

Big Ticket Cases Get Low Cost Solutions

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A growing number of major law firms and their deep-pocketed clients are using a state-funded program to settle six- and seven-figure cases for free, despite the program being originally intended for disputes of less than \$50,000.

Several mediators who participate in the alternative dispute resolution program say that judges will routinely refer Fortune 500 companies with \$1 million-plus disputes to a mediator who volunteers his or her time.

"Those who can't afford it should get it for free. I support that," said Jeff Kichaven, president of the Southern California Mediation Association, who resigned last month from the court's panel of volunteer mediators over frustration with the program. "But if you can afford to hire a lawyer, then you ought to be expected to hire your mediators as well."

Richard Bayer, president of the California Dispute Resolution Council, has urged the Los Angeles Superior Court to amend the program so that only those who could not afford a mediator would receive free services and others would pay a small fixed fee.

But in response, Presiding Judge William MacLaughlin defended the program, writing that "at no time has the Legislature or Judicial Council established any means test as a prerequisite to eligibility for court-provided ADR."

That letter "was a tipping point for me," said Kichaven, who heads a 500-member organization of mediators.

MacLaughlin has stood by his letter, arguing that the program's original intent was to encourage mediation, not offer free services to the indigent. He also dismissed the complaints, which he said come only from a "small number" of mediators.

Free vs. paid

The court-funded ADR program, created in 1994, was originally designed to introduce mediation in the local courts by offering three free hours of a mediator's time to people who filed lawsuits of \$50,000 or less.

Today, the program has a \$1.3 million annual budget, paid for with a combination of local filing fees and a portion of the court's \$600 million general fund. The money goes primarily to administrative staff.

The rest of the program depends on mediators who volunteer their services to gain experience or market themselves to lawyers who might pay them for other cases.

Private mediation has become big business, with mediators typically charging \$150 to \$500 an hour.

The free service has become a cost-effective means for major law firms and their corporate clients to settle certain kinds of disputes. Employment cases are particularly common, as are those involving product liability, personal injury and automobile insurance.

One recent employment dispute had a top-billing corporate law firm defending a major retail chain over claims that a class of store managers was entitled to hundreds of thousands of dollars in unpaid overtime pay. Both sides knew the case would not get resolved in the three hours they were given, even if it was for free.

"We were trying to find something useful to do with the time given to us," said Joel Grossman, the mediator in the case, which remains unresolved. In most cases, he said, "it would be a complete waste of time."

In the program, judges send lawyers on both sides to a court clerk who provides a list of volunteer mediators from which to choose. Both parties must agree to a mediator. They also can go outside the program at that point and hire a mediator.

While many cases fall below the \$50,000 limit, more are creeping into the hundreds of thousands of dollars. Several mediators said they have handled cases for some of the city's largest corporate firms, including Murchison & Cumming LLP, Sullivan & Cromwell LLP, Sheppard Mullin Richter & Hampton LLP and Gibson Dunn & Crutcher LLP.

"They look at a good portion of the mediation as a free cost savings," said Grossman, a mediator at ADR Services Inc. who has handled cases for free that ended up worth \$750,000 to \$1 million.

Sometimes, the lawyers prefer to hire their own mediator for more time-consuming and complex cases, said Robert Sacks, managing partner of the Los Angeles office of Sullivan & Cromwell. But the firm uses pro bono services in cases that are "very small," often worth \$100,000 to \$200,000, Sacks said. Many of those can settle within the day.

"We're not looking to save money by requiring people to work for us for free," he said. "We're never looking for a free hand-out."

Following state law

Private mediators have become increasingly expensive, often charging full-day rates rather than half-days. For a case worth less than \$100,000, paying for a mediator doesn't make sense, said Guy Gruppie, senior partner at Murchison & Cumming in Los Angeles. "We use them to the best advantage of our clients," he said. "Cases where maybe there are not multiple parties, not a lot of facts in dispute, are cases we consider going free."

Often, judges order cases to mediation even if the parties are too far apart to settle. Those cases, Gruppie said, are not worth paying a mediator for, no matter how much the case is worth.

MacLaughlin disputed the idea that judges simply want to get cases off their calendars. He also said judges are simply following a state law, noting that the pilot program in Los Angeles was codified by the Legislature and made available to other California courts and programs in the 1990s.

The purpose of the program, he said, is to resolve cases more quickly and economically, regardless of whether the parties are low-income residents or General Motors. "Warren Buffett could have a \$35,000 dispute with somebody and, even though he could buy our entire court, he's still entitled to go to mediation," MacLaughlin said.

He agreed that judges should not be sending cases worth more than \$50,000 to mediation, but argued that the process of determining value is difficult. Just because a case is filed for \$10 million does not mean it is worth that much, he said.

He also questioned the ability of the court to enforce a requirement that only those parties who could not afford a lawyer should have access to a free mediator.

"I don't know how anyone would expect us to go about determining whether someone had the ability to pay for mediation," MacLaughlin said. "It would be a nightmare for us."