

## The 3 faces of party-selected ADR



Hon. Frederic N. Smalkin (Ret.), JAMS mediator and arbitrator

Mention ADR to many lawyers and litigants, and their response might well be that it is simply a court-mandated attempt at settlement that they must undergo before proceeding to trial, no matter what the actual likelihood of a settlement is. Some might be ready, depending on the nature of, and the amount of money at stake to try in earnest to settle the matter, while others might know that mandated settlement is highly unlikely to achieve its goal in their case, for reasons running from the skills of the mediator through personal animosity of the parties to the bottom line – the amount of a money settlement.

The situation is somewhat different when the parties agree to seek mediation from

a major ADR firm such as JAMS. The parties will have agreed to spend a considerable sum shared between them to hire a mediator from a large menu of well-vetted and experienced mediators. Some of these mediators are retired state or federal judges, while others have extensive experience as practicing lawyers in specific areas of law, such as maritime or construction law, and some others have made a profession of mediating for many years. From this menu can be chosen a short list of mediators fitting qualifications appropriate to the case, following which the parties will pick the one they both agree upon. Thus, the mediator will know that the parties have placed their confidence in him or her to exert best efforts in helping them reach a settlement that is fair and reasonable. The mediator's feeling of accomplishment upon settlement is a welcome reward for the hours of preparation, exhortation, and patient prodding that has brought the case to settlement.

But settlement is only one face of the range of neutral skills offered by a major ADR provider such as JAMS. The second face is that of the arbitrator. Whether as a sole arbitrator or as a member of an arbitral tribunal, many lawyers and judges find ar-

bitration to be challenging and demanding of time, concentration, and reflection. Whether the case involves a repossessed used car, the dissolution of an LLC, or a multi-million dollar dispute between corporations, the goal of the arbitrator is to remain fair and impartial. He or she is a judge, and a good arbitrator never forgets that he or she is the font of justice, only without robes. Like a serving judge, the best arbitrators will be apt administrators as well as legal experts. Setting schedules, working out discovery disputes, streamlining the flow of the case through modern media long-distance witness interrogation (e.g., Skype or FaceTime), and the drafting of a timely and well-crafted award are all part of the job. Good arbitrators must at all times be aware of the fact that scope of judicial review of their work is extremely narrow. There is, for practical purposes, no appellate body in most arbitrations that “grades the papers” of the arbitrator. Accordingly, the arbitrator's discretionary calls as to rules of evidence and findings of fact will actually carry more weight and finality than a trial judge's similar determinations. Once again, when the neutral arbitrator finishes crafting an award that deals fairly and squarely with the case, the

sense of satisfaction is very rewarding.

What, then, is the third face of ADR? Although not as widely known as mediation and arbitration, the neutral case evaluation is an important arrow in the good ADR practitioner's quiver. These confidential evaluations will involve the neutral's judgment and comments on the strengths and weaknesses of the claims and/or defenses in a particular case, usually at the pre-filing stage or on appeal. Besides drafting written evaluations of cases, JAMS neutrals are likewise often selected to serve as “mock judges” at the pre-trial stage or at the appellate stage. Attorneys pay close attention to the comments and suggestions the neutrals give them on how to make their presentations more effective in bench or jury trials. JAMS neutrals are increasingly in demand for the added value their “30,000 foot” perspectives can lend to counsel's view from within the swamp of trial preparation.

Whatever the case, and for whichever JAMS task you need him or her for, the folks at JAMS are well-qualified and eager to help, whether the matter be one of mediation, arbitration, or neutral case evaluation.

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