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Mediation Work Complementary to Midsize and Smaller Firms

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If you've called in an attorney to be a mediator or a neutral for a case recently, there's a good chance the attorney you found works at a midsize or small firm.

Though there are many notable attorneys from Pennsylvania's largest firms working as mediators, those in the industry who spoke to *The Legal Intelligencer* generally noted that the bulk of attorneys doing mediation work were at small or midsize firms.

An informal survey conducted by The Legal of the American Arbitration Association's listing of certified neutrals in Pennsylvania seems to confirm that view. If AAA's listing is taken literally, it suggests that the majority of mediators do come from midsize and small firms, with significant exceptions of course.

"It is the case that most mediators come from smaller and midsize firms," said Kevin Casey, co-chairman of Stradley Ronon Stevens & Young's alternative dispute resolution (ADR) group.

But experts were quick to point out that the size of an attorney's firm is in no way a predictor of his or her likelihood of being a mediator. Rather, mediators said, there exist several circumstances that often make mediation practice more complementary to small or midsize firm practice.

Those reasons are generally broken down into work style, existence of conflicts and economics.

David Ferleger, a former special master to the U.S. District Court for the District of Connecticut who does ADR consulting, said mediators often come from small-firm environments.

One reason, Ferleger said, is the nature of mediation work is often more appealing to attorneys who come from smaller firms.

"People attracted to working in a small-firm environment are more likely to be attracted to the style of work that [characterizes] mediation," Ferleger said.

Moreover, at some big firms, he said, the firm's number of potential conflicts of interest makes it difficult to do a

significant amount of mediation work.

"Lawyers who work in large firms are much more likely to have personally, or through the firm, conflicts of interest," Ferleger said.

And sometimes doing mediation creates those conflicts.

Casey said sometimes the largest firms don't want to risk creating conflicts that will prevent them from working with a client later.

"If I'm a big firm and handle some mediation, that may preclude me later on from taking a big case from a big client who was a party to that mediation," Casey said.

Ferleger also pointed to the economic pressure at the biggest firms.

"Mediation pays much less than legal work. Mediators are paid their hourly fee, and the more successful they are, the less likely it will require a lot of time," Ferleger said.

Michael T. Carney, president of ADR Options Inc., noted economics as an issue as well.

"At bigger firms, there is the billable-hour pressure -- a press of business every day at the firm that is bottom line-oriented, which can prevent people from pursuing [mediation work]," Carney said.

Moreover, Stradley Ronon's Casey said, mediations don't necessarily generate obvious repeat work, which doesn't always fit into the firm's business strategy.

While mediation and other ADR practices are certainly growing, the number of full-time mediators is still small, according to Harris T. Bock, director of the Dispute Resolution Institute.

Bock estimated that about 50 people in Philadelphia mediate full time. Carney provided an even lower estimate: 20.

Instead, most attorneys who do mediation do it on a part-time basis, often limiting the amount of time it takes up to leave time for litigation.

Christopher Lee, managing shareholder of construction boutique Jacoby Donner, said he limits his mediation work to no more than about 35 percent of his practice. Lee is a neutral certified by AAA.

Theodore A. Adler, also a neutral for AAA, said he limits his private mediation work to about 30 percent of his practice.

Adler, founding partner of Reager & Adler in Camp Hill, Pa., said becoming a mediator is often a natural progression for well-respected attorneys whose colleagues trusted them to mediate claims.

In fact, mediators repeatedly said they had gotten involved in mediation work at the request of a colleague to mediate a dispute, which led to taking courses to be certified. Midsize and smaller firms that want their attorneys to become mediators may want to suggest their more seasoned attorneys keep their ears open for those opportunities.

"Mediators are usually people who have been around for so long, they've got no ax to grind, and they have earned the stripes for being a litigator for 30, 40 or 50 years," said Carney.

The benefits of having attorneys who work as neutrals are not always as tangible as the bottom line. But mediators are quick to point to the advantages.

Lee said doing mediations made him a better advocate in litigation and bolstered his reputation.

"If someone becomes a well-known mediator it brings some stature to that firm -- some visibility. [Doing mediation] brings experience in how mediations work, which goes to benefit clients," Lee said, adding later, "I'm often consulted by partners on tactics for mediations."

Sally Griffith Cimini, partner at Pittsburgh-based Babst, Calland, Clements & Zomnir and an AAA neutral, said being a mediator was important for client service.

"It's not always the right thing to throw money at litigation, and if that's the case it is our obligation both ethically and, I think, from a business perspective [to provide alternatives]. As a neutral, it's just another service I can offer," Cimini said.

Profitability concerns have kept the biggest firms from having formal ADR groups, according to Casey.

But some large regional and national firms do have ADR groups, including Stradley Ronon, Cozen O'Connor,

Schnader Harrison Segal & Lewis, and Dickie, McCamey & Chilcote, among others.

Casey, a certified arbitrator and a mediator by the U.S. District Court for the Eastern District of Pennsylvania, said he considers mediation and other ADR work an essential service to clients -- for firms of all sizes.

"Mediation is here to stay. If you aren't doing mediation you will be left behind. You will be lacking the ability to do a service that clients need," Casey said. "Even if firms view it as a [practice that won't make money], they have got to have it. ... Clients will go elsewhere for mediation, and maybe they will stay there."

Casey said he considers Stradley Ronon's ADR group profitable, "but we have [renowned mediator and arbitrator] Ben Picker." He acknowledged that ADR practices are not generally profitable in the monetary sense.

Casey said firms questioning the value of having attorneys practice ADR should ask themselves how they would measure the success of that practice.

"At the outset, my suspicion is if you measure by the number of dollars gotten by the group, you are probably going to be disappointed," Casey said. "But if the measurement is, are your clients happier? Is the work making them come back? Then the answer is pretty clear."