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January 16, 2008

Gail Kaplan
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Dear Ms. Kaplan:

Thank you for seeking input from Alan Wiener and me about the proposed amendments to the Civil Action Mediation Program statutes (California Code of Civil Procedure section 1775 et seq.) contained in the proposed Conference of Delegates Resolution authored by Ms. Moreno. Below is a summary of our main concerns about these proposed amendments. As we previously indicated, these comments reflect our personal views, and not the official views or position of the Judicial Council or the Administrative Office of the Courts. Nevertheless, we hope that you will find our input useful.

Beyond the specific concerns listed below, our sense from the statement in support of this proposal is that this proposal is intended to address disagreements with the way that the Los Angeles Superior Court's CCP 1775 program is structured and funded. As a general matter, we do not believe that trying to amend a statewide statutory scheme that impacts the authority of the superior courts in all 58 counties is the best or most appropriate way to address such local concerns.

Reduction in Cases That Can Be Ordered to Mediation under the Program

One of the most significant substantive changes that the proposal would make is to amend CCP section 1775.5 to prohibit courts from ordering civil cases in which the amount in controversy exceeds \$25,000 to mediation under CCP section 1775. This proposed change raises several significant concerns.

First, it is critical to recognize that the CCP 1775 mediation program is integrally related with, and structured as an alternative to, the mandatory judicial arbitration program established by CCP 1441.10 et seq. (see, for example, CCP section 1775.3 and 1775.4). In all courts with 18 or more judges, and in other courts that elect to establish judicial arbitration programs, CCP section 1141.11 requires the court to submit non-exempt unlimited civil cases valued at less than \$50,000 to non-binding judicial arbitration. Section 1141.11 also allows courts to include limited civil cases in their mandatory judicial arbitration programs. Section 1775.3, in turn, requires the Superior Court of Los Angeles County, and authorizes other superior courts, to order cases in which judicial arbitration is otherwise required to mediation, instead of to judicial arbitration.

If the CCP 1775 mediation program were modified to prohibit courts from ordering civil cases in which the amount in controversy exceeds \$25,000 to mediation, the 1775 program would no longer offer an alternative to judicial arbitration for these cases. Courts with judicial arbitration programs would be required to submit non-exempt cases to judicial arbitration. We believe that is preferable to allow courts to utilize a variety of different ADR processes so that courts can work with litigants to select the process that is best suited to the particular dispute.

Moreover, the proposal does not explain why, as a policy matter, courts should not have the authority to order cases valued between \$25,000 and \$50,000 to mediation. Based on the statement in support of the proposal, this proposed change appears to be aimed to prevent courts from providing free or low-cost mediation services in unlimited civil cases, rather than related to whether courts should be authorized to order mediation in those cases. If anything, we believe that the success of mediation that has been demonstrated and the inflation that has occurred since the \$50,000 limit was established in 1993 would warrant increasing, rather than reducing, the value of cases that are eligible for CCP 1775 mediation.

Cost of Mediation in Cases Valued Over \$25,000 to Be Shared by the Parties

Another very significant substantive change that this proposal would make is to require that the parties in cases valued over \$25,000 pay for the cost of mediation, including the mediators' compensation, under the 1775 program.

CCP section 1775.8 currently provides that the compensation of court appointed mediators shall be the same as arbitrators in the judicial arbitration program, and that funds allocated for the payment of arbitrators in the judicial arbitration program shall be equally available for the payment of mediators under section 1775 et seq. The judicial arbitration statutes, in turn, provide that the compensation of these arbitrators in cases ordered to arbitration shall be paid by the court; that the compensation shall not be less than the greater of \$150 per case or per day; that courts may set a higher rate of compensation for arbitrators; and that arbitrators may waive compensation in whole or in part (see CCP section 1141.28). This proposal would delete section 1775.8 and add a language to section 1775.5 providing that "[i]n unlimited jurisdiction cases where the amount in controversy exceeds \$25,000, the cost of mediation including the compensation of mediators, shall be shared between the parties, unless the parties stipulate otherwise."

The arguments provided in support of this proposed amendment are based on a factual error and we believe both the text of the amendments and the arguments in support of them are flawed in other ways as well.

The summary of the proposal states that the amendment ... “deletes the references to the nonexistent allocation of judicial funds to pay for the costs of mediation.” It is simply incorrect that funds referred to in 1775.8 are “nonexistent.” While the Superior Court of Los Angeles County does not currently have funds allocated to pay mediators serving in its CCP 1775 mediation program, other courts do have these funds available and do use them to compensate mediators in their programs. Deleting the authorization to use these funds to support the CCP 1775 program would hinder other courts’ ability to compensate mediators in programs established under this statute, which does not appear to be in anyone’s interest.

