

COURT MEDIATION PROGRAMS: An Endangered Species?

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One of the most important aspects of our system of justice is access to the means to achieve a just end. One of the hoped-for ideals of legal professionals is to find ways to accomplish the goals entailed in access to justice. Right now the California court system is in something of a tailspin when it comes to the provision of justice and providing easy access to the public. In my recent wanderings through the system and contacts with judicial officers, administrators and lawyer colleagues, I have been hearing some remarkable comments. I think what is the most glaring of all of the concepts expressed in those comments is a stubborn adherence to outdated and outmoded concepts of the litigation world. 20 years ago--perhaps as late as 10 years ago--some of the concepts I will discuss were workable and may even have made sense.

The role of alternative dispute resolution has always been the ugly cousin of litigation. Lawyers were trained that the only means to a just end was a trial by jury. Of course, seasoned lawyers, particularly those who have suffered surprising and disappointing outcomes of jury trials, are slowly realizing that may not be the case. Nevertheless, there is still some stubborn adherence to the old way. Within the past five years there has been a remarkable change in services that are available to lawyers and litigants to assist them in the resolution of a wide variety of cases from the most simple to the most complicated. Law schools are now training new lawyers about ADR services. Lawyers

of my vintage and before tell me consistently that ADR was seldom even mentioned when they went to law school. What is important is that ADR is no longer just a procedural obstacle to getting a case to trial as it was when I first started practicing; it has become a necessary means for rapid and reasonably predictable outcomes. Within the past five or so years, there has been another change in our profession. Seasoned trial lawyers and former judicial officers have pursued training in mediation. It hasn't been too long since a lawyer's ADR alternatives were limited to the few large ADR services. Those large services have developed into very slick and attractive businesses in beautiful buildings. In the meanwhile, a number of small ADR services have cropped up that offer the same or better quality of the old-time "big guys" at a fraction of the cost.

So, why is this important? Well, over the past few years the Southern California courts have implemented a number of court administered mediation programs. The attractions to those programs has been many, including: they are generally populated by mediators who are vetted by the courts and, in some cases, actually trained by the courts to provide this essential service; the services provided by those mediators are generally of outstanding quality and effectiveness; and, what seems to be the most critical to many of the attorneys I have spoken to in this regard is that the services are provided at little or no cost, no matter how wealthy the clients or the law firms.

While all of those features are wonderful for the litigants, they have imposed their own types of pressures on the court systems. The administration of these programs is extremely time-consuming for the courts. Though the success has been such that

many cases have been cleared from the trial dockets, the paperwork and personnel hours required for the administration and tracking of these programs is sometimes onerous. It is true that there are sources for special funding for some programs, but the funding is relatively small and really doesn't go very far to pay for the programs and to pay for the mediators' time. Within a few weeks before this article, I have been told by at least two experienced litigators that they have pulled back on hiring mediators since they are getting such high quality service at virtually no cost. This is, of course, good business. Few of us want to spend more on a service than we have to. However, at the same time it is pushing some of the best mediators in the court systems away from providing low-cost services. It is hard to justify spending hours to mediate a case that is worth tens or even hundreds of thousands of dollars for a fee that probably wouldn't pay the fuel bill for the litigants to drive to the mediation.

In one of the many mediations I do every week, I recently spoke with an insurance adjuster who stated to me in no uncertain terms that that particular insurance carrier will no longer engage the services of one of the major ADR services because the fee charged was as much or more than (this was a five-figure fee) the case was valued. Clearly, counsel and their principals/clients need to start comparison-shopping.

Other changes now may be coming to the court system because of the negative pressures involved in providing services as they have been. Some courts are considering an elimination of or a dramatic cutback in the no-cost mediation services. Other courts who are burdened by outside contracts for such services are currently

facing delays in getting cases to court program mediation for eight months and more. Of course, in such situations and since the case filings outnumber the available mediation dates (as in-court contract services are limited) available, the delay will continue to grow leaving lawyers and litigants frustrated and dissatisfied.

Some courts have published on their websites all of the names and contact information, including biographies and fee arrangements, for all of the mediators who have been providing services for the courts. That is an outstanding source of information about mediators. County dispute resolution services such as DRS in Riverside provide similar access to mediator information. Additionally, most of the smaller ADR services in the state have websites that are very revealing about the qualifications and cost of their services.

If counsel and their clients/principals wish to get their cases resolved, if counsel and their clients/principals wish to achieve a resolution at a cost not remarkably higher than the low cost court programs; if counsel and their clients/principals wish to pursue resolution timely and efficiently, they should undertake a search for ADR services outside of the court system that will deliver quality and effective service at a cost that will not break the bank. If they do not, it will not be long before the courts give up their programs or the quality mediators that provide services for the court programs will simply give up offering their services for--almost nothing-- to litigants and firms who have substantial cases to be mediated.