Court-Annexed ADR in Los Angeles County

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1. Why mediation legislation was enacted in the United States

1.1 *Prefatory Note*

While most other countries deal with only one or a limited number of jurisdictions, it should be remembered that the United States consists of 51 different jurisdictions, namely the federal jurisdiction and the 50 states.

And while in the area of arbitration most state arbitration statutes apply only to strictly local cases because in other cases those statutes are pre-empted[1] by the Federal Arbitration Act, no equivalent federal statute exists for mediation. Besides, insofar as state law *does* apply, whether independently or as a supplement to the Federal Arbitration Act, virtually all states have adopted the Uniform Arbitration Act of 1955[2] or the Revised Uniform Arbitration Act of 2000.[3] In contrast, the states' legislation in the area of mediation has primary applicability.

1.2 *Introduction; history of court-connected mediation in the United States*

This article gives a brief overview of the current status of mediation legislation in the United States, and focuses in some more detail on the status of court-annexed mediation at the local level, i.e. in the Los Angeles Superior Court.[4]

The concept of mediation as a form of dispute resolution goes back thousands of years, notably in certain Asian countries.[5] In the United States, mediation is also traced

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[1] Allied-Bruce Terminix Cos v. Dobson, 513 U.S. 265 (1995); Preston v. Ferrer, 552 U.S. 346 (2008) ("The FAA's displacement of conflicting state law is "now well-established", and has been repeatedly reaffirmed." 552 U.S. at 353.

[2] *See* John M. McCabe, *Uniformity in ADR: Thoughts on the Uniform Arbitration Act and Uniform Mediation Act*, 3 PEPP. DISP. RESOL. L.J. 317, 318 (2003)

[3] The RUAA has been adopted in various forms in Alaska, Colorado, Hawaii, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Utah, Washington and the District of Columbia. Several other states are considering its adoption, including Arizona, New York and Pennsylvania. See, e.g., Raymond P. Pepe, *Revised Uniform Arbitration Act, Report to the Pennsylvania House Judiciary Committee regarding House Bill 1625, Printer's No. 2078* (September 9, 2008), pdf file available on www.klgates.com (last visited on March 18, 2010)

[4] This article does not cover the voluntary mediation program in the Second Appellate District of the Court of Appeal located in Los Angeles. There is, however, a now somewhat dated report on a two-year pilot program in the First Appellate District for Mandatory Mediation. See www.courtinfo.ca.gov/reference/documents/mediation.pdf (last visited on March 20, 2010).

[5] Mediation is said to have traceable origins that go back to the Chou Dynasty (1100 – 256 BC), more specifically to the writings of Confucius (551 - 479 BC). *See generally*, Donald C. Clarke, *Dispute*

back to the country's earliest history as many Native American tribes have employed a form of mediation for many centuries.[6]

The modern incarnation of mediation in the United States finds its roots in the collective negotiations of the labor-management area during the 1960s, and, perhaps surprisingly, in the urban turmoil and civil unrest of the late 1960s, when riots broke out in places such as Watts (in Los Angeles), Detroit and Boston.[7] Essentially, the mediation methods used in the labor area were used by community activists to intervene in interracial conflicts.[8]

In turn, these community mediators realized that mediation could also be useful for handling interpersonal conflicts rather than letting these conflicts escalate while waiting to be handled in court. In the early 1970s, the first community mediation centers were established, one of the first in Rochester, New York,[9] but also in places such as Philadelphia, Columbus, Boston and Manhattan, as an alternative to the courts.[10]

Courts first became interested in mediation in divorce cases, as since the 1970s more states were adopting laws in favor of "no-fault" divorce, while in "fault-based" states the courts began to favor "divorce by consent" for "irreconcilable differences."[11] Not wanting to conduct adversary proceedings surrounding child custody issues, courts became open to the mediation process as a way to help parents resolve those disputes.[12]

On January 24, 1982, Chief Justice Warren Burger addressed the American Bar Association at its midyear meeting in Chicago. In his famous speech, Burger called for an increased focus on mediation and arbitration.[13] Although he spoke more about arbitration than mediation, many trace the rapid increase in popularity of alternative dispute resolution programs in the 1980s and 1990s to his "call to action."[14]

Resolution in China, in CONTRACT, GUANXI, AND DISPUTE RESOLUTION IN CHINA 369 (Tahirih V. Lee ed., 1997); Kevin C. Clark, *The Philosophical Underpinning and General Workings of Chinese Mediation Systems: What Lessons Can American Mediators Learn?*, 2 PEPP. DISP. RESOL. L. J. 117, 121 et seq. (2002)..

[6] *See* Mark S. Hamilton, *Sailing in a Sea of Obscurity: The Growing Importance of China's Maritime Arbitration Commission*, 3 ASIAN-PACIFIC L. & POL'Y J. 10, under "II B. The History of Dispute Resolution in China" (2002); Robert Perkovich, *A Comparative Analysis of Community Mediation in the United States and the People's Republic of China*, 10 TEMP. INT'L & COMP. L.J. 313, n.6 (1996) and the works cited therein.

[7] Robert A. Baruch Bush, *Staying in Orbit, or Breaking Free: The Relationship of Mediation to the Courts over Four Decades*, 84 N. DAK. L. REV. 705, 709 (2008).

[8] *Id.*, at 710.

[9] *Id.*, at 711, citing Joseph B. Stulberg, *A Civil Alternative to Criminal Prosecution*, 39 ALB. L. REV. 359, 360 (1975) (stating that this Center started operations in September 1973)

[10] *Id.*, at 711, 713.

[11] Baruch Bush, *supra* note 7, at 718.

[12] *Ibid.*

[13] Chief Justice Warren E. Burger, *Isn't There a Better Way?: Annual Report on the State of the Judiciary, Remarks at the Mid-Year Meeting of the American Bar Association (Jan. 24, 1982),* in 68 A.B.A.J. 274 (1982).

[14] Kevin C. Clark, *supra* note 4, 2 PEPP. DISP. RESOL. L. J. 117 (2002).

A few years before Burger's call to action, as one of the first in the country[15], California had instituted an ambitious court-based alternative dispute-resolution program involving arbitration. Pursuant to a 1978 amendment to the Code of Civil Procedure,[16] this program required litigants to submit their cases to non-binding or "judicial" arbitration. Currently, all cases involving money damages of $50,000 or less (except so-called small claims of up to $7,500) that are filed in the state's 16 largest court jurisdictions must attempt arbitration before they will be allowed to proceed to trial.

The earliest attempts in the United States at legislation relating to mediation took place in the late 1970s and early 1980s. Early statutes were scattered because they intended to accommodate special situations in which the legislature wanted to encourage mediation.[17] For example, Colorado wanted to encourage resolution of disputes in mobile home parks;[18] and Iowa set up a mediation program in which lenders were mandated to mediate before they could foreclose on agricultural land that secured the debt.[19]

By 1989, the legislatures of the 50 states and the federal government had adopted close to 1,000 mediation-related statutes.[20] As of 1994, those several governments had enacted 2,000 such statutes,[21] and in 2001, the Prefatory Note to the Uniform Mediation Act (UMA) reported that this number had increased to more than 2,500 statutes.[22]

To this day, in addition to the countless statutory provisions at state level, labor relations boards, workmen's compensation boards, school districts and public commissions (such as for public utilities, parks and wildlife departments, social services, etc.) may adopt, and in many instances have adopted, their own rules regarding mediation.[23] Also, the local courts frequently each have their own rules about mandatory and voluntary mediation.

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[15] The oldest program instituting mandatory judicial arbitration was adopted in Pennsylvania in 1952. California's program appears to be the first one after Pennsylvania. For a description of the judicial arbitration programs in a number of states, *see* L. Christopher Rose, *Nevada's Court-Annexed Mandatory Arbitration Program: A Solution to Some of the Causes of Dissatisfaction with the Civil Justice System*, 36 IDAHO L. REV. 171 (1999).

[16] CCP §§ 1141.10 – 1141.31. The implementation of these provisions can be found in Division 8, Chapter 2 of the California Rules of Court, Rules 3.810 – 3.830. The local rules for the Los Angeles Superior Court can be found in Chapter 12 of the local Rules, Rules 12.27 – 12.36.

[17] *See* Scott H. Hughes, *The Uniform Mediation Act: To the Spoiled go the Privileges*, 85 MARQ. L. REV. 9, 17 (2001).

