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Private-mediator ethics in California

AND THE NEWLY ENACTED STATE BAR NEUTRAL-CERTIFICATION PROGRAM

No doubt many readers are familiar with Abraham Lincoln's famous and wise quote. It is repeated to underscore how long resolving civil disputes has been an important goal of our American justice system.

> Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often the real loser – in fees, and expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough.

(Abraham Lincoln, "Notes on the Practice of Law," circa 1850.)

Mediation

Mediation is "a process in which a neutral person or persons facilitate communications between the disputants to assist them in reaching a mutually acceptable agreement." (Evid. Code, § 1115, subd. (a); Cal. Rules of Court, [hereinafter "Rule"] rule 3.852(1).)

Outside of the rules of conduct for mediators on a superior court's list of panel mediators, who conduct *court-ordered* mediations (Rule 3.850-3.860), there are no special training requirements for *privately retained* mediators in California. Indeed, privately retained mediators are not required to be attorneys. Likewise, the ABA's "Model Standards of Conduct for Mediators" are optional.

California's ethical rules for *court-appointed* mediators do not apply to *privately retained* mediators

In the years before budget cuts prompted the world's largest trial court to shutter its Alternative Dispute Resolution Services in 2013, I was one of countless lawyers appearing in the Los Angeles Superior Court, whose clients were ordered by the judge to mediate. After leaving the courtroom, opposing counsel and I would walk to the court's ADR office and select a mediator from the court's panel. Although many of the panel mediators were unknown to us, the court's vetting process gave us confidence in selecting an unknown mediator. Indeed, the mediators on the court's panel had all voluntarily subjected themselves to the requirements of the California Rules of Court.

For example, the Rules of Court require *court-connected* mediators to maintain impartiality towards all participants. Such mediators are to be mindful of potential conflicts of interest and, therefore, must make reasonable efforts to keep themselves informed about matters that could reasonably raise a question about their ability to conduct the proceedings impartially. (Rule 3.855.) The Rules also require court-connected mediators to self-assess their competence to mediate. (Rule 3.856(d).) Such mediators are also prohibited from using the information acquired in confidence during a mediation outside of the mediation, or for personal gain. (Rule 3.854(d).)

While *privately retained* mediators are under no similar legal obligations, List serves and other outlets for discussion in the legal community provide information that allows lawyers to vet potential mediators. Just as lawyers want to have a good reputation in the community, mediators desire a good reputation in the legal community for impartiality, competence, and trustworthiness. Indeed, it would be hard to imagine a private mediator who breached a client's trust, such as by using confidential information acquired during the course of mediation outside of mediation or for personal gain, to have much, if any, repeat business.

Further, the California Rules of Professional Conduct impose a duty of competence on all lawyers. (Rules of Professional Conduct, Rule 1.1.) This duty applies not just to the lawyers who represent clients at a mediation, but also to lawyers who mediate cases. Of course, seeking a remedy for lack of competence at a mediation, by a lawyer or by a lawyer-mediator, would be largely hindered by the mediation confidentiality.

California's mediation confidentiality is intended to encourage mediation

"Mediation confidentiality" is a broad concept set forth in a number of statutes. California's mediation confidentiality statutes were enacted to advance public policy and encourage mediation. (See, e.g., Evidence Code, §§ 703.5, 1115-1129.) The importance of mediation confidentiality is underscored by the number of California Supreme Court decisions repeating the public policy behind these statutes.

The statutory scheme is "broadly construed" to protect confidentiality, and "unqualifiedly bars disclosure of specified communications and writings associated with a mediation absent an express statutory exception." (*Simmons v. Ghaderi* (2008) 44 Cal.4th 570, 580; *Rojas v. Superior Court* (2004) 33 Cal.4th 407, 416.)

Evidence Code section 1119 prohibits "any person," i.e., mediator and participants, "from revealing any written or oral communications made during mediation." Likewise, section 1121 prohibits the mediator (but not a party) from advising the court about conduct during mediation that might warrant sanctions.

"Participants" is more broadly defined than just the "parties." It includes all persons attending and assisting in the mediation on behalf of the disputants. There are occasions when a party wants to bring a non-party to the mediation for assistance or support. If your client wants to do this, you should ensure that your client and this non-party understand and agree to abide by mediation confidentiality.

Mediation confidentiality also extends to communications between the parties and their own lawyers about mediation. This includes discussions conducted in preparation for a mediation and all mediation-related communications that take place during the mediation itself. (*Cassel v. Superior Court* (2011) 51 Cal.4th 113, 128.)

