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And
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**UNDERSTANDING THE MEDIATION PROCESS TO ASSIST
MEDIATORS, SELF-REPRESENTED LITIGANTS, AND
ATTORNEYS**

By: Judge Steven I. Platt (Ret.)

INTRODUCTION:

Good afternoon.

I appreciate this opportunity to discuss the role of the legal researcher in the 21st Century profession of dispute resolution from the perspective of what I now call myself, “a Recovering Judge.” I spent a total of 29 years from 1978 to 2007 on three different Trial Courts. I was also assigned to Maryland’s intermediate appellate court on multiple occasions. For the last 17 years, I have engaged in the world of private dispute resolution as an arbitrator, mediator, neutral case evaluator, Special Magistrate and Consultant on dispute resolution system design and implementation.

What I see is vastly different from what I saw from the Bench in the last quarter of the 20th Century, 1978-1999 and the first decade of the 21st Century, 2000-2007. Like every other institution of government, The Judiciary, as well as the private dispute resolution sector is rapidly changing. “Evolving” connotes too slow a process to be an accurate description of what is going on. Technology and globalization are rapidly transforming the forums and techniques of dispute resolution and with them the paradigms of the administration of civil justice.

These modifications of existing governmental institutions, corporate organizations as well as new financial products and devices, result from rapid technological development and globalization. These trends will, notwithstanding some of the subliminal messages from our

recent elections, not be reversed. So, therefore, the work and role of the legal researcher must necessarily expand and diversify to accommodate these changes and trends.

I recognize, that it is ironic that almost contemporaneous with these changes and my remarks, we just recently witnessed a not-significant portion of the electorate in the country, and if you want to count “Brexit”, indeed the world, revolting at the voting booths against “elites.” Legal researchers are, at times, in the business of identifying and defining what and who are “elite.”

CHANGES IN THE METHODS OF DISPUTE RESOLUTION:

Traditionally, our citizens have had their disputes (legal and factual) resolved by a judge or jury in a courtroom. There, the role of the legal researcher has historically focused on assisting the trier of fact, and the arbiter or authority on the law, be it a judge or jury, to locate and understand the evidence and the law which applies to it. Traditionally, those legal researchers except for law clerks, staff attorneys, and law librarians have not worked for the court and are not paid by the court. Rather, they work for and are paid by the parties and/or counsel. Therefore, in many instances, their research and the advocacy based thereon are, at least initially, viewed by both judges and juries as suspect. I am sure that almost everyone in this room has encountered that barrier if not overt cynicism to your research and arguments based thereon being received and found persuasive.

That is changing. For one thing, the appointment by the Court of its own experts and reliance on its own research frankly as a reaction to the diffusion of the “mainstream” media and social media particularly in cases involving valuation issues is on the rise. Most state courts have the authority to do that and more and more are open to exercising it. Judges and Court Administrators who do not always know or understand “who you are, what you do, how you do it.” I encourage you to reintroduce yourselves to judges and court administrators who you may think you need further introduction. In doing so, however, you *must* educate them. As a caution, do not assume a basic knowledge except among a very few experienced judges of the terminology produced by your research, including valuation techniques, particularly of intellectual property, businesses (distressed and other) as well as intangibles and other forensic accounting issues.

Courts are also increasingly relying on their own appointed Financial Forensic Experts as Receivers and Special Magistrates. In doing so, they expect their experts to be able to access complex legal research as well as multi-disciplinary research. Most state courts and all federal courts give their Judges the authority and discretion to appoint whomever they want including non-lawyers. The standard is “abuse of discretion.” Appointing someone with knowledge of the issues and industry before the courts and who can make informed and educated recommendations or even run a company for the Court, having the experience to do so, is clearly not an “abuse of discretion.” The judges will increasingly depend on you and your research to identify who those individuals are and their methodologies.

Finally, The Courts are increasingly utilizing Special Magistrates and Settlement Administrators a/k/a “Claims Adjudicators” to administer and manage settlements of high stakes, multi-party litigation particularly Class Action cases and Mass Tort cases. Court Appointed Special Magistrates and Settlement Administrators are most of the time authorized by Rule and/or Court Order to employ “such professionals, experts and consultants as they deem necessary” to carry out their court ordered duties, which likely will include recommending the allocation of damages, expert fees, and attorney’s fees to The Court. That is you! Those Settlement Administrators, Special Magistrate, and Receivers are a market which, if currently unexplored, should be on your marketing screen shortly. They need your cutting edge multi-disciplinary research.

