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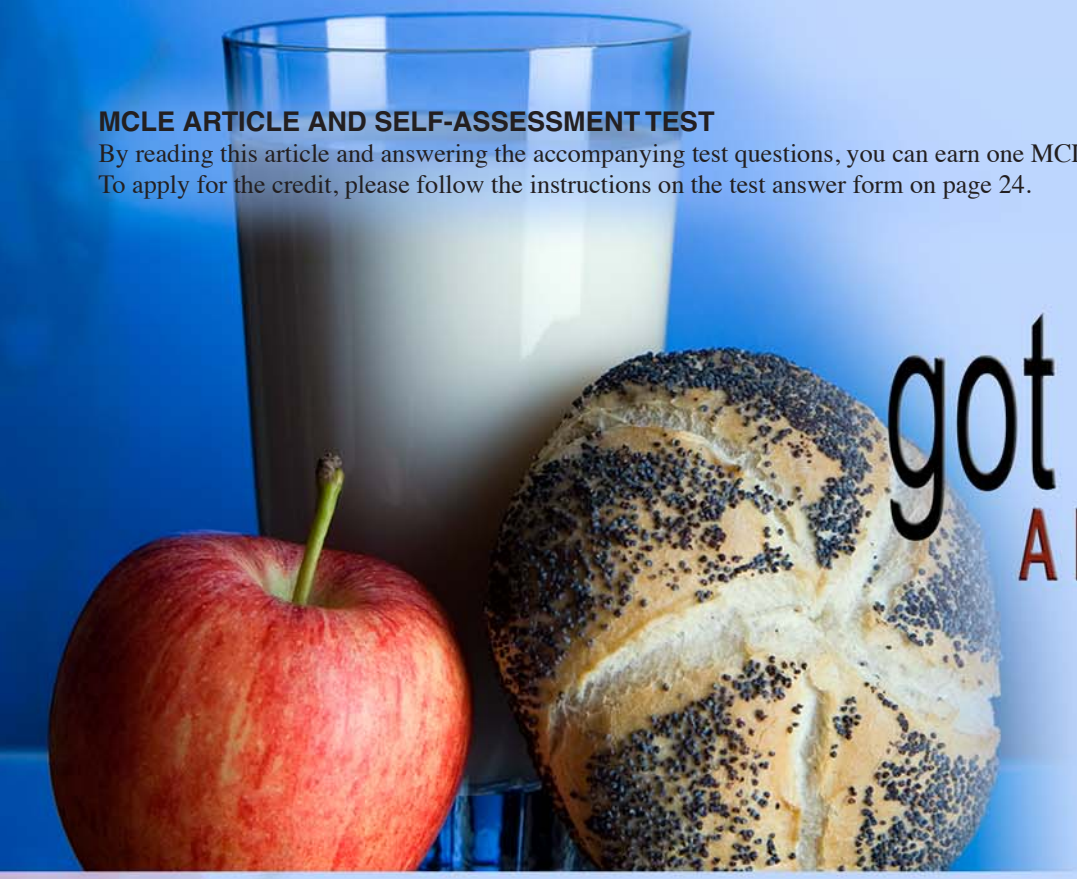

got ADR?
A Healthy Choice

By Bradley W. Hertz

YEARS AGO, MILK WAS advertised via the clever slogan, "Milk. Good for Every Body." After it was determined that milk was not, in fact, good for every body (or everybody), the slogan became "Milk. Something for Every Body."

Perhaps Alternative Dispute Resolution (ADR) could benefit from a similar public relations effort, with a slogan such as "ADR. A Healthy Choice." Or, like the tagline "Got Milk?" one could ask "Got ADR?" When compared to litigation in terms of cost, time, stress and uncertainty, ADR can be a healthy alternative. Apropos to this edition of *Valley Lawyer* and its focus on health and wellness, this article addresses the benefits and mechanics of ADR as a viable means to resolve disputes. While most practitioners are well aware of ADR, perhaps it is time to bring it even more into the mainstream and no longer consider it "alternative."

