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How ADR Can be Used to Resolve Mass Disaster and Insurance Claims

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After wildfires tore through San Diego County in 2007, more than 2,000 law suits were filed against San Diego Gas & Electric by more than 5,000 plaintiffs. Parties included individuals, the City of San Diego, the County of San Diego, Cal FIRE, the San Diego County Parks and Recreation Department and multiple insurance carriers and underwriters. With limited court resources available for such massive litigation, plaintiffs, defendants, cross-defendants and the court were eager to find another way to resolve the disputes. What emerged was a highly sophisticated mediation program that, so far, has resulted in 98 percent of the cases settling and recovery of more than $800 million.

"The statistics are staggering," says Kenneth Chiate of Quinn Emanuel Urquhart & Sullivan, a lawyer who helped devise the aggressive plan. "This is the finest mediation program I've ever been associated with – and I've been practicing for 45 years."

The San Diego wildfires cases are just one example of how effective ADR can be used to resolve mass disaster and insurance claims. Similar mediation and arbitration programs have been implemented in cases related to the BP oil spill, Hurricane Katrina, September 11 and earthquakes. The reasons are clear: alternative dispute resolution is quicker, less expensive and more flexible than traditional litigation, particularly in complex, high-volume claims with multiple parties.

There are other benefits as well. Plaintiffs in large-scale disaster cases typically get their claims paid faster. And defendants – particularly insurance companies, which are all about risk assessment – are able to get claims quickly off their books and out of the press sooner.

In the San Diego cases, the neutrals and the parties "spent quite a bit of time hammering out an agreement on protocols for hearing hundreds of cases quickly," explains retired 4th District California Court of Appeal Justice John Trotter, who oversaw the mediation program. "They agreed on things like damages and what each side gave up." For example, plaintiffs agreed to forego double damages for tree loss as well as pre-judgment interest. Similarly, the defendant gave up the right to argue against liability (though it didn't admit it). Importantly, Trotter adds, "the lawyers did not in any way give up advocacy rights."

At the same time, Trotter was granted "some extra powers that mediators don't generally have," such as determining which cases were suitable for binding mediation. He also had the power to handle minors' compromises so they didn't have to go through probate. "Those were great time savers." Everything was in writing and filed with the court, which, Trotter says, was "tickled pink" with the mediation program.

Trotter came to the San Diego cases with significant disaster litigation experience, having worked on the Erin Brockovich case, Oakland fire claims and various earthquake

disputes. ADR, Trotter says, is "a wonderful vehicle" to resolve such mass disaster cases. "You have to have the right mix. It all depends on the facts, but it can be very, very helpful."

All told, the San Diego parties spend about 60 days haggling over the structure of the mediation deal and then finessed it along the way. Initially, Trotter presided over regular Friday phone conferences in which he and the parties addressed "problems we never dreamed of" such as how to value avocado groves and determining reasonable rebuild costs across different zip codes. "We haven't had a Friday call in quite some time," Trotter says proudly.

To assist Trotter, Viggo Boserup, who has mediated more than 4,000 cases, was assigned special master, handling each case on the front end, establishing protocols regarding things like the exchange of documents, the limits on discovery and property inspections. He started out with 150 cases and his docket quickly rose to several hundred.

"It was my job to make sure they all got moved along," Boserup explains. "It was a real hands-on experience. Getting the milestones agreed upon required buy-ins from everyone. It was a matter of monitoring."

Boserup devised a timeline by which certain targets had to be met in each case. For example, within one week, a mediator was appointed (assigned "at random" using a rotation system, he explains.) Within two weeks, requests for documents were submitted.

"We created a template for submitting these demands," Boserup says. "Every plaintiff used the same form for things like attorneys fees, non-economic damages, economic damages, which made it easier for the mediators." Then settlement conferences took place with mediations scheduled no later than 112 days after submission. "We hit those markers like clockwork," Boserup says.

One trick was creating a comprehensive Google spreadsheet of the timeline to which all parties had access. "We had a lot of data, 3,000 – 5,000 data points," Boserup explains. "Everything was transparent to all the parties." In addition to the Google spreadsheet, Boserup communicated via text and email so he could be "hands on and available a hundred percent of the time."