[18] *Ibid.*; *Colo. Rev. Stat. Ann.* 38-12-216 (West 2000) (originally enacted in 1981).

[19] *Iowa Code Ann.* 654.2C (West 1995) (originally enacted in 1986). *See* Hughes, *supra* note 17, at 17;

[20] *Id.*, at 16-17.

[21] *Id*, at 17.

[22] National Conference of Commissioners on Uniform State Laws, UNIFORM MEDIATION ACT WITH PREFATORY NOTE AND COMMENTS, at Prefatory Note, Part 3, *Importance of Uniformity* (August 10-17, 2001) *available at* www.law.upenn.edu/bll/ulc/mediat/UMA2001.htm (last visited on March 18, 2010). The Uniform Mediation Act was drafted by Drafting Committees of the NCCUSL and the Section on Dispute Resolution of the American Bar Association.

[23] Hughes, *supra* note 17, at 17.

The first state to adopt a systematic court referral to mediation was Florida, which in 1988 adopted a law that authorized all civil court judges, on a discretionary basis, to order any case on their docket to mediation (with certain exceptions).[24] Florida was soon followed by other states, including Texas, North Carolina, Minnesota, Massachusetts, Illinois, Ohio and others.[25] On the federal level, Congress adopted the Civil Justice Reform Act in 1990. This Act required that each federal district develop a case management plan, and recommend referral to Alternative Dispute Resolution (ADR) including mediation.[26]

1.3 *History of mediation in California*

Before 1998, the mediation rules of California had been spread over seven different Codes until that state adopted a comprehensive mediation statute as part of the Evidence Code, restating and adding to, the existing legislation.[27] Presumably, more states will seek to consolidate their legislation, either by adopting the Uniform Mediation Act[28] or by following California's example of adopting the relevant state's own comprehensive mediation statute. If that assumption is correct, the enormous proliferation of statutes may well diminish in the coming years, - although a wider acceptance of the UMA will perhaps not have as much impact as one might expect, as it basically covers only confidentiality.

The predominant reason for the adoption of statutory law that deals with mediation is to encourage the use of the process.[29] The main subject (but by no means the only one) that is covered in such statutes is confidentiality of the mediation process and the protection of mediation communications in the evidentiary rules that apply to pre-trial discovery and evidence taken at trial.[30]

Almost as important a reason for the adoption of mediation legislation is the public policy of lessening the caseload of the courts and the very substantial costs associated with the expansion of the court system that would be required without encouragement of alternative dispute resolution. For example, Section 1775(c) of the California Code of Civil Procedure ("CCP") explicitly provides that "…[m]ediation may also assist to reduce the backlog of cases burdening the judicial system. It is in the public interest for mediation to be encouraged and used where appropriate by the courts."

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[24] Fla. Stat. § 44.102 (2009); Baruch Bush, *supra* note 7, at 732.
[25] Baruch Bush, *supra* note 7, at 732.
[26] 28 USC §§ 652 (2008); Caroline Harris Crowne, *The Alternative Dispute Resolution Act of 1998: Implementing a New Paradigm of Justice*, 76 N.Y.U.L. REV. 1768, 1790 (2001).
[27] *See* Eric van Ginkel, *The UNCITRAL Model Law on International Commercial Conciliation: A Critical Appraisal*, 21 J. INT. ARB. 1, 3 (2001).
[28] As of this writing, the Uniform Mediation Act has been adopted by ten jurisdictions: the District of Columbia, Illinois, Iowa, Nebraska, New Jersey, Ohio, South Dakota, Utah, Vermont and Washington. Bills to enact the UMA have been introduced in a number of additional states. *See* http://www.acrnet.org/uma/index.htm (last visited on March 18, 2010).
[29] *See, e.g.,* California Code of Civil Procedure Section 1775 (a) – (e).
[30] *Accord*, McCabe, *supra* note 2, at 319 (2003).

CCP Section 1775(f) goes on to say:

> "The purpose of this title is to encourage the use of court-annexed alternative dispute resolution methods in general, and mediation in particular. It is estimated that the average cost to the court for processing a civil case of the kind described in Section 1775.3 through judgment is three thousand nine hundred forty-three dollars ($3,943)[31] for each judge day, and that a substantial portion of this cost can be saved if these cases are resolved before trial."

2. Content of the Legislation in Los Angeles County

2.1 *Focus on Los Angeles County's ADR Program*

Given the overwhelming number of different rules pertaining to mediation in California, let alone the United States, this article will focus on the rules as they apply to mediation of a litigated case that comes within the jurisdiction of the California Superior Court for Los Angeles County.

The California court system is the largest in the country. The LA Superior Court system, within which all trial courts are now unified in one administrative system, is the largest in the United States,[32] and probably the entire world.[33] It consists of 12 districts with a total of 48 courthouses.[34] It is therefore not surprising that in the Code of Civil Procedure, the California Legislature in 1994 designated the LA Superior Court as the primary place to conduct an ADR pilot program.[35]

The LA Superior Court's Mediation Program is governed principally by:

(i) Code of Civil Procedure ("CCP") Sections 1775 - 1775.15;[36]
(ii) Evidence Code ("EC") Sections 703.5 and 1115 - 1128;[37]

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[31] In 1993. Obviously, today's cost is substantially higher.
[32] *See* http://www.lasuperiorcourt.org/aboutcourt/ui/history.aspx (last visited on March 18, 2010).
[33] *See* http://www.courtinfo.ca.gov/about/ (last visited on March 18, 2010). The court system is organized by county. Since a constitutional amendment adopted on June 2, 1998, each county court system was allowed to unify all previous courts into a single superior court with jurisdiction over all case types. As of February 2001, all 58 counties of California have a unified superior court. Los Angeles County did so on January 22, 2000, thereby becoming what could be the world's largest court.
[34] *See* http://www.lasuperiorcourt.org/locations/ (last visited on March 18, 2010)
[35] CCP Section 1775(e). The "pilot" program was originally meant to take four years, from 1995 through 1998, to study the effectiveness of mediation as a tool in resolving general civil cases. In 1998, the program was extended for two years. In 2000, the program was made permanent by a famous (or infamous?) one-sentence bill reading "This bill removes the sunset provision of the mediation program in Los Angeles Superior Court." *See* Lee Jay Berman, *A Brief History of the Los Angeles Superior Court's Mediation Program* (compiled for the Southern California Mediation Association), http://www.mediate.com/articles/scma_article.cfm (last visited March 20, 2010).
[36] Available at http://www.leginfo.ca.gov/cgi-bin/displaycode?section=ccp&group=01001-02000&file=1775-1775.15 (last visited on March 18, 2010).
[37] Available at http://www.leginfo.ca.gov/cgi-bin/displaycode?section=evid&group=00001-01000&file=700-704 for Section 703.5, and http://www.leginfo.ca.gov/cgi-

(iii) California Rules of Court, Rules 3.890 – 3.898;[38] and
(iv) Chapter 12 of the Los Angeles Superior Court ("LASC") Local Rules.[39]

CCP §§1775 through 1775.15 apply specifically to the courts situated in Los Angeles County.[40] However, at the option of the presiding judge, any other county may adopt the program set forth in CCP §§1775-1775.15. Some twenty superior courts out of California's 58 counties have elected to conduct ADR programs for civil cases in some form, and not all of these ADR programs include mandatory mediation.[41] Each of these superior court systems has its own set of local rules, which may differ in material respects from the LASC Local Rules.[42]

Pursuant to Section 1775.3 (*juncto* Section 1141.11), all "non-exempt unlimited civil cases" are to be submitted to mediation if the amount in controversy, in the opinion of the court, will not exceed $50,000[43] for each plaintiff. In essence this means that all civil cases with an amount in controversy between $25,000 and $50,000 must go to mediation, early neutral evaluation or (non-binding)[44] judicial arbitration.

Claims for up to $7,500 ("Small Claims") and cases that fall between $7,500 and $25,000 ("Limited Jurisdiction") can go to mediation only if all parties agree. Whenever the court determines that the controversy is amenable to arbitration, limited jurisdiction cases that involve a claim for money damages[45] go to judicial arbitration unless the parties agree to some other form of dispute resolution.[46]

The Court determines on a case-by-case basis the suitability of a particular case for mediation, settlement conference, neutral evaluation or (non-binding) arbitration. The Court confers with counsel as to which form of dispute resolution offers the better likelihood of final disposition of the case without further proceedings. The Court may then order or suggest any of the foregoing options, in its discretion, and sets the dates for

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bin/displaycode?section=evid&group=01001-02000&file=1115-1128, for Sections 1115-1128 (last visited on March 18, 2010).

