within the last few years in response to the problems associated with law firm breakups and inadequate or nonexistent partnership agreements. These programs offer mediation and/or arbitration to lawyers who are either involved in fee disputes, internal disputes or law firm breakups.<sup>29</sup> Programs that mediate or arbitrate disputes between lawyers have been likened to a form of internal damage control. The disputes are contained within the law firm rather than being exposed to the public and to the media. Further, these programs minimize damage to the indi-

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24. Zeldis, *Clear Agreements Key to Avoiding Suit*, N.Y. L.J., Oct. 19, 1987, at 6, col. 2.

25. Kahn, *supra* note 23, at 1421. See Metanas, *Paying for a Partner's Departure*, Nat'l L.J., Feb. 17, 1986, at 1.

26. Kahn, *supra* note 23, at 1419.

27. Zeldis, *supra* note 24.

28. *Id.* (quoting R. Weil). Many partnership agreements are old and vague, often dating back to the founding of the firm. These agreements are of little help in resolving issues. Firms should re-evaluate their agreements periodically to update old issues. Zeldis, *Firms Differ on the Value of Partnership Agreements*, N.Y. L.J., Oct. 19, 1987, at 1, col. 4; 6, col. 2.

29. The Los Angeles County Bar Association and the Massachusetts Bar Association have dispute resolution programs geared solely towards settling fee disputes. The Cleveland Bar Association, the New Hampshire Bar Association, the Bar Association of San Francisco and the Denver Bar Association arbitrate law firm breakups. For a related discussion concerning law firm breakups, see Terry, *Ethical Pitfalls and Malpractice Consequences of Law Firm Breakups*, 61 TEMP. L. REV. 1055 (1988). The bar associations of Connecticut, the District of Columbia, Illinois, Kentucky, Maryland, Massachusetts, Mississippi, and North Carolina have contacted the Pennsylvania Bar Association for information regarding the PBA program.

vidual parties. The expertise and experience of the mediator/arbitrator can be used to anticipate and resolve problems before the harm becomes irreparable.<sup>30</sup>

In mediation, a neutral third party, who is powerless to impose outcomes, assists the disputants' efforts to negotiate a mutually acceptable resolution to a problem, whose solution has eluded the disputants themselves. The mediator helps to narrow issues, acts as a sounding board, defuses hostility, facilitates communication, and recommends arbitration if necessary. As a professional conflict manager, the mediator can "translate" offers and responses in neutral words that the parties can evaluate on their merits. The parties maintain sovereignty over their interests and have no obligation to concede or agree to anything.<sup>31</sup>

Arbitration is the process of submitting a disagreement to one or more impartial persons who render a binding decision. Due to its binding nature, arbitration differs from mediation, where the third party simply brings the disputants together to discuss settlement opportunities. Formal rules of evidence and procedure are not used in arbitration. The arbitrator assigns to each party the burden of proof necessary to prevail.<sup>32</sup> Both arbitration and mediation are usually private dispute resolution mechanisms.<sup>33</sup>

Agreements on complex issues of valuation of a firm's assets, the collection probability of its accounts, and the division of unbilled time and receivables come with greater ease and lower cost when a neutral, third party expert helps settle the dispute.<sup>34</sup> Additionally, the mediator or arbitrator can act as an equalizer when there is a power imbalance. Finally, although the mediator or arbitrator is precluded from acting as legal counsel for either party, the mediator or arbitrator may identify legal and other issues that exist and may recommend that each side obtain appropriate professional advice.<sup>35</sup>

Two recently developed dispute resolution systems for attorney disputes will be analyzed in this Note. Both the Pennsylvania Bar Association<sup>36</sup> and the Association of the Bar of the City of New York<sup>37</sup> have established detailed dispute resolution programs. The objectives of the

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30. Moss, *supra* note 15, at 12.

31. Committee Rep., *Association-Sponsored Mediation and Arbitration of Disputes Between Lawyers*, as amended May 15, 1989. 43 Rec. N.Y.C. B.A. 981, 985 (Dec. 1988) [hereinafter ABCNY Rules].

