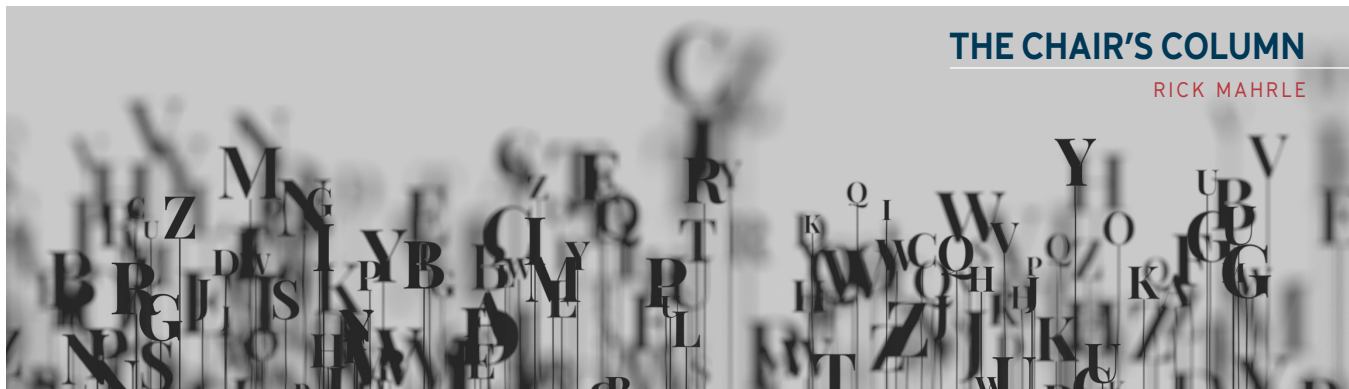




ARIZONA ADR FORUM

THE CHAIR'S COLUMN

RICK MAHRLE



RICK MAHRLE

brings more than 45 years of trial experience to his transition as a full-time mediator and arbitrator. He has conducted more than 200 mediations and arbitrations through the American Arbitration Association in construction, commercial, and employment matters. Rick also is an arbitrator for FINRA, a mediator for federal government entities, and a hearing officer for the State Personnel Board. Rick has served on the Executive Counsel for the ADR Section of the State Bar of Arizona and chaired the Section's CLE presentations at the State Bar Convention.

Rick received his J.D. from ASU in 1977 and has been a litigation partner at Gammage & Burnham since shortly after the firm's founding in 1983.

I recently had several mediations that brought home the point that successful settlements usually require that the parties have adequate information in order for them to make reasoned decisions regarding how to resolve their dispute. In other words, timing can be everything.

I have presented at several CLE programs on the importance of timing. The most obvious example involves trying to settle a personal injury dispute where there is uncertainty regarding whether the claimant is going to have any type of permanent injury or impairment, or there is a reasonable possibility of future surgery, or other unknowns. This lack of certainty makes both parties essentially have to guess as to how things may progress in the future. The injured party wants to make sure that they are going to obtain an appropriate recovery should the future surgery, or the permanent impairment, arise in the future. The party at fault, of course, does not want to be in a position of paying for something that may never happen. Trying to settle such a dispute too soon becomes a crap shoot.

My recent experiences involved construction disputes between the owner and the general contractor. In each matter, a typical scenario was involved where the general contractor was owed a considerable amount of

money and the owner had various claims for inadequate and unfinished work. However, no one had ever itemized to any extent what inadequate work was the fault of the general contractor, or what it might cost to remediate the issues. Without at least some of that information, the parties are just shooting in the dark. Furthermore, without an adequate identification of the work still needed to be performed, and the cost of that work, the mediator is left with very little in the way of leverage to work with the parties to try to find a reasonable compromise. The result is simply frustration on the part of the parties and the mediator.

