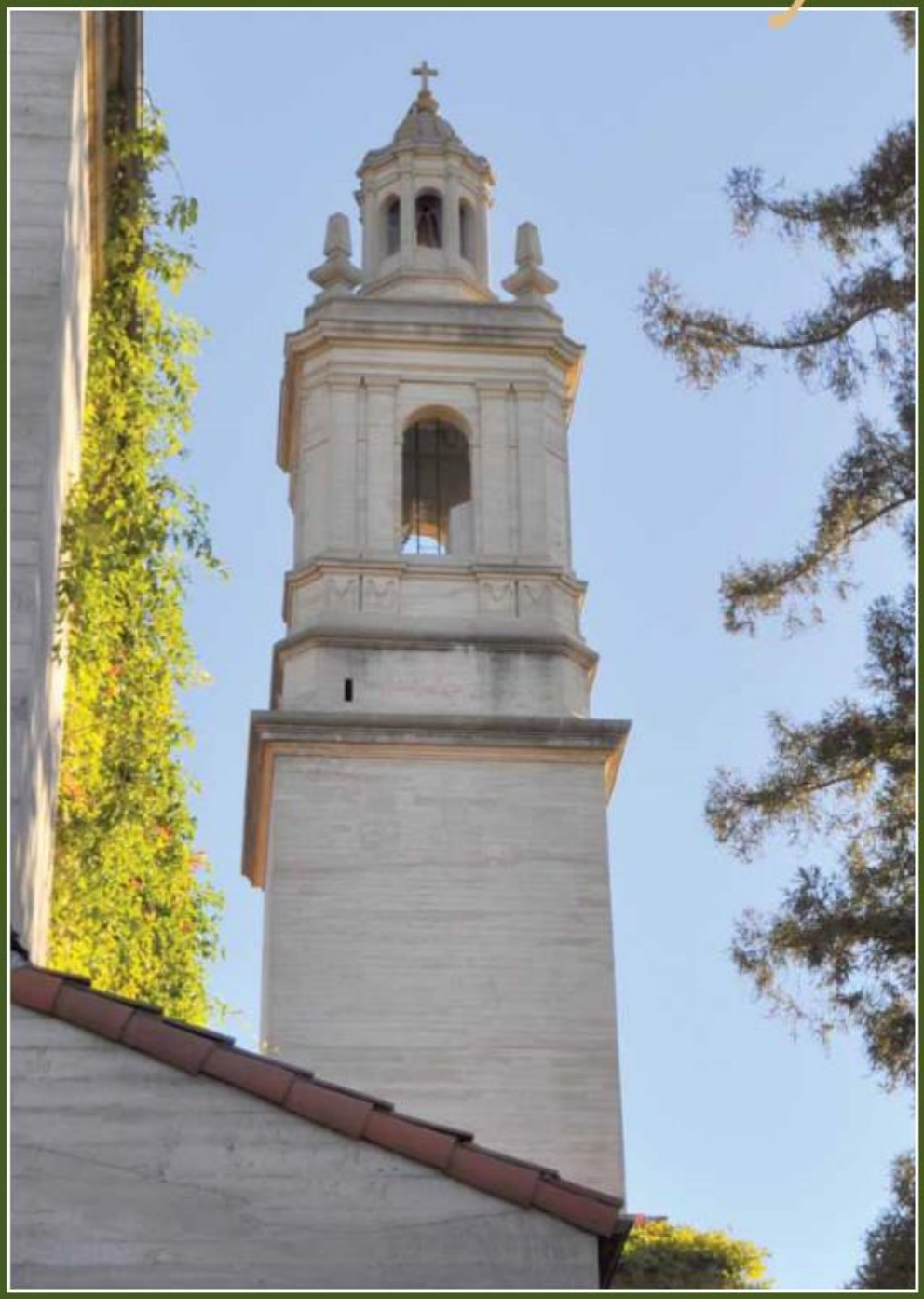
Santa Barbara Lawyer

Official Publication of the Santa Barbara County Bar Association
April 2015 • Issue 511



Mediation and "Alternative" Dispute Resolution

A Brief History in the Santa Barbara Superior Court

By Hon. Frank J. Ochoa

Hon. Frank J. Ochoa

Some would ask, "Mediation?" And they felt we might as well incorporate *meditation* into the courtroom processes as a way of resolving cases: "Om…. Om….Om….CASE RESOLVED!"

