

SAN FERNANDO VALLEY BAR ASSOCIATION
ALTERNATIVE DISPUTE RESOLUTION SECTION
EXECUTIVE COMMITTEE
C/O CHARLES B. PARSELLE
14320 VENTURA BLVD., #408
SHERMAN OAKS, CA 91423
Telephone: 818.781.5810
Facsimile: 818.781.5380

May 1, 2005

Honorable Helen I. Bendix
Chairperson, LASC ADR Committee
Los Angeles Superior Court, Dept. 18
111 North Hill Street
Los Angeles, CA 90012

Dear Judge Bendix,

This letter is addressed to you as Chair of the Court's ADR Committee and is submitted on behalf of the Executive Committee of the ADR Section of the San Fernando Valley Bar Association, representing the members of the ADR Section.

LOS ANGELES SUPERIOR COURT
DISPUTE RESOLUTION SERVICES IN LITIGATED CASES

The letter is intended to contribute to discussion regarding the provision of ADR services by LASC and to propose a change in the current system insofar as the system relies substantially on pro bono contributions by mediators.

The request:

We request that LASC restrict the provision of pro bono mediation services to (a) cases ordered to mediation (b) cases of limited jurisdiction (c) cases of hardship, i.e. where filing fees have been waived by the court, or other similar circumstance in the court's discretion.

We further request that all other cases, all of which are voluntarily submitted by parties to mediation, be referred to the Party Pay panel at a flat rate of \$450 for a 3-hour session with two parties, plus \$150 for each additional party with additional hours at the assigned mediator's stated rate, or any off-panel mediator the parties may choose.

Summary of contents:

This letter traces the history of ADR through statutory provisions since 1978, discusses whether courts have an obligation to provide pro bono ADR services and if so in what circumstances, and surveys practices in neighboring counties.

Summary Conclusions:

1. The legislature encourages the use of ADR.
2. ADR particularly mediation has grown in recent years and now constitutes a specialty with a cadre of trained practitioners. Many bar associations including the ABA and State Bar have ADR sections.
3. The use of judicial arbitration has dwindled as the use of mediation has grown.
4. The legislature envisioned that mediators be paid for their services.
5. No statutory provision requires that the courts provide a pro bono mediation service, except as provided in (6) below.
6. Courts that avail themselves of funding pursuant to the Dispute Resolution Programs Act (B&PC 465 et seq.) are directed to provide ADR services “on a sliding scale basis, and without cost to indigents.”
7. Courts may not order any case into mediation with an amount in controversy over \$50,000. Such cases must be voluntarily referred.
8. Where parties have voluntarily consented to mediation in the expectation of benefit from such service, there is no legal reason why they should not pay for the service.

ADR TRACED THROUGH RECENT STATUTORY PROVISIONS

Although the court is no doubt familiar with the following, it is included for the sake of completeness. In 1978 when the legislature enacted the Judicial Arbitration Act, it made a distinction between courts with fewer than 18 judges and those with more. The former were authorized to refer all cases to arbitration if the amount in controversy was under \$50,000.00, whereas in the larger courts arbitration was mandated for cases with an amount in controversy under \$50,000.00 “*other than a limited civil case,*” which apparently limited the mandatory provisions of the arbitration statute to cases with an amount in controversy between \$25,001.00 and \$50,000.00 in such larger courts.

The statute provided for compensation to arbitrators in the amount of \$150.00 per case or per day. [CCP 1141.18]

The legislature evidently had hopes for arbitration as “an efficient and equitable method for resolving small claims” and desired that courts “should encourage or require the use of arbitration for such actions whenever possible.” [CCP 1141 et seq.]

The reason for this hope placed in the arbitration process was its finding that

“litigation involving small civil claims has become so costly and complex as to make more difficult the efficient resolution of such civil claims that courts are unable to efficiently resolve the increased number of cases filed each year, and that the resulting delays and expenses deny parties their right to a timely resolution of minor civil disputes.”

[CCP 1141.10] However, arbitration proved to suffer from two impediments, first a party’s right to *de novo* the result [CCP 1141.20], and also the discovery cut-off provision in CCP 1141.24.