[38] Available at http://www.courtinfo.ca.gov/rules/index.cfm?title=three, under Division 8, Alternative Dispute Resolution, Chapter 4. Civil Action Mediation Program Rules (last visited on March 18, 2010).

[39] Available at http://www.lasuperiorcourt.org/courtrules/ui/ (last visited on March 18, 2010).

[40] CCP Section 1775.2(a).

[41] *See* http://www.courtinfo.ca.gov/programs/adr/tcadr.htm (last visited on March 18, 2010).

[42] http://www.courtinfo.ca.gov/programs/adr/tcadr.htm provides links to the ADR program of the superior court each of these counties.

[43] Raised from $25,000 by amendment to CCP §1141.11 in 1987. To the author's knowledge, no bills are pending to increase this amount, even though as of this writing this amount has remained unchanged for 23 years. The amount had previously been raised from $15,000 (established in 1978) to $25,000 in 1985.

[44] Judicial arbitration is non-binding, as the parties are free to request a trial de novo within 30 days following the award if they do not accept the arbitrator's decision. After this 30-day period, the award becomes binding and will have the effect of a judgment.

[45] LASC Rule 12.29 exempts from judicial arbitration cases seeking equitable relief, class actions, small claims cases and certain other cases.

[46] CRC Rule 3.811(a) and LASC Rule 12.28, pursuant to CCP § 1141.11(c).

completion of such ADR proceeding and a further status conference following such completion dates.[47]

2.2 *Suggested by Judges*

Even in cases in which the court does not order mediation or arbitration, it will discuss the possibility of mediation and the other ADR options with counsel and may encourage the parties to explore it on a voluntary basis.[48]

2.3 *No Suspension of Procedure*

According to Section 1775.7(a), mandatory mediation does not generally suspend the running of time periods[49] within which the plaintiff must serve his summons and complaint upon the defendant,[50] within which the case must be brought to trial,[51] or after which the court may, in its discretion, dismiss the case for failure to prosecute it.[52]

The only exception to this rule is when an action is or remains submitted to mediation for more than four and one-half years and the mediation ends in non-agreement, in which event the time period within which the case must be brought to trial will be computed without inclusion of such four and one-half year period.[53]

For (voluntary) international mediation, the California International Arbitration and Conciliation Act[54] does provide for a stay of judicial or arbitral proceedings from the commencement until the termination of mediation proceedings. In addition it provides that all applicable limitation periods "including periods of prescription" shall be tolled until the 10th day following termination of the mediation proceedings.[55]

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[47] LASC Rule 12.2. The various options are well explained in a number of short video's on the Court's website, http://www.lasuperiorcourt.org/adr/UI/index.aspx by clicking on "ADR Information" in the left column (last visited on March 18, 2010).

[48] Limited empirical research appears to indicate that cases are slightly more likely to settle if they entered mediation at the judge's own initiative or at a party's request, rather than as a result of random assignment. *See* Roselle L. Wissler, *Court-Connected Mediation in General Civil Cases: What We Know From Empirical Research*, 17 OHIO ST. J. ON DISP. RESOL. 641, 676-677 (2002).

[49] Note that for court-mandated or court-suggested mediation to come into play the action must have been commenced by filing a complaint with the clerk of the court. Thus, there is no issue here of tolling any statute of limitations that would arise if mediation were initiated by the parties prior to filing suit. For an example of "domestic" mediation that tolls the applicable statute of limitations, *see* Conn. C.G.S. §52-192a (pre-suit medical malpractice claims toll statute of limitations).

[50] Within three years from the date the complaint has been filed with the court. CCP §583.210.

[51] Within five years from the date the complaint was filed with the court. CCP §583.310.

[52] CCP §583.410 *et. seq.*

[53] CCP §775.7 (b).

[54] CCP §§1297.381 and 1297.382. For a discussion of this Act, *see* Eric van Ginkel, *Transatlantic Dispute Resolution*, http://www.mediate.com/articles/vanGinkelE1.cfm?nl=64 (last visited on March 18, 2010).

[55] Generally, the few states that have adopted international conciliation statutes do provide for tolling of applicable time periods. *See, e.g.,* North Carolina (N.C. Gen. Stat. 1-567.82), Ohio (Ohio Rev. Code Ann. 2712.82), Oregon (Or. Rev. Stat. 36.538), and Texas (Tex. Civ. Prac. & Rem. Code 172.207). *But see* the Colorado International Dispute Resolution Act (Col. Rev. Stat. 13-22-501 to 13-22-507).

2.4 *The Los Angeles ADR Program*

The Los Angeles Superior Court has developed an ADR Program that allows the resolution of a dispute by four[56] different means:

1. Judicial Arbitration
2. Settlement Conference
3. Neutral Evaluation, and
4. Mediation

2.4.1 *Judicial Arbitration*

Judicial Arbitration is the oldest ADR method used in California. As discussed earlier,[57] the California legislature first adopted this program in 1978. Judicial arbitration is *non-binding*, at least for a (non-extendable) period of 30 days following the date that the award is filed with the clerk of the court.[58] During the 30-day period any party is free to request a trial *de novo* if that party does not accept the arbitrator's decision. The award must be in writing but the arbitrator is not required to make findings of fact or conclusions of law.[59]

The arbitration is confidential, and if followed by a trial de novo, any and all reference to the arbitration (including that there had been arbitration proceedings) during the trial is prohibited.[60]

After the 30-day period has expired without a request for a trial *de novo*, the clerk must immediately enter the award as a judgment and mail notice of entry of judgment to all parties.[61] The judgment so entered has the same force and effect as a

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[56] Two other proceedings are identified as methods of alternative dispute resolution under the LASC ADR Program, namely "trials before temporary judges" (CRC Rules 2.380 through 2.834; LASC Rules 12.44 through 12.56) and "references by agreement" (CCP §638 *et seq.*; CRC Rules 3.900 through 3.932; LASC Rules 12.44 through 12.47 and 12.57 through 12.59). Both procedures occur pursuant to agreement or stipulation between the parties, with the appointment of a referee being subject to approval by the court. LASC Rules 12.49 and 12.57. They are somewhat comparable to binding arbitration. Like an arbitrator, the temporary judge and the referee are appointed and paid for by the parties. In principle, proceedings before a temporary judge take place in another location than the court's facilities, unless it is determined that such use furthers the interest of justice, - in which case the proceedings may take place at the courthouse upon payment of a fee (Rule 12.54). See also CRC Rules 2.834(a) and (c). Proceedings before a temporary judge or referee are conducted in the same manner as if the case were being tried to the court. As a quasi-judicial proceeding, they must be open to the public, subject only to the same restrictions that would apply if the proceedings were held in the courthouse. But as these proceedings are commonly held in private offices, there is in fact a high degree of privacy. Decisions by the referee, when they become final, are binding upon the parties and stand as the decision of the court (CCP §644), so that judgment may be entered thereon. Interestingly, the judgment is subject to appeal in the same way as if the case had been decided by a judge (CCP §645).

[57] *See supra* note 16 and accompanying text.

[58] CRC Rule 3.826 (a) and LASC Rule 12.27.

[59] CRC Rule 3.825 (a).

[60] CRC Rule 3.826 (c).

[61] CRC Rule 3.827 (a) and (b).

regular judgment, except that it is not subject to appeal.[62] It may be set aside only by motion to vacate within 6 months on the ground that (i) the arbitrator was subject to a disqualification not previously disclosed, (ii) in furtherance of justice,[63] (iii) the award was procured by fraud, corruption, or other undue means, (iv) there was corruption in the arbitrator, or (v) the party's rights were substantially prejudiced by misconduct of the arbitrator.[64]

2.4.2 *Settlement Conference*

Settlement Conferences are either mandatory or voluntary. If mandatory, they are handled by a judge, who can be the trial judge for the case or a colleague. If voluntary, they are handled by either a retired judge or a "settlement officer" with substantial litigation experience. The process differs from arbitration because the neutral does not reach a decision, and from mediation in that the neutral after having heard the parties will evaluate the strengths and weaknesses of each party's case whereupon he or she may make a suggestion for a settlement.

Settlement conferences are not covered by the mediation confidentiality provisions of §§1115 through 1128 of the Evidence Code.[65] Although voluntary settlement conferences are relatively new,[66] and the number of cases handled in this way is still very limited, their popularity is increasing dramatically, especially in personal injury cases involving automobile accidents and slips-and-falls.[67] The process is assisted greatly by the availability of a database that allows the parties to inspect verdicts and settlements in comparable cases, both countywide for the LA Superior Court as a whole, and by district.

