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PERSPECTIVE

## Litigators look to creative solutions to save time and money

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If you have called the department handling your state court lawsuit only to learn that the next available hearing date is six months away, or if you have trailed for months on a trial date, then you personally have experienced the impact of budget cuts on our judicial system. Time is money, and these delays can drastically increase the expense of litigation to clients. Worse, delayed resolution of matters can shift the balance of power in a case when an unresolved discovery dispute, dispositive motion or trial looms over the parties.

While attorneys are familiar with the more traditional forms of ADR, such as mediation and arbitration, ADR focuses on resolving disputes of any kind. Creative attorneys now use ADR to resolve even interim disputes and, in doing so, save their clients time, money and the anguish that can accompany uncertainty.

ADR is hot; companies are responding to the changing court environment by developing new programs and reviving older, pre-“fast track” dispute resolution methods. The only limits to ADR are the parties’ willingness to participate in the process and their imaginations to create a framework to resolve disputes. In the long run, even though ADR may have up-front expenses, it can save clients plenty of money.

The following scenarios present age-old legal problems, and offer innovative ADR solutions.

**Problem:** You have a genuine dispute over the discoverability of bank records, and it is grinding the case to a halt. The hearing date on a motion to compel is months away and both sides need resolution to evaluate settlement. The court denies the ex parte application for a new hearing date, noting the stack of motions on its calendar that day. What can you do?

### Possible solution: discovery mediation

Parties can stipulate to have a private judge mediate a discovery dispute through a process appropriately called “discovery mediation.” As long as the parties cooperate and act in good faith, there is a discovery mediation method for every dispute. Counsel may opt to have a private judge adjudicate the dispute after a more typical law and motion practice with a hearing or, alternatively, they can sit down with the private judge to jointly create a solution that balances

the potential prejudice to the producing party against the requesting party’s need for the discovery.

Despite the cost of a private judge, discovery mediation saves litigants’ money. The parties may be able to dispense with law and motion and use the ADR neutral to avoid protracted meet and confers depending on the discovery mediation method and the nature of the dispute. Further, resolving a dispute that holds the parties hostage has real value and may even facilitate settling the entire case.

Discovery mediation may not be right for every case. If one side is being purposefully obstructive, then the parties are unlikely to agree to discovery mediation. Further, if a party cannot produce discovery without a court order due to the privileged nature of the information, then the parties may consider requesting the court to order a special reference for the discovery dispute.

**Problem:** You represent a plaintiff with significant injuries. The defendant

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vehemently contests liability and thinks that he can successfully defend this case. Bifurcation of the trial on liability and damages is inevitable. You know that taking the liability issue to trial will involve highly technical (excruciatingly boring and laborious) issues. Mediation seems impossible since the plaintiff’s demand is in the millions and the defendant has offered nuisance value.

### Possible solution: jury mediation

Jury mediation allows for a trial dress rehearsal when settlement discussions have stalled and the parties want to know how particular issues will play out before a jury. Through a jury consulting company, the parties obtain vetted jurors representing the demographics of the trial venue. The parties and mediator determine the scope of the issues and what evidence to present to the jury (the point is to get candid feedback, not to jump on your opposing counsel). Each party presents their evidence and then watches through a one-way mirror in another room while the consultant polls the jury to gauge the

jury’s reactions to evidence. With the jury’s feedback, the parties immediately begin mediation.

Jury mediation has resulted in settlements in virtually every case, especially when the parties are polarized on a discrete issue(s) preventing meaningful mediation. The cost of the private jury and mediator pales in comparison to trial and, even when the parties can’t settle, they can prepare for trial armed with the jury’s invaluable feedback.

**Problem:** A distributor claims it relied on alleged supplier misrepresentations when selling a faulty product. The resulting litigation has damaged their relationship with each other and customers. The distributor and supplier need this matter resolved quickly before the dispute permanently destroys their symbiotic economic relationship and years of goodwill.

### Possible solution: private trials

The current crisis in the courts has led to a private trials renaissance since they offer the benefits of arbitration, including speedy resolutions, without sacrificing rights to appeal. The parties can even utilize a paid jury for the trial. The application and utility of private trials will evolve with changes in the court.

Private trials can provide a win-win in cases where delay hurts both sides. A private judge can try a matter in one-third the time of a public court since the judge need not abide by the court’s start and stop times, long lunch break requirements, and interruptions from the court’s regular calendar. Plus, the parties can plan for trial with certainty (no trailing), which eases the burdens of scheduling witnesses, especially experts who often charge per day of testimony. This saves money for clients without forsaking the legitimacy of the trial process or right to a court trial.

**Problem:** You represent a financial institution that has arbitration provisions in their contracts. Your client needs a speedy resolution to disputes, but thinks that arbitrations result in “split the baby” outcomes with no right to appeal. They ask you for other options for their contracts.

### Possible solution: general judicial reference

To a transactional attorney, a general judicial reference is the theoretical perfect marriage between a court trial and arbitration. Like arbitration, the parties must agree to a general judicial reference, which generally provides faster case resolution outside of the civil court system.

Unlike arbitration, a general judicial reference functions like a court trial since California statute governs them; the parties try the case before a neutral applying procedural and substantive law. The court retains jurisdiction over the lawsuit and enters judgment based on the neutral’s decision. The parties may then appeal that judgment no differently than if the court heard the entire matter.

General judicial reference does have its drawbacks. Parties seeking to keep their disputes out of the public record need to know that judicial reference requires a pending lawsuit, whereas arbitration can be completely private. Also, the parties may desire to keep the process informal, like an arbitration, which may become a problem on appeal. Further, to prepare for appeal, the parties need to mark exhibits, make objections, and preserve their records, which may necessitate a costly court reporter (although parties now must hire court reporters for court trials to make a record). However, a judicial reference can still save money because the case will not trail, and the referee can often try the case three times faster than the court since there are no time limits or calendar interruptions.

ADR, never easier to sell, is a voluntary process that requires cooperation among all involved parties, including counsel. Either the parties can remain locked behind door #1 — a congested court system with binary results in an adversarial process, or open door #2 — speedy, cost-effective alternative dispute resolution that can lead to win-win solutions for everyone.

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