32. Creo, *Pennsylvania Bar Association Lawyer Dispute Resolution Program*, to be published in Pa. Law., draft version at 7.

33. R. COULSON, *BUSINESS ARBITRATION - WHAT YOU NEED TO KNOW* 8 (1986).

34. Moss, *supra* note 15, at 12.

35. *Id.* at 12-13.

36. Penn. B.A. Lawyer Dispute Resolution Program Rules, [hereinafter PBA Rules], as amended Nov. 1989 [hereinafter PBA Rules].

two programs are the same: to provide quick, inexpensive and fair means to resolve attorney-related disputes, while introducing participants to new forms of dispute resolution. The provisions of these two programs are similar in many respects, but differ on several key issues.

#### A. *Eligibility for Use of Programs*

The Pennsylvania Bar Association's (PBA) program, officially titled "The Lawyer Dispute Resolution Program," offers mediation or mediation followed by arbitration to attorneys involved in disputes concerning law firm dissolutions, departures of one or more attorneys from a law firm, disputes between attorneys who are in the same firm and intend to stay there,<sup>38</sup> and the allocation of fees between attorneys in different law firms.<sup>39</sup> The PBA, as administrator of the program, reserves the right to decline jurisdiction over the matter when, in the opinion of the mediator or arbitrator, the dispute involves either a non-attorney party or a probable violation of law or Rules of Professional Conduct.<sup>40</sup>

The Association of the Bar of the city of New York's (ABCNY) program, which is administered by the Committee on Arbitration and Alternative Dispute Resolution, arbitrates or mediates any dispute if four conditions are met. First, the dispute must be solely between lawyers and arise out of their professional or contractual relationship relating to the practice of law or to the facilities for such practice.<sup>41</sup> Second, if the dispute is between an employer and a purely salaried employee, it must be a preexisting dispute which is being submitted by the parties pursuant to a submission agreement.<sup>42</sup> Third, the dispute must involve at least one economic issue.<sup>43</sup> Finally, at least one of the parties to the dispute must either reside or maintain an office for the practice of law in the city of New York.<sup>44</sup>

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37. ABCNY Rules, 43 Rec. N.Y.C. B.A. 981, 984 (Dec. 1988). The ABCNY rules were amended as of May 15, 1989.

38. The PBA does not believe many internal disputes concerning the division of the economic interests and management responsibilities of a law firm will be submitted to binding arbitration. Equity holders will likely be reluctant to turn over their autonomy to an outsider. Mediation may be a more appropriate resolution mechanism for these disputes. *Creo*, *supra* note 32, at 3.

39. PBA Rules § (A)(2). The PBA program provides that the rules of the Pennsylvania Uniform Arbitration Act shall be used to resolve the disputes. PBA Rules § (C)(28).

40. PBA Rules § (A)(2).

41. ABCNY Rules § (2)(a)(i).

42. *Id.* at § (2)(a)(ii).

43. *Id.*

44. *Id.* at § (2)(a)(iv). Disputants need not be a member of the Association of the Bar of the City of New York to use the program. Committee Rep., *supra* note 31, at 982. To

B. *The Mediator/Arbitrator*

Mediators and arbitrators for the PBA are appointed from separate panels established by the PBA.<sup>45</sup> These panels currently consist of sixteen mediators and seventeen arbitrators<sup>46</sup> selected to provide balance among geographic location and areas of expertise, such as business law, accounting and firm management.<sup>47</sup> The panel members in the PBA receive skills training and instruction in different aspects of law firm dissolution, such as tax consequences, ethical issues and management problems.<sup>48</sup> The PBA ordinarily encourages the use of one mediator or arbitrator. However, co-mediation or tripartite arbitration boards are permissible if all parties agree.<sup>49</sup>

The PBA also requires that a mediator on a particular case may not serve as the arbitrator on the same case. The mediator and arbitrator are prohibited from communicating with each other about the case when it is pending.<sup>50</sup> At the conclusion of the mediation, the mediator may obtain written stipulations in order to certify unresolved issues for arbitration.<sup>51</sup>