For those embroiled in litigation or a pre-litigation dispute, ADR often provides a safe, sane, rational and cost-effective way out. Whether it's international diplomacy; President Obama holding a "beer summit" with Professor Henry Louis Gates and Sergeant James Crowley; or a local attorney mediating a tort or contract case, ADR provides something for every disputant.

A noted civil procedure textbook even describes ADR as "ameliorating the harmful byproducts of civil litigation." (Levine, Slomanson and Shapel, Cases and Materials on California Civil Procedure (2008) (Levine), at 475). Just as healthy eaters attempt to reduce harmful byproducts in food, so too can disputants reduce the harmful aspects of litigation by availing themselves of ADR.

The California Legislature has codified ADR as a worthy goal and has long encouraged the use of court-annexed ADR methods in general, and mediation in particular. Specifically, the legislature has declared that "the peaceful resolution of disputes in a fair, timely, appropriate, and cost-effective manner is an essential function of the judicial branch of state government…." (California Code of Civil Procedure (CCP) section 1775(a)). "In the case of many disputes, litigation culminating in a trial is costly, time consuming, and stressful for the parties involved." (CCP section 1775(b)).

Insofar as the reduction of stress is advised by any practitioner of health and wellness, and given that the legislature has declared that trials are stressful, it follows that avoiding trials where possible is good for one's health.

Among the types of ADR regularly practiced via the Los Angeles Superior Court (LASC) are mediation, arbitration, settlement conferences (both voluntary and mandatory), and neutral evaluation. The LASC website provides a significant amount of ADR information at www.lasuperiorcourt.org/adr. There, viewers can find online videos about ADR methods; read detailed descriptions about what to expect from ADR; learn about mediators from court-approved panels (both volunteer and "party pay"); and obtain numerous forms and explanations regarding the ADR process. This article devotes much of its focus to mediation, as it is the "most utilized ADR process" in the LASC (LASC ADR Neutral Resource Manual (2008), at 7).

Mediation

"Mediation" is defined as "a process in which a neutral person or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement." (CCP section 1775.1; California Rule of Court (CRC) 3.852(1)). A mediator fosters communication between the parties

and attempts to facilitate a resolution, but makes no findings or decisions about the facts or law and renders no award. Mediators are generally "facilitative," in that they facilitate the flow of information between the parties, but can also be "evaluative," by giving the parties an evaluation of the case's strengths and weaknesses in an effort to settle the case. There are several other types of mediators, including "transformative" and "restorative," who go beyond the "nuts and bolts" of getting a case settled.

Los Angeles Superior Court-Connected Mediation

Qualifying for the LASC pro bono mediation panel requires at least 20 hours of core/classroom training; 10 hours of practical training; completion of at least 5 mediations; a place of business to conduct mediations; security clearance; continuing education in mediation; and a commitment to accept at least one mediation case per month (See "Pro Bono Mediation Panel Requirements" at www.lasuperiorcourt.org/adr/forms/PBMediationPanelRequirements.pdf).

Court-connected mediation plays a major role in reducing overcrowded LASC dockets, especially in "limited" civil cases (where the demand does not exceed $25,000) (CCP section 86); in "unlimited" civil cases where the amount in controversy does not exceed $50,000 (CCP section 1775.5); and in larger cases where the parties stipulate to mediate before a court-connected mediator (CRC 3.891(a)(2)). Parties can stipulate to mediation or other forms of ADR by executing and filing a "Stipulation to Participate in ADR" (Form LAADR 001).

Mediation is by no means limited to smaller cases, and parties can almost always stipulate to mediate their disputes, regardless of the size of the case. For example, in 2005, after a 2-day mediation, J.P. Morgan-Chase agreed to pay $2.2 billion to settle a class action arising out of the Enron scandal. And in 2007, mediation resulted in the Catholic Archdiocese of Los Angeles agreeing to pay $660 million to settle more than 300 sexual abuse claims. (Levine, at 520).