The best-known example of this relatively recent phenomenon and “The Man” is of course, Ken Feinberg of 9-11 Fund, BP Gulf Oil Spill, and Virginia Tech fame, to name a few. In each of these cases, and others, the roles of Financial Forensic Experts and the legal and multi-disciplinary researchers they employ, has been to perform among other functions:

1. Research and Develop formulas and algorithms to determine the allocation of economic damages based on severity indexes established by the terms of the settlement agreement and data collected to support it.
2. Explain to the Special Magistrate, The Administrator, and/or The Court, those formulas and the allocation of damage awards based thereon.
3. Explain to the recipients of the different categories and amounts of damage the basis for the differentiations in the size of their distribution or award.
4. Supervise the transfer and application of data from investigations, interviews and records to the administrators formulating and implementing the settlement.

I, myself, have been involved in this process more than once as a Special Magistrate and Settlement Administrator, and I can tell you that the research needs of these Financial Forensic Experts who are qualified to, and willing to perform these functions are growing, but the number of potential legal researchers who understand those needs, and can meet them and are qualified to do so by education and experience is not large or at least not known.

THE USE OF EXPERTS IN ADR:

Furthermore, the non-traditional use of Experts, particularly Financial Forensic Experts in what is known as Alternative Dispute Resolution (ADR) is growing. As I have said, these new roles derive from the traditional role of assisting a judge or jury but are expanded to include or substitute persuading other players in the dispute. For example, in Mediation, the legal researcher can be most effective by assisting the opposing party, opposing counsel, or even the opposing expert in understanding the issues from the opposing parties’ perspective or how a court would understand it. There’s an old saying in the litigation world – “Don’t play in the other guys analytical ballpark.” However, in a Mediation, you **DO** play in the other guy’s analytical ballpark. That’s how you persuade him/her. If successful, it is likely that your research will result in the desired resolution of the dispute.

In an Arbitration, explaining to a single arbitrator or a three-arbitrator panel the methodology which is appropriate to value market share in order to determine as in asbestos cases the percent of allocation of damages, between defendants or in the newly emerging cannabis industry, with which I am familiar, the percentage of revenue or profits to which a consultant is entitled are examples. Here the success of the expert's client will very much depend on the legal researcher's ability to persuade the Arbitrator that the methodology utilized is appropriate and individualized to the valuation of the real, personal, or even intellectual property at issue in the case and not just a one size fits all over formula developed by the industry particularly the insurance industry.

Finally, it is useful to understand that in the new "Administration of Justice" paradigm, the data, opinions and related experience and information that will be sought from you will, to a certain extent, depend on the dispute resolution forum and technique being utilized by the parties and Counsel. In litigation and arbitration, your opinion as to how to determine the specific quantification of damages will be sought utilizing the theory of the case, and the valuation theory selected by the hiring authority. In a Mediation or Neutral Case Evaluation, your opinion is most likely to be sought to aid in a risk analysis designed to leverage the possible settlement of the case.

I hope I have been helpful and have adequately described the comparatively new world that you, as legal researchers have been or will shortly be operating in. As we look to the future of the field of dispute resolution and the administration of justice and specifically to your role as experts in that system, perhaps the best guidance that I can provide in conclusion is the advice of Abraham Lincoln which we would all do well to heed today, "*The dogmas of the quiet past are inadequate for the stormy present and future. As our circumstances are new, we must think anew and get anew.*"

Judge Steven I. Platt (Ret.) is the Founder and Managing Member of The Platt Group, Inc., a professional Alternative Dispute Resolution Firm. He is also a member of The Maryland Board of Directors of The National Academy of Distinguished Neutrals (NADN), which, after a thorough peer review by the Board of Directors of that "invitation only" organization, selects only the top 10% of Neutrals in the country. He is also on the Judicial, Commercial, Employment, Large Complex Case, and Construction Panels of the American Arbitration Association (AAA), the International Institute for Conflict Prevention and Resolution (CPR), The International Mediation Institute (IMI). The Association for resolving business disputes to judges and lawyers both in Maryland and nationally through both The Judicial Education Program of the American Enterprise Institute (AEI) Brookings Joint Center for Regulatory Studies (served on Judicial Advisory Board), and through The American College of Business Court Judges (Past President).

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