That describes the attitude of a few of my colleagues when I began to work, with others, on an Alternative Dispute Resolution program for the Santa Barbara County Superior Court in 1996. Those judges wanted no consideration of any process for resolving cases short of trial. The parties either settled the case on their own, or they would have to roll the dice and go to trial. Those "purists" among us who thought that trial or approval of the parties' unassisted settlement negotiations were the only legitimate resolution for court cases spent much time in trial.

All judges understand arbitration as a case resolution process. After all, arbitration is very much like a court trial proceeding. It has the look and feel of a court trial, with the presentation of evidence and objections under the Evidence Code. It's a bit less formal than a court trial, but it is the same breed of animal. The arbitrator's decision might be binding on the parties, or it might not be a conclusive end to the litigation. If it is not, they retain the right to march back into court and have a "real" trial.

Neutral Case Evaluation also has a base of understanding among the members of the bench. Sitting down with the parties and hearing a brief presentation regarding the contentions and the evidentiary issues in the litigation; and, in return, providing an assessment of the strengths and weaknesses, and the risks involved for each side, as well as the outcome probabilities, is something that each of us judges had done in a settlement conference. No big deal. But what was this new and different animal called "mediation"?

Most judges handling civil cases took advantage of the Court's Settlement Master program. Under this program, cases on the doorstep of trial were scheduled for a mandatory settlement conference before an experienced litigator who volunteered to act as a "Settlement Master" on behalf of the court. The court was selective in its appointment of Settlement Masters, so the appellation held some status among members of the Bar.

We had considerable success with the Settlement Master program, but we were only taking advantage of one of the windows of opportunity to settle a case. We were only availing ourselves of the window that exists at the end of the litigation chain, on the doorstep of trial. This window is created because the parties have been beaten down by the litigation process to the point of exhaustion. They've gone through responding to written discovery, taking depositions, various law and motion proceedings, and they probably have writer's cramp from writing checks for various and sundry fees and expenses. They are crawling to the doorstep of trial with the realization that they are probably about to spend as much money, resources and emotional energy to conduct a trial proceeding as they have spent in getting to this point.

There is a much earlier window of opportunity for settlement of the case. It exists at the commencement of the litigation. The controversy is just beginning, no one has yet dug in their heels, and, although not happy to be in the fray, the wounded feelings caused by the litigation process are yet to be known. In that 1996-1997 time frame, the judges determined that we should endeavor to open that window; a countywide committee was created with the vision of creating a "multi-door courthouse" model, designed to offer litigants with pending civil cases several alternative methodologies for resolution of their cases, other than traditional courtroom litigation.

My first exposure to mediation as a dispute resolution mechanism had occurred in the late 1970s. I was the Directing Attorney of the Yolo County Law Office of Legal Services of Northern California, adjacent to Sacramento. I had handled a number of civil rights and community-related issues and was known for such endeavors. One fall evening, a youthful, exuberant "block party" had become a tumultuous nuisance, drawing neighborhood complaints. City of Woodland police officers endeavored to close the party down and met resistance. Law enforcement units

Continued on page 11

Ochoa, *continued from page 8*

from seven different police agencies eventually responded, and several dozen "less than peaceable" arrests ensued. Some called it a riot; others termed it a police riot. The subsequent plethora of prosecutions led to angry picket lines surrounding the local courthouse, and steadily increasing community tensions, which were the subject of widespread local media coverage. I was approached by a number of local community representatives and was beseeched to consider bringing a large-scale unlawful arrest/excessive force legal action.

At about the same time, I received an unsolicited call from San Francisco. The caller was from the U.S. Department of Justice's Community Relations Service. Unaware that such an entity existed, I did my research, and discovered that it had been created by Title X of the Civil Rights Act of 1964, specifically to deal with such issues. I eventually conversed with a mediator from that service who had handled a number of community mediations around the country, including the 1973 occupation of Wounded Knee. He asked my assistance in establishing a community-based mediation in an effort to resolve the mounting discord. It seemed to me that litigation would only exacerbate a clearly volcanic situation, so I agreed to assist in commencing the federal government's effort, through a community-wide mediation process, to resolve the multitude of issues raised.