2.4.3 *Neutral Evaluation*

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[62] CRC Rule 3.827 (c).

[63] Subject to the conditions set forth in CCP §473.

[64] CRC Rule 3.828 (a). The three grounds for vacatur listed as (iii), (iv) and (v) are just three of the six grounds for vacatur allowed in regular arbitration under the California Arbitration Act. *See* CCP §1286.2(a)(1)—(6).

[65] CRC Rule 3.1380. The Advisory Committee Comment to Rule 3.1380 (d) makes this clear as follows: "This provision is not intended to discourage settlement conferences or mediations. However, problems have arisen in several cases, such as *Jeld-Wen v. Superior Court of San Diego County* (2007) 146 Cal.App.4th 536, when distinctions between different ADR processes have been blurred. To prevent confusion about the confidentiality of the proceedings, it is important to clearly distinguish between settlement conferences held under this rule and mediations. The special confidentiality requirements for mediations established by Evidence Code sections 1115-1128 expressly do not apply to settlement conferences under this rule."

[66] Voluntary settlements became part of the ADR Program in 2008, but they have not yet been covered by the LASC Local Rules.

[67] According to the LASC ADR Office the number of settlement conferences held in 2009 had increased to over 400. Interestingly, the settlement rate in limited jurisdiction cases appears to be higher for settlement conferences than for mediation. In 2009, approximately 50% of mediated limited jurisdiction cases settled, whereas more than 70% of limited jurisdiction cases settled in voluntary settlement conferences. Of course, this still compares unfavorably with the overall resolution rate for mandatory mediation of cases (between $25,000 and $50,000) which is close to 80%. Source: LASC ADR Office.

Neutral Evaluation[68] (formerly called "Early Neutral Evaluation) is a process that may be classified between a settlement conference and mediation. The "neutral evaluator," who is an experienced attorney with expertise in the subject matter of the case, convenes an informal meeting with the parties and their counsel.[69] Each party gets a chance to present his or her case, after which the evaluator may ask questions and raise issues. The evaluator then identifies areas of agreement and disagreement, clarifies and focuses the issues, and encourages the parties to enter procedural and substantive stipulations.

Outside the presence of the parties the evaluator prepares his evaluation, which may include an estimate of the likelihood of liability (if contested) and the dollar range of the damages, an assessment of the strengths and weaknesses of each party's evidence and arguments, and about how the dispute could be resolved. The evaluator is often an expert in the subject matter of the dispute. While the evaluator's opinion is not binding, the parties typically use it as a basis for trying to negotiate a resolution of the dispute.

Interestingly, whereas *ex parte* communications with the neutral are allowed in mediation, they are not permitted in neutral evaluation (unless otherwise agreed) until after the evaluator has committed his evaluation to writing.[70]

Under LASC rules, the parties may request that the evaluator postpone disclosing his evaluation and engage in settlement discussions. Curiously, these settlement discussions do not constitute mediation under the Court ADR Program.[71] Nevertheless, the local rules of the court declare that the confidentiality provisions of Evidence Code §§1115-1128 apply to neutral evaluation.[72]

There is some question as to whether the local court has the authority to declare these provisions so applicable. This would appear to be the exclusive privilege of the California legislature. On the other hand, neutral evaluation clearly falls within the broad definition of mediation set forth in EC §1115(a).[73] But why then provide that the settlement discussions under LASC 12.19(5)(C) are not mediation, even though they are described as being "facilitated" by the evaluator, who is allowed to caucus with each party?

Neutral evaluation may be most appropriate in cases in which there are technical issues that require special expertise to resolve or the only significant issue in the case is the amount of damages.[74] It may not be appropriate when there are significant personal

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[68] Neutral evaluation is governed by LASC Rules 12.0 through 12.10, 12.19 through 12.26 and 12.37 through 12.47.
[69] LASC Rule 12.19.
[70] LASC Rule 12.7 (2).
[71] LASC Rule 12.19 (5)(C) Note.
[72] LASC Rule 12.8.
[73] EC §1115(a) defines "mediation" as follows: "a process in which a neutral person or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement."
[74] http://www.courtinfo.ca.gov/programs/adr/types.htm#neutraleval (last visited on March 18, 2010).

or emotional barriers to resolving the dispute.[75] The process is not often used in Los Angeles. In 2009, slightly more than 100 cases were assigned to neutral evaluation.

2.4.4. *Mediation*

LASC Rule 12.11 describes mediation as follows:

> "In mediation, a neutral person called a "mediator" helps the parties try to reach a mutually acceptable resolution of the dispute. The mediator does not decide the dispute but helps the parties communicate so they can try to settle the dispute themselves. Mediation leaves control of the outcome with the parties."

2.4.4.1 Voluntary or Mandated Mediation

As stated previously,[76] cases with claims up to $7,500 (small claims) and claims between $7,500 and $25,000 (limited jurisdiction) may not be ordered into mediation. Thus, only actions with a value of between $25,000 and $50,000 for each plaintiff may be ordered to mediation.[77] Of course, as also previously noted,[78] nothing prevents a judge to suggest, sometimes strongly, to the parties that they try (voluntary) mediation. Especially in small claims and limited jurisdiction cases this is the rule rather than the exception. In cases with claims in excess of $50,000 it depends on the judge. There are still some judges who do not favor mediation in large cases, while others suggest so strongly that in this author's personal experience, the parties come to mediation believing they have been ordered to mediation.

Although empirical research is sketchy on this subject, it appears to make little difference whether the case has been referred to mediation by court order or by a suggestion of the judge.[79]

2.4.4.2 The Process

Once the court has determined the suitability of a litigated case for ADR, the parties go to the court's ADR Office where they complete an ADR Intake Form.[80] This often happens on the same day that the judge sends the case to mediation. At the ADR Office or online, the parties may select a more experienced mediator from the so-called "Party Select Panel"[81], or ask the ADR Office to have the computer select a mediator

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[75] *Ibid.*
[76] *Supra* note 45 and accompanying text.
[77] LASC Rule 12.12.
[78] *Supra* note 48 and accompanying text.
[79] *See* Roselle L. Wissler, *supra* note 48, at 678 (In one group, cases were more likely to settle if they entered mediation at the judge's own initiative or at a party's request than if they were randomly assigned to mediation; in the other group, settlement was not related to whether cases entered mediation at the nomination of both parties, one party or at the judge's nomination.)
[80] This procedure can now also be completed on line. LASC Rule 12.3.
[81] The same procedure applies to the selection of a neutral evaluator and an arbitrator. By selecting a neutral from the Party Select Panel (also called the "party-pay" panel), the parties agree to pay the neutral a

(who could be less experienced) for them at random from the "Random Select Panel."[82] Even then, however, the selection is not fully at random, as the parties need to provide the ADR Office with the case criteria, which include area of law, jurisdiction, location and special needs, if any. The ADR staff will then enter these criteria into the computer, which selects randomly a neutral who meets the case criteria.[83]

The ADR Office then issues a Notice of Assignment and sends this to the mediator and all parties. The mediator is requested to contact the parties within ten days of receipt of the Notice.[84] A party has five days from learning of a potential conflict to request disqualification of the mediator pursuant to CCP §170.1 *et seq*.[85]

Upon contacting the parties, the mediator schedules within 15 days after the appointment, a suitable date on which all parties are available. The mediation needs to take place prior to the mediation completion date set by the court,[86] within 60 days of the date on which the judge referred the case to an ADR process,[87] but in practice the mediation completion date is often set later than that.

If possible, the mediator should try to accommodate a request for a continuance of the mediation date if all parties seek the postponement.[88] A party may file a motion with the court for an extension of the mediation completion date for up to 30 days, which the court will grant only upon good cause shown.[89]

In preparation of the mediation, the mediator may request that the parties submit briefs, which are short statements providing information about the issues in dispute.[90]

The parties must appear in person.[91] When the party is other than a natural person, it shall appear by a representative with full authority to resolve the dispute.[92]

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total of $150.00 per each of the first three hours. At the end of the 3-hour period, the parties may agree in writing to continue the mediation at the neutral's regular rate. When the parties choose to have the ADR Office select a neutral from the Random Select Panel (also called the "pro bono panel"), the neutral could be a less experienced one, but the service is free for the first three hours.

