

SCMA President's Address, May 2005

By Jeff Kichaven

"I am certainly not an advocate for frequent changes in laws and constitutions. But laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths discovered and manners and opinions change, with the change of circumstances, institutions must advance also to keep pace with the times. We might as well require a man to wear still the coat which fitted him when a boy as civilized society to remain ever under the regimen of their barbarous ancestors."

I didn't write that.

Thomas Jefferson did. Those words are inscribed on the walls of the Jefferson Monument in Washington, D.C. I thought they were inspirational when I first saw them, as a college student. I still do.

Jefferson's message captures a new spirit being brought to bear in the Los Angeles Superior Court's ADR program. We believe that the bench and bar are ready to embrace that spirit as SCMA's ADR allies. The Court is now undertaking a generational reexamination of the rules governing its ADR program, and your SCMA representatives are there to help guide it. The time is right. Our new partners have open minds, for which we thank them, and we are excited about the growth that this reexamination is all but certain to bring. I want to share with you a bit of what is under way.

First, a bit of history. The current rules governing the Los Angeles Superior Court's ADR program were developed at a time, which was, while not barbarous, as remote from today's circumstances as some of those rules' chronological contemporaries, the rotary-dial phone, eight-track tapes and the Betamax.

When the Court's rules were devised, mediation was a sporadic, even exotic, event. Mediation-savvy litigators were few and far between. They had to spend hours educating opposing counsel, case by case, as to what mediation was and why it might be appropriate, uniquely, to their then-current case. Demand for mediation was sparse. So it made sense for the Los Angeles Superior Court to jump-start the bar's consciousness of mediation through its compulsory programs.

Because demand was sparse, supply was limited, too. It was hard to find a full-time professional mediator. There were a few in San Francisco, hardly any in Los Angeles. Litigators on a casual, occasional basis did mediation. By dilettantes. Certainly that was what I was for the first years of my mediation experience, and it is true of many others as well.

Today, it is a different world. The court's jump-starting of a mediation-friendly culture worked exquisitely well and we owe the Court our continued gratitude and loyalty!

Mediation is not occasional or sporadic. It is a regular part of the process of resolving legal disputes. Lawyers don't get confused between "mediation" and "meditation" any more.

As demand for mediation has grown, supply has responded. Today's mediators are no longer hobbyists, amateurs or moonlighters. We are highly trained, skilled specialists and committed professionals. Many no longer have any traditional law practice at all. Our malpractice policies require lower premiums because they contain an explicit exclusion for "law practice."

These differences call for different rules regarding: Who decides whether to mediate, and when? Who selects mediators? And, How shall mediators be compensated? The court's program has done its job.

Litigators are now sophisticated consumers of mediation services. They can be trusted to make these decisions for themselves and for their clients. It would not be fair to call the current rules "barbarous." But the changes in circumstances have been dramatic. So our institutions can and should advance. In short, as in most of the rest of the American economy, the marketplace can now be trusted with the efficient allocation of mediation resources.

The role of government – here, its judicial branch – in determining the allocation and utilization of mediation resources can and should accordingly recede.

But, don't parties still need to be "ordered" to mediate so they won't look weak in the eyes of their clients or other parties? Generally, no. The former stigma, the fear of appearing weak if you suggest mediation, is largely gone. That is the legacy of success of the Court's program to date. To the extent the stigma remains, judges need not "require" mediation in order to see it take place. Courts need only order lawyers "to meet and confer regarding the advisability of mediation." That's all the help good lawyers need to get cases mediated when they are ready to be mediated.

But, doesn't the Court need to control that mediates litigated cases? Again, no. The marketplace is flooded with information about mediators. The SCMA website is one place we hope litigators will go when they need that information. The Court might maintain a directory, with mediators free to list whatever training and qualifications they think relevant. The marketplace can handle it from there. Litigators do due diligence and manage to find good experts in all manner of human endeavor. Mediators are experts on communication skills and techniques, and the negotiation of settlements. Litigators can and should be trusted to find the right mediators, too.

Market-oriented reforms are in the interests of all stakeholders – the bench, the bar and, yes, SCMA members. For our under funded court system, scarce resources can be devoted to those who truly need pro bono services as well as to other aspects of the administration of justice. For the bar, litigators will control the timing of mediation and the selection of mediators to a greater extent, minimizing unproductive mediations and maximizing the prospects of real progress and settlements when mediations do take place.

For our members, the benefits are obvious. Many members have told me how deeply they resent the present culture, which makes them feel as if they are being forced to work for free, or at sub-market rates, on cases with significant amounts in controversy where every other professional in the room – and often there are many – is receiving hundreds of dollars an hour. In response, the bench and bar report that some mediators have developed what they believe to be improper billing gimmicks, which threaten our continued partnership with the Court.

These distortions of the marketplace for mediation services are unnecessary and counterproductive. They breed disrespect for the very mediators whose help litigators need to get difficult cases settled. They hamper the development of the very profession that so many of today's litigators want to make their second career.

We have been slow in urging the application of Thomas Jefferson's wisdom to the court's rules governing mediation because the task of revamping an entire entrenched bureaucracy requires the building of alliances and the presentation of a coherent plan that will serve the interests of all stakeholders – Bench, Bar and mediation professionals.

Now, the time seems right. We firmly believe that our stakeholder-partners will be willing to work with us, and with each other, to make the world of mediation in Los Angeles County the "civilized society" of which Jefferson wrote.