Therefore, be advised, before you dive into a mediation, make sure that both parties have enough information and documentation that can form the basis for a reasoned outcome that, while may not be entirely satisfactory to the parties, at least is a solution that both sides can live with.

Rick Mahrle
Chair – ADR Section

EDITOR | DENNY ESFORD

We welcome comments about this newsletter and invite you to suggest topics or submit an article for consideration.

Contact the Editor, Denny Esford at denny@windycitytrialgroup.com.

EDITOR

In this issue we draw back the curtain on the Office of Accountability and Transparency (OAT) at the City of Phoenix. OAT was conceived as an advanced proactive response to the recent Department of Justice Report regarding the city's policing practices and performance. Mediation Director Kate Otting describes an interesting approach viewed from the ADR lens. Also in this issue is a message from our Chair and my article surveying the growing effort by the ADR industry to more effectively provide cost controls using fixed fees in commercial arbitration.



It is my hope that you find these articles both interesting and useful in your ADR practice. Our next issue will preview the State Bar Convention at Wild Horse Pass in June. As always, feedback is welcome. Send along a note if you have an idea for future articles that could benefit our readers.

Denny Esford
Editor – ADR Section Newsletter

EDITOR'S MESSAGE

DENNY ESFORD



FIXED FEE ADR

Should You Consider Fixed Fees in Your Commercial ADR Practice?

For several years now, much has been written about the impending death of the billable hour as a lawyer business model in favor of fixed fees. Despite this prediction, the billable hour remains the predominant method of lawyer income.

However, whether a fixed fee model should extend to your private ADR practice, or you agree to it as part of an ADR services firm assignment, may depend on what your competitors are doing and the nature of the dispute. This article surveys how some ADR companies are presenting fixed-fee options to help you decide if that model provides the commercial ADR professional with a competitive advantage in their private practice.

Fixing Filing and Administrative Fees

The American Arbitration Association (AAA) is the elephant in the room of the ADR space as the largest ADR provider in the industry. AAA *administrative fees* are fixed along a sliding scale from \$1,725 for a case less than \$75,000, to a fee \$24,750 with \$10M at issue plus 0.01% of any amount over \$10M. However, AAA specifically excludes the arbitrator and mediator *compensation* from their pricing model.¹ So not very helpful in determining whether an hourly or fixed fee model is the most competitive option. Similarly, JAMS has an arbitration filing fee of just \$2,000 for a two-party dispute plus a 13% “Case Management Fee” charged on the fees billed by the arbitrator. But again, the fees charged by the arbitrator are controlled by the arbitrator.²

ADR Systems, based in Chicago, goes a step further offering no administrative fee for two-party commercial mediation matters with less than \$100,000 at issue and a flat fee of \$1,100 per party, and the mediation may be conducted in-person or via video conference. However, this is qualified by a three-hour limit on mediator time after which the parties agree to be billed at the mediator’s chosen rate.³ And competing with the mandatory arbitration program

in Chicago’s Cook County Law Division, personal injury arbitrations are offered at a flat fee of \$795 per party for 2.5 hours of arbitrator review, hearing and decision time. However, like AAA, the arbitrator’s standard hourly fee is charged after 2.5 hours.⁴

Getting Closer to Truly Predictable Costs

Going a bit further is CPR Dispute Resolution Services (CPR) based in New York City. CPR’s Flat Fee Mediation Program provides a pool of 200 “carefully vetted” mediators to choose from for a flat fee of \$3,500 split among the parties for cases with less than \$500,000 at issue. This includes “one day of mediation up to 10 hours including preparation.” If more than 10 hours is required, the parties split a fixed hourly rate of \$350 which CPR touts as “a significant discount from the rates normally charged by CPR’s experienced panelists for a mediation.”⁵


