

Daily Journal

www.dailyjournal.com

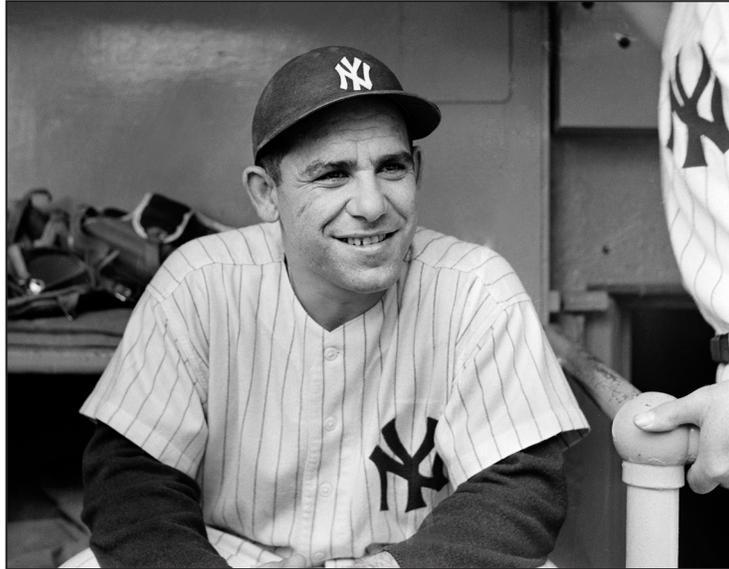
FRIDAY, DECEMBER 15, 2017

In mediation and arbitration, it ain't over til it's over

By Carlos Moreno

Yogi Berra's famous baseball tautology resonates with its obvious simplicity. This adage also rings true especially in litigation and the role that traditional ADR tools have used to achieve finality by mediation and binding arbitration. With the ever-increasing diminishing role of the jury trial, it is clear that ADR has played a crucial part in reducing crushing caseloads in state and federal courts. Participants have also benefitted by resolving disputes in a quicker and less expensive manner.

Less attention has been focused on the advantages of other lesser-used ADR tools beyond mediation and arbitration. As techniques and the complexities of cases have evolved, mock trials (bench and jury) have been increasingly employed by lawyers facing potentially enormous outcomes, particularly in IP and other "bet the company" high stakes cases. Using an experienced neutral or a panel of neutrals in a mock trial or oral argument setting of their own design allows lawyers to test both legal and factual theories of a case. This can include opening and closing arguments, expert witness examination, testing of demonstrative evidence, and other facets of a trial or arbitration. Valuable insights as to whether a matter has sound jury or judge appeal, which on first impression may be too complex or convoluted, are important considerations for lawyers prior to tendering the case to the



New York Times News Service

New York Yankees catcher Yogi Berra at Yankee Stadium in New York on June 13, 1956.

ultimate triers of fact and deciders of law.

Even before a case is filed the use of neutrals to evaluate pre-filing considerations early in a dispute can be helpful to avoid the inevitable expense of discovery, delay and trial preparation. Submitting an issue of contract interpretation to a neutral for a non-binding or binding ruling is just one example. Although lawyers are obviously most familiar with the facts, the law and legal theories, having another set of neutral eyes consider a matter for an objective second opinion at an early stage can also be extremely helpful in developing themes and strategies should the case go forward.

The use of neutrals as special masters in discovery disputes is

well established in matters invoking privilege or voluminous document production requests. Discrete motions on threshold issues are also particularly common in class action certification litigation as are similar dispositive motions for summary adjudication which can often result in the complete resolution of a case.

At the appellate level parties should consider input from an experienced neutral to review briefs, evaluate underlying trial court rulings, and engage in a moot court argument with a panel of neutrals. Often, one or more neutral evaluators, through a review of the briefs and considering the anticipated composition of the appellate panel, can direct counsel on the best approach to oral argument. Counsel can then focus on the key win-

ning arguments (and mitigate the losing ones) in the limited time allotted for argument. It is not uncommon for counsel (and especially trial counsel) to lose sight of the forest for the trees in many complex cases. Mock argument before an experienced neutral panel not only provides counsel with an opportunity to hone his or her oral presentation, testing both factual and legal theories, but it also gives valuable feedback on the likelihood of success.

Most times the better part of valor is securing the certainty of a neutral's resolution at the earliest stages of a case through mediation. Going forward, the costs of litigation are almost always unpredictable. But the inevitable emotional and stressful impacts are more certain, making the task of achieving true certainty and finality elusive.

These ADR tools should always be in your toolkit in many of your cases, yes, even on appeal, because "it ain't over til it's over!"

Carlos Moreno is a JAMS panelist based in Los Angeles. He previously served on the California Supreme Court. He can be reached at cmoreno@jamsadr.com.



MORENO