



The Role of the Independent Mediator

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The arena of alternate dispute resolution (“ADR”) has become filled with organizations that dominate the field and provide an invaluable service to the litigation community and the overtaxed court system. Providers of Arbitration and Mediation services, both large and small, play an invaluable role in our society today: efficient and expeditious resolution of disputes that historically consumed undue amounts of judicial resources, creating a court system clogged with cases that took years, even decades, to resolve, often to the great dissatisfaction of the parties to those disputes. Time, money, emotional energy and vast amounts of public resources have been historically spent on dealing with litigated controversies. The advent of ADR has been and continues to be a very successful attempt to deal with the explosion of litigation over the last quarter of a century.

The “Big Players” like American Arbitration Association (“AAA”), Judicial Arbitration and Mediation Services (“JAMS”), Judicate West, ADR Services, Signature Resolution and others, have rosters of retired judges and experienced attorneys who are well qualified in the skills of ADR. There are also many “independent” neutrals, not affiliated with institutional providers, who offer competitive and oftentimes more cost-effective alternatives within the framework of traditional ADR. This article examines the potential benefits of the latter group of ADR professionals.

You Don’t Have to Quit Your Day Job

Conventional wisdom is that you need to give up your daily law practice to be a successful mediator. However, there are several reasons this doesn’t have to be the case.

First, it takes a number of years to gain the experience and training to become a busy, qualified mediator. It doesn’t happen overnight, no matter who you are or what your experience may be.

Second, practical economic considerations will likely dictate that you keep up your law practice for some period of time while you transition into the mediator role.

Third, continuing to practice law while you build your mediation practice can be a great source of information for you to use in successfully handling mediations. First-hand knowledge of what is going on with the local courts and contact with local counsel are essential tools of a good mediator, and those tools are best honed by continuing to handle litigated matters and staying involved with

other lawyers and judges. Not only do you continue to build your knowledge base, you increase your credibility with your marketplace and clientele by maintaining your active status as a litigator.

I have been mediating cases for nearly 20 years and have continued to practice law during that entire time. I believe it has been a significant benefit to me as a mediator to continue my law practice, even if it has scaled down due to the growth of the mediation practice and the constraint of time devoted to mediations.

Cost and Scheduling

Most independent mediators are less expensive on an hourly or daily basis than institutionally affiliated mediators. Scheduling with independent mediators is usually much easier, with more available dates and less bureaucratic maneuvering.

Since the advent of the COVID pandemic and the rise of Zoom mediations, I can say anecdotally that attorneys have become even more appreciative of a streamlined scheduling process and the availability of Zoom mediation scheduling within 30-45 days of their initial contact. Many lawyers have said that they and their clients don't want to wait 60 to 90 days, or longer, to schedule a mediation after the decision is made to use the ADR process.

Local Knowledge

When I was taking a mediation training course twenty years ago, a well-respected mediator who was teaching the course asked the class the question "who do you go back to for mediations, and what is the reason you go back to that person?" The most frequent answer to those questions was simple: "Someone you like, who gets it done." A mediator who you know, either as a mediator, judge or a lawyer, with whom you have a historical professional relationship, who is local to your dispute and your clients, is likely a more comfortable choice as an ADR provider for your case. The local mediator may know more about local judges, juries and attorneys than an out-of-county or institutionally-based mediator who does not have "feet on the ground" with respect to a local controversy, local juries, judges and counsel.

Knowledge of the "players" in the mediation is a very important part of the process, not only for building credibility with the participants (counsel, clients, insurance professionals and any other decision makers), but also with respect to general demographics regarding the particular issues in dispute. Questions like "what will a local jury do" or "how have similar cases in this area been resolved" are best answered by a mediator who has fingers on the pulse of the local courts and community.

Select the Mediator Best for Your Case

In reviewing statistics provided by the Judicial Council of California for fiscal years 2020-2021, there were total statewide civil filings of 636,142 cases. Of those filings, 89,541 were in the greater Bay Area counties (Alameda, Contra Costa, Marin, Monterey, Napa, San Benito, San Francisco, San Mateo, Santa Cruz and Sonoma). Remarkably, during that same 2020-2021 fiscal year, there

were only 1,991 jury trials statewide. Of that number of jury trials, only 195 were civil cases, and of those 195, only 24 were in the greater Bay Area counties listed above.

Certainly, the COVID pandemic has contributed to that ridiculously low number of jury trials. However, the significance of the Judicial Council statistics is that there are an enormous number of cases that are available for the ADR process, and without that process, the court system would be severely impacted, if not brought to a standstill. The good news is that there is plenty of business for the ADR industry, and there is no indication that the volume of business is going to diminish in the near future.

Each case has its own personality, and as such, its own needs in terms of the appropriate ADR provider. Lawyers and clients choosing a mediator for the particular case must decide whether their case needs a mediator who is a retired judge, a local lawyer or some other qualified mediator. Fortunately, there are myriad good choices.

The role of the independent local mediator is one that is indispensable to the efficient operation of the court system and the efficient handling of civil litigation by the legal community. The same is true for the large institutional ADR providers, whose qualified mediators offer valuable services as well. Both have their place in the ADR community and in keeping our system of civil justice available to those who need it.

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