A newcomer to the ADR industry is New Era ADR, offering flat fees for commercial mediation and arbitration based on a tiered system of case complexity as determined by New Era ADR. Tier 1 claims have party-shared fees of \$300 for filing, mediated at \$1,500 or arbitrated for \$3,000. Tier 1 seeks damages of less than \$25,000, no request for injunctive relief and can be decided without a hearing. Examples include simple breach of contract or employment contractual disputes. At the other end are Tier 5 disputes requiring large document submissions where both facts and law are in dispute and the parties have agreed to a formal motion to dismiss or summary judgment. Cited examples run the gambit of IP licensing disputes, insurance coverage, and injunctive relief claims. Tier 5 calls for shared fees of \$1,500 for filing, mediated at \$10,000 or arbitrated at \$50,000.⁶ New Era also touts the ability to perform even Tier 5 resolutions via a video conference platform thereby expanding the neutrals to choose from without the expense of travel costs required for

in-person presentations. However, even New Era ADR makes time assumptions for mediations of up to one day of 8 hours before additional fees kick in. *Id.*

Takeaways

What ADR firms like AAA and ADR Systems do not answer at all is the total cost of a particular mediation or arbitration as it depends solely on the pricing structure of the individual mediator or arbitrator. CPR gets a step closer by fixing the rates of the neutral for extended time requirements but is limited by their limited panel of neutrals. New Era ADR attempts to close the predictability gap by assessing the complexity of each case and providing a fixed fee approach over the broadest set of neutrals to choose from. However, as a start-up, it remains to be seen whether New Era’s model will be profitable, dependent on its ability to successfully predict whether its Tier assessment method accurately predicts the time a mediation or arbitration may take and whether they can offer favorable fees and management support such that they can attract a sufficient pool of qualified neutrals.

Conclusion

While ADR companies are attempting to find ways to manage the total costs of mediating or arbitrating disputes, none appear to have proven their model will truly eliminate the billable hour in ADR matters. However, particularly in the commercial context, cost predictability and containment have always been the watchwords for profitable businesses. Therefore, how these ADR companies continue to search for ways to control ADR expense bears monitoring in your private commercial ADR practice. 

BY DENNY ESFORD

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Building Police-Community Relations Through Mediation:

The Benefits of Facilitated Conversations



BY KATE OTTING

The practice of mediation constantly adapts to the diverse populations it serves. One example is the emergence of mediation between police and community members. The City of Phoenix recently joined this trend.

Across the country, mediation has demonstrably helped build police-community relations, foster accountability, reduce costs and improve complaint resolution times.¹ Moreover, it enables parties to discuss the complaint, in a calm, respectful conversation facilitated by a professional mediator. Ultimately, mediation has been shown to provide a more satisfactory outcome, for both police and community members, than conventional complaint resolution options.² The goal: to build police-community relations by giving all parties at the mediation table an opportunity to be heard and understood. This type of mediation also aims to bring closure to an interaction, while also positively shaping future encounters between police and community members.

What is OAT's Mediation Program?

The Office of Accountability and Transparency (OAT) was conceptualized by the Phoenix Mayor and City Council and written into City Code in 2021, to ensure a fair, thorough, and objective mechanism for receiving community member complaints and commendations regarding the Phoenix Police Department (PPD). The Code establishing OAT also tasks the agency with conducting mediations.

In February 2023, I was hired as OAT's first Director of Mediation. With a 30-year career in dispute resolution, including serving as Arizona Attorney General's Director of Conflict Resolution

and as a Deputy for the Arizona Ombudsman-Citizen's Aide, I assumed building this program would be simple. After meeting with counterparts across the country, I discovered the unique nuances of police-community mediation and common obstacles to launching such programs. In fact, most colleagues said it took at least three years to schedule their first mediation. Fortunately, we've had broad support from City leadership, PPD and the community.