The ABCNY maintains two panels consisting of mediators and arbitrators. These panels consist of experienced lawyers who have been admitted to the New York Bar for ten years or more.<sup>52</sup> Unless otherwise agreed by the parties, each case will be handled by one mediator.<sup>53</sup> The parties may either appoint the mediator, have the ABCNY appoint the mediator in strict rotation from the established panel, or provide for any other method of appointment.<sup>54</sup>

The parties have a choice of one or three arbitrators and may provide for the method of appointment of the arbitrators pursuant to ABCNY guidelines. The ABCNY will determine if there should be one or three arbitrators if no decision can be reached by the parties.<sup>55</sup> The selection

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settle the disputes, the ABCNY has incorporated the Commercial Arbitration Rules of the American Arbitration Association into its program. ABCNY Rule § (5).

45. PBA Rules § (A)(6). Only one arbitrator or mediator will be assigned for each dispute unless the parties agree otherwise. *Id.* at (B)(2), (C)(7). Unlike mediation, where the mediator(s) is appointed by the PBA, the disputants may select the arbitrator(s) from the panels. *Id.* at (B)(2), (C)(6).

46. Creo, *supra* note 32, at 4.

47. Moss, *supra* note 15, at 10.

48. *Id.*

49. Creo, *supra* note 32, at 6.

50. PBA Rules § (A)(6).

51. *Id.* at § (A)(6).

52. ABCNY Rules § (8)(c).

53. *Id.* at § (8)(a).

54. *Id.* at § (8)(b).

55. *Id.* at § (8)(a).

of arbitrators is similar to the selection of mediators in the ABCNY program. If three arbitrators are used, each party may select one with the ABCNY selecting the third arbitrator.<sup>56</sup> The ABCNY will select all three arbitrators if necessary.<sup>57</sup>

The two programs differ as to whether a written decision by the arbitrator is necessary. Although the PBA program requires the award to be in writing, a written opinion will not accompany the award, unless requested by one of the parties.<sup>58</sup> In contrast, the ABCNY program requires that the award must be accompanied by a reasoned opinion, unless otherwise agreed by the parties.<sup>59</sup> Due to the private nature of the proceedings, both the PBA and the ABCNY provide that the mediation and arbitration sessions will be confidential.<sup>60</sup>

### C. Mediation Requirement

The most striking difference between the PBA and the ABCNY programs concerns the requirement of mediation as a prerequisite to arbitration. The PBA program requires that all parties, before submitting their disputes to PBA arbitration, attend at least one mediation session conducted through the PBA program.<sup>61</sup> On the other hand, the ABCNY does not have such a requirement. Instead, the ABCNY provides the mediation option as a usually less intrusive, but not mandatory, alternative to arbitration in the resolution of disputes among attorneys.<sup>62</sup>

The PBA requirement that the disputing lawyers use at least one mediation session before moving into arbitration is unique. The organizers of the PBA program insisted on the mediation requirement to solve the dispute, or at least narrow the issues for arbitration.<sup>63</sup> Further, because mediation is a relatively new dispute resolution technique in the United States, the organizers hope the exposure of the mediation process to lawyers will increase its popularity and use in other types of civil disputes.<sup>64</sup>

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56. *Id.* at § (8)(b). Both the PBA and ABCNY arbitrator selection methods avoid the potential problems associated with biased party-appointed arbitrators. The arbitrators must disclose any conflict of interest or any circumstances likely to create a presumption of bias in favor of the selecting party. PBA Rules § (B)(3), (C)(9). ABCNY Rules § (III)(5), incorporating AMERICAN BAR ASSOCIATION, COMMERCIAL ARBITRATION RULES Rule 19 (1988).