In spite of the legislature’s encouragement, due to the parties’ extensive use of the right to *de novo* the arbitrator’s decision, arbitration tended to become mostly an additional hurdle on the long road to trial (in the 1980s approaching 5 years), and in 1993 the legislature made another attempt to accomplish its goal of “the peaceful resolution of disputes in a fair, timely, appropriate and cost-effective manner” [CCP 1775 (a)] by enacting the Civil Action Mediation statute.

Whereas the arbitration statute simply encourages the use of arbitration, the mediation statute is quite lyrical in its praise of mediation and uses the word “encourage” three times in its findings and declarations section. Legislators stated their concern that *“litigation culminating in a trial is costly, time consuming, and stressful for the parties involved.”* [CCP 1775 (b)]

Section 1775.5 imposed on courts the same dollar limitation for referring cases to mediation as Section 1141.11(a) for arbitrations, viz. *“the court shall not order a case into mediation where the amount in controversy exceeds \$50,000.00.”*

The following year in 1994, CRC Rule 1631 was enacted providing for the submission to mediation of *“any action in which the amount in controversy, independent of the merits of liability, defenses, or comparative negligence, does not exceed \$50,000.00 for each plaintiff,”* thus eliminating the apparent anomaly of only cases with a value between \$25,001-50,000.

The legislature envisioned compensation for mediators in the same fashion as for arbitrators; CCP section 1775.8 provides: “The compensation of court-appointed mediators shall be the same as the compensation of arbitrators pursuant to Section 1141.18 ...” That particular source of funding came to an end in the early 1990s but there are two other provisions that bear on the matter of mediator compensation. These are the 1986 Dispute Resolutions Programs Act In 2001, and CRC Rule 1580 adopted in 2001.

DO THE COURTS HAVE A LEGAL OBLIGATION TO PROVIDE PRO BONO
ALTERNATIVE DISPUTE RESOLUTION PROCEDURES?

The matter of arbitrator and mediator compensation is raised in the Code of Civil Procedure at sections 1141 and 1775, in California Rules of Court 1580, and in the Business & Professions Code at section 467.2 (Dispute Resolutions Programs Act).

In summary, we submit that nothing in the Code of Civil Procedure suggests that courts are under an obligation to provide pro bono mediation services, while the Rules of Court expressly envision payment for mediators, and DRPA requires that pro bono services be provided only for “indigents,” with others paying “on a sliding scale basis.”

(a) Code of Civil Procedure

The law permits *ordering* certain cases into mediation pursuant to CCP 1775.3-5 and CRC 1631, but since the legislature no longer provides funds for the provision of such services (unfunded mandate), it can be argued that courts may order such cases into mediation whether or not mediators are available to provide the service pro bono. (Nonetheless, for the avoidance of doubt, the proposal contained herein is that the pro bono panel continues to be available for cases “ordered” into mediation.)

CCP sections 1141 et seq. and 1775 et seq. contemplate payment to arbitrators and mediators by the State or county rather than by the parties. When governmental funding for arbitrators and mediators ceased in the early 1990s (apart from the temporary “early mediation pilot program” set forth in CCP 1730 et seq.), the courts turned to arbitrators and mediators to furnish such services pro bono. This included not only members of the bar but also the non-attorneys who had enrolled in the court’s ADR provider program, and such providers responded generously.

(b) California Rules of Court, Rule 1580

The Judicial Council in enacting Rule 1580 (adopted eff. Jan. 1, 2001) of the California Rules of Court clearly anticipated the compensation of mediators:

CRC Rule 1580.1 entitled “Court-related ADR neutrals” provides:

“(a) *[Lists of neutrals] If a court makes a list of ADR neutrals available to litigants, the list shall contain, at a minimum, the following information concerning each neutral listed:*

1. *The types of ADR services available from the neutral;*
2. *The neutral’s resume, including ADR training and experience: and*
3. *The fees charged by the neutral for each type of service. [emphasis added]*

(b) *[Requirements to be on lists] In order to be included on a court list of ADR neutrals, an ADR neutral must:*