[82] LASC Rule 12.3. There are separate panels for mediation, neutral evaluation, arbitration and family law. The panel qualifications are different for each panel. See Appendices A-1 through A-4 attached to the LASC Rules.

[83] See LASC Local Rules, Chapter 12, Appendix A-1, page 1 (herein "Appendix A-1).

[84] *See* http://www.lasuperiorcourt.org/adr/, "How Neutrals Are Notified And How ADR Hearings Are Scheduled" (last visited on March 18, 2010).

[85] LASC Rule 12.4 and Appendix B-1(D)(2)(a).

[86] LASC Rule 12.14(a).

[87] CRC Rule 3.896 (c), which also provides that the time period may be extended up to 30 days. In practice, the mediation completion date used to be set as many as 180 days following the assignment of the mediator. As part of a general delay reduction calendar, the time for completion of a mediation has been reduced considerably.

[88] LASC Rule 12.14(c).

[89] For Limited Jurisdiction cases, (voluntary) mediation and arbitration hearings must be completed within 120 days (CCP §1141.11(d)).

[90] LASC Rule 12.17.

[91] CRC Rule 3.894(a), LASC Rule 12.15.

[92] *Ibid.*

Each party is entitled to have counsel present at all mediation sessions. Representatives of insurance companies are required to attend all mediation sessions and to have decision-making authority. The mediator may excuse their personal attendance, in which case the representative must attend by telephone.[93]

The mediator must ask all participants at the mediation session to complete an Attendance Sheet stating their names, addresses and telephone numbers.[94] Within 10 days following the conclusion of the mediation, the mediator must file a so-called Statement of Agreement or Non-Agreement.[95] The parties need to file an ADR Information Form with the ADR Office.[96]

In the event the parties settle prior to the mediation, plaintiff or plaintiff's counsel need to immediately give written notice to the mediator, the court and the other parties, and (additionally) oral notice if the mediation is scheduled to take place within 10 days. If plaintiff fails to notify the mediator at least 2 days prior to scheduled mediation date, the mediator may file a motion for compensation, and the court may order the parties to pay the neutral a fee in an amount up to what he would have earned, not to exceed $450.[97]

Generally, when the parties have settled, the plaintiff must file a request for dismissal within 45 days of settlement. Otherwise the court must dismiss the case after 45 days.[98]

2.4.4.4 Mediator Fees

As stated before, mediators in Los Angeles County who participate in the mandatory mediation program agree to serve on the Random Select Panel and conduct the first three hours *pro bono publico*.[99] If the mediation continues beyond these three hours, upon prior agreement with the parties, the mediator may charge his/her regular hourly fee.

Since the summer of 2004, the court has instituted an additional panel of "party pay mediators", now called the Party Select Panel, pursuant to which the mediator may charge $150 per hour for the first three hours, and his/her regular fee after that.

[93] *Ibid.*
[94] LASC Rule 12.18(a)
[95] LASC Rule 12.18(b).
[96] LASC Rule 12.10. The procedures are described in some detail at http://www.lasuperiorcourt.org/adr/UI/index.aspx by clicking on "Click here to view Civil ADR Information", and then on "ADR Process" (last visited on March 19, 2010).
[97] CRC Rule 3.1385(a). *See also* LASC Rule 12.9.
[98] CRC Rule 3.1385(b).
[99] The superior courts in other counties (including San Diego and Santa Barbara) have programs in which mediators receive hourly compensation in all cases.

In either case, the mediator agrees not to charge for the time spent on convening, review of briefs and preparation.[100]

Initially, parties were able to make a selection not only from the "party-pay panel" but also from the "pro bono panel". The unintended result of this system was that parties were able to look up the name of a mediator on the party-pay panel, but to select him/her as an unpaid mediator from the pro bono list.

The recent rule changes aim to make this impossible. Under the new rule, if the parties choose to have a mediator from the pro bono list, the computer selects someone at random, and the list of pro bono mediators is no longer available. Alternatively, the parties can select a mediator from the "party-pay" panel.

This author believes that a lot of the unhappiness with the old system will be alleviated by these changes (increased training and random selection from the free panel). Of course, the continued existence of the pro bono system for *all* cases (instead of limiting it for example to cases $25,000 and under) will still cause those mediators to find themselves in the awkward position that during the mediation process they may be surrounded by say five or six attorneys, who all charge their usual rates to their clients, while the mediator does so for free, even if they do most of the work.

Mediators' regular hourly fees in Los Angeles range from $250 to $1,000 per hour.

3. Mediation Incentives; Education

3.1 *Mediation Incentives*

Beyond the pro bono/reduced fee system described in the previous section, I am not aware that California law uses incentives to encourage mediation. The benefits of mediation are so well established that it may not require any further incentives.

On the other hand, it is not unusual for a judge to exert considerable pressure to convince the parties and their counsel to agree to voluntary mediation of the case before him/her. Some judges are not familiar enough with the rules that they will order mediation in cases with claims in excess of $50,000 per plaintiff. At the same time, parties sometimes perceive that the judge's suggestion is an order to mediate. It is important that any court-annexed ADR system includes seminars to educate the judges, not only so that they are familiar with the rules, but also so that they "buy in" to the system.

The judge may urge the parties to estimate the costs associated with taking a matter all the way to trial. Since the legislature encourages mediation at the earliest

[100] Even though this rule is set forth in the section of Appendix A-1 (p. 3) relating to the Party Select Panel, it would be anomalous if a Random Select panelist would be able to charge for that time.

possible stage, i.e. before most pre-trial discovery has taken place,[101] the cost-savings can be substantial. At that stage, in addition to the pre-trial discovery that still needs to take place, experts may still have to be consulted, procedural issues may arise which may be the subject of motions and legal issues may still have to be researched in more detail and briefed. Both parties will reap considerable benefits if mediation can settle the litigated case before the parties incur all these expenses.

3.2 *Education*

3.2.1 Training and Qualification of Mediators.

Generally, a mediator must comply with the experience, training, educational and other requirements established by the court for appointment and retention of mediators.[102] For the LA Superior Court system, these requirements are set forth in Local Rule 12.3 and Chapter 12, Appendix A-1.

In 2007, the qualifications for serving on the mediator panel were increased considerably. In order to qualify for the Random Select Panel, mediators must now complete 40 hours of training[103] (including at least 20 hours of classroom training that covers specified subjects, 10 hours of practical training and completion of 5 mediations (either litigated cases of community-based cases).

In order to qualify for the Party Select Panel, mediators need to have completed at least 25 Random Select mediations, and a minimum of 10 hours of Continuing Education annually, 5 hours of which involve advanced mediation skills training and 5 hours of which must involve education in substantive areas of the law.[104] The mediator is also required to maintain, or have access to, a place of business in which to conduct mediations.[105] Party select panelists must also continue to provide pro bono services on the Random Select Panel,[106] currently at a minimum rate of 12 mediations per year.[107]

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[101] CCP Section 1775(d) provides as follows:

Mediation and similar alternative processes can have the greatest benefit for the parties in a civil action when used early, before substantial discovery and other litigation costs have been incurred. Where appropriate, participants in disputes should be encouraged to utilize mediation and other alternatives to trial for resolving their differences in the early stages of a civil action.

[102] CRC Rule 3.856(a). The Judicial Council of California, Administrative Office of the Courts (AOC) is considering the development of new Rules of Court to establish statewide "Qualification Standards for Mediators in Court-Connected Mediation Programs for Civil Cases." The preliminary proposals include 40 hours of mediation training, completion of a number of mediations, continuing eligibility requirements and references. This appears to be almost identical to current standards in Los Angeles.

[103] Up from 25 hours. See Appendix A-1, pp. 1-2. Additionally, non-attorneys must have at least a college degree, and are required to take at least 3 hours of "litigation nuts and bolts training".

[104] Appendix A-1, Item II.4, p.3. There is some confusion as to this requirement, as there is also a requirement that applies to all panel members to complete 15 hours of continuing mediation training every three years. *See* Appendix A-1, Item 9 on p. 4. For Party Select panelists, is this CE requirement in addition to the requirement on page 3?

[105] Appendix A-1, Item II.5, p.3. *See also* the same requirement for all panelists in Item 6 on p. 4.

[106] *Ibid.*

[107] Information obtained from the LASC ADR Office.

The training is currently being provided by professors from the Straus Institute for Dispute Resolution at Pepperdine University Law School.

