

## Calls for outside-the-box thinking to resolve disputes

By James P. Kleinberg

Imagination? Creativity? These are terms not typically associated with lawyers — or judges for that matter. But the increasingly complicated world of litigation, coupled with the crippling effects of budget cuts on the judicial system, calls for outside-the-box thinking of ways neutrals can help resolve differences.

Of course, the traditional methods of arbitration and mediation are in constant and growing use. In arbitration, parties in complicated cases are agreeing to pre-hearing discovery, using dispositive motions and requiring reasoned awards. Mediation has been transformed from the traditional notion of a “facilitative” process where the mediator is little more than a carrier pigeon, ferrying demands and offers back and forth without imparting judgments on the merits. More and more mediators are acting in an “evaluative” capacity, sometimes proposing solutions to the problem at hand. But other uses of neutrals are in the offing.

### References: General and Special

Courts have long used neutrals as special masters or referees to decide (sometimes without further review) discovery disputes. In this role, neutrals hear motions, sit in on depositions and rule on objections, and generally help the parties to expedite the discovery process. This is significant in two ways: The court is relieved of time-consuming motion practice, and the parties may be able to reduce the cost of discovery, which often dwarf the trial costs.

Code of Civil Procedure Section 639 provides for a “special” reference for limited purposes such as accounting or discovery. A court can make this type of reference on its own. But with encouragement from the court, if the parties stipulate, the neutral may hear dispositive motions, pre-trial matters and try the case. CCP Section 638 applies to “general,” “all purpose,” or “consensual” appointments and assignments. The right to appeal may be preserved. Again, the principal benefit of this approach is a quicker and therefore less expensive approach to dispute resolution.

Here are other examples of how neutrals can resolve disputes:

#### Client-Lawyer Disputes

No lawyer wants a fee dispute, or worse, a malpractice claim published for all to see. Likewise, a client typically wants these types of issues resolved quickly. An experienced neutral, especially one with a real-world, law practice background, can bring these issues to a prompt conclusion.

#### Lawyer – Lawyer Disputes

Hardly a week goes by without the news of a law firm merger or collapse, almost always with financial consequences for the lawyers involved, the staff left behind, the landlord of the office space, the bank that kept lending money, etc. A special master can bring a resolution to these complicated issues in a comprehensive way.

#### Class Actions

Issues about payments to class members — how much and when, refunding unclaimed settlement proceeds to defendants, and the nature and amount of cy-

pres awards — frequently consume much court time. These issues may be dealt with expeditiously in a neutral setting outside of court. Another issue is the allocation of fees between class counsel, which can sometimes devolve into a public feud that tarnishes everyone’s reputation. A neutral may assist in bringing the lawyers to resolution.

#### Partnership and Private Corporation Disputes

Even if the partnership agreement does not provide for ADR, why not have the partners use a neutral to assist them to bring a measure of peace to their relationship? Closely held corporations, with each of the two founders holding a 50 percent interest, can often find themselves in struggles over control, distributions, the nature and timing of investments and costs. A long-term court fight may have dire consequences for the business.

#### Corporate Board Reviews

At times, corporate boards or outside directors need an impartial fact-finder to help them with decisions. This is another instance where confidentiality and privacy can be a major consideration.

#### Professional, Governmental or Nonprofit Organizations

It is fairly common these days that organizations that are in the public eye — bar associations, hospitals, regulatory agencies, charities, sports leagues — find themselves embroiled in a controversy that calls out for an impartial investigation and resolution.

#### Pretrial and Trial Preparation

Even before a case is filed, a neutral may be helpful in deciding whether to start litigation.

Usually termed “early neutral evaluation,” a neutral can provide a rational, independent assessment of the potential case — its merits, demerits, costs and likelihood of success may be invaluable. We frequently ask doctors for second opinions before a serious medical procedure — why not in business?

If a lawsuit is underway, neutrals can hear motions and give helpful insights as to what arguments may be productive and which are not. A neutral can preside over a mock trial and make evidentiary rulings that may be critical to evaluating the case.

#### Conclusion

These are only some of the ways an experienced neutral may help resolve disputes. Creative thinking may well suggest more. But whether these or other approaches may work, at the very least those involved in a dispute should pause and consider alternatives that are quicker and less expensive.

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