57. ABCNY Rules § (8)(b)(iii).

58. PBA Rules § (C)(32).

59. ABCNY Rules § (15).

60. PBA Rules § (B)(13), (C)(29). ABCNY Rules § (1).

61. PBA Rules § (C)(4).

62. Committee Rep., *supra* note 31, at 984.

63. Moss, *supra* note 15, at 13.

64. *Id.*

#### D. Compensation and Expenses

The avoidance of excessive legal fees was a major reason for the implementation of these dispute resolution programs. Both programs require that a small administrative fee be paid by the participants in the programs.<sup>65</sup> The compensation provided to the mediators and arbitrators varies depending on the program. The PBA requires that the mediators and arbitrators serve for \$500 per day (plus travel expenses). This rate of reimbursement is well below the usual daily rates for such experienced attorneys.<sup>66</sup>

The fees provided to the mediators and arbitrators for the ABCNY program are reasonable when compared to the legal costs of extended litigation in the city of New York. The ABCNY provides that an hourly rate of not less than \$150 and not more than \$250 be provided to the mediators and arbitrators, unless otherwise agreed by the parties.<sup>67</sup>

#### V. EFFECTIVENESS AND FUTURE OF THE DISPUTE RESOLUTION PROGRAMS

At the present time, the success of these dispute resolution programs, designed to aid the legal community, cannot easily be determined. The PBA and the ABCNY programs have just recently been established and neither program has entertained a significant number of disputes. The organizers acknowledge the very recent enactment of the programs as the main reason for the low participation levels.<sup>68</sup> Only after these programs have been in use for several years will it be possible to determine the impact on the legal community.

Although programs such as those of the PBA and ABCNY are still in their infancy stages, increased attorney participation in these programs in the future will benefit many different parties. First, the lawyers themselves will profit through the use of these programs because the financial and emotional strain of a long, drawn out fight with former partners can be alleviated. Second, the judicial system is benefited each time a dispute is settled by means other than through litigation. Third, through the use of arbitration and/or mediation, lawyers can focus their attention upon

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65. The PBA requires that each party pay an administrative fee of \$50 if at least one party is a member of the PBA, or \$125 if neither party is a PBA member. PBA Rules § (A)(5). To institute proceedings using the ABCNY program, the parties must pay a total administrative fee of \$150. ABCNY Rules (App.)(Note to claimant).

66. Moss, *supra* note 15, at 10.

67. ABCNY Rules § (III)(11).

68. Moss, *supra* note 15, at 12.

the needs of their clients much sooner than if they were involved in protracted litigation with another attorney.

When law firm breakups and dissolutions result in litigation, the participating lawyers can expect an experience of the costliest, most emotionally draining nature.<sup>69</sup> Not only do the lawyers' checkbooks suffer, these divorces can have detrimental effects on the lawyers' reputations and practices.<sup>70</sup> Adverse publicity and the loss of clients, due to time consuming legal battles with others in the profession, have destroyed the practices of many respected lawyers.<sup>71</sup>

The time and money spent by attorneys involved in protracted litigation can prove disastrous. One prominent Philadelphia attorney who handles lawyer-versus-lawyer cases charged fees ranging from \$50,000 to more than \$100,000. In many cases, these were not the final costs assessed to the attorneys but only interim charges.<sup>72</sup> Another attorney, from the law firm of Shea & Gould in New York, notified his lawyer-clients that one withdrawal would cost approximately \$1 million. The lawyer-clients fired the attorney for suggesting that they settle. These particular lawyer-clients litigated their dispute for over six years. A similar dispute between two feuding attorneys was litigated for more than eleven years.<sup>73</sup>

If the costs alone are not prohibitive, the time spent in litigation can be detrimental to the practices of the lawyers involved. Delays attendant to the overcrowded court system only prolong the ordeal facing the attorneys and can virtually eliminate the possibility of an equitable solution.<sup>74</sup> Speed, confidentiality, low cost, the prospect of a fair, informed solution, and the preservation of important relationships accrue to the benefit of attorneys who can solve their disputes in a quick and inexpensive fashion through the arbitration or mediation process.<sup>75</sup>

Additionally, a major carrier of professional liability insurance, the Bertholon-Rowland Agencies, has agreed to grant a reduction of five percent in malpractice premiums to Pennsylvania firms incorporating the following clause into their partnership agreements (or bylaws):

Any controversy or claim arising out of or relating to the dissolution of the partnership [corporation], or relating to a partner's [shareholder's] withdrawal from the partnership [corporation], shall be settled through mediation conducted in accordance with the then-existing rules of the

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69. *Id.* at 9.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* at 12.