3.2.2 *Education of Attorneys*

It is equally important that practicing attorneys receive negotiation and mediation training, so that they can be more effective in assisting their clients. Although this may be self-evident to some, many attorneys arrive at this author's mediations only partially prepared or even totally unprepared, and frequently they did not sit down with their client beforehand[108] to do an analysis of the consequences of not settling.[109] Currently, the LASC ADR Program offers no training for attorneys.

3.2.3 *Education of Judges, Court Personnel*

To the best of this author's knowledge there is no legislative requirement currently in place that obliges judges and other court personnel to be educated in mediation laws and mediation techniques. But, under the skilled leadership of professor Peter Robinson, this author had the privilege of helping in the training of sitting California judges in mediation techniques, in a program offered at a conference of the California Judges Association under the auspices of the Straus Institute for Dispute Resolution at Pepperdine University Law School. This training, which has been offered for many years, was received with great enthusiasm by the participating judges, who clearly recognized the benefit of the training.

As was pointed out, however, by Professor Suzanne Schmitz, "Judges and attorneys need to understand the effect of the rules governing the mediation program. … [E]ducation of the bench and bar is the most important tactic for ensuring effective programs."[110] Such education, to paraphrase her words, should be offered and promoted by the California courts.[111]

The knowledge of judges about the mediation process can be especially helpful in establishing the proper timing of the referral to mediation, taking into consideration such factors as the degree of discovery desirable before mediation, deciding on dispositive motions preferably prior to mediation, ruling on requests for interim relief, such as preliminary injunctions and protective orders preferably prior to mediation,[112] and

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[108] Roselle Wissler reported in her 2002 article that her analysis of empirical research conducted in nine Ohio state courts that more than half of the parties reported they had received "considerable" preparation for mediation by their attorneys. Wissler, *supra* note 48, at 654. In spite thereof, Wissler concluded that parties' expectations probably differed from those of their attorneys.
[109] This author recommends counsel in mediations that come before him that they do an analysis of the best, worst and most likely alternatives to a negotiated agreement (respectively known as BATNA, WATNA and MLATNA) with their client before they come to the mediation. This often serves to lower the client's expectations and teaches them that getting to a mediated settlement will imply that they have to make concessions.
[110] Suzanne J. Schmitz, *A Critique of the Illinois Circuit Rules Concerning Court-Ordered Mediation*, 36 LOY. U. CHI. L.J. 783 (2005).
[111] *Ibid.*
[112] *Id.*, at 794-795.

flexibility on the possibility of a second referral to mediation at a later time if the first time mediation was unsuccessful. Above all, a thorough understanding of the mediation process will help judges see that referral to mediation is more effective when done at the "earliest possible time that the parties are able to make an informed choice about their participation in mediation."[113]

3.2.4 *Education of the Public*

Rule CRC 3.898 requires that each court in California make available educational material, adopted by the Judicial Council or from other sources, which describes the available ADR processes to the public.

4. Effectiveness of Court-Annexed Mediation

4.1 *Settlement Rates*

Consistent with federal statistics, the LA Superior Court system reports that as many as 97% of all civil cases filed do not go to trial. They are either withdrawn, dismissed upon a successful motion, settle through negotiation, or settle as a result of mediation.[114]

The success rate of court-mandated mediation is almost equally impressive. In the 12-month period of July 2008 through June 2009, the overall settlement rate was close to 80%, which compares very favorably against data relating to other court-connected programs in the United States.[115] This is also quite a bit better than the settlement rate in earlier years. For example, in the period of July 2003 through June 2004, the settlement rate was about 61%. It is possible that the improved settlement rate is due to the increased competency of the mediators who now have to go through a substantially more rigorous training than five years ago, and perhaps also to the increased familiarity with mediation on the side of attorneys.

Additionally, many of the cases that end in non-agreement at mediation are settled later on, to a large extent because parties tend to continue the bargaining process that started at the court-annexed mediation session. These cases would not be covered by the ADR Office's statistics, as the mediator will have reported the case as not having settled as he/she needs to file a report within 10 days following the mediation session. This may explain, at least in part, the discrepancy between the percentage of cases ending in non-

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[113] *Id.* at 792 (quoting Ill. Cook County Cir. Ct. Rule 4.4 (2004)).
[114] *See* http://www.lasuperiorcourt.org/adr/UI/INDEX.ASPX, and click on "What is Alternative Dispute Resolution" (last visited on March 19, 2010).
[115] For example, Roselle Wissler reported that her research analysis of 935 cases in Ohio courts showed that only 45% of the mediated cases reported a full settlement (with 3% reporting settlement on some of the issues). Wissler, *supra* note 48, at 665.

agreement (more than 20%)[116], and the low percentage (3%) that eventually does proceed to trial.

4.2 *Decline in Number of Cases*

Over the past several years, there has been a substantial decline in the number of cases that are handled by the ADR Office of the Los Angeles Superior Court. In the 12-month period from July 2003 through June 2004, the LASC ADR Program still handled well over 36,000 cases.[117] In the 12-month period from July 2007 through June 2008, the number of cases was still in excess of 20,000 cases. In the most recent 12-month period, from July 2008 through June 2009, this number had gone down to a little more than 17,500 cases.

This author has the impression, although not based on any concrete data, that the main cause for this decline may simply be inflation. A $50,000 case in 2010 just does not have the same value that a $50,000 case had in 1987.[118] Thus, more and more cases that used to fall within the $50,000 ceiling now must be considered larger cases that are no longer subject to mandatory mediation.

5. California's Ethical Standards for Mediators.

5.1 *Ethical Rules for Court-Connected Mediators Only*

Since January 1, 2003, California has ethical rules for mediations that take place within the context of court-connected mediation programs.[119] The rules apply to any mediator who has agreed to be on a superior court's panel of mediators for civil cases, or have otherwise agreed to participate in a court-connected mediation, - for the duration of the mediation proceedings.

Curiously, California has not, or at least not yet, [120] adopted rules of conduct for mediators who mediate outside of the court-connected mediation programs, even though similar rules of ethics exist for arbitrators.[121]

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[116] Of course, the 20% figure includes the substantial number of cases that are withdrawn or dismissed. This number could be as high as 13% (based on the federal statistics, which run fairly parallel to the statistical information available about states).

[117] This number included about 22,000 general jurisdiction cases and more than 9,500 limited jurisdiction and small claims cases.

[118] The website inflationdata.com calculates the inflation rate since 1987 at almost 95%. See http://inflationdata.com (last visited on March 20, 2010).

[119] The *Rules of Conduct for Mediators in Court-Connected Mediation Programs for Civil cases, Adopted by the Judicial Council of California* are included in the California Rules of Court. They were revised slightly effective January 1, 2007. See CRC Rules 3.850 through 3.860.

[120] The author has been unable to find any state that has adopted a *general* code of ethics for all mediations conducted in the state, other than *North Carolina* (but the North Carolina's Standards of Conduct apply only if the mediation is not governed by any other statute, program rules or standards of conduct) (*see* http://www.nccourts.org/Courts/CRS/Councils/DRC/Standards/Conduct.asp (last visited on March 20, 2010); *Virginia*, - the Virginia Standards of Ethics and Professional Responsibility for Certified Mediators

5.2 *Additional codes of conduct may apply*

If the mediation is administered by an institutional agency or provider, the mediator may be subject to a particular code of conduct developed by such agency or provider. For example, the federal government developed a Mediator Code of Professional Conduct[122] for mediation by neutrals employed by the Federal Mediation and Conciliation Service ("FMCS"), a federal agency that provides mediation services principally in the area of collective bargaining between companies and organized labor. Similarly, mediators who mediate under the auspices of the American Arbitration Association have undertaken to comply with the 2005 "Model Standards of Conduct For Mediators" (sometimes known as the "Joint Standards") [123] that were originally developed as a joint project with the Dispute Resolution Section of the American Bar Association and the Society of Professionals in Dispute Resolution ("SPIDR").[124]

The Joint Standards are the most widely adopted national standards of conduct for mediators in the United States. Besides being used by members of the "American Arbitration Association ("AAA"), American Bar Association ("ABA") and the Association for Conflict Resolution ("ACR), many of the state and national organizations use standards that are largely based on the Joint Standards.[125] Unfortunately, however, the Joint Standards do not have the force of law. This is clearly a lacuna that requires to be filled.[126]

Private organizations of mediators have often developed their own standards. For example, the California Dispute Resolution Council ("CDRC"), a statewide organization of mediators, arbitrators, and other neutral dispute resolvers, has developed its own

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(which apply to all certified mediators in that state) (available at http://www.courts.state.va.us/courtadmin/aoc/djs/programs/drs/mediation/soe.html (last visited on March 20, 2010) and *Tennessee*, - the Tennessee Supreme Court Standards of Professional Conduct for Rule 31 Neutrals (available at http://www.tsc.state.tn.us/opinions/tsc/rules/TNrulesofcourt/06supct25_end.htm#31 (last visited on March 20, 2010)). Like California, the Supreme Court of New Jersey adopted a Standard of Conduct for Mediators in Court-Connected Programs (available at http://www.judiciary.state.nj.us/notices/n000216a.htm (last visited on March 20, 2010).

