

RECOGNIZING THE STATE'S

TOP NEUTRALS

Lawyers vs. Judges: Who makes a better neutral?

By Rebecca Beyer

In the race to be a great neutral, many people think judges have a built-in advantage: the bench. The honorable in front of their names packs quite a punch in persuading clients to listen to a certain recommendation.

But attorneys have an advantage as well: their skills and experience in negotiation. Attorneys routinely roll up their sleeves with clients and opposing counsel to try to come to terms on difficult cases.

So the question is, Who makes a better neutral, attorneys or judges?

Most everyone agrees that judges, lawyers and people who are neither can make great neutrals. Like anything else in life, a lot of mediation comes down to the individual.

Many say mediation is all about shared pain. It takes a certain skill set to bring two parties together and make them both scale back their expectations to reach a settlement.

"A judge will often tell you it's the aequal point," said Dan Stormer, a civil rights and employment attorney at Hadsell & Stormer in Pasadena. "Both sides squealing equally in pain, mutually uncomfortable."

Michael Saltz, a business litigator from Los Angeles' Jacobson, Russell, Saltz &

Fingerman, agreed.

"Every settlement represents a compromise on both sides," he said. "There's a saying that the only good settlement is a settlement that makes both sides hurt. If both sides are unhappy, you know you've reached common ground."

When faced with the task of deciding on a neutral, some attorneys let the



posing side choose. Others swap names until they agree on a particular person. But some litigators have strong feelings for either judge-mediators or attorney-mediators.

Choosing a mediator has a lot to do with maintaining credibility with clients who

may be struggling with the idea of forgoing their shot at a jury trial and a big verdict.

It matters, said Quinn Emanuel Urquhart Oliver & Hedges entertainment litigation partner George Hedges, because a lot is on the line.

"If [the mediator] just sits there and asks one side, 'What do you want,' and then asks the other side,

"What do you want,' and the two sides are way far

someone who is willing to engage in the process, and, in his experience, that tends to be attorneys.

"Oftentimes, you see retired judges who simply don't engage," Hedges said. "Maybe that is just a result of having been a judge for so long. Sitting in that position as a judge, you don't mix it up with lawyers and clients that often. That's not your role."

Deborah Koefler, a labor and employment defense attorney with Mitchell Silberberg & Knupp in Los Angeles, thinks that judges may not have the patience to deal with the emotional issues that often accompany her cases.

"I think that judges, by the very nature of their job, obligate themselves to exercise considerable control over parties in a courtroom; there can be no other way," Koefler said. "But that exercise of control doesn't always work in heated disputes with emotional people."

Attorneys also may have developed an expertise in a certain area that makes them a preferred choice for a particular type of mediated case, like labor and employment, Koefler said.

While judge-mediators may be better generalists, the attorney-mediators she uses are "almost uniformly people who have mediated many employment disputes."

"They are quite knowledgeable about

the law and also the dynamics of relationships," she said.

Stormer prefers to use attorney-mediators in his cases as well, but he thinks that, over the years, more and more judges have become adept at running successful mediations.

"Judges are more willing to become trained in not using the power of their office but in using persuasion and analysis and compassion," Stormer said. "They are getting better."

Still, he said, judges are accustomed to saying that a case should settle for a set amount of money; a law-of-averages approach that handles the monetary part of a case.

But sometimes nonmonetary resolutions are more important to a client who has been wrongfully terminated after years of service to an employer.

Pointing to a recent case of this kind that settled with a judge, Stormer said the difference was that the judge was willing to be "creative."

"My client wanted some indicia of her good employment," Stormer said. "That was vitally important."

In the end, the settlement included an employment plaque.

"I said she worked there and was good employee," Stormer said. "She needed to not have 20 years of good employment taken away with a bad memory."

Stormer said that, historically, litigators have understood that sort of nuance "in a hot second" because they know the need for both empathy and sympathy in dealing with clients.

"Judges have been judges," Stormer said. "They've been trained to remove themselves from the relationship between both sides and to deal with issues before them. That's hard to change when you go into the world of mediation."

But many judges work hard to become good mediators. Like attorneys, they enroll in training seminars and sign up for courses like the "Social Psychology of Conflict" or "Cross-Cultural Negotiation and Dispute Resolution" at places such as the Straus Institute for Dispute Resolution at Pepperdine University School of Law in Malibu.