The California Supreme Court has observed that the legislative intent underlying the Evidence Code's mediation privilege is "clear": "the purpose of confidentiality is to promote 'a candid and informal exchange regarding events in the past. . . .This frank exchange is achieved only if the participants know that what is said in the mediation will not be used to their detriment through later court proceedings and other adjudicatory process.'" (*Foxgate Homeowners' Association v. Bramalea California, Inc.*, (2001) 26 Cal.4th 1, 14.)

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The Supreme Court recognized the "conflict between the policy of preserving confidentiality of mediation to encourage resolution of disputes and the state's interest in enforcing professional responsibility to protect the integrity of the judiciary and the public against incompetent and/or unscrupulous attorneys." (*Foxgate*, *supra*, at p. 17, fn. 13, citations omitted.) The Supreme Court concluded that, "[A]ny resolution of the competing policies is a matter for legislative, not judicial, action."

A decade after its *Foxgate* opinion, the California Supreme Court, again, referred to the clear legislative intent of the mediation confidentiality statutes, in *Cassel*, *supra*: "The Legislature decided that the encouragement of mediation to resolve disputes requires broad protection for the confidentiality of communications exchanged in relation to that process, even where this protection may sometimes result in the unavailability of valuable civil evidence." (52 Cal.4th at p. 136.)

The statutory confidentiality of the mediation privilege is designed to safeguard mediation communications from disclosure to foster trust and candid negotiations. This serves California's public policy of encouraging the resolution of disputes by means short of litigation. Once mediation has been attempted as an alternative means of resolution, "making and communicating the candid disclosures and assessments … are most likely to produce a fair and reasonable mediation settlement." (*Cassel*, *supra*, at p. 133.)

The mediation-confidentiality provisions are found in other statutory provisions as well. With certain statutory exceptions, Evidence Code section 703.5 renders judges, arbitrators, and mediators incompetent to testify to any statement, conduct, decision, or ruling at or in conjunction with the prior proceeding. Statements made by parties during mediation were expressly made subject to the confidentiality provisions of the Evidence Code. (Code Civ. Proc., § 1775.10.)

Finally, mediation confidentiality is recognized in the State Bar's recently enacted Rule 8.3 of the Rules of Professional Conduct. When CRPC Rule 8.3 was enacted in 2023, it received considerable attention (and was promptly referred to as "the snitch rule" in several bar association publications).

This rule requires a lawyer to "inform the State Bar, or a tribunal with jurisdiction to investigate or act upon such misconduct" when the lawyer "knows of credible evidence" that another lawyer has either (a) "committed a criminal act," or (b) has engaged in "conduct involving dishonesty, fraud, deceit or reckless or intentional misrepresentation or misappropriation of funds or property," and the act or conduct "raises a substantial question as to the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects."

CRPC Rule 8.3 contains an express exception for, and does not authorize, disclosure of "information protected by mediation confidentiality." (Rules of Professional Conduct, Rule 8.3(d).)

The recently enacted mediator certification program

In September 2024, California's Senate Bill 940 was signed into law. This adds section 6173 to the Business & Professions Code, of "Alternative Dispute Resolution Certification Program." This statute requires the State Bar to create a program to certify alternative dispute resolution firms, providers, or practitioners – even non-lawyers.

The statute defines "Alternative dispute resolution" as "mediation, arbitration, conciliation, or other nonjudicial procedure that involves a neutral party in the decision-making process." (Bus. & Prof. Code, § 6173, subd. (d).) The law, by its terms, includes both mediators and arbitrators. That is, the State Bar is required to create a certification program for mediators and arbitrators, with different tiers for each.

The certification program for mediators must include a requirement that the firm, provider, or practitioner verify that the mediators comply with ethical standards that are equivalent to the Rules of Conduct for Mediators in Court-Connected Mediation Programs for General Civil Cases. These are the same Rules of Court referenced above, at California Rules of Court 3.850 to 3.860.

Similarly, the certification program for arbitrators must include a requirement that the firm, provider, or practitioner verify that the arbitrators comply with the 17 Ethics Standards for Neutral Arbitrators in Contractual Arbitration. These standards are contained in the California Rules of Court.

The Judicial Council enacted the 17 standards pursuant to its mandate under Code of Civil Procedure section 1281.85. This statute, in turn, required those persons serving as neutral arbitrators under an arbitration agreement to comply with the ethics standards for arbitrators adopted by the Judicial Council. When it adopted the standards, the Judicial Council noted that the ethics standards are "not intended to establish a ceiling on what is considered good practice in arbitration or to discourage efforts to educate arbitrators about best practices."

