

Fee Justice?

OPINION: Judicial integrity is a reflection of character, moral strength and courage, not of who pays the freight.

BY WILLIAM SHEFFIELD

In reading Mitchell S. Shapiro's piece titled "Fee Injustice" (Verdicts & Settlements, Feb. 18), he seems fearful of everyone around him.

I agree with Shapiro that neutrality is at the heart of a judge's qualifications. Without it, the entire system, whether it be the public or private courts, is threatened.

However, judicial integrity does not come from regulation, as he asserts. Rather, it comes from the particular's judge's character, his moral strength and courage built over a lifetime. Counsel has every right and the duty to make certain the judge selected to hear the least or most important case has that level of moral strength necessary to make hard calls — without any concern for who the parties might be, who their counsel might be or how an unpopular decision might impact the judge.

Shapiro found retired judges like blobs of silly putty in the hands of the "materialistic" world of ADR. Lawyers are wimps who, in their desire to snuggle up to judges, show their sycophantic lack of character. Sitting judges are so motivated by their own "self-interest" (wrapped in the hopes of themselves someday eating the fatted ADR calf) that any efforts by them to police private judging must be "disregarded."

Shapiro's concern is off the mark. The exceptionally high level of both competence and integrity that is the profile of the typical private judge is readily apparent. However, having said that, keeping a neutral neutral is always an important end, for both the neutral and counsel. It is not an unreasonable fear for an attorney who has not previously appeared before a particular judge, whether public or private, to be concerned about the fact that opposing counsel has appeared many times before that same judge and represents a client, often an insurance company, who brings this judge considerable business.

The fears of obtaining a judge biased in favor of the opposition is just as great in court as in ADR. While public judges have no financial stake in hearing the case, the opportunities for cronyism and favoritism are just as great. The phrase "home court advantage" did not begin with basketball — rather it describes a court of law in which the out-of-towner has an uphill legal and procedural battle. The syndrome is not a new one.

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Shapiro overlooks or undervalues two important principles, and is perhaps naive about others.

First, he calls for "a commission" to consider the fears he has concerning the neutrality of private judges. Private judging is done in the context of an agreed-upon ADR format, chosen by the parties for its many advantages. They are there because the financial and emotional costs are less than in the public courts. So it must be remembered

With many former public judges serving as private neutrals, counsel have a wealth of experience and personalities to pick from. But the important point is they get to pick.

When the parties and counsel appear for a trial in the Superior Court, they must accept the judge they are assigned to, unless they elect to use their one peremptory challenge.

Picking the right private judge is probably the most important step in the development of a case. How does competent counsel make certain the judge is truly capable and neutral?

One of the best ways is to ask around. Then ask the judge for references and a disclosure statement, which will show how many times he has worked with opposing counsel.

Next, if necessary, ask the judge to meet with all counsel for an interview, which will bring counsel closer to selecting that judge or further from it.

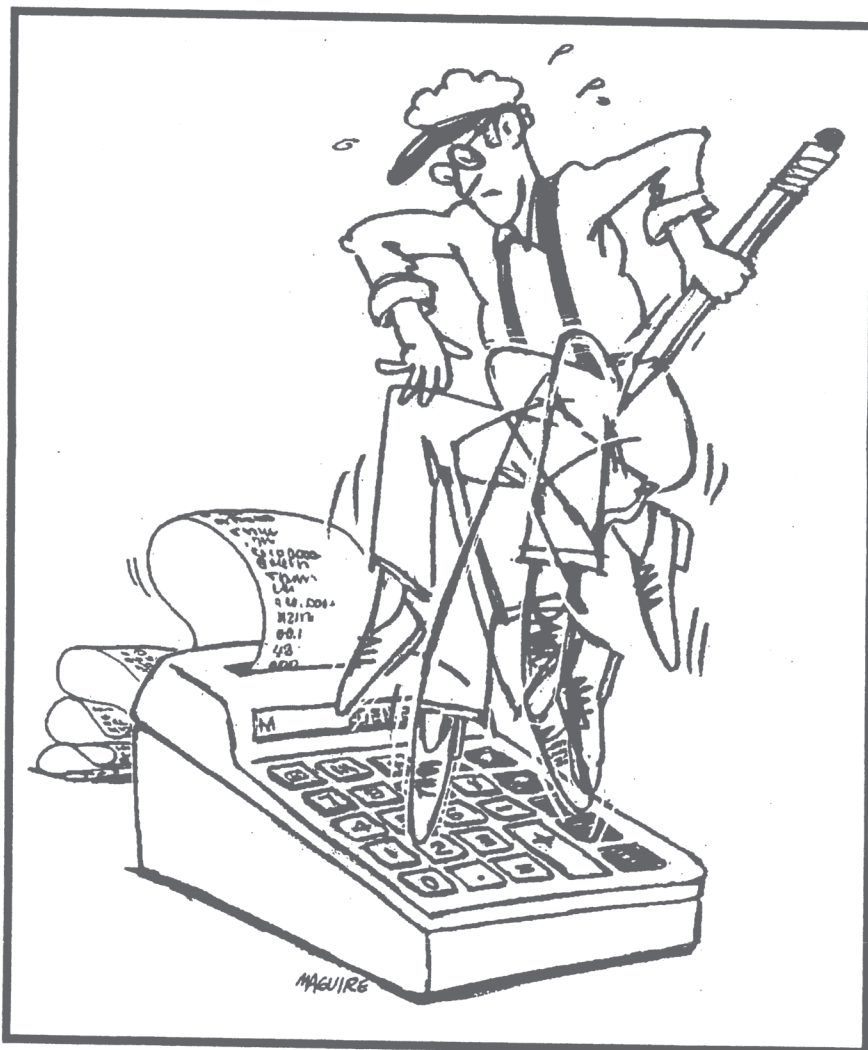
However, probably the best overall indicator of a judge's neutrality is his reputation in the community. Reputation though should not rest on one case, but should be a conclusion reached from a compilation of thoughts collected over a period of time.

Is the judge a straight shooter? Does the judge split the baby? Does this judge find the plaintiff has met its burden but then waters down damages to appease the defense? Will he "reward" the plaintiff with some money, even though plaintiff has failed to persuade? These questions are legitimate and need to be resolved before accepting a particular judge.

Counsel must do due diligence. If the attorney didn't make these types of inquiries, counsel has abdicated an important responsibility and left the outcome of the case to chance.

Finally, counsel should use the services of a first-rate ADR provider that supports judges without insisting they become involved in marketing. If judges must market, their independence can appear compromised. When the ADR provider does the marketing, I believe the judges can be absolutely neutral without any consideration of personalities or who the parties are before them.

This piece is in opposition to Mitchell Shapiro's opinion piece printed Feb. 18, in which he asserted that the profit motive inherent in the private judging industry poses a significant challenge to neutrality.



that ADR participants have chosen that forum and their choice should be respected without interference. The freedom to contract should be respected for the constitutional right that it is.

Next, the parties have also selected the particular neutral hearing the case. That the neutral selected must be agreed upon by each side to the case is a great advantage over the public courts.

Because each side must stipulate to the judge, each holds a veto power. The marketplace weeds out judges who are typically biased toward one side or the other. Counsel has the right to expect two ingredients in the judge they select: neutrality and legal competence.