

FEDERAL AND STATE STATUTES THAT MANDATE MEDIATION

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As part of the preliminary study of the issue of whether SCMA should support a mediation certification process, its Ad Hoc committee on the subject determined that information regarding what mandatory mediation statutes exist may be instructive information. The information provides insight into the nature of the subject matter and requirements of practice that mediators may be called upon to know. This preliminary study lists relevant federal and state statutes.

A. Federal ADR

Official federal government adoption of Alternate Dispute Resolution (ADR) occurred in 1990.¹ The services encompass mediation, arbitration, mini-trial and other forms for disputes in the federal sector involving federal agencies. When the 1990 Act terminated by sunset Oct. 1, 1995, it was replaced the Administrative Dispute Resolution Act of 1996 ("1996 ADR Act"), 28 USC §§652(a); 651(b). Its purpose was to permanently reauthorize the 1990 Act. The 1996 act encouraged agencies to 1) utilize their own employees in intra-agency dispute resolution arrangements; 2) utilize employees of other agencies as neutrals, 3) contract the services of private sector non-agencies as neutrals, and 4) use the services and facilities of other federal agencies, state governments, municipal governments, and private organization. *Id.* p. 16. The use of ADR by federal agencies has grown as a result of the 1990 and 1996 acts. Under the 1996 Act the Federal Mediation and Conciliation Service (FMCS) is named as the provider of ADR. FMCS may be called upon to provide arbitrators and mediators for disputes involving labor, contracting, purchasing and equal employment opportunity

¹ The 1990 Act attempted to qualify the confidentiality criteria necessary for ADR processes that included a nonexclusive list of "settlement negotiations, conciliation, facilitation, mediation, fact-finding, mini-trials, and arbitration." The best compendium of federal statutes is contained in the American Bar Association's publication: Federal Administrative Dispute Resolution Deskbook, Marshall J. Breger, editor; Gerald S. Schatz & Deborah Schick Laufer co-editors, 2000.

disputes."² The ADR Act of 1996 created an Interagency Alternative Resolution Working Group (IADRWD) to "promote greater use of mediation, arbitration, early neutral evaluation, agency ombuds, and other alternative dispute resolution techniques." with the goal "to make the Federal Government operate in a more efficient and effective manner, and to encourage, where possible, consensual resolution of disputes and issues in controversy involving the United States, including the prevention and avoidance of disputes." *Id.* at 294. By 2000, over 29 agencies had published proposed or final ADR policies under the 1996 Act. Many agencies had ADR specialists whose duties were for "reporting and evaluation of ADR use, to advocate for ADR in three areas: dispute prevention, early intervention and litigation." As for use of private neutrals, the 1996 Act amended the Competition in Contracting Act, creating contracting criteria treating neutrals the same as for expert witnesses – i.e., not requiring competitive bidding. *Id.* at 18. However, agencies' practices in qualifying their neutrals vary in their selectivity - some with no requirements, others with strict requirements but most have at least minimum standards to ensure minimum competence. In the District Courts civil and bankruptcy cases may be resolved by ADR under 28 U.S.C. § 651. The Federal Judicial Center and Administrative Office of the Courts may assist District Court ADR programs.

Selected specific federal agency mediation practices under the 1996 ADR Act; their separate statutes and rules:

Agricultural Mediation Program – The USDA Certified State Mediation Program operates to assist farmers and lenders to avoid default and bankruptcy. At Section 502 of the Agricultural Credit Act of 1987, the secretary of agriculture developed an authorized list of USDA certified mediation programs. If conditions are met, the Farm Service Agency may match state grants up to \$500,000 to operate a state agricultural mediation program. See 7 C.F.R. 1946.

² Most agencies use their own personnel, other agencies' personnel, administrative law judges, contract appeals board members, FMCS mediators and facilitators, private lawyers, academics, retired judges and other individuals acceptable to the disputants. Sometimes institutionalized neutral sharing occurs through the creation of inter-agency dispute resolution bodies typically called "dispute resolution boards." They compile lists and have also "shared neutrals."