Community mediators from the Department of Justice facilitated a seven-month-long process in my Legal Aid office law library. The process involved discussions between heads of law enforcement agencies and local government officials on one side and an array of community representatives on the other. That process resulted in the formulation of a comprehensive written agreement, which provided a framework for ongoing dialogue and for resolving future community complaints, and also included the first "use of force" policies for some local law enforcement agencies. I still recall the day when the agreement was signed and the six or so representatives on each side of the table stood, shook hands, and engaged in celebratory salutations. Each walked away with a greater understanding and increased respect for the others involved in the process. Mediation worked where litigation would have not.

The first "Alternative Dispute Resolution Program Committee" in Santa Barbara County met on October 23, 1996, during the pre-court consolidation era. I was the representative of the Santa Barbara Municipal Court. Judge Bruce Dodds chaired the committee for the Superior Court. Judge Jim Jennings was the other Superior Court representative. North County Municipal Court Judge Rick Brown, Referee Steve Belasco from that court, and local bar representatives David Bixby, James Herman, James Iwasko, and Paul Pettine filled out the committee roster. Attorney, and former Legal Aid Foundation of Santa Barbara cohort Lessie Nixon, and Judge Zel Canter, as I recall, joined later. The development and implementation staff included consultants and ADR specialists, Robert Oakes and Lee Jay Berman, Attorney Iya Falcone, Gary Blair, the court's Executive Officer, and Flota Pritchard, the Calendar Coordinator. Time has marched on for each of us, and I am undoubtedly leaving out some worthy participants. The charge of the committee was to create a system where litigants could choose from a selection of dispute resolution methodologies in order to get to closure.

I had been elected to the post of Presiding Judge of the consolidated Superior Court in the fall of 1997. My term, which commenced in January 1998, was extended from two to four years in order to allow continuity in the management of the court consolidation process. In terms of my ongoing interest in developing a court-attached ADR program, I was impelled by my Legal Aid experience and by a realization that the traditional litigation forum was not the best way to resolve some of the cases in court. On the contrary I had concluded that litigation was the worst way to resolve some in-court disputes.

I was, perhaps, ten years on the Municipal Court bench in the early 1990s, when a bench trial was assigned to my courtroom. The trial carried a 1-2 day time estimate, so it certainly did not appear that trial would be complex or too time consuming. It struck me as odd though that the Plaintiff and the Defendant had the same last name. The Plaintiff was suing for the sum of ten thousand dollars, which he claimed to have loaned to the Defendant.

I became uneasy when I learned from counsel's opening statements that Plaintiff and Defendant were father and son. As testimony began, the following scenario unfolded: Plaintiff was a successful building contractor who had long been estranged from his son. During a period of rapprochement, when their long winter had begun to thaw out a bit, he became aware that his son and daughter-in-law were, for the first time, endeavoring to purchase a home for their family with three children, and needed his assistance with a down payment. Father had had very little contact with son's children, unlike the grandchildren bestowed upon him by his daughter. Father was very close to his daughter, her husband, and their children. He had, in fact, purchased a ranch residence in the Santa Ynez Valley for them because his daughter loved to keep and ride horses.

It seemed odd that a father with one son and one daughter

Continued on page 14

Ochoa, *continued from page 11*

should have such starkly different relationships with the only two branches of his family tree. To shower one child and her progeny with wealth, attention and gifts; to spend all holidays and grandfatherly time with one set of grandchildren, and to shun the other branch entirely, seemed an extremely sad and convoluted state of affairs. And now he was suing his son, giving me the task of making the legal determination as to whether the $10,000 which was transferred from father to son for the down payment was a "loan" or a "gift."

In the mid-afternoon of the first day of trial, the true family dynamic began to reveal itself. It became apparent that father had married son's mother 32 years prior to the time of trial. He had divorced son's mother and had married daughter's mother 31 years ago. From the timing of things, son was either not yet born, or had just been born, about the time of the dissolution of marriage and subsequent remarriage. It was easy to see that such an abrupt end to a marital relationship might be some cause for estrangement. But I had no idea what was about to come forth.