If parties choose to mediate their disputes privately – independent of the court's mediation program – there are a host of well-qualified mediators, ranging from retired California Supreme Court and Appellate Court justices, to retired trial court judges, to attorneys and non-attorneys schooled in mediation. Some contracts, such as real estate contracts, require mediation as a condition precedent to arbitration or litigation. And disputes between certain types of parties (e.g., a homeowner's claim against his homeowners' association) require mediation (California Civil Code section 1369.520(a)).

Mediation Hallmarks

Among the hallmarks of mediation are: (1) confidentiality (CCP section 1775.10; California Evidence Code sections 1119, 1152 and 1154; and CRC 3.854); (2) mediator competence and impartiality (CRC 3.856 and 3.855); (3) voluntary participation and self-determination (CRC 3.853); and (4) procedural fairness (CRC 3.857). The mediation process is only as strong as the mediators, parties, counsel and insurance claims adjusters. If the process is to be successful and yield the desired results of resolving cases, then each participant must take the process seriously and have a vested interest in the mediation's success.

Mediation Logistics

After the mediator gives notice to the parties via a "Notice of Alternative Dispute Resolution (ADR) Hearing" (Form LAADR 028), the parties are asked to sign an "Acknowledgment of Confidentiality for ADR Process" (Form LAADR 050) and complete an attendance sheet (Judicial Council Form ADR-107) before the mediation begins. The Acknowledgment sets forth the details regarding mediation confidentiality and provides that, notwithstanding such confidentiality, a written settlement agreement reached as a result of the mediation is admissible in a court action to enforce the settlement.

If a court-ordered mediation results in a settlement, the parties generally enter into a "Stipulation Re Settlement" (Form LAADR 038), which states, among other things, that the settlement may be enforced pursuant to CCP section 664.6.

For a detailed analysis of complex issues pertaining to mediation confidentiality, attorneys are commended to read the California Supreme Court's decision in *Foxgate Homeowners' Association, Inc. v. Bramalea California, Inc.* (2001) 26 Cal.4th 1. There, the court focused on "the intersection between court-ordered mediation, the confidentiality of which is mandated by law, and the power of a court to control proceedings before it and other persons 'in any manner connected with a judicial proceeding before it,' by imposing sanctions on a party or the party's attorney for statements or conduct during mediation." (*Foxgate*, at 3).

The Supreme Court examined CCP sections 1119 and 1121 and concluded that "there are no exceptions to the confidentiality of mediation communications or to the statutory limits on the content of mediators' reports. Neither a mediator nor a party may reveal communications made during mediation."

Generally, the first 3 hours of a court-connected mediation are provided on a pro bono basis, before a randomly-assigned, volunteer mediator, who is allowed to charge for his or her time after 3 hours, if the parties so agree. In this case, the "Stipulation Re Fee for Service" (LAADR 037) is completed. If counsel would rather select a mediator, they may choose one who has qualified and chosen to serve on the LASC's "party-pay" panel, in which case a fee of $150 per hour for up to three hours must be paid.

According to the LASC ADR Department, approximately 20,000 cases are handled each year via court-connected ADR (LASC ADR Neutral Resource Manual (2008), at 7). The fact that tens of thousands of litigants, counsel and insurance carriers are obtaining many thousands of hours of pro bono or low-cost mediation services through the LASC mediation panel has generated much discussion among the mediation community, which has long been working toward greater

professionalization and compensation for its hard-working providers of ADR services. Given the law of supply and demand, however, as there seems to be enough of a supply of pro bono and reduced-fee mediators to meet the demand, it may be a while, if ever, before most mediators can "quit their day jobs" and become full-time ADR professionals.

Other aspects of the court-connected mediation process include the fact that mediators cannot be subpoenaed to testify in court as to what occurred during a mediation, subject to limited exceptions such as testimony about statements made in mediation that give rise to a crime, contempt of court, or State Bar or judicial disciplinary proceedings. (California Evidence Code section 703.5).