My colleagues at OAT have also been instrumental in educating me about civilian oversight of police. I've also attended community engagement events and ride-alongs in every Phoenix police precinct, not only to educate police and community mem-



KATE OTTING has been a mediator for over 25 years. She is currently Director of Mediation for the City of Phoenix Office of Accountability and Transparency. There, she has built a program aimed at improving relationships between community and the Phoenix Police Department through conversations facilitated by seasoned mediators. She also founded Interaction Management Associates in 2004 to serve public sector organizations of all sizes and stages of development. IMA provides conflict intervention, coaching, training and system design services. Kate has served clients in Africa, Asia, Australia, Europe and North America. She holds a master's in international administration. She is trained in facilitative and transformative mediation frameworks.



Otting is a fellow of ASU's Global Community Development Partnership with Feng Chia University in Taiwan. She is also on Conflict Prevention Africa's expert roster. She is a member of the National Association for Community Mediation, National Association for Civilian Oversight of Law Enforcement, and the Association for Conflict Resolution, the latter for which she was also past president of the Arizona chapter. Her previous positions include Arizona's Deputy Ombudsman, Director of Conflict Management Programs for Arizona's Attorney General and Vice President of the International Center for Community Journalism. She also worked in Togo, West Africa with the Peace Corps. Her early work in school violence prevention was featured in the PBS documentary *The American Promise*. Kate and her husband have 4 adult children, a granddaughter and a beautiful Husky named Tasha.



“Mediation, as a whole, provides a holistic and human approach of discussing important and critical topics and incidents of concern to all parties involved... which in turn strengthens our internal processes and procedures, and of course relationships with the community we serve. Huge advocate of mediation and the process.”

“My hope is this process continues to grow... Thank you for launching this program and including PD in the process.”

“I firmly believe this process is beneficial to both the complainant and the Phoenix Police Department. It allows a forum for PD to explain why officers do what they do from a policy standpoint, but it also provides a forum for PD to hear and address legitimate concerns the community may have that don't necessarily rise to the level of serious misconduct. I also believe it gives our community members a 'voice' in how we address officer behavior, which in turn, fosters trust between police and community.”

Feedback from community members:

“There was greater understanding. All party's where [sic] heard. It was a good outcome. T his needs to be done more.”

“It's good to talk things out.”

“Gained better understanding.”

bers about OAT's Mediation but, more importantly, to hear concerns and hopes for the program. With input from colleagues, community and police, OAT now has a framework modeled after the most effective police-civilian mediation programs, while also incorporating elements that work for Phoenix.

At the time of this publication, OAT has conducted four mediations involving community complaints against PPD. Following OAT's first mediations, 100% of the participants, including four complainants and seven PPD designees, indicated they were satisfied with their experiences with mediation.

Feedback from PPD designees included the following:

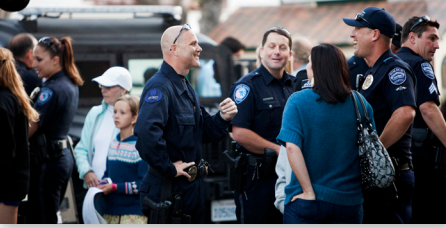
OAT will eventually facilitate two types of mediation: department and individual officer. Department mediations are for complaints where no individual officer is identified, larger community concerns about police response or involvement, or issues related to broader police policy and practice. The first mediations cited above fell into this category. OAT is having ongoing discussions with PPD to advance the mediation program to eventually include complaints involving individual officers.

OAT's Mediation Program Fundamentals

OAT's mediations arise from incidents reported to OAT involving PPD and members of the community. A complaint is considered appropriate for mediation, unless it involves an allegation of criminal conduct against an officer, or the complaint is a result of an incident that involves an arrest, or if there was an injury to either party, or if there was property damage by an officer.