In addition, deleting section 1775.8 would create confusion concerning the compensation of mediators in those cases that are ordered to mediation under the 1775 program. The new language the proposal would add to section 1775.5 only address compensation of mediations in cases valued at over \$25,000, which would no longer be eligible to be ordered to mediation under the proposal. If 1775.8 were deleted, these statutes would no longer contain any provision addressing the compensation of mediators in cases that could still be ordered to mediation under the 1775 program.

Furthermore, the proposal provides no explanation of why, as a policy matter, courts should be prohibited from providing mediation services at no cost to the parties in civil cases where the amount in controversy exceeds \$25,000. Just because the amount in controversy exceeds \$25,000 does not mean that the parties in an unlimited civil case are necessarily in a better position to pay for mediation services than the parties in a limited civil case. Low income individuals are also parties in cases where more than \$25,000 is in controversy.

Offering mediation without cost to the parties increases public access to mediation services. The National Standards for Court-Court Connected Mediation Programs cited in support of the proposal state that “Access to court-connected mediation services should be provided as broadly as possible. Specifically, courts should not make mediation available based on whether the parties are able to pay.” Amending the statute to require that the parties in these cases pay for mediation would decrease public access to this valuable dispute resolution process. Even those courts that have adopted voluntary, market-rate mediation programs, typically offer no- or low-cost mediation services to those who could not otherwise afford to participate in mediation.

The explanation in support of this amendment, quotes one of the National Standards for Court-Connected Mediation Programs that cautions courts against exclusive reliance on volunteer mediators. It is important to note that this standard addresses only the issue of whether a court should rely entirely on unpaid mediators, not the issue of who should pay for mediators’ services. The proposed amendments, in contrast, address who must pay for these services. By

requiring that the parties that pay for these services in cases valued at over \$25,000, the proposed amendments would effectively prohibit a court from paying mediators for their services in these cases.

While this is never stated directly, by quoting the standard discussed above immediately after discussing the Los Angeles Superior Court's ADR program, the explanation in support of the proposal also appears to imply that the Los Angeles Superior Court relies solely on volunteer mediators. However, in addition to a panel of mediators who have agreed to provide volunteer services for the first three hours of mediation, the court also offers a panel of individuals who provide services for a fee from the outset of the mediation.

Freeing up DRPA Funds for Other ADR Programs

The explanation in support of the proposal state that the amendment "would . . . make available public funds to support those under funded Court-annexed ADR programs where the litigants have been ordered to mediation." As other portions of the explanation make clear, the "public funds" referred to are grant funds given to the court by Los Angeles County under the Dispute Resolution Programs Act (DRPA).

This argument is fundamentally flawed because, by statute, DRPA funds cannot be used to support court-ordered mediation. Business and Professions Code section 467.2, part of the DRPA, provides that "A program shall not be eligible for funding under this chapter unless it meets all of the following requirements: . . . (f) Provision that participating in the program is voluntary and that the parties are not coerced to enter dispute resolution."

Selection of Mediators

The explanation in support of the proposal also states that the amendments "will maximize the litigants' choice of the mediator." We believe that these amendments proposed would reduce, rather than increase, litigants' choice of mediators.

The proposed amendments would add language to CCP section 1775.5 providing that "The method of selection and qualification of the mediator shall be as the parties determine." But this language already appears in CCP section 1775.6. Repeating this same language in section 1775.5 does nothing to expand litigants' choice of mediator; the parties in cases submitted to mediation under CCP 1775 already have the power to choose their own mediator, whether from a court panel or not. However, the other proposed amendments to CCP 1775.5 would eliminate the ability of litigants in cases valued at over \$25,000 to choose a mediator whose services are available at no cost to the parties.

Other Amendments for Which No Explanation Is Provided

The proposal includes two other significant amendments to the CCP 1775 for which no explanation whatsoever is provided:

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- In section 1775.5, the proposal would delete the current the provision that the court must determine the amount in controversy for purposes of determining eligibility for submission to 1775 mediation in the same manner as courts determine eligibility for referral to judicial arbitration. Deleting this provision would create confusion about both who is to make this determination and how this determination is to be made.
- Section 1775.13, which expresses the Legislature's intent that the 1775 program statutes not be construed to preempt other current or future court-connected ADR programs, would also be deleted. This provision is important for clarifying that the CCP 1775 program is not the only type of ADR program that courts are authorized to implement.

Conclusion

This proposal appears to be principally designed to address the fact that in Los Angeles County, DRPA funds are being used to support a court-connected mediation program for unlimited civil cases in which the parties are not required to pay a fee for the mediator's services. This is a local program structure issue which we believe the authors should address by working directly with the Los Angeles Superior Court and Los Angeles County. Instead, this proposal seeks to amend a statewide statute that establishes the framework for mediation programs in all 58 superior courts in the State of California. Both because we believe that statewide legislation is not an appropriate mechanism for addressing such local issues and because of the concerns we raised above about these particular amendments, we do not support this proposal.

Thank you again for requesting input concerning this proposal.

Sincerely,

Heather Anderson

cc: Alan Wiener