Pennsylvania Bar Association Lawyer Dispute Resolution Program (the "PBA Program"). Any issues that are not resolved through such mediation shall be submitted for arbitration conducted in accordance with the then-existing rules of the PBA Program, and judgment upon the award rendered may be entered in any Court having jurisdiction thereof.<sup>76</sup>

A five percent reduction in malpractice premiums may prove very attractive to partners who are looking for ways to reduce operating expenses. As a result of this discount offer, the PBA program may experience increased participation levels several years from now when partners, who have incorporated this clause into their partnership agreements, are legally obligated to resolve their disputes through mediation or mediation followed by arbitration. This will likely result in fewer malpractice claims because the attorneys will be able to focus their energies upon the needs of their clients much sooner than if their disputes were disposed of through litigation.

The reputation of the entire legal profession suffers when attorneys fail to settle disputes among themselves. The notion of lawyer-versus-lawyer litigation is contrary to the concept that the lawyer's societal function is to settle disputes. Highly publicized breakups of law firms such as Finley, Kumble, Wagner, Underberg, Manley, Myerson, & Casey, and the litigation between former partners that follows, further detracts from the eroding public image of the legal profession.<sup>77</sup> The legal community and the attorneys involved will benefit from the use of arbitration and mediation programs because disputes are resolved in a private setting. The private nature of these programs will significantly reduce adverse media exposure of the disputes.<sup>78</sup>

Although not every law firm breakup or dissolution results in disagreement, partners quite often resort to hostile and protracted litigation

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76. Letter from John E. Colburn, Sr., President of Bertholon-Rowland Agencies, to Mary Hull, PBA program (July 18, 1988). Although no reduction in malpractice premiums has been offered through use of the ABCNY program, its promoters suggest that attorneys use contractual language similar to that of the PBA in drafting their partnership agreements:

"Any controversy or claim arising out of or relating to this agreement, or breach thereof, shall be settled by arbitration under the Rules for Arbitration of Disputes between Lawyers of The Association of the Bar of the City of New York, and judgment upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof." Committee Rep., *supra* note 31, at 983.

77. *Public Image of Lawyers*, 74 A.B.A. J. 46 (Nov. 1988); See Jensen, *supra* note 16.

78. Committee Rep., *supra* note 31, at 981-82.

"Not only is it unseemly for lawyers to engage in litigation among themselves; it betokens an inability to adjust their conflicting interests short of litigation, and thus a failure to fulfill one of their most important societal functions when faced with conflict among themselves. Media exposure of litigation between lawyers can only erode further the public image of the profession."

rather than an amicable, negotiated termination of their partnership relationship.<sup>79</sup> Litigation among lawyers can only increase the problems facing the public and the judicial system. It is well-documented that the court system in the United States is severely overburdened.<sup>80</sup> Civil caseloads almost doubled in the ten year period ending in 1985.<sup>81</sup> The number of civil case filings grew in excess of four percent per year during this period, which was four times the rate of the population growth in the United States.<sup>82</sup> This overwhelming caseload poses a threat to the quality of court-rendered decisions.<sup>83</sup> Lawyer-versus-lawyer disputes settled through private arbitration and/or mediation will help reduce the civil case docket.

Litigation arising due to law firm divorces may have a great impact on clients as well as the judicial system. The clients of the attorneys involved in the litigation have been likened to children over whom custody battles are fought in divorce cases.<sup>84</sup> A negative impact on the clients may result from the disruption or distraction of the lawyers as they center their attention towards their own litigation. Clients are additionally affected because they need to make choices regarding their future representation, and the possible unwillingness of the lawyers to complete the client's representation.<sup>85</sup>

The pertinent question is how many clients can a lawyer satisfy if all his Saturdays, Sundays, and perhaps Mondays and Tuesdays, too, are going into his own litigation. How much creative energy can he spare for a client's problems? At best, the distraction cuts into billable hours; at worst, it may result in client defections and rising malpractice claims.<sup>86</sup>