Department of Labor – Under the Labor-Management Relations Act (LMRA), Pub.L. 80-101, as amended Title 29 U.S.C. §172 et seq, the Department of Labor uses arbitration as the FMCS under the Civil Service Reform Act of 1978.³ In 1993, through Executive Order No. 12871, a National Partnership Council, consisting of heads of federal government and labor unions to advise the president on matters related to labor-management relations. As a result more than 850 local-level partnerships were formed, changing the nature of inter-government relations. While arbitration is the favored method for resolution of labor disputes, the FMCS supplies the panel of arbitrators and mediators to state agencies and parties. A board of inquiry is usually appointed from the FMCS roster and administered by its Office of Arbitration Services (OAS). Also, under the Postal Reorganization Act of 1970, the FMCS provides a list of arbitrators if the parties fail to reach a resolution on their negotiations of a new collective bargaining agreement.

Equal Employment Opportunity Commission (EEOC) was created in 1991 for enforcement of Title VII of the Civil Rights Act of 1964, see 29 USC; 29 Code of Federal Regulations 1630 et seq., 1640 and 1641 et seq. It provides mediators to resolve claims after an investigation has resulted in a finding of likelihood of violation. The EEOC is responsible for enforcing federal laws that make it illegal to discriminate against a job applicant or an employee because of the person's race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information. Most employers with at least 15 employees are covered by EEOC laws (20 employees in age discrimination cases). Most labor unions and employment agencies are also covered. The laws apply to all types of work situations, including hiring, firing, promotions, training, wages, and benefits. In 1998, Congress budgeted the EEOC's ADR program \$37 million which is applied to its field offices to resolve incoming changes through mediation at a rate of approximately 10,000.00 per year.

Environmental Protection Agency (EPA)– the Environmental Policy and Conflict Resolution Act of 1998 provides convening, neutral evaluation and mediation . It operates through two enabling mechanisms: (1) the Consensus and Dispute

³ Prior to 1947 when the Taft-Hartley Act was enacted, FMCS was not independent of the Department of Labor, Cyrus Ching, separated mediation from arbitration functions, assigning mediation to staff.

Resolution Program, based in the Office of Policy, and (2) the Enforcement ADR Program which are applied to enforcement cases, many under CERCLA (Comprehensive Environmental Response, Compensation and Liability Act of 1980) utilizes mediation to prevent stalemates of Superfund matters and also in others including the Clean Air Act (CAA) and the Clean Water Act (CWA); The Emergency Planning & Community Right-To-Know Act (EPCRA); the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA); the Resource Conservation Recovery Act (RCRA)' and the Toxic Substances Control Act (TSCA) contained in Title 42, U.S. Code §§ 9600 et seq.

Department of Interior; Interim and Final ADR policies at 59 Fed. Reg. 30368 (June 3, 1994) - tested and worked well for the Bureau of Land Management regarding the Wild Horse and Burro Act mediation in *Animal Protection Institute, et al v. Bureau of Land Management*.

General Services Board of Contract Appeals (GSBCA) through the Competition in Contracting Act (CICA) 41 U.S.C. § 253, and the Federal Acquisition Streamlining Act and the Contract Dispute Act (CDA). Federal Acquisitions Act (FAR), at FAR 6 102(d). In 1996 ADR services were increased. Facilitated and evaluative mediation is often utilized as its third-party assisted ADR method, as well as mini-trials; non-binding arbitration or matters may proceed to a Disputes Review Board. In non-CDA cases; appeals from contracting officer's final decisions are also provided ADR under its Rules 204 by judges and GSA personnel.

Special Education: California has its own Individuals with Disabilities Education Act that mimics the federal status (IDEA 20 USC §1400) which required mediation between the parents and school districts. Cal. Ed. Code §§56500.3. (see discussion below at State Laws: Schools (below))

Taxation: the IRS administrative dispute process includes both arbitration and mediation through the Internal Revenue Service Restructuring and Reform Act of 1998 [26 USC 7123].