Under the new statute, the firm, provider, or practitioner must have procedures in place for persons to make complaints for non-compliance, as well as procedures to remedy such failures to comply with the standards. (§ 6173(b)(1)(A)-(D).) Further, the complaint procedures for mediators must be substantially similar to the complaint procedures for court-connected mediators (as set forth in Rule 3.865).

Another requirement for the State Bar's certification program is having different levels or tiers for certification. The statute provides that "Higher levels or tiers are awarded to firms, providers or practitioners that demonstrate a higher level of commitments to accountability and consumer protection based on criteria developed by the State Bar." (§ 6173(b)(2)(A).) These levels or tiers, however, "do not reflect an assessment of the quality of a firm, provider, or practitioner." (§ 6173(b)(2)(B).) The State Bar also has the authority to deny or revoke certification for a failure to meet or maintain certain certification standards. (§ 6173(b)(3).)

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Finally, but not insignificantly, the statute authorizes the State Bar to charge a fee to cover the "reasonable costs" of administering the program. The certification program is to be self-funded, in that the State Bar's annual license fees cannot fund it. (§ 6173(c).)

In response, the State Bar has created the Alternative Dispute Resolution Certification Working Group. Its 21 members have been further assigned to sub-committees. The State Bar's website reflects that the working group has been charged with making recommendations for a comprehensive framework for certifying ADR firms, providers, and practitioners designed to promote public confidence and consumer protection in ADR services. [https://www.calbar.ca.gov/Portals/0/documents/cc/ADRC-Working-Group-Charge.pdf]

As of the writing of this article, the working group's aim is to submit its recommendations to the bar's board of trustees at its September 2025 meeting. In the meantime, there are opportunities for public comment at public meetings, and it is anticipated that there will be a public comment period once the recommendations are made.

The working group will submit recommendations for rules and procedures and a periodic evaluation of the certification program for three areas. The working group has already held several public meetings (available for viewing online, such as on the State Bar's YouTube channel, at "calbarca").

Each of the three areas has prompted the many questions set out below. (These questions do not necessarily reflect the views of the author or ADR Services, Inc.):

Qualification requirements: Includes complaint and remedy procedures.

- What kind of experience or training will be required to become certified?
- How will the complaint and remedy procedures preserve mediation confidentiality?
- As non-lawyer mediators are not subject to the State Bar's jurisdiction, what incentives do non-lawyers have for participating in the certification?
- As mentioned above, privately conducted mediation is confidential, and mediators are not bound by the disclosure requirements for court-connected mediators found in CRC Rule 3.855(b), of "past, present, or currently expected interests, relationships, and affiliations of a persona, professional, or financial nature." Mediators who are certified under the new Section 6173(b) must comply with this disclosure rule. How will this requirement intersect with the confidentiality expectations of a mediator's clients, both of the law firms and the disputants themselves?
- As the statute allows ADR providers to become certified, and not just individual neutrals, must ADR providers seeking certification disclose all of their ownership interests and client lists? Will certification have any effect on an ADR provider's financial sponsorship of any Bar or legal organizations?

Tiered certification structure: Includes awarding higher levels of certification to firms, providers, or practitioners that demonstrate higher levels of commitment to accountability and consumer protection.

- How will this be implemented, in light of the statutory language that a "higher" tier does not mean "higher" quality? If "quality" is not a factor in certification, then how does certification meet the stated aim of providing information to consumers? What are the tiers based on? How much weight, if any, is given to education, training or experience (including judicial experience)?
- What does "accountability and consumer protection" mean? What will be the implications for unaffiliated, independent neutrals versus neutrals (such as myself) who are affiliated with ADR providers? Can an unaffiliated neutral become certified if that neutral does not have a complaint procedure?

Administration: Includes procedures and criteria for certifying applications and denying and revoking certification. This also includes fee structures.

- As to discipline, what due process will be given? Who has the burden of proof? How can the mediator defend conduct during a mediation without divulging confidential information? For example, how would a certified mediator defend against an allegation of coercing a party into accepting a settlement well in excess of, or below (depending on the complaining party), the "worth" of the case?
- Given that the certification program must be financially self-sustaining and cannot be funded by member State Bar dues, what will it cost? Will the cost disadvantage those independent mediators who are not affiliated with providers?

Conclusion

Ultimately, attorneys and their clients are the "consumers" of alternate dispute resolution services. The statutory requirements of the State Bar's ADR provider certification are set forth to allow you, the consumers of mediation, to understand the requirements and to assist you in determining whether or not State Bar certification will ultimately be a helpful factor in selecting a neutral.

As the State Bar's Working Group is hearing public comment and preparing its recommendations, this is the opportunity for neutrals and the legal profession to provide input on creating the certification program.

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