

RESOLUTION 7-06-2002

DIGEST

Mediator Requirements: Qualifications and Disclosures

Adds sections 1803 and 1804 to the Code of Civil Procedure to require that mediators disclose all relationships they have with parties and decline the case if any party objects or if the conflicts are clear and substantial.

RESOLUTIONS COMMITTEE RECOMMENDATION

DISAPPROVE

History:

Similar to Assembly Bills 2574, 2656, and 3029.

Reasons:

This resolution adds sections 1803 and 1804 to the Code of Civil Procedure to require that mediators disclose all relationships they have with parties and decline the case if any party objects or if the conflicts are clear and substantial. This resolution should be disapproved because the disclosure mandated is overbroad and because informed parties should be able to choose biased mediators.

The proposed disclosure standard goes too far. For example, it appears to require a mediator to disclose that the mediator's niece's spouse previously worked at the insurance company for one of the parties. If mediators must identify and report such remote connections, the cost of their services will presumably increase for naught. They should not be required to any relationships except known connections that a reasonable person would consider potentially material.

The disqualification requirement is also unjustifiably rigid. Assuming proper disclosure, parties should have the right to use a mediator no matter what his or her connections. Unlike arbitrators or private judges, mediators cannot impose an outcome. They are engaged to facilitate settlement. For that purpose, a party might prefer someone who (by virtue of the mediator's known sympathies) could more readily influence adversaries.

SECTION/COMMITTEE REPORTS

Standing Committee on ADR of the State Bar of California

Recommend: Disapprove

Reasons:

The ADR committee recognizes that lack of statewide ethical guidelines dealing with disclosure of potential conflicts may encourage abuse, and consequent loss of public confidence in mediation. Effective regulation, however, should follow responsible, deliberate, and competent analysis. For example, the Judicial Council's recently-adopted [April 19, 2002] Rules of Conduct for mediators in court-connected programs for civil cases were the culmination of nearly three years' study by judges, court-related ADR program administrators, mediators, attorneys and academicians. And these Rules did not deal with the much broader application of disclosure requirements in private, consensual mediations outside the court system.

The proposed resolution, while ambitious and motivated by obvious good intentions, appears to address a single problem, "disclosure by mediators of conflicts of interest," only to create much larger problems. These problems arise in the proposal's vague, sometimes unusual, terminology, and by attempting to address disclosure requirements without considering other equally compelling ethics issues.

Vagueness in terminology appears initially in the proposal's definitions:

"Oral Agreement" is to be governed by definitions in the Evidence Code, but the term does not appear elsewhere in the proposed Resolution.

"Disputants" are persons *"who have legal rights and duties to participate in mediation and reach a mutually acceptable agreement."* Disputants, except in mandated court mediation programs, have no *"duty"* to participate in mediation and certainly no duty to *"reach a mutually acceptable agreement."*

Under Principals of Neutrality, the Resolution language requires the mediator to be *"competent,"* but does not explain whether the term refers to legal/subject matter competence and/or the ability to conduct a mediation; nor,

who decides whether the mediator is competent.

Further examples of fatal ambiguity are the use of the concepts "*maintain the mediator's position*," "*meet all mediation commitments*," "*predictable*" future suspect relationships, "*management-level employee*," "*effective record-keeping system*," "*reasonably known*" disputants and attorneys, and "*clear and substantial*" required disclosures mandating mediator withdrawal "*irrespective of the disputants' desires*."

The requirement to make all disclosures "*in writing*" fails to consider the varied circumstances in which mediation is used, including peer mediations on school grounds. The requirement to disclose the "*true names*" of all disputants of prior mediations or arbitrations under specified circumstances is a likely violation of confidentiality principles despite excusing disclosure of disputants "*not conducting business*."

In sum, the proposed Resolution creates regulations and sanctions for a currently unregulated process without the benefit of comprehensive analysis. Its language, whether clear or vague, will create unintended liability exposure for mediators where none before existed. The proposal will allow disgruntled disputants with post-decision regret to attempt to set aside settlements for the slightest alleged violations and seek damages. The proposed sanctions will require admissibility of confidential communication of a mediation or mediation consultation in order to prove violations, thereby undermining the confidentiality provisions of the Evidence Code. These consequences will "chill" the growth of mediation, increase costs of mediation, and ultimately reduce access to an affordable alternative to litigation.

TEXT OF RESOLUTION

RESOLVED that the Conference of Delegates recommends that legislation be sponsored to add sections 1803 and 1804 to the Code of Civil Procedure to read as follows:

1 §1803. Definitions.