Sometimes, a judge is just what the litigator-who-mediates ordered.

"If an attorney is recommending a certain course of action and his client is resistant, sometimes a client will respond more to hearing the advice of a judge," said Peter Robinson, managing director of the Straus Institute who teaches a class called "Apology, Forgiveness and Reconciliation."

Business litigator Saltz agreed.

"Sometimes, mediations happen early on," he said. "The client hasn't felt the sting of attorney bills yet, and they wholeheartedly believe in their case."

Saltz said mediation can mean convincing clients that what they are entitled to is not what they are going to get.

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"Who do you go to? Another lawyer with the same social status as you?" he asked. "Or someone who has sat on the bench and can claim he has seen it all and can look your client straight in the eye and say, 'You're going to lose your case?'"

Attorney Karineh Khachatourian, an intellectual property partner at Gordon & Rees in San Francisco, also thinks that clients respond better to a judge-mediator.

"Generally speaking, when dealing with people who are not lawyers, a judge is more revered," she said. "A judge is someone of authority who appears to be neutral. A lawyer is not."

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influenced by [a judge] telling them that they have a bad case or might lose, having that from a judge or former judge is something that's going to sway them more than having the same thing from a nonjudge," he said.

Others think that the powers of the robe don't necessarily count outside the courtroom.

"Sometimes, judges feel they are entitled to respect even if they aren't working for it, just because they wear the robe," Hedges said.

Stormer said judges can push the limits of their title. He mentioned a former judge who mediates his cases in a mock courtroom at his

office and has an assistant who travels with him to cases.

"It's sort of like having all the trappings of his prior judgeship," Stormer laughed. "I think it's silly, like 'pay attention to me because I'm the all-powerful one.'"

Jan Frankel Schau, a lawyer-mediator who is the president-elect of the Southern California Mediation Association, said that a lot of mediation is about developing a relationship with the parties.

"Judges may not be accustomed to dealing with the individuals in a case," she said. "It's all about being able to take off the black robe. The robe can get in the way of the rapport they need to develop."

But the "honorable" carries a lot of weight.

Amy Newman, president of Alterna-

tive Resolution Centers, which has a hundred neutrals working mostly in Southern California, said that her company's judges do more business, although attorneys have stepped it up in the last 10 years.

"Judges have been on the bench for generally 20 years, and their whole job is being neutral," she said. "An attorney comes out of the box, and even if they are an expert, they have been an advocate for one side or the other. They have to transcend that in some way to be seen as neutral."

But Newman added that attorneys are often called on for "niche" cases like those of entertainment, medical malpractice or employment and intellectual property law.

Rosemarie Chiusano, regional vice president of Judicate West, and Alan Brutman, the company's executive vice president, said that, in their experience, judges are often preferred for arbitrations.

"They've been making tough calls for 20 years or however long they were on the bench," Brutman said.

On the other hand, he continued, many people prefer attorneys for mediations because "attorneys negotiate all the time."

Chiusano agreed with Newman that attorneys have to compensate for having been advocates of one side or another. They take mediation classes, she said, and "really perfect the art

of it." Judges, Brutman continued in agreement with Schau, have to forget about the power they wielded on the bench and work on establishing relationships with the parties.

Of course, in the end, in mediation, the dividing line between good and bad mediators is not between a judge or a nonjudge, attorneys say. It's between someone who is willing to work with the parties and someone who isn't.

Lucie Barron, president of ADR Services, emphasized that personality makes a big difference.

"A good mediator is someone who is good with people," she said. "It's not just knowing the issues. It's being able to read the people and to understand interpersonal dynamics."

Harry Chamberlain, a partner at Los Angeles' Stephan, Oringer, Richman, Theodora & Miller, and president of the Association of Southern California Defense Counsel, said that mediation "is one of those things that makes the practice of law more of an art than a science."

"You have to sit down and think about who will be the best facilitator to help personalities in the case get together and reach a resolution," Chamberlain said. "The strength of good mediators is that they put people at ease, they say, 'This is safe, you can vent a little here, you can have the catharsis of being outraged at some wrong committed in your life.'"