[121] *See* Ethics Standards for Neutral Arbitrators in Contractual Arbitration, Division VI of the Appendix to the California Rules of Court, effective January 1, 2003. These standards constituted the first of their kind in the United States.

[122] *See* http://admin.fmcs.gov/assets/files/OGC/MediatorCodeofConduct.doc (last visited on March 20, 2010).

[123] *See* www.abanet.org/dispute/news/ModelStandardsofConductforMediatorsfinal05.pdf (last visited on March 20, 2010).

[124] This organization has since merged into the Association for Conflict Resolution ("ACR"). *See infra* note 131.

[125] *See generally*, Max Factor III, *Thirty FAQ's for California Mediators on Ethical Minefields involving Business, Construction, Employment and Real Estate Mediations*, http://mediate.com/articles/factorm2.cfm (last visited on May 18, 2005).

[126] *See* Diane J. Levin, *More Like Guidelines: Ethical Standards Of Conduct For Mediators Considered*, http://www.mediate.com/articles/LevinDbl20091012b.cfm (last visited on March 20, 2010)

"Standards of Practice for California Mediators."[127] On the other hand, the Southern California Mediation Association[128] requires every applicant for professional membership status to affirm his/her commitment to abide by the code of mediator conduct promulgated by one of four organizations, including the ABA,[129] the CDRC[130] and the ACR.[131]

5.3 *Main Features of CRC Rules 3.850 through 3.860*

The California Rules of Conduct ("CRC") in court-mandated cases are set forth in CRC Rules 3.850 through 3.860.[132] The Rules are intended as minimum standards to promote confidence in the integrity and fairness of the mediation process. The Rules are not intended to create a basis for challenging a settlement agreement or for a civil cause of action against a mediator.[133]

Rule 3.853 provides that a mediator must conduct the mediation in a manner that supports the principles of voluntary participation and self-determination by the parties. Consequently, the mediator must inform the parties at the outset that any resolution of the dispute requires a voluntary agreement of the parties.[134] In addition he/she must respect the right of each participant to decide the extent of his or her participation in the mediation, including the right to withdraw from the mediation at any time.[135]

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[127] *See* http://www.cdrc.net/pg2.cfm (last visited on March 20, 2010). For private membership organizations in other states, *see for example*, the Colorado Council of Mediators' "Revised Code of Professional Conduct" (available at http://www.coloradomediation.org/ccmo/current_members/resource_documents.php (last visited on March 20, 2010); the Maine Association of Mediators' "Standards of Professional Conduct"; and the New Hampshire Conflict Resolution Association's "Standards of Professional Conduct" (available at http://www.nhcra.org/standards.htm (last visited on May 18, 2005)).

[128] Similarly, the Wisconsin Association of Mediators has a Standard of Conduct based on the Model Standards described *supra* at note 57. *See* http://www.wamediators.org/pubs/ethicalquidelines.html (last visited on May 18, 2005). *See also* the Iowa Association for Dispute Resolution's Model Standards of Conduct for Mediators (http://www.iowaadr.org/Standards.htm (last visited on March 21, 2010)). In addition, the Michigan Supreme Court adopted Standards of Conduct for Mediators that are based on the Model Standards. (available at http://www.courts.michigan.gov/scao/resources/standards/odr/conduct.pdf (last visited on March 21, 2010)).

[129] *Supra* note 123.

[130] *Supra* note 127.

[131] The ACR is an organization that in 2001 resulted from the merger of three ADR organizations, including SPIDR mentioned in the text accompanying note 58 *supra*. *See* http://www.acrnet.org/about/ACR-FAQ2.htm (last visited on May 17, 2005). In January, 2005, the ACR announced that the final version of revised Model Standards of Conduct for Mediators, along with the Joint Committee's recommendation for approval, had been sent to the ACR Board of Directors and to the leadership of the AAA and the ABA Section of Dispute Resolution. *See* http://www.acrnet.org/publications/ACRUpdate41.htm#2 (last visited on May 18, 2005).

[132] Pursuant to LASC Chapter 12, Appendix B-1 "G. [*sic*] Applicable Standards, a mediator must comply with "9. The standards set forth in Code of Civil Procedure section 170.1; 10. The standards set forth in California Rules of Court, rule 3.855; 11. Any other applicable standard of professional conduct or rule of conduct; or 12. Any additional rules or standards adopted by the Court." Presumably item 11 refers to CRC Rules 3.850 through 3.860.

[133] CRC Rule 3.850(b)(2) and (3).

[134] CRC Rule 3.853(1).

[135] CRC Rule 3.853(2).

5.4 *No Good-Faith Participation Requirement*

It is important to note that contrary to the requirement of some 22 states in the United States[136] and some federal district courts,[137] California court-connected mediation does not require the parties to participate in good faith. This is consistent with the stringent confidentiality requirements of EC §1119, which the California Supreme Court has consistently interpreted as being absolute.[138] The mediator must also refrain from coercing any party to make a decision or to continue to participate in the mediation.[139]

5.5 *Voluntariness and Self-Determination in Court-Mandated Mediation*

Thus, Rule 3.853 makes clear that the principles of voluntariness and self-determination apply even to court-mandated mediation. As the Advisory Committee Comment under Rules 3.853 states,

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[136] John Lande, *Using Dispute System Design Methods to Promote Good Faith Participation in Court-Connected Mediation Programs,* 50 UCLA L. REV. 69, 78 (2002), notes that at least 22 states and the territory of Guam have such statutory requirements.

[137] At least 21 federal district courts and 17 state courts have local rules requiring good-faith participation. ABA Section of Dispute Resolution, *Resolution on Good Faith Requirements for Mediators and Mediation Advocates in Court-Mandated Mediation Programs*, p.7 (Approved by Section Council, August 7, 2004). For a recent case, *see* In re A.T. Reynolds & Sons, Debtor, 2010 Bankr. LEXIS 245 (February 5, 2010), (creditor and its counsel held in contempt of court for failing to participate actively in the [court ordered] mediation process, which did not constitute participation in good faith).

[138] This author doubts that the degree of confidentiality required by Section 1119 of the Evidence Code is good policy. *See* Eric van Ginkel, *Rojas v. Superior Court: The Battle of Two Opposing Public Policies*, IBA MEDIATION COMMITTEE NEWSLETTER, Vol. 1 No. 1, 31-37 (April 2005) (also published in ALTERNATIVE DISPUTE RESOLUTION, the Newsletter of the ADR Section of the Ontario Bar Association, Vol. 13 No. 4, 10-17 (June 2005) and on mediate.com, http://mediate.com/articles/vanginkele2.cfm. *See also* Peter Robinson, *Centuries of Contract Common Law Can't Be All Wrong: Why the UMA's Exception to Mediation Confidentiality in Enforcement Proceedings Should be Embraced and Broadened*, 2003 J.Disp. Resol. 135; Wimsatt v. Superior Court, 152 Cal. App. 4th 137 (2007) (in which Judge Aldrich warns that as the Supreme Court has repeatedly resisted attempts to narrow the scope of mediation confidentiality, even in situations where justice seems to call for a different result, 152 Cal.App.4th at 152, the trial court could not craft an exception in this case, even if this may have meant that the plaintiff had to forego his legal malpractice lawsuit against his own attorneys. 152 Cal.App.4th at 162. Judge Aldrich believed "that the purpose of mediation is not enhanced by such a result because wrongs will go unpunished and the administration of justice is not served." *Ibid.* However, as the California Supreme Court has also said repeatedly, it is up to the legislature to amend the law, and not the courts.). *But see* Cassel v. Superior Court, 179 Cal. App. 4th 152 (2009) (*de-published*; petition for review granted, 2010 Cal. LEXIS 1527 (February 3, 2010) (Evidence should not have been excluded in client's malpractice suit against law firm, as law firm failed to show a sufficiently close link between the communications with client and the mediation to require application of mediation confidentiality statute to those communications.)