It was during son's testimony in the defense case that the true nature of the conflict was revealed. He testified that his mother, and his sister's mother, *were themselves sisters.* They were each other's only sibling. Father had married older sister and she was soon with child – the testifying witness. Father then took a fancy for wife's younger sister, divorced wife number one, and married younger sister, with whom he had the daughter. *The two sisters had not spoken to each other for 31 years.*

I was crestfallen. I wasn't really given the task of making a cool, clean determination as to whether a father had made a "loan" or a "gift" to his son. I was being dragged into the perpetuation of three decades of familial destruction. I began to envision the possible results of my determination. If father won, and received a $10,000 judgment against his son of meager means, whose only asset was the home where Grandpa had helped put a roof over his grandchildren's heads, would Plaintiff put a lien on that very abode? If the verdict was for the defense, would Grandpa ever speak to his grandchildren again?

I know judges can't take into consideration such things; our task is to rule according to the facts and the law. But it was abundantly clear that my determination was not going to be a resolution to these people's problems. I called a break in the action. I took counsel into chambers and conferred with them about the circumstances of the case. I suggested mediation or some form of family counseling. Each attorney had apparently made efforts to steer their clients in such a direction, without success. With my urging, they made another go of it. Once again, without success.

I concluded the trial proceeding the next day. The evidence revealed that the monies were given by father to son, without any promise or expectation of recompense. It was a gift; hence, verdict for the defense.

I wondered for years, and still wonder, if those excruciating family dynamics ever changed. My trial proceeding could only have made things worse. Whenever the parties to an action have an ongoing relationship, litigation is probably *not* the best way to resolve a dispute. And in many cases, it just might be the worst. This is true whether the relationship is among family members, among neighbors, in an employment setting, in the business world, or in any other circumstance where relationships are likely to live on after the dispute ends.

This realization was reaffirmed in another case I handled in my first year after election to the Superior Court bench, in 1997. There were six Superior Court judges in South County, and we each did one-sixth of everything. My office had been vacant for a while so the other judges carved out one-sixth of their portion (probably the least favored portion) of each of their cases and sent them to me.

Among those cases was an action for partition of a substantial piece of property. Hemingway's (nom de guerre) was a well-established, long time business situated on a downtown street. It was a few blocks away from the courthouse, and was in the business of selling various types of furniture. I received the case on the doorstep of trial and was seeing it for the first time. As always, I conducted a final settlement conference before clearing the decks for the trial proceeding.

The case involved two branches of the Hemingway family. It turns out that Old Man Hemingway, around the turn of the century, had been an industrious businessman who had acquired several substantial parcels of property in the downtown area during his lifetime. Those properties had become the sites of several prosperous and influential business enterprises. The patriarch had had two children, and had left his substantial estate to them. They had children and grandchildren, but the haggling over the common business interests had, over time, created what can only be described as an all-consuming hatred between the two branches of the family.

I learned that my lawsuit was the sixth of seven filed between the two branches of the family. The annals of the Hemingway family lawsuits filled many of the court clerk's filing cabinets. Each side had a matriarch who ruled her

Continued on page 16

Ochoa, *continued from page 14*

branch of the family. The animus between the branches of the family was so ingrained that each branch attributed the untimely death of a family member to the stress ostensibly thrust upon their branch by the other.

Now, I'd learned my lesson from that first case (the father suing his son), so I determined to dig in my heels on this one. I spoke to the attorneys about my perceptions of litigation in the family setting and strongly urged mediation. Both counsel were favorable to the suggestion and promised to endeavor to persuade their clients to the mediation pathway. I continued the pre-trial conference for two weeks.

Counsel arrived for the conference and began to report on their efforts. For one, the task had been rather easy. His client was completely agreeable to trying mediation as a means of seeking to resolve the dispute. The other was not so fortunate. His client, the 92-year-old matriarch (for convenience I'll call her Mrs. Jones), adamantly refused to try some new-fangled way of resolving her case. She was insistent on her day in court, and she would absolutely not consider any other alternative. I cogitated for a while and then formulated a suggestion. I asked counsel for the consenting party if he would object to my meeting in private with Mrs. Jones to see if I could convince her to try mediation. He not only consented, he was strongly in favor of such a course of action. Mrs. Jones' attorney also supported the plan to the point where he was willing to, and agreed on the record to, allow his client to meet with me in his absence. My secretary went about the task of scheduling an in-chambers meeting between myself and the truculent Mrs. Jones.