An example of mediation confidentiality can be found in the Statement of Agreement or Non-Agreement (SANA, Judicial Council Form ADR-100), which the mediator files with the court after a mediation. The SANA contains minimal information, primarily confirming to the court that the mediation took place and stating whether or not the case was resolved, and mediators are not permitted to give additional substantive details about the mediation.

During the period that a litigated matter has been referred to mediation, parties are urged to exercise restraint with regard to conducting discovery (LASC Rule 12.17). While obviously, counsel need to learn about and assess the strengths and weaknesses of their cases before knowing the case's value, "mediation and similar alternative processes can have the greatest benefit for the parties … 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 … in the early stages of a civil action." (CCP section 1775(d)).

Procedures and rules exist for many other aspects of court-connected ADR, including: (1) a procedure for neutrals to use courtrooms for mediations and arbitrations; (2) a procedure for continuances of ADR proceedings, including for the parties to compensate the neutral for untimely continuance requests; (3) a procedure for a neutral's recusal or disqualification; and (4) a procedure for complaining about a court ADR volunteer.

Suffice it to say that mediation and mediators provide a valuable dispute resolution option, one that sometimes does not get the respect and consideration it deserves. Like a prodding mother who urges her child to "eat your vegetables; they're good for you," litigation attorneys would be wise to hear a voice over their shoulder urging them to consider mediation. It's a healthy choice that should not be pushed to the side of the dinner plate in favor of the "Rambo Litigation" red-meat burger.

Arbitration

An arbitration involves each side presenting its case to a neutral third party who sits as an arbitrator and issues an award based on the evidence, as a judge would, but in a less formal process. Arbitration is "an efficient and equitable method for resolving small civil cases, and … courts should encourage or require the use of arbitration for those actions whenever possible" (CCP section 1141.10(a)). Arbitration can be binding or non-binding.

Judicial Arbitration

In court-connected, or "judicial," arbitration, the arbitrator issues an "Award of Arbitrator" (Form LAADR 014). Parties need not accept the arbitrator's award, and instead they may, within 30 days after the Award's filing, file and serve a "Request for Trial De Novo After Judicial Arbitration" (Judicial Council Form ADR-102). This places the case back on the court's calendar as if there had been no arbitration, but it must be timely filed or the Award becomes final (CCP section 1141.20; CRC 3.826).

If the party requesting the trial de novo obtains a trial result that is less favorable than the arbitration result, that party will be ordered to pay the other party's costs, including expert witness fees (CCP section 1141.21). This statutory scheme resembles CCP section 998 in some respects and is designed to encourage careful evaluation of a case before rejecting an arbitration award, at the risk of paying the opposing party's costs.

Some commentators have said that "judicial arbitration" is a misnomer in that it is generally not conducted by a judge, and its non-binding nature makes it not arbitration in the traditional sense. A detailed recitation of the judicial arbitration rules is beyond the scope of this article, but reviewing CCP sections 1141.10 – 1141.31 and CRC 3.810 – 3.830 is a good start.

Binding arbitration

In binding arbitration (also known as "private" or "contractual" arbitration), the disputants agree to abide by the arbitrator's award, and that agreement can be enforced in court if necessary (CCP section 1285, et seq.). Courts are extremely reluctant, however, to interfere with a binding arbitration award. The award can be vacated on the narrow grounds set forth in CCP section 1286.2, such as corruption, fraud and arbitrator misconduct. The award can be corrected on the narrow grounds contained in CCP section 1286.6, which include an evident miscalculation of figures; an evident mistake in the description of persons, things or property; or an imperfection in the form of the Award, not affecting the merits.

"Choosing binding arbitration means giving up significant rights. As stated by the California Supreme Court, 'private arbitration is a process in which parties voluntarily trade the safeguards and formalities of court litigation for an expeditious, sometimes roughshod means of resolving their dispute'" (Levine, at 478, citing *Vandenberg v. Superior Court* (1999) 21 Cal.4th 815, 831).

