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## **Mediator Criticizes Superior Court's Neutral Program**

**By Eron Ben-Yehuda**

At a recent conference, the president of the Southern California Mediation Association spoke out from the audience to criticize as outmoded the Los Angeles Superior Court's program that provides litigants with neutrals to settle cases before trial.

The system pressures mediators to work for free or at "sub-market" rates, according to Jeff Kichaven.

"I'm reminded of the saying that the cheese is always free in a mousetrap," Kichaven said. Kichaven delivered his rebuke April 14 during one of the discussion panels at the seventh annual conference of the American Bar Association Section of Dispute Resolution held in Los Angeles. The meeting room was packed with 70 people, who remained quiet and attentive as Kichaven made his remarks.

The Los Angeles court program offers both a pro bono and a "party pay" panel. Mediators and arbitrators that sit on the pro bono roster volunteer the first three hours of hearing time, after which the parties could continue at whatever fee they agree on with the neutral.

More experienced neutrals, who have completed 25 court-referred mediations or arbitrations, can join the paid roster and charge \$150 from the outset. A higher rate may be negotiated after three hours.

Kichaven, a renowned Los Angeles neutral, voiced his views during a question and answer period following a panel titled "Voluntary v. Compensated Court-Related ADR ... Which Way Should We Go?"

Neither option is to Kichaven's liking. And he's not alone.

Kichaven, who leads an organization of 500 members, said mediators complain to him by phone and e-mail.

"There's no subject of complaint in the mediation community [that's] more common than that they are required to work for free or under a system essentially of wage and price controls in cases where there are hundreds of thousands or millions of dollars in controversy and every other professional in the room is being paid hundreds of dollars for what they are doing," he said. Los Angeles Superior Court Judge Helen I. Bendix, chair of the court's ADR committee, sat as a panelist at the session.

She disagreed with Kichaven's characterization of the system as imposing "price controls."  
"No one is forced to be on our panel," Bendix said.

Mediators benefit because they learn their craft taking on court-referred cases, she said. They gain experience and confidence to "put up a shingle" and start their private practice, she said. "And I think to the extent that you want to have a vibrant mediation community, you have to train your young," she said.

In Kichaven's view, that kind of mentality made sense years ago, when mediation was in its infancy.

"Mediation-savvy" litigators used to be few and far between, according to a handout Kichaven distributed at the session. Because demand was sparse, supply was also limited, the flier reads. It was hard to find a full-time professional mediator. Today, it is a different world.

"Lawyers don't get confused between 'mediation' and 'meditation' any more," Kichaven wrote. "As demand for mediators has grown, supply has responded. Today's mediators are no longer hobbyists, amateurs or moonlighters. We are highly trained, skilled specialists and committed professionals."

Kichaven thanked the court's program for "jump-starting" the mediation-friendly culture. But a new approach is necessary, he said.

"I tell mediators all the time that you must be prepared to come through the way everyone else in the American economy functions, by going out, marketing yourself, advertising, speaking, writing - doing all the things that everybody else in business does in the United States to generate business.

"And not to look to the Los Angeles Superior Court as if somehow the court has a responsibility for promoting your career as a mediator," he said. "We must be subject to laws of supply and demand the same way everybody else is."

Similar court programs are offered elsewhere in California. In the San Francisco federal court system, neutrals offer the first four hours free, with the next four at \$200 an hour, according to Bay Area mediator Gail Killefer.

Killefer, a panel member in the session, credited the program with helping her establish her practice.

"For me, it's been critical," she said. "If people's practice gets to a point where they don't really need to be on the court ADR program anymore, certainly they have the option of getting off and that would open the door for new people getting on.

"And I think that sort of cyclical moving in and out of programs as people's practices develop makes a lot of sense to me."

Not everyone who belongs to the Southern California Mediation Association shares Kichaven's outlook.

Los Angeles mediator Susan Keenberg, an organization member who sat among the audience at the session, stood up to share her thoughts.

"Jeff does not voice my opinion," Keenberg said.

The court panel allows lawyers to meet new mediators and find out if they know what they're doing, she said.

"Lawyers want to see you in action," she said.

Kichaven gave an example of the difficulty the court system imposes. He described the kind of phone calls other mediators tell him they get: "You know, Jeff, I get a call from a lawyer and the lawyer says I know you're not on the party pay panel and this or that. I'd like to use you, but I'll use you if you do the first three hours for \$150 an hour."

Kichaven said, "I think price control is the appropriate analogy."

"Lawyers in Los Angeles understand very well the pressure they can bring to bear on members of the Southern California Mediation Association and others," he said. "And if you say no, you know full well they'll just go to somebody else."

In that kind of situation, panelist Steve Cerveris, a Toluca Lake mediator, said, "I give them an hour [at \$150]."

In order to generate goodwill, as well as favorable public relations for the future, "I'll say, 'You know what? I can't give you three. I appreciate the call. I'm flattered. I'm honored. My wife won't allow me. But I'll give you an hour.'"

Los Angeles Superior Court Judge Alexander Williams III, an audience member, said despite the disagreements, both sides recognize that the litigation community is embracing mediation. "Let's all celebrate our success and not fight about it," he said.

The three-day conference also included a session examining strategies to help attorneys improve their effectiveness in court mediation programs. Another discussion panel was titled "When Harry Met Sally: Is the Entertainment Industry's Infatuation with ADR True Love, or Are They Just Faking It?"

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