2 For purposes of this Chapter:

3 (A) "Mediation", "Mediator", and "Oral Agreement" shall be governed by the definitions in

4 Division 9, Chapter 2 of the Evidence Code.

5 (B) "Disputants" mean natural or artificial persons who have legal rights and duties to participate in

6 mediation and reach a mutually acceptable agreement.

7 (C) "Family" means the mediator's spouse or a person within the third degree of

8 relationship to the mediator or the mediator's spouse, or the spouse of such person.

9

10 §1804.

11 (A) Principles of Neutrality:

12 (1) A mediator shall be honest, impartial, and free from favoritism or bias in word, action, and

13 appearance.

14 (2) A mediator shall not give or accept any property of value, directly or indirectly, for the referral

15 of cases.

16 (3) A mediator shall be competent to handle the matters under dispute. If a case is beyond the

17 mediator's competence, the mediator shall decline the case or withdraw from the case, seek appropriate

18 assistance, or obtain the informed written consent of all parties to serve.

19 (4) A mediator shall maintain the integrity of the mediator's position and shall not be influenced by

20 outside pressure, fear of criticism or self-interest.

21 (5) A mediator accepting an appointment must be able to and shall act promptly to meet all

22 mediation commitments in a timely manner.

23 (B) Required Disclosures means all reasonably known current, past or predictable future:

24 (1) business, professional, or close personal relationships the mediator, including the mediator's firm

25 or family, has with the (a) disputants, including all instances in which the mediator, including the mediator's

26 firm or family, is now or has provided any services for any disputant or adverse to any disputant; (b)

27 disputants, lawyers, law firms, and insurers representing a disputant; or,

28 (2) financial interest the mediator, including the mediator's firm or family, has in any disputant or in

29 the subject of the dispute; or,

30 (3) business, professional, or close personal relationships the mediator, including the mediator's

31 firm or family, has with an officer or management-level employee of a disputant, or with an individual

32 representing a disputant; or,

33 (4) circumstances that might reasonably raise a question under subdivision A.
34 (C) Disclosure - Procedure: The mediator shall in writing indicate the absence or presence of any
35 required disclosures. Where the mediator provides required disclosures the mediator shall disclose in writing
36 the following where applicable:
37 (1) Where a disputant to a proposed mediation is also a disputant to a prior or pending mediation or
38 arbitration of the neutral within the prior five years, the mediator shall disclose the following for each such
39 prior or pending case: (i) the date the case closed unless the case is not closed in which instance the date
40 opened; (ii) the names of all disputants, provided that the true names for any individuals not conducting
41 business and not a disputant to the proposed mediation shall be described only by their role ("claimant" or
42 respondent"); and (iii) the names and representative interest of the lawyers and their law firms, if any.
43 (2) In all other instances the specific circumstances constituting the required disclosures;
44 (3) If the mediator fails to make required disclosures as required herein the mediator shall decline
45 the case or withdraw from the case.
46 (4) The mediator shall utilize an effective record keeping system to identify required disclosures and
47 make all reasonable efforts to learn of facts warranting required disclosures.
48 (D) Disclosure - Timing:
49 (1) The mediator shall in writing indicate the absence or presence of any required disclosures as
50 soon as possible following appointment or proposed appointment, but in all cases prior to convening the
51 mediation.
52 (2) The mediator's duty to disclose continues during the mediation process and shall be made orally
53 or in writing, as circumstances permit, as soon as possible within 72 hours after the mediator becomes aware
54 of any required disclosures.
55 (3) The duty to make required disclosures runs to reasonably known disputants or their reasonably
56 known counsel, and to the court or other referring organization if required by such court or organization.
57 (4) After making required disclosures the mediator shall decline the case or withdraw from the case
58 unless all disputants agree to retain or continue to retain the mediator. However, a mediator shall decline the
59 case or withdraw from the case where there are clear and substantial required disclosures irrespective of the
60 disputants' desires.
61 (E) Public Education: Disputants and their counsel who use mediation to resolve disputes have the
62 right to know of required disclosures so they may make informed decisions in selecting mediators. The fact
63 and nature of this *Mediation Disclosure Act* shall be provided to Disputants and their counsel as follows:
64 (1) Mediators who directly contract with disputants and/or their counsel for mediation services shall
65 provide in separate writing or in their written communications, in 12-point bold font, the following:
66 "Disputants to mediation have the right that mediators disclose in writing the absence or presence of any
67 conflicts of interest [Code of Civil Procedure 1803-1804]. Upon request a copy of the *Mediation Disclosure*
68 *Act* will be provided to you."
69 (2) Community Mediation Organizations which provide or arrange to provide mediation services for
70 disputants who often utilize the organization's facilities may, as an alternative or supplement to the notice in
71 section E (1), conspicuously and prominently post in their facilities the following message: "Disputants to
72 mediation have the right that mediators disclose in writing the absence or presence of any conflicts of interest
73 [Code of Civil Procedure 1803-1804]. Upon request a copy of the *Mediation Disclosure Act* will be provided
74 to you."
75 (3) All other organizations which provide or arrange to provide mediation services for Disputants
76 and/or their counsel, shall provide in separate writing or in their written communications, in 12-point bold
77 font, the following: "Disputants to mediation have the right that mediators disclose in writing the absence or
78 presence of any conflicts of interest [Code of Civil Procedure 1803-1804]. Upon request a copy of the
79 *Mediation Disclosure Act* will be provided to you."
80 (F) Remedies: Disputants to mediation who sustain damage as a result of any violation of this
81 Chapter shall have such remedies as are provided in law or equity. Where there has been a finding that the
82 mediator's violations of the *Mediation Disclosure Act* were willful or repetitious, the court may additionally
83 impose the following sanctions it finds suitable to protect the public's interest:
84 (1) suspension from providing any mediation services, not to exceed 12 months per single case
85 encounter; and/or
86 (2) public reproval published in a state-sponsored ADR web site.