Subject to narrow exceptions, an arbitrator's award is not generally reviewable for errors of fact or law. (See *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1). As with judicial arbitration,

a detailed recitation of the contractual arbitration rules is beyond the scope of this article, but reviewing CCP sections 1280 – 1297.337 should provide practitioners with a worthwhile introduction.

For all the benefits of arbitration, certain large employers and others have been taken to task by the courts for the inequities contained in their arbitration clauses or in the way their arbitration clauses are carried out. (See *Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, in which the California Supreme Court found fault with Kaiser Permanente's self-administered arbitration system).

Settlement Conferences

Settlement conferences are similar to mediation in that the settlement officer assists the parties in attempting to resolve the case. Settlement conferences can be voluntary (VSC) or mandatory (MSC) and often occur in the courthouse and relatively close to trial, so the parties have had an opportunity to engage in discovery and evaluate the strengths and weaknesses of their case.

Judges may set MSCs on their own motion or at any party's request (CRC 3.1380(a)). These types of settlement vehicles are often a last ditch effort at pre-trial settlement and frequently result in the proverbial settlement "on the courthouse steps."

Neutral Evaluation

Neutral evaluation provides parties and counsel, in a voluntary, confidential setting, the chance to make summary presentations of their cases and obtain a non-binding evaluation by a neutral attorney who has experience in the relevant areas of law. According to the LASC, among the goals of neutral evaluation are to: provide a "reality check" for attorneys and clients; identify and clarify the key disputed issues; and provide an early assessment of the merits of the case by a neutral expert. The evaluator will prepare an evaluation of the case, which might even contain an estimate of each party's likelihood of success on both liability and damages. Sometimes this leads the parties to an early resolution or at least litigation that is more streamlined and focused.

Public Policy Issues

To be sure, not all disputes are amenable to ADR. Some disputes require a judicial interpretation of law or a judicial fact-finding process that results in an "all-or-nothing" victory, with no "splitting the baby." Sometimes a party wants its "day in court" and looks at "settling" as a dirty word. But for many, even most, civil litigation matters, where the outcome comes down to dollars and cents, ADR often is the best way out of an unfortunate situation.

While there are many fans of ADR, it also has its detractors. Some say private ADR has created a two-tiered justice system: one for those who can afford to pay "full freight" for professional mediators and arbitrators; and another for those who cannot. Others say that professional neutrals might be tempted to have a bias toward those parties and counsel who give them repeat business. Another criticism is that ADR is not necessarily less expensive than litigation, after one calculates the neutral's fees and the sometimes steep administrative fees charged by ADR providers.

Critics also contend that the lure of significantly better pay has led the most capable jurists to leave the bench early to enjoy the benefits that private ADR can offer them.

As with the current debate over whether to receive the swine flu vaccine, the debate over the pros and cons of ADR is sure to continue. While ADR may indeed have some "side effects," as all medications do, for a great many disputes, it is just what the doctor ordered.

Bradley W. Hertz *is a civil litigation and administrative law attorney, with offices in Los Angeles and West Hills, a mediator and an adjunct law professor at Chapman University School of Law. He currently serves as President of the California Political Attorneys Association and is a member of the Southern California Mediation Association. Hertz can be contacted at BrHertz@aol.com or (818) 593-2949.*

MCLE Test No. 18

This self-study activity has been approved for Minimum Continuing Legal Education (MCLE) credit by the San Fernando Valley Bar Association (SFVBA) in the amount of 1 hour. SFVBA certifies that this activity conforms to the standards for approved education activities prescribed by the rules and regulations of the State Bar of California governing minimum continuing legal education.