The quality of services provided to clients is compromised with the suddenness and intensity of the attorney's need to set up new office space and staffing.<sup>87</sup> The fiduciary duties of partners involved in dissolutions, and the relative compensation due partners completing work which re-

79. Committee Rep., *supra* note 3, at 878.

80. Marvell, *Caseload Growth - Past and Future Trends*, 71 JUDICATURE J. 151, 160 (1987). For the ten year period ending in 1985, state civil case filings grew at a rate of 48%. *Id.* From June 30, 1980 to June 30, 1985 the number of federal district court filings increased from 188,487 to 299,169; a rate of 58.7%. GENERAL ACCOUNTING OFFICE, FEDERAL COURTS: DETERMINING THE NEED FOR ADDITIONAL JUDGES (Jan. 1987). Between 95% and 99% of civil cases are settled before jury verdicts are reached, however, the court docket is still greatly backlogged. J. O'CONNELL, *THE LAWSUIT LOTTERY* 84 (1979).

81. Marvell, *supra* note 81, at 160.

82. *Id.*

83. Justice Antonin Scalia, in speech before the ABA, N.Y. Times, Feb. 16, 1987, § 1, at 1, col. 1.

84. Committee Rep., *supra* note 3, at 879.

85. *Id.*

86. Moss, *supra* note 15, at 9.

87. Committee Rep., *supra* note 3, at 879.

mains on pending matters, present very difficult financial and ethical issues.<sup>88</sup> The struggle between disputing partners can spill over into the client's own litigation when questions of compensation, turning over files, and retaining clients arise.

Attorneys involved in a law firm breakup may expose themselves to serious ethical problems and costly malpractice claims. One commentator has suggested that in any one law firm breakup there are at least seven groups of ethical regulations that may be violated by the feuding attorneys. These include: (1) a lawyer's continuing obligation to the client<sup>89</sup>; (2) restrictive covenants; (3) fees and fee division; (4) publicity and client contact; (5) conflicts of interest; (6) confidentiality; and (7) a lawyer's duty with respect to the safekeeping of property.<sup>90</sup> The expeditious nature of these arbitration and mediation programs enables lawyers to turn their attention towards client matters much sooner than if they were involved in their own time-consuming litigation, thus reducing the chances of ethical violations and the possible malpractice actions that may follow.

The most crucial problem these fledgling programs face is attracting participants. The ABCNY program has not been as successful as originally anticipated. Since its inception in 1988, there has been only one arbitration.<sup>91</sup> According to one promoter, the principal reason for the program's lack of success has been inadequate publication and marketing.<sup>92</sup> In contrast, the PBA has attracted several participants to the program by instituting a comprehensive publicity plan. The PBA publicized its program through articles in several publications, national, state, and local bar conferences, and a presentation at a state trial judges' conference (followed by a mailing to all state trial judges). The PBA anticipates generating a number of cases through judicial referrals.<sup>93</sup>

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88. Committee Rep., *supra* note 3, at 879. See Terry, *Ethical Pitfalls and Malpractice Consequences of Law Firm Breakups*, 61 TEMP. L. REV. 1055 (1988). See also Hillman, *Law Firms and Their Partners: The Law and Ethics of Grabbing and Leaving*, 67 TEX. L. REV. 1 (1988).

89. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16 comment (1989). MODEL CODE OF PROFESSIONAL CONDUCT DR 2-109, 2-110 (1988).

90. Terry, *Ethical Pitfalls and Malpractice Consequences of Law Firm Breakups*, 61 TEMP. L. REV. 1055, 1065-66 (1988).

91. Letter from Berthold H. Hoeniger, Chair, ABCNY program, to Keith Rabenold (Jan. 9, 1990) (discussing ABCNY program).

92. Letter from Berthold H. Hoeniger, Chair ABCNY program, to Keith Rabenold (Feb. 14, 1989) (discussing ABCNY program).

93. Letter from Robert M. Ackerman, Director, PBA program, to Keith Rabenold (Feb. 17, 1989) (discussing PBA program). The PBA has implemented a detailed publicity program to increase awareness of, and use of, the PBA program. (PBA Publicity Plan-Short Version).

