

April 21, 2005

Via FAX and U.S. Mail

Hon. William A. MacLaughlin
Presiding Judge
Los Angeles Superior Court
111 North Hill Street, Room 204
Los Angeles, CA 90012

Hon. Helen I. Bendix
Chair ADR Committee
Los Angeles Superior Court
111 North Hill Street, Room 204
Los Angeles, CA 90012

Dear Judges MacLaughlin and Bendix:

The California Dispute Resolution Council is the statewide advocacy organization for Alternative Dispute Resolution (ADR) in California. Our membership constitutes more than 300 of the most active mediators, arbitrators, retired judges, community programs, private ADR providers, court ADR administrators, and academicians. With a full-time lobbyist in Sacramento, CDRC has been shaping public policy as it relates to ADR in California for 11 years. We weigh in on legislation as it is proposed, and act as the voice of ADR in helping to educate lawmakers about the practice of ADR and about the consequences of their actions on the ADR field, the courts and in the law as they consider legislation regarding ADR's implementation.

In 1994, we worked with, among others, the legislature, members of the AOC and the Bar, in the shaping of what was then SB 401, providing for a mandatory mediation pilot program for Los Angeles County, and making that program available for any other counties in California that decided to opt into it. SB 401 became codified as CCP section 1775, authorizing the court to establish a mediation program, and defining the intent of the legislature with regards to the operation of such a program.

Los Angeles County enjoyed great success with this program during its four year pilot period and beyond when the legislature, in an eleventh hour move, removed the sunset provision on the pilot program, continuing it indefinitely. It is our understanding that for the last several years, the Los Angeles Superior Court (LASC) has administered about 25,000 mediations through this program annually.

We are proud of the program that we helped to conceive and construct, and of the reduction in trial court delay by resolving thousands of matters without the need for continued court hearings and court days. The program has also succeeded in meeting its other goal of educating the lawyers of the Bar about the effectiveness of mediation in litigated matters.

When CDRC takes a position on proposed legislation or public policy, we are guided by our Dispute Resolution Principles (“Principles”), which represent the thinking in the field as it relates to the delivery of ADR. We ultimately supported SB 401 because it was consistent with our Principles. A copy of our Dispute Resolution Principles is enclosed for your review.

Recently, our Public Policy Committee, in responding to feedback from our members, reviewed the implementation of CCP 1775 by LASC, and its relation to our Principles. We were troubled to find a number of inconsistencies between what we believe to have been the original intent of SB 401, and the ultimate implementation by LASC. Several components of LASC’s management of its ADR caseload directly conflict with our Principles. CDRC believes that if the Bill were proposed today in the manner in which we understand it to be implemented by the LASC, CDRC would be forced to oppose it and put our effort behind defeating it, unless amended.

Given these conflicts, our membership (especially the Los Angeles contingent) has asked us to point out to you these apparent inconsistencies with our Principles for your consideration. Upon review, we ask that you consider bringing the Court’s policies into alignment with the original spirit of the legislation, and into alignment with our Principles so that we can fully support your effort and encourage our members to participate in the Court’s program.

Our Principle I.A., titled Voluntary Participation, states, “The values of a democratic society are maximized when parties voluntarily elect to participate in a dispute settlement process of their own choosing.” “Mandatory” mediation means compelling one to participate in a voluntary process. We supported this oxymoron for a limited time and for the limited purpose of demonstrating to the Bar the effectiveness of mediation as a viable settlement in litigated matters (the original Bill called for a pilot period of four years, ending in 1998). CDRC could only support the mandatory aspects of the program based on the last sentence of Principle I.A.; . . . , “(t)o the extent participation in an alternative dispute resolution process is mandated . . . the resolution of the dispute should not be binding.”

Principle I.B, Informed Consent, states, “Parties should be free to choose whatever dispute resolution process best meets their needs.” If parties are still being ordered to mediation by the Court, then they no longer have such a choice.

Principle I.C.2 Funding, provides: “Government and community organizations should continue to make mediation and other dispute resolution services available for those who cannot afford to pay for them. Disputants with the ability to pay may be expected to contribute financially to administrative costs, fees for third-party dispute resolvers, and other legitimate user charges.”

We understand that “disputants with the ability to pay” are not in fact paying for mediation services in the LASC’s *pro bono* mediation program, and we ask that you implement such a requirement. CCP 1775.5 states in part, “The court shall not order a case into mediation where the amount in controversy exceeds fifty thousand dollars (\$50,000). The determination of the amount in controversy shall be made in the same manner as provided in Section 1141.16...” The \$50,000 limit represents the line drawn by the lawmakers in determining which disputants were eligible for *pro bono* services through the Court. Section 1141.16 strictly governs the eligibility

for cases to utilize Judicial Arbitration. It was the intent of this legislation that the Court's authority over cases ceases when a case is valued at more than \$50,000. The Court's program of administering cases of unlimited size and allowing such cases access to the publicly funded ADR program is not consistent with these intentions, nor is it consistent with our guiding Principles.

Principle II.F, Compensation, provides:

“Neutral alternative dispute resolvers are entitled to reasonable compensation for their services. Compensation is especially appropriate when parties voluntarily select the dispute resolution process and dispute resolver, and have the financial ability to pay for the services.”

This provision relates specifically to your Party Pay Panel, and provides that, “(a)rtificial caps should not be placed upon an alternative dispute resolver's compensation. However, reasonable limitation on fees may be appropriate when necessitated by inability of the parties to pay full compensation...”

Principle II.H, Choice of Neutrals, states, “To the maximum practical extent, parties should be free to select providers of ADR services for their disputes.” By requiring all of the neutrals serving the LASC to provide their services on a *pro bono* basis, the pool of available neutrals is limited to those who are willing to volunteer. That pool is largely filled with newly trained mediators seeking to gain some experience, and tends to exclude seasoned, qualified full-time professional neutrals. This not only discounts the efforts of experienced neutrals but makes the mediation process less effective.

The LASC's new Party Pay program caps the mediator's fees at \$150 per hour for the first three hours. What that does is effectively raise some mediators up to \$150 and lower others, creating a one-price-fits-all plan. This may have been an effective way to introduce mediation services initially but once 100,000 mediations have been completed, the market is aware of the benefits of mediation. We believe that providers of dispute resolution services are not so easily interchangeable, and that there is a reason that the free market economy pays some \$75 per hour and others \$500 per hour. Our Principles underscore the concept that disputants, especially those who are represented by counsel, are best qualified to determine which kind of mediator best suits their uniquely individual dispute. Disputants should decide whether a dispute warrants a highly qualified mediator with specific subject matter expertise, or a less expensive mediator who might not possess those same qualifications. CDRC generally opposes any program that sets one price for all mediators.

CDRC is guided by our Principles, and we work diligently with the various entities and providers throughout the state to see that ADR services are delivered consistent with their intent, and consistent with the intent of legislation which we have worked hard to shape.

I am confident that upon further review of these issues, the Court will decide to continue its mediation program in a way that is consistent with the intent of this legislation. CDRC will then ask its members, and the mediation community at large, to increase their *pro bono* contribution to this program. We will be able to represent that the disputants for whom they are providing

these services would not otherwise have the access to our services, based either on their ability to afford to pay for them, or that the size of their case may not warrant paying for mediation.

Sincerely,

Richard Bayer, Esq.,
President

cc: Julie Bronson, ADR Administrator