1. Mediation, judicial arbitration, settlement conferences and neutral evaluation are the four types of Alternative Dispute Resolution methods that are regularly practiced via the Los Angeles Superior Court.
   True
   False

2. Members of the public can have their disputes mediated online via the Los Angeles Superior Court website (www.lasuperiorcourt.org/adr).
   True
   False

3. Written settlement agreements entered into as a result of a court-connected mediation may be enforced in court pursuant to CCP section 664.6.
   True
   False

4. In 2007, mediation resulted in the Catholic Archdiocese of Los Angeles agreeing to pay $660 million to settle more than 300 sexual abuse claims.
   True
   False

5. Mediation confidentiality is not important, as the mediation process is very informal, and because settlement demands are inadmissible in court under Evidence Code sections 1152 and 1154, it does not matter who else knows about them.
   True
   False

6. Disputes between certain types of parties (e.g., a homeowner's claim against his homeowners' association) require mediation prior to the commencement of civil litigation.
   True
   False

7. In the Los Angeles Superior Court's ADR program, counsel are permitted to select their own mediators from the court's panel, regardless of whether the mediators are on the pro bono panel or the "party-pay" panel.
   True
   False

8. During the period that a litigated matter has been referred to court-connected mediation, parties should engage in vigorous discovery to work their cases up for trial in the event that the mediation does not result in settlement.
   True
   False

9. The California legislature has declared that the peaceful resolution of disputes in a fair, timely, appropriate and cost-effective manner is an essential function of the judicial branch of state government.
   True
   False

10. Judicial arbitration is the most-utilized ADR process in the Los Angeles Superior Court.
    True
    False

11. Qualifying for the Los Angeles Superior Court pro bono mediation panel requires at least 20 hours of core/classroom training; 10 hours of practical training; completion of at least 5 mediations; a place of business to conduct mediations; security clearance; continuing education in mediation; and a commitment to accept at least one mediation case per month.
    True
    False

12. In the *Foxgate* case, the California Supreme Court focused on the intersection between the confidentiality of court-connected mediation, and the power to impose sanctions on a party or attorney for statements or conduct during mediation, and concluded that the need for confidentiality generally outweighed the power to sanction.
    True
    False

13. According to the Los Angeles Superior Court ADR Department, approximately 50,000 cases are handled each year via court-connected ADR.
    True
    False

14. Without exception, mediators in court-connected mediations cannot be subpoenaed to testify in court as to what occurred during mediation.
    True
    False

15. Within 30 days after the filing of an Award of Arbitrator in a judicial arbitration, a request for a trial de novo must be served and filed in order to prevent the Award from becoming final.
    True
    False

16. After a judicial arbitration, if the party requesting a trial de novo obtains a trial result that is less favorable than the arbitration result, that party will be ordered to pay the other party's costs, including expert witness fees.
    True
    False

17. Courts are not at all reluctant to interfere with a binding arbitration award.
    True
    False

18. Neutral evaluation provides parties and counsel, in a voluntary, confidential setting, the chance to make summary presentations of their cases and obtain a non-binding evaluation by a neutral attorney who has experience in the relevant areas of law.
    True
    False

19. Every dispute is amenable to ADR.
    True
    False

20. Private ADR has its detractors, in that some people believe it raises equitable and ethical concerns, causes judges to leave the bench earlier than they otherwise might, and is not as cost-effective as it appears to be.
    True
    False

MCLE Answer Sheet No. 18

INSTRUCTIONS:
1. Accurately complete this form.
2. Study the MCLE article in this issue.
3. Answer the test questions by marking the appropriate boxes below.
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   Woodland Hills, CA 91367

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ANSWERS:
Mark your answers by checking the appropriate box. Each question only has one answer.

1.	❑ True	❑ False
2.	❑ True	❑ False
3.	❑ True	❑ False
4.	❑ True	❑ False
5.	❑ True	❑ False
6.	❑ True	❑ False
7.	❑ True	❑ False
8.	❑ True	❑ False
9.	❑ True	❑ False
10.	❑ True	❑ False
11.	❑ True	❑ False
12.	❑ True	❑ False
13.	❑ True	❑ False
14.	❑ True	❑ False
15.	❑ True	❑ False
16.	❑ True	❑ False
17.	❑ True	❑ False
18.	❑ True	❑ False
19.	❑ True	❑ False
20.	❑ True	❑ False