The appointed day finally came and I had some tea and biscuits brought into chambers. I arranged the furniture and made the environment as peaceable and homey as I could. When Mrs. Jones arrived, I gave her a friendly greeting and commented on her dignified appearance. We made small talk for a while, and then I began to ease into the topic. I gave a brief primer on mediation and told her that mediators are trained professionals, like judges, but they have a different process. They are trained to be a neutral negotiator in communications between the parties to the dispute. They go back and forth; they facilitate mutual understanding between the two sides; they clarify the issues in contention; they try to understand the disclosed and undisclosed interests of each party; and then they go about the task of identifying options for resolving the dispute. Those options are often far beyond the resolution possibilities the legal system provides to a trial judge.

Mrs. Jones listened unflinchingly, and then responded, "No way, no how. Not now and never. I *will* have my day in court."

I sank back in my chair and shifted gears. I talked about the expense of going to trial as opposed to the relatively low cost of mediation. I explained that the parties decide how to resolve the problem instead of handing that power over to a judge. I talked about how mediation might result in a solution to the problem that might ease the tension between the two branches of the family.

Mrs. Jones listened politely, and then responded, "No way, no how. Not now and never. I *will* have my day in court, and I want *you* to decide my case."

I sank back again and thought about the value of continuing on. Was she really resistant to the point where I was just banging my head against the proverbial brick wall? I decided to make one last-gasp effort. I determined that I would use a finely honed, but extremely rarely used tool in my judicial toolbox. I asked her, "Please Mrs. Jones, won't you just try this once, for me, please?" That's right, I begged. I beseeched her to try mediation – for me.

The hard veneer melted and her face softened. The personal entreaty worked, where logic and reasoning had not. She responded and said, "Okay judge, if you really want me to do this, I'll do it *for you*." My sigh of relief was surely audible.

I assigned the case to the best mediator available, who conducted a one-day mediation. The trial estimate for this case, number six in the series of cases, had been two weeks. In one day, the mediator was able to resolve the partition lawsuit. She also resolved lawsuit number seven which had been waiting in the wings. In addition, she extinguished any grounds over which the branches of the family might seek to litigate in the future by getting one side to buy out all the mutual business interests binding them to the other. By doing so, she insured that lawsuits 8, 9, and 10 would never come about, and might have tilled the soil for the growth of new familial relationships.

Each of the committee members was impelled by similar circumstances, and after years of planning and preparation, thanks to the judges and attorneys who toiled away in that development process, the Santa Barbara Superior Court's CADRe (Court Administered Appropriate (or Alternative) Dispute Resolution) Program began operation in July of 1999. In 2005, Judge Bill McLafferty worked with affected persons to develop the CMADRESS (Case Management ADR Early Settlement Session) refinement to those court processes. A visit to the court's website will apprise the reader of the intricacies and success levels of these once innovative programs.

When the court incorporated ADR into civil case pro-

cessing early in the litigation game, it created multiple avenues for the litigants to choose in their effort to get to resolution. It gave its imprimatur to methodologies of case processing that are less costly, less time consuming, and less stressful than litigation and trial, and which have the potential to draw resolution from a broader range of possibilities. Creating those options for the court's user community has had no down side, and has had many beneficial impacts on the consumers of court services.

It has also had many ancillary positive impacts on the court and its staff as well. The earlier that cases are resolved, the fewer the number of calendarings, the more paper is saved (or time making computer file entries), and the less the stress upon the judicial officer managing the case. Ultimately, it is not only true that alternative methods of resolving cases may be better than litigation, it is the case that litigation is the worst way to resolve some of the disputes that find their way into our courtrooms. ADR has a permanent home in the Santa Barbara courthouse. ■

Judge Frank Ochoa retired in January, 2015 from the Santa Barbara Superior Court after more than 32 years on the trial court bench. He served on numerous statewide judicial committees and task forces and was temporarily assigned to the local division of the California Court of Appeal. He developed the local adult and juvenile court drug court programs as well as the CADRe program. He was the Presiding Judge through the countywide court consolidation process as well as the transition from county funding to a statewide court funding base and administrative structure. He now operates a private judging practice in the areas of mediation and arbitration; as well as providing other dispute resolution and consulting services.