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THE NEXT GENERATION OF NEUTRALS



A new brand of neutrals is changing alternative dispute resolution practice in ways that affect practitioners and parties alike. The influx of innovative players to these types of proceedings is a sign of the times—ADR is in demand. With its popularity as a sound process for remedying legal matters on the rise, the legal landscape has a new look, thanks in part to a diverse group of neutrals.

Bloomberg BNA caught up with three former attorneys turned arbitrators/mediators to discuss the growing

practice and popularity of ADR. Jeffrey G. Benz, Robin H. Gise, and Shirish Gupta of JAMS shared their best tips on breaking barriers in the business, innovating legal practice to meet industry demands, and making the exciting move from attorney to neutral.

Breaking Through and Breaking Tradition

“When this game started, it was a younger person’s game because it was so new. Somewhere in between then and now, the demographic shifted. It became an area that people retired into,” Benz explained during our discussion of the historically traditional nature of the practice. These days, however, “people are seeing and being exposed to ADR,” Benz stated.

“As opposed to 20 years ago, ADR is much more common now,” Gupta added. “It’s become engrained as the norm.” Naturally, this normalization of ADR attracted a different breed of attorneys. While still a draw for former law firm partners and judges, “the next generation of neutrals are practitioners who joined the field earlier in their careers,” Gise suggested.

Greater acceptance of ADR as a go-to form of dispute resolution resulted from attorneys being exposed to ADR earlier in their careers. Specifically, Gupta credited legal education as the force behind broadening this traditionally close-knit field into a more inclusive practice. “A plethora of ADR programs in schools around the country offering students the opportunity to actually practice ADR” further normalized the field, added Benz, allowing it to become a popular alternative for both dispute resolution and career development.

In addition to the expansion of classroom and clinical offerings, a multitude of other considerations contribute to the appeal of arbitration and mediation. “The nature and difficulties of legal practice have changed, and litigation has become more onerous and less pleasant,” Benz summarized. “You have court dockets that are understaffed with judges and overflowing with cases that are being managed at a very slow rhythm.”

To that end, Gise credited the increase in court programs which require parties to go to mediation. She added that the trend toward ADR is also “largely client-driven due to the cost and onerous nature of litigation.” This can be especially true in the commercial space, Gise noted, where disputes regularly involve “parties who want to continue doing business together.” As “litigation can put a damper on those relationships,” arbitration and mediation are optimal alternatives.

Benefits to the Business of Law

The benefits of opting for ADR over traditional litigation extend beyond those that affect practitioners and parties. “Alternative dispute resolution is essential to the practice of law,” Gupta stated. “ADR providers help the court systems manage their dockets and help get cases off their dockets.” Overall, Gupta views ADR as a “way to make the system more efficient and less painful for all involved.”

“Now that the field is opening up to more diverse groups of people,” with varying backgrounds and perspectives, Gise observed, ADR is even more beneficial to the business of law. “ADR is a business,” Benz added, “and as an ADR provider, you want to be able to offer choice so that parties can pick their factfinders based on whatever factors they find important.”

According to Benz, the ability to think strategically about how disputes develop and proceed is key to growing a legal practice and the practice of law. “Sitting as the arbitrator, you get a much more holistic sense of what the dispute process is about,” Benz reflected. “You’re very much removed from most of the weeds, you’re out of the trees of the forest. It’s the notion of being able to look at a dispute from a different eye—a different vantage point.”

This enhanced perception of dispute resolution can actually lead to greater opportunities in law and business development, Benz noted. “At the end of the day, you’re able to make better decisions with regard to resolving disputes. A lot of legal training teaches you to be a zealous advocate. It’s a safe position for lawyers because you can always push, push, push. But it detracts from your ability to be practical. ADR has taught me a bigger picture view of dispute resolution.”

Innovation in the Legal Industry

The growth of innovative industries in recent years has also played a role in both building up the business of ADR and attracting attorneys to the field early on. As these highly specialized markets require expertise in specialty practice areas, attorneys are challenged to meet the unique demands of these industries. Often times, “next-gen” neutrals can deliver in these areas.

Gupta, who grew up with and around technology, is able to efficiently and effectively resolve complex tech-related disputes thanks to a deep understanding of the industry and its products and services. “Technology is not something alien to me. When we’re talking about hardware,

software, or newer concepts like Bitcoin or IoT—I get it. I grew up taking apart computers and creating websites.”

Noting the trend toward younger CEOs and staff in Silicon Valley, Benz observed that parties “need someone who understands how the internet operates and how social networks work and interact in commerce in this new world.” As a benefit to both the parties and the process, Gupta added, “it takes less effort for the parties to educate a tech geek neutral.”

Gise shared similar experiences in the employment law context. “The way people work today is so different. People don’t tend to stay at jobs too long. There’s a more transient nature to employment and you really see it, even in the way compensation is structured now. As someone who has grown up in that world, it’s easier for me to relate. I understand it,” Gise observed.

From Attorney to Neutral: Experts Weigh In

One common principle found within the practice of ADR and the practice of law, Gupta stated, is that “you still have to go out there and develop that book of business. If you’re not comfortable doing that, you probably won’t be successful in ADR.” “There’s no one path—you have to make your own,” Gise added. “It takes patience and networking. Don’t give up your day job right away.”

Benz noted that writing awards is one experience that can benefit any practitioner, at any stage. “Writing awards will change your view of the world. It puts you in the position of the factfinder. You start stripping away zealous arguments, and you narrow it down to the core arguments that allow you to win the day.” Benz emphasized that ADR is unique, as “it’s about playing a productive part in helping people solve problems by putting away the hatchets and arrows.”

Benz offered the following takeaway advice to those interested in transitioning to ADR full-time: “You need to understand it first, and then you need to do it. Take cases based on experience, not money. Volunteer a lot. There’s nothing that compares to experience.” Gise also noted that “inexperience can really be a detriment to the process,” and recommended finding mentors. “The opportunity to shadow an experienced mediator is invaluable,” she added.

Overall, attorneys “ultimately have to be accountable to parties in the choices they make,” Benz stressed. “The business of ADR has to be accommodating. This includes flexibility and being responsive to each customer on a case by case basis.” According to Benz, practitioners who truly make this a priority are likely to succeed. Benz reiterated the goal of a good practitioner—“focus on creating a process that allows the parties to construct a final binding award,” as it’s the only product and service you are offering.

The Future of Arbitration and Mediation

“In terms of prognostication,” Gupta stated, “I foresee online binding arbitration for small-valued disputes.” Benz agreed, noting that “the bigger role to be played by online dispute resolution has yet to be realized.” Gupta also addressed dispute resolution via text message. “It’s happening—texting is part of my mediations and it’s growing.”

Benz further noted that “as technology develops, people will find ways to apply it to ADR as opposed to the courts since courts move too slowly and don’t have the necessary budgets.” Along these lines, court backlogs and delays are likely to result in the continued development of mediation programs, which will lead to more mandatory mediation, Gise observed. “The legal field is changing. People are dissatisfied with the practice of law and want an alternative” to resolving disputes.

With a diverse group of neutrals in the game, the popularity of arbitration and mediation is on the rise, and for good reason. Practitioners and parties, take note—an exciting expansion of the practice of ADR is underway, and it’s changing the legal landscape for the better. To learn more about the future of ADR, and to access current data about trending issues and industries, visit Bloomberg **BNA’s Arbitration Award Navigator** and start a free trial today.

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