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The time has come for mandatory mediation

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As litigation costs have become prohibitive for most individuals over the past 25 years, mediation has become an integral part of the civil litigation process. The vast majority of cases settle before trial, and most settlements are the result of the mediation process. While mandatory mediation has become increasingly common, California has yet to enact a mandatory mediation statute that covers all civil cases.

The concept is not foreign; California has always embraced the alternative dispute resolution process in general and mediation in particular. The Golden State was a leader in family law mediation enacting the first mandatory mediation statute in custody disputes in 1981. Five years later, the Legislature enacted California Business and Professions Code Sections 465-471.5 encouraging ADR (mediation, conciliation and arbitration) as a state public policy, and authorizing the Judicial Council and individual counties to establish dispute resolution programs. In 1993, the Legislature enacted the Civil Action Mediation Program (Code of Civil Procedure Section 1775 et seq.) that allows courts to establish court-annexed mediation programs and order cases into mediation as an alternative to judicial arbitration where the amount in controversy does not exceed $50,000 for each plaintiff. In turn, the Judicial Council has established procedures that govern such mediations. Actions that exceed $50,000 in controversy may be submitted to court-sponsored mediation if the parties stipulate.

Between 2001 and 2002, early mediation pilot programs were established under statutory mandate to authorize early referrals to mediation. These court-annexed civil mediation programs were implemented in five counties - three mandatory programs in the superior courts in Fresno, Los Angeles and San Diego counties, and two voluntary programs in the superior courts in Contra Costa and Sonoma counties. The statute required the Judicial Council to review the results of the program and send a report to the Legislature and governor. According to the report submitted, the programs were successful and reflected an overall positive experience. Trial rates, case disposition time, and the courts' workload were reduced. Litigant satisfaction with court services increased, while litigant costs decreased in cases that resolved at mediation.

Subsequently, various mediation programs have been established throughout the state on a county-by-county basis, although some programs have fallen victim to recent budget cuts. Most cases will be mediated by the time of trial, either through a court-annexed program or private mediation. In short, mediation has become an integral part of the civil litigation process that is now ingrained in our legal culture. Nevertheless, California courts have no statutory power to order parties to mediation in matters where the amount in controversy exceeds $50,000. Unlike many other states that have already legislatively provided their courts with appropriate statutory powers, California needs to adopt such legislation.

As of now, California courts can neither order parties to a nonstatutory mediation, nor order them to pay for the cost of a mediation involuntarily. *Jeld-Wen Inc. v. Superior Court*, 146 Cal. App. 4th 536, 543 (2007). In *Jeld-Wen*, the appellate court rejected the argument that courts, as part of their inherent power to control the proceedings before them under CCP Section 128, have inherent power to appoint mediators. Generally, mediation is a statutory process. *Jeld-Wen* also promotes two public policies: First, mediation is a voluntary process. However, this policy is questionable when the Legislature has enacted a mandatory mediation program in limited cases. Second, parties cannot be ordered to pay for the costs of mediation. This policy presents an impediment to a comprehensive statutory mandatory mediation scheme in California because ordering parties to pay for the cost of mediation raises issues of due process and equal protection under the 14th Amendment.

The same type of constitutional and public policy concerns were addressed in *Ada Solorzano, v. Superior Court*, 18 Cal. App. 4th 603 (1993), where, in a discovery dispute, the trial court appointed a private referee under CCP Section 639 and ordered the parties to each pay one-half of the referee's fees under CCP Section 645.1 over the plaintiffs' objection on grounds of indigence. On appeal, the plaintiffs argued that this denied them meaningful access to the court in violation of their rights to equal protection and due process under the U.S. Constitution, and impermissibly infringed on their rights to counsel. The appellate court agreed holding, among other things, that the trial court's order constituted an abuse of discretion, since the order failed to consider its impact on the indigent plaintiffs, and that Section 645.1, providing for the payment of discovery referees by the parties, did not constitute authority for the trial court to appoint a privately compensated discovery referee to resolve the dispute. Generally, Solorzano and its progeny recognize the rights of indigent litigants under federal and state case law and California statutes. These rights, powerful as they are, do not allow a court to sidestep consideration of a party's professed in *forma pauperis* status, which by definition means that he or she is unable to pay all or a portion of the costs of a private referee.

Thus, to satisfy the criteria discussed in the *Jeld-Wen* and *Solorzano* cases, and drawing on the analogous statutes in the appointment of a referee, the following mandatory mediation draft statutes should, in our view, pass constitutional muster. Further, the proposed statutes give courts broad discretion to excuse parties from mediation in appropriate cases and also give the Bar flexibility to control the timing of mediation so as not to impede the all-important advocacy role of attorneys in litigation disputes.

Section 1001: Mandatory Mediation Except for Cause

Unless the parties to a civil action are excused from mediation as provided in Section 1002 below, the parties shall participate in a mediation no later than 60 days prior to the date set for trial in the action.

Section 1002: Release from Mediation for Cause

Upon the filing of a motion by any party to a civil action, the court may release the parties to the action from mediation upon any of the following grounds:

(a) The parties have participated in good faith in another dispute resolution procedure approved by the court in which the action is pending;

(b) Based on facts submitted to the court on the motion, the court determines that the matter is not suitable for mediation;

(c) The court finds that one or more parties to the action lack the financial resources to pay a pro rata share of the mediator's fee, and the mediator's fee will not be paid either by a mediation program recognized by the court or by the remaining party(ies) to the action established in a written instrument filed with the court.

Section 1003: Selection of Mediator by Consent of Parties or Court Appointment

Unless the parties are released from the requirement to participate in mediation under Section 1002, the parties shall submit to the court no later than 90 days from the date of trial the name of a mediator mutually selected by the parties. In the event the parties fail to file a written designation of a mediator under this section, the court shall, in its discretion, appoint a mediator; providing, however, if the parties have collectively or separately submitted the names and contact information of proposed mediators to the court, the court shall select a mediator from the names provided unless the court in its discretion determines all persons submitted are not suitable; and further providing, if the court does not appoint a mediator from persons proposed by the parties, the court shall appoint a mediator from a list of mediators provided by the court under the court's approved list of qualified mediators.

The draft act leaves room for refinement or modification. Nonetheless, it should engender a robust discussion by the bench and bar leading to the enactment of a mandatory mediation act applicable to all civil actions in California.

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