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Mediation prior to suit on the upswing: experts

By John Flynn Rooney
Law Bulletin staff writer

Private neutrals in Chicago now resolve an increasing number of commercial disputes before lawsuits are filed, according to neutrals and lawyers involved in such matters.

“What seems to be the trend I’m starting to see is that more and more lawyers and business people are taking their cases out of the court system, into private mediations and arbitrations because it’s saving a lot of time and money,” said Stuart A. Nudelman, who retired as a Cook County judge three years ago and now works as a neutral, along with practicing law.

Richard A. Siebel, another retired Circuit Court judge, estimated that he has served as a mediator in five or six commercial matters in which a lawsuit had not yet been filed. He believes all but one of those matters settled at mediation sessions prior to the filing of a lawsuit.

“In my experience that’s a relatively recent [situation] where lawyers are taking cases to mediation before suits are even filed,” Siebel, counsel in K&L Gates Chicago office, added in a telephone interview.

Alternative dispute resolution is used in civil cases ranging from tort to divorce. Two forms of ADR are typically used.

Arbitration can be binding or non-binding with one to three panel members. Mediation usually involves a sole neutral working with the parties using a form of shuttle diplomacy. If mediation breaks down, either party can opt to take the case back to court.

The Cook County Circuit Court’s Law Division began a court-annexed mediation program five years ago.

“With orders for mediation and the voluntary mediation in the cases in the commercial setting, that’s where more cases are resolving through mediation,” said Circuit Judge Allen S. Goldberg, who spearheaded the Law Division’s mediation program.

For the past year, a total of 443 Law Division cases were dismissed following a settlement reached through voluntary mediation, according to figures provided

Arbitration

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by Law Division Presiding Judge William D. Maddux. There were another 2,653 cases were dismissed in which a settlement was reached without using voluntary mediation, the figures showed.

Following the Law Division's lead, the court's Chancery Division initiated a court-annexed mediation program in early 2007. As of May 31, Chancery Division judges had referred 350 cases to that program, according to figures provided Chancery Division Presiding Judge Dorothy Kirie Kinnaird.

A total of 133 cases, representing 49 percent of the 274 matters mediated, were fully resolved, according to the figures. Another four cases were partially settled and 137, or 50 percent of the cases had not settled.

Of the 350 Chancery Division cases referred to mediation, 188 were commercial matters. Of the 188 cases, 85 had fully settled and two were partially settled, the figures showed.

Jennifer W. Morrow, vice president of commercial services for Chicago-based ADR Systems of America, said that her company's increased caseload of commercial matters is due in part to the Circuit Court's mediation and arbitration programs.

ADR Systems has seen a more than 80 percent rise in commercial business during the past two years, according to Morrow.

"With the economic downturn, there's a reticence by companies to file lawsuits that are public or enter into costly litigation," Morrow said in a recent telephone interview.

Lawyers are urging company officials to enter mediation before filing a lawsuit, Morrow added.

In the past six to nine months, ADR Systems has received between 10-12 cases based on agreements between lawyers and parties, according to Morrow.

"Lawyers are recognizing that mediation and arbitration can be one more tool in their toolbox to provide great service to their clients in difficult times," Morrow said.

In May, ADR Systems opened its own Commercial Services Division at 222 S. Riverside. That division uses 20 experienced neutrals, including numerous retired Cook County jurists such as Nudelman and Siebel.

Phillip A. Bock, a principal of Bock & Hatch LLC in Chicago who represents

plaintiffs in commercial class action cases, said, "In the past couple of years, I've noticed that in-house counsel are more willing to try mediation earlier in the case."

Steven B. Blonder, a partner at Much, Shelist, Denenberg, Ament & Rubenstein P.C. in Chicago, represents both plaintiffs and defendants in business disputes.

"I'm seeing a [significant] increase in matters going to mediation both before the lawsuit is filed and during the litigation process," Blonder said.

More matters are handled through mediation due to the economy and an overloaded court system, Blonder added.

"And ... we've got so many well-respected judges who have retired from the bench and are willing, ready and able to serve as mediators," Blonder said in a telephone interview.

JAMS, The Resolution Experts, also has a Chicago outpost. JAMS has seen its ADR business here increase nearly 20 percent this year, compared to last year, said Kimberly K. Taylor, JAMS vice president in its East Central Region and associate general counsel.

"The neutrals whose practices are growing the fastest ... are in the commercial area," Taylor added in a telephone interview.

James F. Henry, who handles ADR matters for Resolute Systems LLC in Chicago, observed, "Even though it's very wise for a commercial dispute to go to mediation even before a lawsuit is filed, there is still a lot to do to educate each side about the strengths and weaknesses of their positions through the discovery process."

"In many commercial disputes, there is not insurance money to cover the cost of the controversy or the resulting monetary settlement," added Henry, a retired Cook County judge who is now counsel at Meckler, Bulger, Tilson, Marick & Pearson LLP. "You're dealing with real money, not play money."

Kinnaird has noticed a slightly different phenomenon relating to the resolution of disputes before lawsuits are filed.

"We're seeing a much bigger willingness of the lawyer to work it out earlier," Kinnaird added. "Lawyers are reluctant to pay a mediator until they first have a chance to settle things themselves."