ALM | LAW.COM

THE RECORDER

Misjudging Mediators: AB 924 Might Cast Too Wide a Net

By Halim Dhanidina
July 26, 2023

Mediation is an invaluable forum for resolving disputes, allowing parties to achieve an outcome, on their own, that addresses their unique issues without the involvement of outside decision makers. Recently, mediators have been swept up in a broad legal housekeeping project, based on an apparent misunderstanding of the nature of their role in the system.

Many in the legal profession watched in horror as infamous plaintiffs attorney Thomas Girardi dominated last summer's legal news. He had allegedly embezzled and misappropriated millions of client dollars to bankroll his high-end lifestyle and had negotiated client settlement agreements while lying about the amount and availability of settlement funds.

Worse, Girardi may have had plenty of help. He allegedly used well-paid private judges to administer his cases. Although these judges may not have known or understood the depths of Girardi's alleged scheme, the harm done to Girardi's victims could not have been done without them.

The private judging profession has been notably free from oversight. Retired judges, justices and attorneys have routinely been hired by parties or appointed by the court to resolve complex cases, oversee discovery, and pay out large settlement funds to plaintiffs, often free from scrutiny. So, as the earth-shattering allegations against Girardi came to light, legislators in Sacramento decided to take action.

Courtesy photo

Retired Associate Justice Halim Dhanidina of California's Second District Court of Appeal is now a neutral for Signature Resolution.

Assembly Bill 924, authored by Assemblymember Jesse Gabriel, seeks to introduce guardrails to protect litigants against injury caused by unethical or conflicted private judges or dispute resolution neutrals. In short, a judge or neutral who receives a written complaint alleging violation of rules or standards of conduct must report this to the State Bar of California.

Without a doubt, AB 924 has the potential to be an important—and perhaps long overdue—step

toward holding such professionals accountable. Private judges, arbitrators and mediators all have a legal and ethical obligation to use their best judgment when managing legal disputes and to act in the best interest of all parties. They must not allow bias or self-interest to factor in any way into their actions or decisions.

But private judges and arbitrators are the ones with real horsepower. They oversee discovery, make factual determinations and issue decisions that are binding on the parties in legal actions. If they have conflicts of interest or their perspective is significantly colored by factors outside of the matter directly before them, any judgment they render will be suspect. They are by law required to disclose any potential conflicts, allowing litigants to run their own smell tests before agreeing to have their cases heard and ruled on by these decision makers. (See Code of Civil Procedure Sections 170.6, 1281.9; canon 6D(5)(a), 6D(5)(b) of the Code of Judicial Ethics.)

Mediators, however, are horses of an entirely different color. Unlike private judges and arbitrators, mediators make no binding decisions and issue no judgments in the cases before them. Their sole charter is to guide the parties in often contentious disputes to the finish line. They do this by listening to both sides, providing a sounding board for each side to identify hot-button and walk-away issues, and—if the parties are ready, willing and able—helping both parties to arrive at a mutually satisfactory resolution.

This is why AB 924 may cast too wide a net. Private judges and arbitrators can do real harm to litigants. If they favor one side over the other, have a financial stake in the outcome of a dispute, or otherwise are incapable of being neutral, their decisions will be tainted. In such instances, they should be removed from cases, have their judgments overturned, and possibly face sanctions.

Mediators, who are paid whether the case settles or not, do not have a pony in the race. Their discretion lies not in findings of fact or law, but rather in deciding what questions to ask each side, how much information to share with the other party (after receiving proper consent), and when to break for lunch. If a mediator does his or her job well, both horses will ultimately cross the finish line successfully and consensually. Mediators are in no position to dictate a result of any kind, as any settlement reached during mediation must necessarily have the blessing of all parties involved.

This is not to say that mediators are immune from ethical challenges. Each superior court that makes a list of mediators available to litigants or that recommends mediators for general civil cases pending in the court has procedures for receiving, investigating, and resolving complaints against mediators. The State Bar's Rules of Professional Conduct set standards applicable to mediators, and the California Judicial Council imposes rules of conduct on court-appointed mediators in civil cases.

Though the rules and standards apply only to court-appointed mediators, they still provide critical guidance on how all mediators—including private neutrals—should comport themselves.

Judicial Council Rules require mediators to maintain impartiality toward all parties in a matter, to disclose on an ongoing basis potential conflicts of interest, and to withdraw from cases when a party objects to their involvement following such disclosure. Mediators must be competent to handle the cases before them: have sufficient skill and knowledge, be in good professional standing, and stay current on matters before them.

The 2023 California Rules of Court, specifically Rule 3.857, require that mediators conduct mediation proceedings in a "procedurally fair manner" and that they inform parties about the different processes and consequences of revealing information under the various forms of alternative dispute resolution.

And herein lies the most significant aspect of mediation, and the biggest opportunity for mediators to cause harm. Confidentiality is the hallmark of effective mediation. It is so important that SB 954, enacted in 2018, requires lawyers to provide their clients, as soon as reasonably possible before they agree to participate in mediation, with a printed disclosure explaining the confidentiality restrictions applicable to mediation. Evidence Code Section 1129 includes the text of a sample disclosure that would satisfy the disclosure requirement.

In 1997, the California Law Revision Commission issued comprehensive recommendations concerning mediator confidentiality. The bottom line is that improper disclosure of confidential information or communications made during mediation can derail settlement negotiations. A mediator who shares communications without a party's express authorization can cause irreparable harm to the process.

The new bill, AB 924, could in fact upend the confidentiality of mediations. If a party believed that one of the rules applicable to mediators was violated, that violation would then be reported to the State Bar and all confidentiality would vanish. In its current form, the proposed law fails to provide any explanation of what would happen once a mediator complaint was filed with the State Bar.

And not all mediators are lawyers. When mediations are conducted by individuals not licensed by the State Bar, what jurisdiction can the Bar assert? For California lawyers who mediate cases in other states, how exactly would the California State Bar oversee, regulate and respond to complaints? These are crucial questions that beg for definitive answers.

One wonders whether the well-intentioned new law ensnares mediators without any clear purpose. Most ethics claims against mediators result from a party not understanding the mediation process, from the mediator not making clear at the start that he or she is not giving legal advice, or from a mediator not disclosing a prior relationship with the parties or their counsel.

It bears repeating that mediators are not judges. They may be able to persuade, but they cannot order parties to do anything. (See *Saeta v. Superior Court* (2004) 117 Cal.App.4th 261.) While they "may present settlement options and terms" and "assist the parties in preparing (the) written settlement agreement," such assistance is confined "to stating the settlement as determined by the parties." (Rule of Court 3.857(h)) Their role is that of a scribe in the preparation of the settlement.

It is also important to remember that mediation works largely because all communications are absolutely confidential in California state court. This is true whether the mediator had been privately retained or court appointed and whether the parties have agreed in writing to apply confidentiality to court proceedings. As long as mediators act in the best interest of the parties, facilitate open communication, and take appropriate steps to protect the confidentiality of communications, they will continue to perform their vital function in the justice system. Any legislation that threatens the confidentiality upon which successful mediation relies deserves a second look.

Halim Dhanidina *(Ret.) is a neutral with Signature Resolution. Dhanidina heard almost 900 appeals as an Associate Justice for the Second District of the California Court of Appeal and presided over 70 jury trials as a Judge for the Los Angeles County Superior Court. Before becoming a judge, Dhanidina was a Deputy District Attorney for the Los Angeles County District Attorney Major Crimes and Hardcore Gang Divisions. He is an adjunct professor of law at UCLA, UC Irvine and Chapman University and has taught judicial education courses for trial and appellate judges statewide.*