B. State Laws

In addition to the Dispute Resolution Programs Act of 1986 (DRPA), Cal. Business and Professions Code §§ 465-471.5,⁴ California also has selected statutes that provide for ADR⁵ - mostly arbitration. In regard to California statutes that provide for mediation, and except for DRPA programs, what follows is an abbreviated listing of specific statutes in specific fields:⁶

Attorney/Client: these issues are governed under the statutes affecting the State Bar, particularly calling for arbitration of fee disputes, but which also provide for a mediation alternative. See Bus. & Prof. Code §6200 et seq.; State Bar Enforcement of Fees/Costs Arbitration Award. [Bus & Prof §6203(d)]; Fees/Costs Mediation Alternative [Bus & Prof Code §§6086.14, 6200(h)].

⁴ The Dispute Resolution Programs Act of 1986 (Stats 1986, ch. 1313, SB 2064-Garamendi and Stats 1987, ch. 28, SB 123-Garamendi) provides for the local establishment and funding of informal dispute resolution programs. The goal of the Act is the creation of a state-wide system of locally-funded programs which will provide dispute resolution services (primarily conciliation and mediation) to county residents. These services assist in resolving problems informally and function as alternatives to more formal court proceedings. DRPA requires 25 to 40 hours of training that include 10 hours of classroom training, 10 hours of experiential training (e.g. role playing, etc) and 5 hours of advanced or specialized training. Litigated cases panels require more education and training, including undergraduate degrees or law degrees, as well as 10 to 18 hours of actual “internship” or mediation experience and 4 to 5 hours per year of continuing education. Dispute Resolution Programs Act Business and Professions Code Sections 465-471.5

⁵ In 1991, the National Conference of Commissioners on Uniform Law approved and recommended for enactment, in all states, the Uniform Mediation Act. 10 states have adopted it, three states have bills introduced for its adoption. California has not adopted the Uniform law.

⁶ These references to statutes are taken primarily from the Rutter Group's California Practice Guide, Alternative Dispute Resolution, Appendix A that lists the subjects where ADR is required to some extent; those statutes that mandate only arbitration are not included.

Automobile: the "Lemon Law" provides for a dispute to be submitted to a "qualified" third party, which may include mediation or arbitration, [Civ. Code §1793.2; Bus. 7 Prof. Code §§472-472.5].

Civil Proceedings – Other than the arbitration provisions⁷ of selective judicial programs the Civil Action Mediation Program [CCP§§1775-1775.15] allows courts to refer to mediation cases otherwise subject to judicial arbitration (i.e. \$50,000 jurisdictional limit). See discussion below at item C.

Condominiums: Disputes between Condo Owners Associations and Owners [Civ. Code §1363.820(c), 1363.840] do not specifically provide for mediation, however, the statutes set out a process that may involve a mediator to "provide a fair, reasonable and expeditious procedure for resolving specified disputes with its member owners," see Civ. Code §§1363et seq., 1366, 1369 et seq.

Construction Defect Claims: Homeowners/ HOA claims against builders provides for mediation of the disputes as an option [Civ. Code §§895 et seq., 1375, 1375.05]; however, mediation is not identified specifically as an option in the comprehensive statutory plan or for early evaluation conference for construction-related disability access claims [Civ. Code §55.3 et seq.

Eminent Domain: Parties may refer a dispute to either mediation or binding arbitration of proceedings (CCP §1250.420).