Having a large volume of similar cases related to one disaster with similar issues managed by a small group of lawyers "localized" the process, Boserup adds, and made settlement more productive. "It's so hard to value cases otherwise," he says. "Our court system is decentralized so it's hard to know if you're comparing apples to apples. But in this case, with one defense counsel and six or eight plaintiffs counsel, we were able to see patterns evolving: how tree issues got resolved, how avocado grove, landscape, building costs and memorabilia issues got resolved."

The results then grew predictable, with historical data affecting later cases. "You can start to project outcomes, and cases may settle directly without even reaching mediation," Boserup says. "It was efficient. We started to resolve three to seven cases a week on the phone. The predictability of settlement really makes the process hum."

For its part, the court "was ecstatic," according to Boserup. "These cases couldn't be tried as a class action because the claims were so different – some were about a house, some about avocado groves, some about a $1 million comic book collection. To try all of these cases would have tied the court up for a dozen years. With the fiscal crisis, losing courtrooms left and right, it wouldn't have worked."

Boserup is so enthusiastic about the San Diego process that he's developed his own case management system – with the help of software developers in India – so he can replicate

the procedures in other large-scale cases. “It’s streamlined,” he says. “I can now take on unlimited cases.”

JAMS mediator Lawrence Pollack similarly mediated the settlement of a mass disaster case: insurance claims lodged by the Port Authorities of New York and New Jersey with certain London insurers related to the property damage to bridges and tunnels arising out of September 11. Using alternative dispute resolution, the claims settled within seven years.

“It worked extremely well,” according to Pollack, who spent 28 years in private practice before becoming a neutral. “The process was flexible. There were no rigid rules. We had the give and take of the policyholder and the insurer.”

An essential element of any arbitration or mediation, Pollack says, is trust. “We had the ability to use evaluators with knowledge of the subject matter,” he explains. “We had a specialist, someone who knew the coverage terms, which is often not the case in court where the judge is a generalist.”

Unlike in court proceedings, neutrals can “triage” a case quickly and sometimes spin off certain pieces to mediation or arbitration. “You get to the heart of it” that way, he says. With the World Trade Center, for example, the original property damage claim later evolved into claims related to respiratory problems suffered by individuals who helped with the disaster cleanup. “Engaging in alternative dispute resolution across the table is always a helpful practice.”

In Ken Chiate’s experience, cases in traditional litigation frequently don’t settle because the defendant has a lawyer or firm that they use all the time and “regrettably, lawyers generally try to stay on the right side of clients.” That means that even if the defendant’s lawyer thinks the plaintiff has a strong case, the lawyer won’t press for settlement if the client gives extreme pushback.

“Feeling like they’re swimming upstream, the lawyer prefers not to push the client into settlement even if the lawyer knows it’s in the client’s best interest because the lawyer doesn’t want to poison the well for the future relationship,” Chiate explains. “But a mediator can come in and say, ‘You’re smoking something. You’re going to lose. I can see a jury awarding X.’ The client hears it from a neutral, who can act as the bad guy in the room, and it doesn’t risk the relationship with the lawyer who wants repeat business.”

Similarly, on the plaintiffs side, the lawyer may realize “in their heart of hearts that the case only has a certain value and that juries only care about the cost of living, jobs, the budget, and they’re less likely to sympathize with a plaintiff who gets to build a bigger, nicer house [after a disaster],” Chiate says. “But if the lawyer pushes settlement too hard, it risks the plaintiff going to someone else who quotes a higher price and over represents what the case is worth. But a plaintiff can’t get mad at a mediator and change lawyers. The mediator’s job is to get the case settled, especially in mass disasters with repetitive claims. They tell the plaintiff what’s reasonable and let the plaintiff know that everybody else is settling.”

In the San Diego mediation, a critical element to success was persuading the judge not to set a trial date, which sounds counter-intuitive, Chiate says. “The judge normally has to whip plaintiffs into settling by setting cases for trial – there’s nothing like an open courtroom to get a case to settle,” he explains. But with the 2,000 fires cases, scheduling a trial for 10 to 15 plaintiffs would have completely distracted all parties from mediation. “It would have required six to eight months of full court press discovery for a trial that would last eight to 10 months. That’s a year and a half of intense effort for just a dozen cases,” he says. “We explained that would be a less beneficial use of everyone’s time.