(Proposed new language underlined; language to be deleted stricken.)

STATEMENT OF REASONS

Existing Law: There is currently no law requiring mediators handling private, consensual mediation to disclose conflicts of interest.

This Resolution: This resolution requires private mediators to disclose conflicts of interest. This will encourage greater utilization of and support for private mediation, resulting in the reduction of costs to disputants and taxpayers.

The Problem: Many federal, state and local laws, and private non-profit organizations, mandate or encourage mediation as a dispute resolution process. Mediator impartiality and independence is core to the growth and acceptance of mediation as the process of choice in resolving disputes. At stake is public trust in the justice system. Parties are encouraged by law and practice to reveal themselves, particularly in private caucus. If a party or counsel has the slightest doubt of mediator impartiality, their confidence and willingness to reveal vital information will be impaired, and we will have not openness in mediation but inhibition resulting in deficient process and inferior outcomes.

Parties want high quality resolution of their disputes. That requires a system that is accessible, affordable, comprehensible, user-friendly, and speedy so whatever the outcome the parties and lawyers can depart assured that a competent neutral has listened to and responded with courtesy, respect and sensitivity.

Parties to a dispute and their lawyers are increasingly demanding more information about the processes and the persons who serve them. A dispute resolution system must therefore assure that reliable information is readily available to the parties and lawyers to enable them to knowledgeably participate in and influence the process. Without education and information, the expectations of the parties and lawyers will be unrealistic with attendant surprise, frustration and dissatisfaction. This resolution seeks to assure such information is available.

IMPACT STATEMENT: This proposed resolution does not affect any other law, statute or rule.

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COUNTERARGUMENT

CONTRA COSTA COUNTY BAR ASSOCIATION

The ideal that mediators disclose relevant connections and generally be impartial is laudable, but this resolution goes much too far. First, the proposed disclosure standard is overbroad. For example, it would impose a duty to discover and report past relationships between a spouse's great uncle and the law firm representing a party. Researching and describing such remote connections is wasteful; mandating the exercise would create a trap for the unwary and could cripple court-sponsored pro bono mediator services. Mediators should simply report all plausibly influential connections of which they are actually aware.

The resolution also goes astray by absolutely disqualifying a mediator if "there are clear and substantial required disclosures," even though the parties are fully informed and still want a particular facilitator's assistance. Given fair disclosure, parties should have discretion to select anybody they think can help them, especially because mediators (unlike arbitrators) *cannot* impose any determination or award and are hired only to encourage consensual resolution. Suppose for instance that liability is very weak but plaintiff's counsel seems oblivious; the defendant might *want* a recognized pro-plaintiff mediator, who would on that account be more likely to sober up the claimants.

Finally, the resolution strikes the wrong note by requiring that mediators be "competent to handle the matters under dispute" and suggesting that a violation would be actionable as mediation malpractice. Mediator competence is a troublesome concept because it suggests more precision and science than the process permits. There are diverse approaches to fostering settlement, and no easy way to know what will work in a particular case. The enterprise

calls for creativity and experimentation and—short of violating confidences—little that would clearly be “wrong” (except in hindsight, when it doesn’t help). By enshrining a notion of objective “competence” to mediate specific matters, one could create unjustified expectations, stifle novel techniques, and (ironically) invite collateral litigation over the adequacy of mediation services.