Complaints are ideal for mediation if they would likely:

- Result in greater complainant satisfaction
- Result in improved police conduct; and/or
- Contribute to community policing goals of improved community-police relations



Building Police-Community Relations Through Mediation: The Benefits of Facilitated Conversations

OAT mediations are scheduled for two hours in a Phoenix community center near the precinct where the incident occurred, virtually or at the OAT Office, whichever is more convenient for the parties. Participation is voluntary and confidential. OAT is working through City of Phoenix procurement processes to find a qualified pool of professional mediators to conduct mediations. They will be accountable to the expectations of OAT, State and local laws, and the Model Standards of Conduct for Mediators.³ Once selected, mediators will be required to attend training specific to community-police mediation, facilitated by OAT.

Community-Police Mediation: Examples of Success

Readers may be surprised to learn that OAT, like most community-police mediation programs, does not document or track mediation agreements. Instead, the benchmarks for success in these types of programs are the face-to-face conversations and parties' experiences with the process.

Parties' satisfaction with mediation, as compared to traditional complaint resolution processes, is typically evaluated through post-mediation surveys. Analyses by similar programs indicate highly positive experiences, as reported by officers and civilians who participated.⁴

A study involving Denver's Office of the Independent Monitor (OIM) found the use of mediation in complaint-handling led to significantly higher satisfaction levels for police and civilians, than those handled through investigation. Surveys revealed that the traditional complaint investigation process is seen as impersonal and can take months to conclude, leaving parties with long periods of uncertainty. Adding to this frustration is the fact that many civilian complaints are not upheld, due to a lack of independent witnesses or evidence, regardless of whether the investigation is conducted internally or by an external civilian oversight agency.⁵ Results from Denver OIM's more recent mediation exit surveys, illustrated in Figure 1, indicate high rates of satisfaction from community members and police.⁶

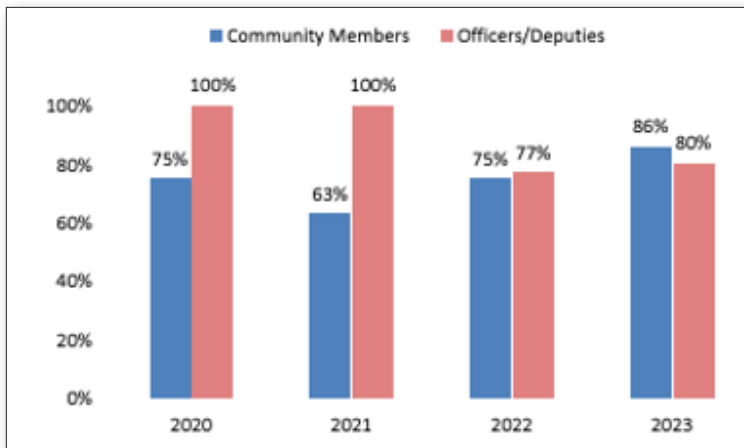


Figure 1
Denver Office of Independent Monitor, Satisfaction with Mediation Process, 2020-2023.

An analysis of New York's Civilian Complaint Review Board also examined parties' experiences with their mediation program. The study found that civilians who participated in mediation were significantly more satisfied with the process, and with NYPD overall, than those whose complaints had been investigated.⁷

The Los Angeles Police Department provides another example of a police-civilian mediation program to which participants favorably responded to mediation. Figure 2 shows the satisfaction rates of officers and complainants between 2014-2016.⁸

Question	Percentage Agreeing	
	Officer	Complainant
Satisfied with process (very or somewhat)	90.2	71.9
Mediation was fair (completely or somewhat)	97.5	87.1
Mediator well acquainted with issues (very well or well)	100.0	86.7
Time required less than expected (a lot or somewhat)	55.0	86.7
Understanding of community/police work increased (a little, somewhat, or a great deal)	70.0	74.2
Would recommend mediation to others (very or somewhat likely)	80.0	80.0
Total number responding	41	32

Figure 2
Results of LAPD Mediation Exit Questionnaire: Experience of Officers and Complainants.

Benefits of Mediation for Police and Community

The OAT Mediation Program offers the following substantial benefits to the Phoenix community and police alike.