The organizers of the PBA program have been pleased with the performance of the program. Since the establishment of the PBA program in 1988, four cases have been completed and four cases are currently in different stages of the mediation process. Of the four cases completed, three concerned the departure of lawyers from their firms. In two of the three attorney departure cases, the parties resolved all issues through mediation. The third attorney departure case was resolved through arbitration after the issues had been narrowed in a mediation session. The fourth completed case concerned a fee dispute between attorneys and was also settled through mediation.<sup>94</sup> The participants in the PBA program have been satisfied with its substantive and procedural quality. However, a high inquiries-to-cases is evidence that promoters are having a difficult time "getting both parties in the room."<sup>95</sup>

Potential attorney-participants may shy away from these programs because the mediation process is so novel and misunderstood.<sup>96</sup> One prominent Philadelphia attorney-mediator, who often recommends mediation to his clients, believes "they hear 'arbitration' [not mediation] and somehow think they're going to be bound by a 'finding'."<sup>97</sup> Education of the legal community concerning the existence of these programs and the benefits of mediation is necessary to increase participation levels.

Mediation is not a win or lose situation. Many people, including attorneys, do not realize that mediation is a process of simply trying to arrive at a mutually agreeable solution to a dispute through a neutral third party.<sup>98</sup> The mediator helps participants analyze the issues and exchange their perceptions about relevant data in hopes of reaching some compromise. The decision making authority rests in the participants. The mediator simply facilitates communication.<sup>99</sup>

The organizers of these programs understand that a successful alternative dispute resolution program may have to strike a compromise between pure models of mediation and arbitration, on the one hand, and the need for successful marketing to lawyers' on the other hand. As an

94. Letter from Laurel Terry, Director of External Affairs for the PBA program, to Keith Rabenold (Jan. 17, 1990).

95. Letter from Robert M. Ackerman, Director, PBA program, to Keith Rabenold (Feb. 17, 1989) (discussing PBA program). Mr. Ackerman commented on the high inquiries-to-cases ratio:

"It would appear to be the old 'it takes two to tango' problem frequently experienced by voluntary dispute resolution programs, compounded by the suspicion held by some lawyers that 'if the other side wants it, it must be bad for our side;' i.e., the old win/lose mentality." *Id.*

96. Moss, *supra* note 15, at 12.

97. *Id.*

98. *Id.*

99. R. COULSON, *supra* note 33, at 12.

example, the PBA program has held fast to the requirement of participation in at least one mediation session prior to arbitration. In the arbitration stage, however, the PBA program has acceded to the litigator's expectations by allowing a party to demand that a written opinion accompany the arbitrator's award.<sup>100</sup> Through such compromise, promoters will be able to attract lawyers accustomed to traditional litigation practices, while exposing them to new, yet highly beneficial forms of alternative dispute resolution.

## VI. CONCLUSION

Programs for dispute resolution among lawyers, such as those sponsored by the Pennsylvania Bar Association and the Association of the Bar of the City of New York, will be an effective alternative to time-consuming, expensive litigation. Attorneys, clients, and the judicial system will all benefit from increased attorney participation in such alternative dispute resolution programs. However, the success of these programs depends on several factors. The programs must, in fact, provide time-saving, less expensive alternatives to litigation. The mediators and arbitrators involved must strive to provide fair and equitable solutions to the problems disputed by lawyers. Law firms and partners must believe in mediation and arbitration, and should incorporate the use of such programs into their partnership agreements or bylaws. Finally, proponents of the alternative dispute resolution movement must continue to educate the legal community on the tremendous benefits available to participants who settle their disputes through arbitration or mediation.

*Keith M. Rabenold*

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100. Letter from Robert M. Ackerman, Director, PBA program, to Keith Rabenold (Feb. 17, 1989) (discussing PBA program).