

Sotomayor Law

Rande S. Sotomayor, Esq.



Mediation, Arbitration and Business Dispute Services

With All Due Respect, Your Honor, . . .

(Mediators Are Available to Everyone. Los Angeles County Does Not Have a Two-Tiered Justice System.)

September 2, 2016

Yesterday, I read with great distress the Op-Ed piece written by Judge Michael Stern in the Los Angeles Times. The apparent purpose is to convince California legislators to appropriate more of its budget to the Los Angeles County court system. However, Judge Stern argues that the budget cutbacks have resulted in “a two-tiered judicial system; a speedy private one for the rich and a protracted public forum for the less advantaged.”

Playing the haves-and-have-nots card is usually a reliable way to generate passion these days. But the picture Judge Stern has created is faulty – like a trompe l’oeil painting – because it is based on the questionable assumption that an adjudicated result is the only “fair” result and a fuzzy description of dispute resolution options available to the public at large.

I think everyone would probably agree that the Los Angeles County Court system is backed up and vital resources have been lost as a result of budget cuts. I completely disagree that the backup has created a good system for the rich and a bad system for the poor.

Let’s examine Judge Stern’s arguments:

First, he states that as a result of the backlog, “those who can afford to are opting for private hearings overseen by for-hire adjudicators.” What are the “private hearings” Judge Stern is referring to?

He states that “frequently trials are being replaced by mediation or settlement conferences conducted by for-hire alternative dispute resolution firms. These firms employ retired judges and attorneys who for a fee - \$5,000 a day or more is typical – perform the decision-making that a judge and 12 jurors have done at nominal cost for centuries.”

Judge Stern implies that mediation and settlement conferences result in a decision made by a for-hire adjudicator. Nothing could be more inaccurate.

“Mediation” is a *completely voluntary* process in which a neutral third party helps the parties settle their dispute *on terms they develop and control*. The process allows the actual stakeholders to decide the outcome, instead of putting their case in the hands of a judge or jury. The mediator is *not* a decision-maker. Settlement conferences are similar to mediation; these are just an old-school way of describing the trial judge’s meeting with counsel – and sometimes the parties – to try to settle the case.

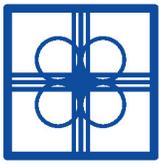
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Perhaps Judge Stern is referring to “arbitration” when he states that the rich litigants can afford a for-hire “decision-maker” to decide their case more quickly than the public courts. “Arbitration” is much like a trial in court. The third party neutral decides who wins and loses, and makes an award, just like a judge and jury. Though he could have said so, and likely has decided countless motions seeking to compel arbitration, arbitration is the true costly alternative to the public court system, and typically only favored by defendants, not rich plaintiffs.

Judge Stern makes it sound as if the only mediators out there are the ones “employed” (not) by ADR “firms.” There are only a handful of such providers. They provide convenient access to mediation, arbitration, and other kinds of dispute resolution services. For the mediators, the firms take care of all of the administrative functions and provide meeting space and lunch for the participants. For the attorneys who hire the mediators, these firms are the gatekeepers for the mediators they like.

In reality, attorneys and clients get nothing more by going to an ADR firm than they would get by going to an independent mediator.

Yesterday, a litigator told me that he actually convinced an LA Superior Court judge to take a day off from a trial because the attorney had a mediation in another case. His explanation: “It’s harder to get a mediation date than it is to get a trial date.”

Are you guys kidding? I think someone needs to let you out of those underfunded courtrooms for a few minutes for a reality check.

Southern California is literally bursting with exceptionally well qualified mediators, trained (often far more extensively than retired judges), experienced, determined professional “peacemakers” who could only dream of making \$5,000 a day. I can’t tell you how many attorneys I know (myself included) who have paid a fortune for a retired judge to “mediate” their case unsuccessfully – nice people who don’t really know how to mediate as opposed to adjudicate, nice people who don’t really want to invest the energy into working with intractable parties, nice people who look at mediation as a retirement plan, not a demanding profession.

Mediation is not just for rich people who can afford to pay a private provider. Judge Stern laments the loss of the LASC ADR program, where many of us got our hands-on volunteer mediation training. It is a sad thing to lose a stable of free and low-cost mediators. But how could an LASC judge *not* be aware of the large network of free and low-cost mediation programs available to those litigants who can’t afford the \$5,000-a-day, or even the \$2,000-a-day mediator? Just to name a few: LA County Bar Association Civic Mediation Project, Southern California Mediation Association Reduced Rate Program, California Association of Realtors, Los Angeles County Department of Consumer and Business Affairs, Loyola Law School Center for Conflict Resolution.

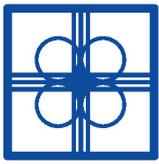
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Please.

In fact, mediation is the top-choice alternative to the expensive, adversarial, risky, lengthy public court process (even before 2012 – does anyone remember running into court in the early 80's on the eve of the expiration of the 5-year mandatory dismissal date?) Countless studies establish that all litigants, from rich corporations to penniless individuals, want to resolve their lawsuits as cheaply as possible. Typically, defendant corporations – the richer of the parties usually – rejoice at court delays, because costs and potential judgments are spread out over a long time and more easily budgeted.

Mediation gets cases off of Judge Stern's busy docket. Mediation satisfies parties because they control the outcome of the dispute. Mediation satisfies lawyers because happy clients refer other clients or return with more business themselves. Mediation reduces the human cost of conflict. Mediation reduces the cost of lost productivity. Mediation promotes certainty. And for some, mediation – with a great mediator – is even free.

Gee, Judge Stern, let's come up with another argument for restoring badly needed funding for the county court system. You don't have to ignore or write off an entire industry of professional mediators, who are available on short notice and at a wide range of costs, and the product of whose work will benefit *your* courtroom and staff, just to fan the flames.

We're here to help. We can. Because we really do care about the value of reducing conflict in the courts and throughout the world.

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