Opportunity for Greater Understanding

Mediation provides police and civilians a chance to communicate directly in a calm, neutral and confidential setting. Officers can clarify what happened and why, from their own perspectives; and they can explain police policies and procedures, pressures of policework, and other limitations that can lead to misunderstanding. Mediation can also increase officers' awareness of their interactions with community members and learn from mistakes. Research shows that when community members feel officers have treated them fairly, they are more likely to respect the legitimate authority of police.⁹ In some cases, one party may not have realized they offended the other, and may wish to seek clarification, offer an apology, or explore ways to improve future police-community interactions.

Broader Resolutions

The facilitated conversation model OAT uses is a "party-driven process that allows both parties to control their own narratives."¹⁰ Instead of answering to external concerns or pressures that may reduce the likelihood of resolution, through mediation, parties are more prone to reaching an understanding that is reflective of their mutual concerns, as well as broader community interests. Furthermore, parties are typically more willing to be accountable to and compliant with verbal agreements reached.¹¹

Even Playing Field

Mediation can level perceived power imbalances by ensuring all



parties have a chance to speak and be heard. This enables productive exchanges civilians and police may not otherwise have in street encounters, or through other complaint-handling processes. As *Police Chief Magazine* asserts, “officers must constantly be on guard, fearing for their own safety and the safety of other citizens while maintaining order and control. Officers might not be able to address all of the questions and concerns of the citizen in the moment.”¹²

It’s no secret that public trust in law enforcement recently declined to record lows.¹³ Community members often fear intimidation and threats of prosecution if they speak freely with police.¹⁴ Mediation offers a way for police departments to restore public trust with their communities. At a minimum, confidentiality in mediation ensures that what community members say cannot be held against them, so they may be more willing to seek clarification and explain how they experienced the encounter that led to the complaint.

Less Tension When Addressing Complaints

Most U.S. police officers are committed to and proud of their work, yet 86% believe the community they serve doesn’t understand them.¹⁵ In conventional complaint-handling processes, officers are expected to explain themselves to investigators or supervisors, escalating defensiveness, with little room for dialogue with the complainant. Alternatively, mediation provides officers with a stake in the outcome of a civilian complaint.

Also, studies show the extreme heat Phoenix experiences can increase rates of aggression and violent crimes. Police and civilians can be physiologically affected by severe temperatures not only potentially impacting the safety of police and civilians, but also leading to poor communication, agitation, and misunderstanding.¹⁶ Mediation takes place in a comfortable climate-controlled environment, allowing for calm, meaningful conversations.

Timely Resolution

The goal of many complainants is to understand officers’ actions or to explain their own. Not all complainants want to see officers punished. Most want a sense of control over how their complaint is handled.¹⁷

Police departments across the U.S. have faced staffing shortages. As a result, many departments have reprioritized service calls, resulting in less interaction with community members and longer response times.¹⁸ Consequently, community members may feel their complaints are being ignored or minimized. When left unresolved, even a minor exchange between an officer and civilian can fester, fueling community members’ mistrust, frustration, and anger toward police.¹⁹ Mediation can be scheduled relatively quickly, providing a streamlined framework for addressing complaints.

A Fresh Approach to Building Police-Community Relations

The City of Phoenix envisioned mediation as a service OAT can deliver to the community. Conflict resolution processes are not new to PPD. Law enforcement inherently involves officers’ interactions with disputing community members.²⁰ Mediation between officers and community members who have complaints about them, can be another solution furthering PPD’s mission to “serve, protect and reduce crime in Phoenix while treating everyone with dignity and respect.”²¹ When community members experience negative interactions with police, OAT’s Mediation Program offers a fresh approach to building mutual understanding, trust, and respect. Mediators have the unique honor of facilitating difficult conversations that can heal and resolve differences. In a time when we all crave a break from divisiveness, OAT’s Mediation Program is serving a vital role in bridging police-community relations, bolstering accountability, reducing costs and improving complaint resolution times. ADR

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