1. *Sign a certificate agreeing to comply with all applicable ethical requirements;*
- and*

2. *Agree to serve as an ADR neutral on a pro bono or modest-means basis in at least one case per year, not to exceed eight hours, if requested by the court. The court shall establish the eligibility requirements for litigants to receive and the application process for them to request ADR services on a pro bono or modest-means basis.* [emphasis added]

(c) Dispute Resolutions Programs Act

The Dispute Resolutions Programs Act (“DRPA”) is sometimes cited for the proposition that mediation services should be pro bono, but we submit there is nothing in DRPA that suggests that mediation services *for those who can afford to pay for it* should be provided pro bono. The only section in DRPA that has any bearing on this is to be found in B&PC 467.2:

“A program shall not be eligible for funding under this chapter unless it meets all of the following requirements: (c) Provision of dispute resolution, on a sliding scale basis, and without cost to indigents.” [emphasis added]

We submit the legislature envisioned that the provision of dispute resolution services should be paid for “on a sliding scale basis”, and that a means should be found to provide such service without cost to indigents. LASC cases where one of the parties is indigent are easily distinguished by virtue of the application for and granting of a filing fee waiver.

(d) The growth in specialized dispute resolution services

The mediation profession has truly become a specialty since 1993; many mediators invest considerable sums in acquiring professional qualifications. For instance, many mediators pursue masters degrees from Pepperdine University, where the required 32 units over two years costs \$32,000.00, plus expenses, in addition to the two years of foregone earnings.

Mediation is no longer a marginal practice to which attorneys donate a few hours from time to time (as for example as *pro tem* judges in Small Claims court). Rather, it is practiced by a whole cadre of specialized professionals on a full-time basis. There is a substantial difference in the settlement rates of paid versus pro bono mediations.

We submit that mediated settlements save even more money than in 1993 when the legislature found “the average cost to the court for processing a civil case...through judgment is \$3,943 for each judge day....” [CCP 1775(f)]

Mediators feel it is anomalous and even unjust that literally everyone else connected with the process - from attorneys to court personnel - is paid, yet the court continues to rely on the uncompensated labor of professional mediators, most of whom need to be compensated in order to pay their bills and help support their families. Interestingly, parties are often surprised to learn that the mediator is pro bono; many of them, noticing that the mediator has to maintain office space including several separate conference rooms for private caucuses, assume that “someone else” is paying the mediator’s fees.

PRACTICES IN NEIGHBORING COUNTIES

The courts of San Diego, San Bernardino, Riverside, Orange, Santa Barbara and San Mateo counties regard mediation as a valuable service for which mediators should be paid. Ventura currently maintains an unpaid panel with 41 participants, but a committee is considering instituting a paid panel. We hope you will consider the experience of these neighboring counties, which is briefly reviewed below.

The *San Diego* Superior Court provides an active mediation program that is not pro bono but fee based. As stated in the San Diego Superior Court website, the court has set up a mediation panel for the convenience of parties, and “*mediators on the court’s panel have agreed to charge \$150.00 per hour for each of the first two hours and their individual rates thereafter for court-referred mediation. Under this new program, parties compensate the mediators directly.*”

The *San Bernardino* Superior Court also has a fee based mediation program. Rule 620 provides “*The court complies with California Rules of Court 1580 et seq, and encourages the use of alternate dispute resolution, including arbitration in accordance with the California rules of court. The court can also arrange private arbitration or determination or other alternate dispute resolution processes through retired judges.*” [As set forth above, CRC Rule 1580 specifically contemplates that ADR neutrals may to charge for their services.]

