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LITIGATION

JAMS leverages history in Hollywood

By Erica E. Phillips
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SANTA MONICA — In Hollywood's tight-knit entertainment business community, it seems like everyone knows everyone. And when clashes arise, lawyers often prefer quiet resolutions, since chances are their clients will need to work together again on another project.

Within that elite circle, alternative dispute resolution provider JAMS has made inroads in marketing its entertainment industry expertise. In early 2010, it formalized that by establishing a 36-member entertainment and sports practice group.

Lawyers for both the studios and industry talent — actors, directors, producers and the like — say those neutrals are top-notch. But they're quick to add that JAMS expertise comes with a significant price tag and a lingering impression the panel of neutrals favors the studios.

A former major studio lawyer who spoke on condition of anonymity in order to protect relationships with neutrals said JAMS is by far the most expensive private ADR provider, with some neutrals charging as much as $10,000 to $12,000 a day.

But another studio lawyer who also asked not to be named because of pending arbitration before JAMS, pointed out that those fees pale in comparison to what lengthy litigation might cost the parties if they proceeded through the court system.

Many years ago, the studio lawyer continued, it was uncommon for studios to include provisions for private arbitration in their contracts. That changed as talent representatives started to request ADR clauses 10 years to 20 years ago, according to the lawyer. Those provisions are now common in contracts between studios and talent, and in recent years several entertainment companies' contracts have even begun specifically naming JAMS as their ADR provider.

Now many talent-side lawyers call those clauses unfair.

"Why would studios insist upon a specific tribunal unless they feel they gain an advantage?" said talent-side litigator Michael Plonsker of Robins, Kaplan, Miller & Ciresi LLP.

But studio lawyers argue the clauses actually eliminated conditions favoring talent. Echoing the sentiments of many lawyers who regularly defend studios in court, the former studio lawyer argued that jurors often favor talent. It's easy to be won over by their "star power," the lawyer said, whereas private arbitration can level that playing field.

Plonsker and others argued there are problems with the arbitration process. For one, many ADR clauses and the JAMS rules provide that the arbitrator — not a court — determines whether a dispute is to be arbitrated. That issue was litigated in a case last year between "Two and a Half Men" actor Charlie Sheen and Warner Bros. Television last year, and the studio won. JAMS neutral, Justice Richard C. Neal made the arbitrability decision, but the case settled before being fully heard last September.

The process would be more fair and better serve the parties, Plonsker said, if it were "more streamlined and less expensive, as originally intended, and did not in essence allow the parties to forum shop by picking the retired judges they think are going to give them a fair shake."

He added that, ideally, the provider group should independently choose the arbitrator, subject to a challenge, and charge the same flat fee regardless of which arbitrator it selects.

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>
> — *Theresa DeLoach*

Despite both sides' differences, they seem to agree on the merits of mediation as opposed to formal arbitration or litigation in court.

JAMS Practice Development Manager Theresa DeLoach said, "That goes back to the fact that the industry is so small, and people tend to have to work together."

Victoria Walsh, a communications specialist at JAMS, said the organization-wide ratio of mediations to arbitrations is 70-30, and DeLoach added that that number is probably higher within the entertainment industry.

At the JAMS office in Santa Monica earlier this month, entertainment group neutrals Neal, Terry B. Friedman, Joel M. Grossman and Diane Wayne addressed what they see as the most common misconceptions about the organization and about ADR in general. They said it wouldn't make good business sense for them to favor one party over another.

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Members of JAMS entertainment and sports practice, left to right, the Hon. Diane Wayne, Joel M. Grossman, Esq., Justice Richard C. Neal, JAMS regional vice president Gina Miller and the Hon. Terry B. Friedman.

"It would be very self-defeating to do anything other than make the honest call if you want to be doing this for the long run," Neal said. "The proof in this pudding is that we see lawyers who've lost cases coming back."

One reason for that, the neutrals ventured, is the group's long track record of handling entertainment industry disputes — either from the bench or, in Grossman's case, decades working at a major studio. JAMS formalized the practice group in response to a growing number of complex cases involving profit participation and new media, and the group's neutrals have undergone specially tailored training on those issues, as well as on digital data management and ADR clauses in entertainment industry contracts. Studio lawyers said it's helpful to work with a neutral who intimately understands the complexities of the issues at play.

Neal added that in every new case, the arbitrator candidate must reveal his or her prior matters and contacts with all of the parties and lawyers involved. They then have 15 days to accept or reject the candidate.

As for the growing pattern of studios naming JAMS in their ADR clauses, DeLoach said that was entirely unexpected.

"We're always shocked and surprised when we see that we're in a certain studio's clause, because we don't make that kind of effort, especially in the entertainment context," DeLoach said. "I think it's really driven by the marketplace."

Grossman agreed. "Individuals and smaller companies may have this idea about some arbitrator, 'He's pretty smart, he knows where his bread is buttered, and he knows he'll have maybe 100 cases from Paramount, for example, and he wants that repeat business,'" he said. "I think it's just something people tell themselves when they lose cases."

In one chapter of a treatise on entertainment litigation, Ronald J. Nessim of Bird, Marella, Boxer, Wolpert, Nessim, Drooks & Lincenberg PC pointed to a study based on data from the American Arbitration Association examining that precise question. The study found that when employees sue their employers, their rate of victory was 32 percent against employers who were not "repeat players" with the arbitration provider, versus 13.9 percent when they were up against employers who were repeat customers of the arbitration provider.

Nessim declined to comment for this story.