Employment:

Fair Employment and Housing Council, (formerly a Commission, as changed effective January 1, 2013) may mediate complaints; it conducts public hearings on complaints alleging unlawful practices. Gov. C. §§ 12930(f), (l), 12961. 12964(a), 12965(a);

In actions involving Employee Organizations against Public Entities (Gov. Code §§3505.2-3505.5, 3507, 3507.1, 3518, 3548. 3589, 3590; Pub. Util. C. §125524; mediation is provided between the public entities and their

⁷ Arbitration is Mandatory in unlimited civil cases in larger counties - i.e with more than 18 judges [CCP §114.11(a); CRC 3.811(a)(1); Arbitration is Mandatory in smaller counties and limited civil cases by local rule [CCP §1141.11(b); CRC 3.811(a)(2)]

employee organization through mediation and under the mandatory impasse procedures of Gov. Code §§3505.4(a), 3505(c)(d), 3505.7;

Similarly, for firefighters and law enforcement personnel economic disputes against their public entity employers provides for either mediation or arbitration under CCP §1299 et seq.

Environment: Responsibility for Hazardous Material Release [Civ. C. §§851(a), 852(b)] requires mediation before commencement of any litigation involving the contamination.

Family Law: Child custody and visitation issues must be mediated without cost to the parties prior to any contested hearing [Fam. Code §3160 et seq.]; there also exists a pilot program of the Judicial Counsel for confidential mediation for custody and visitation disputes. [Fam. C. §§3176(c), 3183(a), 3184 & 3188].

For Dependency Court mediation program [Welf. & Inst. Code §350(a)(2)], the programs are designed to provide a problem-solving forum where all interested persons can develop plans in the best interests of children, emphasizing family preservation and strengthening.

Fire/Earthquake/Auto Insurance Disputes: mediation is provided through the Department of Insurance for disputes arising out of certain fire, earthquake and auto insurance claims. [Ins. Codes §§10089.70, 10089.80, 10089.82, respectively].

Labor: Generally mediation is provided through the Department of Labor, through the California State Mediation and Conciliation Service, Labor Code §§65-55; Railway Labor Act [45 USC§153(i)].

Land Use: Generally matters involving denial of a development project, CEQA determinations, development fee disputes, etc., may be invited to mediation. Parties may use self-selected mediators or may be directed to select a mediator through an organization providing mediators. [Gov. Code §66030 et seq.]

Local Governments: Bankruptcy of a local entity may not occur until the entity has participated in mediation and/or mandatory arbitration or declared a fiscal emergency. (like Stockton, etc.) [Gov. Code §§53760, 53760.1 et seq., 53760.3].

Under the process the entity proposes five qualified mediators of which interested parties (creditors, etc) may strike up to four of them, once a mediator is selected the parties have 60 days to negotiate a resolution.

Schools (except as discussed under employment): Prior to hearing, and if requested, mediation conferences are conducted in disputes between parents and a public school regarding special education of a handicapped child, Education Code §§56500.3, 56501(b)(2). This conforms to the parallel provisions of the Individuals with Disabilities Education Act (IDEA, 20 USC §1400 et seq.

Truancy Mediation: Before habitual truants can be referred to juvenile court, they must be referred to “truancy mediation program” or a school attendance review board. [Welf. & Inst. Code §§601-601.3]

C. Court Imposed ADR

As mentioned earlier, federal district and bankruptcy courts employ various forms of ADR under the 1996 ADR Act at 28 U.S.C. § 651 and many state court programs are provided through DRPA (B&P §§ 465-471.5). California's legislative policy is set forth in Bus. & Prof. Code §465(d), (e) that declares that the "Courts...should encourage greater use of alternative dispute resolution techniques whenever the administration of justice will be improved...(and) counties should consider increasing the use of alternative dispute resolution in their operations and plans for court reform are developed and implemented."

The Judicial Council has adopted the following: ADR programs are part of trial court coordination plans [Gov. Code §68112]; mediation programs in civil cases are part of core operations [CRC Standards of Judicial Administration, Standard 10.70(a)]; certain skills and compliance standards of conduct for referrals to ADR neutrals are at CRC 10.71, 10.71 (*Id.*). A packet of information to parties is required and the information must be posted [CRC3.221.(a),(b)].