The *Riverside County* Superior Court has a fee paying mediation program. Its web site contains information about alternative dispute resolution including a guide to ADR processes, but for dispute resolution services the court web site refers the visitor to the Riverside County Bar Association. The Riverside County Bar Association provides dispute resolution on the following basis: “*The services are provided to the participants for a low rate. The fee is \$150.00 per hour regardless of the number of parties or complexity of the case. Persons who qualify for waiver of the court fees may have their share of the Riverside County Bar Association dispute resolution service fee waived. Visa and MasterCard may be used.*”

Orange County has a fee paying alternative dispute resolution program. The program appears to be optional. The court provides a form approved for optional use Form L1270, revised 1/05, which provides “*Alternative Dispute Resolution [ADR] Stipulation. Plaintiff and defendant agree to the following dispute resolution process,*” then it indicates whether it is mediation or arbitration or neutral case evaluation or other, and then it states, “*We understand that there may be a charge for services provided by private arbitrators and mediators.*”

San Mateo County has a paid mediation program. The San Mateo Superior Court web site also has the following information about its civil ADR program “*More and more people and businesses are using appropriate dispute resolution ‘ADR’ to resolve their legal problems ... you and the other parties will pay the costs and fees for ADR directly to your provider.*”

Santa Barbara Superior Court has a court-administered dispute resolution program called CADRe provided for in Rule 1102 of its rules of court. Mediation must be selected by the parties. Mediators on the CADRe mediation panel in Santa Barbara post their fees on the web

site www.sbcadre.org/fees, which range from \$125.00 per party per hour to a top rate \$450.00 per hour or \$5,000 per day.

WHOSE INTERESTS ARE SATISFIED UNDER THE CURRENT LASC SYSTEM?

Court	Yes: Nearly all cases referred Yes: DRPA funding for all such cases Yes: Roughly half of cases settled Yes: Established working institution run by a capable, hard-working staff
Attorneys	Somewhat: Some take it seriously, some don't, making it frustrating for those attorneys and clients who have "bought in" to the mediation by diligently preparing and bringing appropriate-level decision-makers. Yes: Clients pay for the attorney's time.
Parties	No: Only a fair chance of settlement compared with paid mediations Yes: It's free (although many of them think the court is paying the mediator) Somewhat: Many cases do not settle, and parties may feel disrespected by the other side's refusal to take the mediation seriously, and by the differing levels of competence offered by the <i>pro bono</i> panel.
Mediators:	No: Services though acknowledged as valuable are not compensated.
New mediators:	Somewhat: While new mediators have the opportunity for an apprenticeship, they will get such apprenticeship under this proposal as the <i>pro bono</i> panel will remain for smaller cases and also indigent or hardship cases.
Integrity of Mediation:	No: Tends to be taken for granted because it is free. No: Parties unfamiliar with the distinctions between <i>pro bono</i> mediators of varying quality, and professionally trained, experienced mediators, may conclude that mediation is ineffective.

CONSEQUENCES OF IMPLEMENTING PROPOSED CHANGE

For parties and attorneys, the proposed change will result in a small cost - less than a filing fee or deposition transcript, less than one hour of average attorney time - for referred cases with respect to which parties have already stipulated to mediation, and a likely increase in settlement rates as parties take the process more seriously.

For the court, no adverse consequences are anticipated, as suggested by the experience of neighboring counties, nor any change in the numbers of cases referred to mediation.

For new mediators as well as the court and bar, the pro bono panel will continue to provide a valuable resource for the mediation of limited jurisdiction cases, indigents and such other cases the court orders to mediation.

The paid panel for referred cases will offer an important resource for attorneys and parties who do not choose to seek a private mediator.

The system itself will gain in integrity and a likely increase in settlement rates.

CONCLUSION

Mediators believe that their contribution constitutes a not inconsiderable annual transfer of wealth when one considers that over 36,000 cases were referred to mediation in 2004; that is more than 108,000 hours at 3 hours per mediation – at a conservative \$150/hr., this amounts to more than \$16 million. This letter attempts to show that this is not required either in law or equity, and indeed that common fairness suggests that mediators be compensated for providing services generally acknowledged as being of value.

We respectfully submit that the time is right for change. This proposal preserves all existing interests while assisting the interests of mediators who for so long have supported the system with their pro bono efforts.

We acknowledge that the court's task in addressing this multifaceted issue is not an easy one, and hope that this letter is received in the spirit of collaboration in which it was sent.

Respectfully yours,

Executive Committee On Behalf Of
The Alternative Dispute Resolution Section
San Fernando Valley Bar Association

By: _____
Charles B. Parselle, Chairperson