LOS ANGELES & SAN FRANCISCO

Daily Journal

www.dailyjournal.com

TUESDAY, APRIL 2, 2024

PERSPECTIVE

The ADR ethics bill is a good start, but key issues remain unaddressed

By Hon. Halim Dhanidina (Ret.)

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Primarily in response to fallout from the Girardi scandal, California legislators have focused considerable attention over the past year on the ethical practices of alternative dispute resolution providers. A bill introduced last year would have added neutrals to the universe of attorneys who are required to report to the State Bar complaints received concerning violation of rules or standards of conduct.

Another new bill is now looking at the ethics of mediators and arbitrators. Senate Bill 940 by Tom Umberg would authorize the State Bar to create a certification program for ADR firms, allowing the Bar to charge those firms for the costs of administering it.

Under the proposed law, ADR firms would have to ensure that their arbitrators complied with the Ethics Standards for Neutral Arbitrators in Contractual Arbitration as adopted by the Judicial Council pursuant to Section 1281.85 of the Code of Civil Procedure. Mediators would have to comply with ethical standards equivalent to the Rules of Conduct for Mediators in Court-Connected Mediation Programs for General Civil Cases in Rules 3.850 to 3.860 of the California Rules of Court. ADR firms would also be required to have a complaint process in place and a way to remedy any alleged noncompliance.

Ensuring that neutrals conduct themselves ethically is a laudable objective and should hardly be cause for consternation. All mediators and arbitrators should already be adhering to the highest ethical standards. Aside from paying more money to the State Bar and asking their neutrals to sign ethics statements, the proposed law should not substantially change the way ADR firms already do business.

Assuming the State Bar implements it, the ADR certification program should be straightforward and noncontroversial. If only it were that simple.

Ethical pitfalls of mediation

It goes without saying that arbitration and mediation differ in significant ways. As neutrals, neither arbitrators nor mediators have clients nor can they take sides in matters before them, but they serve completely different functions and answer to different authorities. Arbitrators, like judges, listen to arguments, evaluate facts, apply the law, and issue decisions that are usually final and binding, with limited judicial review. They answer to the cause of fairness and justice.

Mediators, in contrast, manage people and personalities. They neither judge nor provide binding opinions on matters before them. Their role is to provide guidance and expertise, to help parties find their own way toward resolution of disputes. To do so, they must adhere to the highest standards of confidentiality. But sometimes the role and the goal do not coincide.

Every mediator runs up against ethical dilemmas that may force a reexamination of the standards. Suppose the mediator sees an attorney engaging in unethical conduct during the course of a mediation. Attorneys have a duty of candor to their clients, for example, but the mediator may be aware of material information that was purposely not disclosed to a client.

Although attorney misconduct is reportable to the State Bar under Rule of Professional Conduct 8.3, subsection (d) explicitly protects such information from disclosure based on "mediation confidentiality." At what point can or should a mediator divulge concerns about attorney misconduct? After all, successful mediation understandably relies on open communication and candor between mediator, attorney, and client. Must the mediator choose between remaining silent or withdrawing from the case?

Suppose a mediator, with a deep understanding of a particular area of law, observes counsel providing incorrect, inaccurate or harmful information to the client. The mediator cannot provide legal advice, nor can he or she intervene with the client. What if the mediator knows that a case is doomed unless counsel files a specific motion within a set period of time? Although incompetence is not, by itself, an ethical violation, putting a client in harm's way due to a lack of diligence may well cross a line.

A mediator who takes any action to protect a party from counsel's negligence or misconduct may no longer be seen as a neutral. By their very action, they could be deemed to have taken sides. Does the mediator simply watch the case fall apart because of these missteps? Will the mediator be violating the duty of neutrality by advising parties or reporting an issue? These are not easy questions.

Practical implications

The above discussion should bring us back to the bill now being considered by legislators. What does "certification" mean for ADR providers? Will it be, like a license, a requirement for doing business? Or will it be like the Good Housekeeping seal of approval – something that ADR firms can proudly post on their websites and social media?

If the former, lawmakers should understand and address the very real ethical pitfalls faced daily by mediators throughout the state. Many could find themselves making a Hobson's choice between protecting litigants or staying in business. The best mediators will agonize over these decisions and could face dire consequences for acting thoughtfully and, one could argue, ethically.

Ethical standards should be important for all neutrals, whether at firms or in their own practice, but no definition is provided in the bill for "ADR firm." If it applies only to larger organizations, this would appear to contravene its intent to ensure ethical compliance across the profession.

Neutrals who work with firms are generally contractors, not employees. Would the certification program, with its remedial and enforcement provisions, create an employment relationship for these neutrals and a concomitant duty for firms to indemnify them if they are sued?

How would the State Bar oversee and certify neutrals who are not California attorneys? Just as California neutrals can provide ADR services in other states, so too can out-of-state neutrals serve as mediators for matters in California. Non-lawyers provide mediation services in family law and other court-supervised matters. Would they be subject to the State Bar's certification requirements?

Rules of conduct should be consistent for all mediators, but most mediators work privately, outside the court system. If court-appointed mediators follow different processes and procedures, the rules governing court-appointed mediators may not – and should not – apply to private mediators conducting settlement conferences.

Conclusion

Senate Bill 940 is an important step toward addressing legitimate concerns about the ADR profession. Ethics are critical to building trust and fostering good outcomes for legal disputes. This trust is the cornerstone of mediation practice and is often a key component of how attorneys choose their mediators in the first place. But until the bill is imbued with more substance than form, it is just a first step toward ensuring fairness for parties seeking an alternative path toward resolution of their issues.

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