

A Personal Opinion: A Few People Is Not A Stampede

By Max Factor III

Readers of the Daily Journal's recent article about the dissatisfaction of several mediators with the Superior Court's pro bono mediation panel might conclude that the program should be scrapped. The facts suggest otherwise.

While on average, a few mediators quit the panel each month, a greater number of mediators choose to join the Superior Court's ADR panel. That is why the Court's ADR Panel keeps growing in size from year to year. Knowing full-well that they are unlikely to be paid, these highly educated men and women "vote with their feet", making a calculated decision to give away a significant amount of their valuable time.

Why? Volunteering mediation time serves both the public good and one's own business interests. Given the tradition in the American judicial system of attorneys providing some services on a pro bono basis, and with so many mediators coming from the ranks of practicing attorneys, it is not surprising that they have brought with them the notion of pro bono service.

What better way to demonstrate the quality of one's professional mediation services than by doing a fine job mediating for two or more litigants and their respective counsel? This is certainly a more effective form of "marketing" than spending the same three or four hours having a lunch or two with attorneys while trying to describe one's mediation skills.

The Los Angeles Superior Court's ADR Panel is in many ways a vibrant success. Starting with just a handful of mediators a decade ago, it has grown into a force of 2,500-plus. These volunteers include attorneys, retired judges, business executives, psychologists and therapists, general contractors, real estate brokers and others working full-time and part-time as mediators and arbitrators.

The primary reason for the program's success is that it meets the needs of most of its stakeholders. Within minutes of being asked to consider mediation, litigators are provided at the Courthouse with a broad selection of neutrals. These attorneys are undoubtedly satisfied with the strong supply of qualified mediators on the LASC ADR Panel.

The Judiciary also is an obvious beneficiary of the current system, and unquestionably owes a debt of gratitude to the mediators who have volunteered thousands of hours to the panel. More than 35,000 cases were mediated through the ADR Panel last year. Well over half of these were settled at the mediation or as a result of communications and information developed during the mediation. Thanks to the success and efficiency of the ADR Panel, the approximately 235 judicial officers who preside over the more than 150,000 annual cases filed in Civil (unlimited and limited jurisdiction), Family and

Probate are able to spend more time working with counsel and litigants on the remaining matters.

The disputing parties in our civil (and not so civil) litigation process, by and large, report greater satisfaction from the mediation process than from the anticipated continuation of litigation. Had our legislature and our court system not initiated the mediation process, far fewer of the disputing parties would have seen their cases handled by a neutral. As a result, there would have been both greater costs to litigants and less satisfaction to litigants.

There is no Superior Court Pro Bono Discovery Referee Panel which provides discovery referees or special masters to litigants, without reference to whether a litigant is a Fortune 500 company or of limited means. Discovery referees and special masters commonly used by judicial officers to complete tasks that would otherwise be part of a judge's workload are paid, by the litigants, at their full "market rates". So, the concept of giving mediators the equal dignity of a "market rate" panel, after suitable pro bono service, should be as acceptable to the court system as is the current system of discovery referees and special masters receiving their full "market rates."

But is the Superior Court's largely pro bono mediation panel system working well for mediators? The flood of mediators opting to join the panel, versus the trickle that choose to leave, suggests that it is. To be sure, not all mediators are enthusiastic about donating significant hours of time that would otherwise be billable. But they do so, for a variety of good reasons.

Besides the public service and marketing advantages, many newer mediators are simply looking to improve their skills. Since most litigants have attorneys present and protecting their interests at mediation, the ADR Panel is a particularly safe place for the less experienced to learn skills and to gain experience. It may be that it is appropriate for the inexperienced to donate services to complete at least 25 pro bono mediations. It takes many mediations to become sufficiently skilled and intuitive in handling the challenges of difficult people in difficult moments in a way that meaningfully assists the resolution of the conflict.

Many other participants contribute their services on the ADR Panel for reasons similar to the talented individuals who serve as docents for our local museums or mentors, consultants and teachers within their respective professions. Some are retired or considering retirement and looking for a satisfying avocation or a second, and part-time, career. A court system that provides a "market rate" panel would not deter these fine individuals from donating their services or setting a very modest rate for them.

Is the Court's ADR Panel system perfect? Of course not. The dissatisfactions voiced by the mediators who have chosen to leave the panel certainly deserve consideration.

But it is ironic that, by calling for the panel's abolition, these mediators adopt an unfortunate confrontational strategy that negates the possibility of a win/win resolution. I

believe these same fine mediators would employ during mediation a strategy that recognizes and builds upon common interests, even in the face of seemingly irreconcilable points of view.

On Saturday, July 30, 2005, a full membership meeting of California's largest membership organization of mediators, the Southern California Mediation Association, will take an in-depth look at the current system. The resulting recommendations will then be submitted to the Court's ADR Committee. I anticipate that the dialogue of the SCMA membership will be constructive and create a bridge strong enough and wide enough to accommodate with dignity and respect each of the legitimate interests of the stakeholders. I predict that SCMA members are likely to take a "mend it, don't end it" position.

The professions of law, mediation and the judiciary will be better off for the modifications that are yet to be made. But personally, I believe the goal should be to improve and expand that system, within the system, not to topple it.

Max Factor III is a full time mediator in private practice, a Fellow of the International Academy of Mediators. He serves on the AAA's National Roster of Mediators and is a Professional member of the SCMA.