Instead, we wanted the judge to give more time for the mediation to play out, which would result in more benefit for everyone. The court was willing to balance the interests of the most number of plaintiffs to get cases settled rather than to set just a few cases for trial. By not setting a trial date, plaintiffs got the full attention of defendants and defendants' counsel. Plaintiffs were able to get their experts ready and came to mediation fully prepared to settle. No one was distracted by trial prep."

In addition to the profound collaboration in "the designing of the system, the genius in the San Diego cases was not assigning that trial date," Boserup adds, echoing Chiate. "Otherwise, plaintiffs and defendants would have had to prepare for trial. These mediations were detailed, in depth and required lots of preparation and massive due diligence. Each case got heard individually. No one tried to hustle anyone through it."

Once the mediation program launched, briefs were filed and PowerPoint presentations given related to issues like damages for destroyed oak trees, the law on cherished items ("a mother's wedding dress, a father's medal of honor, the only surviving portrait of a great-grandfather," Chiate recalls), interest and emotional distress. In those sessions, mediators received comprehensive compilations of all briefs, which were generalized because each individual mediation was confidential. "We did it one time," Chiate explains. "We didn't have the usual three hours each time the case needed an expert's rationale. It saved a lot of time."

For his part, Trotter calls the San Diego wildfire mediation "the best settlement program I've ever been a part of" and gives credit to the attorneys. "They did a wonderful job. They were thoughtful. They figured out ahead of time what was needed to settle. They came to understand how the process works and understood that they couldn't expect to get 100 percent of what they wanted," he explains. For a mediation program to work in similar cases, the parties need attorneys "who band together," he says. "Get them to talk to each other. And get someone [like Boserup] to help structure a deal. It's basic common sense, but it often doesn't happen because parties' interests are disparate."

Today, just 23 active cases remain. "We had a lot of battles," Trotter says, "but once everyone agreed to [the process], it took off and we solved issues as they arose."

Conceptually, ADR is suitable for any case, according to Trotter. "But when there's a massive number, it's much more productive to use something like this. You need a structured, disciplined, agreed-upon approach. And highly competent lawyers."

Perhaps the most important factor in the program's success was that every party knew that "the worst thing in the world was to have these cases go to trial," Trotter adds. "The plaintiffs would maybe get more money but not in their lifetime. If they settled, they got a check in 30 days." And without such a program, defendants would have to defend cases against each damaged person, which is "enormously expensive," he says. "Everybody benefits from mediation."

According to Pollack, there's virtually no downside to trying arbitration or mediation, even if the process ultimately fails. "Before I was a mediator, I'd tell my clients, 'From frustration comes opportunity. Even an unsuccessful ADR effort often results in effective success in resolving a case.'" At the very least, certain elements of a case can be broken off for mediation or arbitration, narrowing the focus for the parties, who can identify commonalities and quickly define issues.

And, intrinsically, there are no limits within the alternative dispute resolution process. "Sometimes one side or the other won't budge and therefore you can't get a resolution," Pollack says. "But that's really a function of inflexible attitudes, and that's why mediators are dogged."

The most effective mediators, according to Chiate, are those who spend time building "rapport, goodwill, trust and confidence" with the parties, especially the plaintiffs, who are usually not repeat users of the court system and may need education about mediation and arbitration. "Parties need to understand that the mediator is really trying to do the right thing," he says. Without that personal touch, the mediator may seem "like a robot" and it may be hard for parties to accept what the mediator says. In addition, "the most effective mediators come in knowing the facts and present their knowledge of the facts. There's confidence-building in the ultimate decision if the mediators show they understand the parties' positions." Ex-judges, he adds, frequently have an edge as mediators because they know what juries do. "They come to the mediation with an ability to say, 'This is the law' and with the credibility to say, 'There's no way you're going to prove that.'"

The San Diego mediation success "absolutely can be duplicated and not just in disaster cases," Boserup said. "A system like this can be used in product cases, pharmaceutical cases, automobile cases. Similar mediations worked in World Trade Center cases and Virginia Tech shooting cases. It's ideal for situations when multiple claimants arise out of a single, similar circumstance."

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