[139] CRC Rule 3.853(3). Coercion by mediators in court-connected mediation is not a rarity in other states. *See*, *e.g.* Baruch Bush, *supra* note 7, at 735-737, quoting Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got to Do With It?*, 79 WASH.U. L.Q. 787, 796-797 (2001). *See also*, Jeff Kichaven, *When Mediators Cross the Line*, http://www.mediate.com//articles/kichavenJ5.cfm#, warning, *inter alia*, that mediators who behave coercively may lose their malpractice insurance coverage.

"Voluntary participation and self-determination are fundamental principles of mediation that apply both to mediations in which the parties voluntarily elect to mediate and to those in which the parties are required to go to mediation in a mandatory court mediation program or by court order. Although the court may order participants to attend mediation, a mediator may not mandate the extent of their participation in the mediation process or coerce any party to settle the case."

5.6 *Ethics and Confidentiality*

The Rules also require that at the outset of the mediation process, the mediator inform the parties of the confidentiality of the process pursuant to Evidence Code Sections 1115 – 1128 and case law that has interpreted those sections, and that the mediator explain his/her practice regarding confidentiality of discussions held with one of the parties in caucus.[140] Under CRC Rule 3.854(c), the mediator must not disclose information revealed in confidence during caucus unless authorized by the person revealing the information.

There has been criticism of the rule that requires the mediator to inform the participants of the confidentiality rules at the outset of the mediation. Specifically, the CDRC[141] has suggested that instead, at the time that the case is assigned to mediation, the Court should distribute a pamphlet that summarizes California law on mediation confidentiality. This would avoid mistakes that might be made by the mediator, especially if he/she is not a lawyer, and it would get this information to the participants earlier.

5.7 *Conflicts of Interest*

Rule 3.855 deals with the issue of conflicts of interest. The basic rules are that (i) the mediator "must make reasonable efforts to keep informed about matters that reasonably could raise a question about his or her ability to conduct the proceedings impartially", and (ii) he/she has a continuing obligation to disclose these matters to the parties.

The matters that reasonably could raise a question include without limitation (A) "past, present, and currently expected interests, relationships, and affiliations of a personal, professional, or financial nature" and (B) the existence of any grounds for disqualification of a judge as specified in CCP Section 170.1.[142] The Advisory Committee Comment to Rule 3.855 gives examples of what could fall within these categories, and also points out that when an attorney-mediator is part of a law firm, these potential conflicts extend to any other attorney in his/her firm. In a large firm setting, with multiple offices, this could lead to a situation in which the mediator has a conflict that results from the involvement by an attorney he/she does not know but who works in some far away office of the same law firm.

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[140] CRC Rule 3.854(b) and (c).

[141] *See* http://www.cdrc.net/pg21.cfm (last visited on March 20, 2010).

[142] Available at http://www.leginfo.ca.gov/cgi-bin/displaycode?section=ccp&group=00001-01000&file=170-170.9 (last visited on May 18, 2005).

Generally, if no party makes any objections after the mediator makes the disclosures, he/she is allowed to proceed.[143] But if one party objects, the mediator must withdraw (unless more than two parties are involved, in which case he/she may continue to mediate the dispute among the non-objecting parties).[144]

The mediator must decline to serve or withdraw if (1) the mediator cannot maintain impartiality toward all participants, or (2) proceeding with the mediation would jeopardize the integrity of the court or the mediation process.[145] If there is a conflict between a mediator's obligation to maintain confidentiality and the mediator's obligation to make a disclosure, he/she must determine whether a general disclosure of the circumstance without revealing any confidential information will satisfy his/her duty to disclose. If it does not, he/she must decline to serve or withdraw.

5.8 *Competence; Quality of the Mediation Process*

The Rules do not require any particular advanced degree or technical or professional experience as a prerequisite for competence as a mediator.[146] As discussed earlier, however, the LASC Rules do require a minimum number of hours of training and experience.[147]

The Rules of Conduct further deal with the quality of the mediation process, requiring that the mediator conducts the mediation in a procedurally fair manner; his/her marketing of mediation services; compliance with applicable requirements concerning compensation and complaint procedures (which are left to the local courts).

6. Lessons to be drawn from the Los Angeles experience.

1. Develop a legal framework for ADR in general and court-annexed ADR in particular.

2. Convene the judges, lawyers and court staff in order to educate them and to make them "buy in" to the process. Each of them needs to know the rules of the program and be able to support it.

   Educate the attorneys in the mediation process, including effective preparation of themselves and their clients, and negotiation techniques (including BATNA analysis)

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[143] CRC Rule 3.855(d)
[144] CRC Rule 3.855(e).
[145] CRC Rule 3.855(f).
[146] Advisory Committee Comment to CRC Rule 3.856.
[147] *See* LASC Chapter 12, Appendix A-1. *See also, supra* Subsection 3.2.1 and accompanying footnotes.

3. Set the highest possible standards for the qualification of mediators, - an entry requirement of at least 40 hours of instruction and 10 hours of practical training, followed by meaningful continuing education.

It is probably unnecessarily burdensome to require mediators to complete 10 hours of continuing education each year, and to submit a compliance certificate each year. In the future, it may be better to require 30 hours every three years, 15 of which involve advanced mediation skills training and 15 of which involve education in substantive areas of the law.

4. Determine which forms of ADR to adopt. Certain forms of ADR (settlement conference [*not currently protected by confidentiality laws, but frees up mediators to handle more cases*], neutral evaluation, non-binding arbitration) require that the mediators are lawyers. Mediators need not be lawyers. Which disputes are to be subject to mandatory referral, which to voluntary referral?

Try to avoid focusing on the paradigm of the court that is focused on resolution of the dispute and promoting agreement. Instead, as suggested by Baruch Bush,[148] the predominant goal for the mediator may have to be to improve "communication" and to "promote decision making".

5. Determine what type of dispute can benefit from the ADR court-annexed program. Perhaps you need to limit it to a smaller category of cases in the beginning. Examples: Civil? (Commercial broad [including corporate], narrow?), Family law (in LA custody cases do not fall under the ADR program)?, Employment cases?, Inheritance disputes? Real Estate related disputes?, Consumer cases?

6. Be careful what you charge the users of the program. When it is mandatory (smaller cases) (in LA cases between $25,000 and $50,000), you can probably not charge much, and the same is true for even smaller claims (In LA this covers Limited Jurisdiction [between $7,500 and $25,000] and Small Claims [up to $7,500]).

But: People tend not to value what is offered free of charge. In this author's opinion, the original ADR Program in Los Angeles that offered all mediations for free for the first three hours did great damage to the mediation profession in Los Angeles. Principally for two reasons: first, because the mediation process was not valued, being something you could get for free, and second, because it attracted mainly inexperienced mediators who saw it as a way to build up experience and perhaps to develop a practice as a mediator. (Note that in LASC small claims are all voluntary; between $7,500 and $25,000 are mandatory to non-binding arbitration, voluntary to other types of ADR.)

[148] Baruch Bush, supra note 7, at 763.

7. A pro bono program in combination with a "party-pay" program appears to work as herein described, although this author's personal preference would be that parties *always* pay something for the mediation.

But: Don't ever refer a free or almost free mediation to a particular mediator. The computer should make this choice at random (meeting certain parameters such as matching expertise with area of law). Also, do not have the state pay for the mediators, as this misses the point that the users need to value the service for mediation for the mediation profession to continue to flourish. If the state pays, the service is still free to the users.

8. Overall, the primary goal is to build confidence in the system. Emphasize the principles of voluntariness and self-determination. Let people know that in mediation the parties determine themselves what solution they want to agree to. Thus, it is important to adopt Standards of Ethics to which the mediators have to sign on if they want to mediate within the court's ADR Program, so that mediators learn to honor those principles and refrain from coercion.

9. Educate the public. The videos used on the website of the LA Superior Court are very useful. They are brief, but they are to the point. It is not sure, however, whether they help if the viewer lacks the necessary education. The language may need to be adapted for that purpose so that even an illiterate viewer can understand it. In Los Angeles, the videos are both in English and in Spanish.

10. Hire an expert to help you, such as Julie Bronson, who has been head of the ADR Program in Los Angeles for more than ten years. She has already designed several programs in other countries, including some of the Balkan countries, Bulgaria, and Bangalore (India).