

The Practitioner Alternative Dispute Resolution

Answered Prayers

'Foxgate' and Draft Ethical Standards Illuminate Mediator's Role

By Lynne S. Bassis

The "Mediation News Channel" has two important stories to report. One is a California Supreme Court decision that underscores the confidential nature of mediation. The other is the California Judicial Council's release of draft ethical standards for court-connected mediations.

The California Supreme Court answered the prayers of many mediators — almost perfectly — when it handed down its decision in *Foxgate Homeowners' Ass'n Inc. v. Bramalea California Inc.*, 2001 DJDAR 7037 (Cal. July 9, 2001).

In *Foxgate*, the defendant failed to bring its experts to the mediation. The neutral, an appointed discovery referee and mediator, prepared a report for the judge. The report included disclosures about the mediation. The judge considered the report, as well as certain confidential communications set forth in the plaintiff's motion for sanctions. The judge issued a sanctions order against the defense. In February 2000, the Court of Appeal upheld the sanctions order.

Since then, mediators, attorneys, judges and interested parties have been waiting vigilantly to see if the Supreme Court would protect the mediation process from whittlers and chiselers interested in reducing the scope of mediation confidentiality. To the relief of many, the court held unanimously that neither mediators nor mediation participants may reveal communications that occur during a mediation. Such disclosures would contravene Evidence Code Section 1119, which protects confidential communications, and Section 1121, which limits reports by a mediator.

Mediators should not relax completely, however, because the conscientious reader of the opinion will note that the court drew a distinction between "communication" and "conduct" when it stated, "We also conclude that, while a party may do so, a mediator may not report to the court about the conduct of participants in a mediation session."

In a footnote that illustrates this point, the court wrote that counsel's declaration in support of its motion for sanctions, which included the disclosure that the opposing party's experts did not show up for the mediation, would not run afoul of mediation confidentiality.

Whereas *Foxgate* may make mediators impervious to subsequent inquiries about mediation communications or what transpired during mediation, the mediation itself is not similarly insulated. The ability of mediation participants to report on mediation conduct in support of sanctions motions prevents the *Foxgate* ball from being a perfect pitch.

Also, it is noteworthy that the Supreme Court embraced and distinguished two prior case-law exceptions to confidentiality set forth in *Rinaker v. Superior Court*, 62 Cal.App.4th 155 (1998), and *Olam v. Congress Mortgage Co.*, 68 F. Supp.2d 1110 (N.D. Cal. 1999).

In *Rinaker*, a juvenile-court delinquency proceeding, the court held that where a minor's due-process rights are at stake, confidentiality of a prior civil-court mediation must yield to the minor's right to cross-examination of the mediator. To diminish the confidentiality intrusion as much as possible,

the *Rinaker* court advised that an in camera hearing should have been held to weigh the probative value of the mediator's testimony against statutory confidentiality.

In *Olam*, where the court determined that confidentiality had been waived and that the issue was the enforceability of a settlement agreement, the court underscored the importance of the *Rinaker* balancing test to assess whether one party's interest in compelling confidential statements outweighed the state's interest in maintaining confidentiality.

In sum, and not to play Scrooge with respect to the early holiday gift delivered to mediators by the Supreme Court's *Foxgate* decision, it is important to note that the doorway to confidentiality exceptions does not appear to be slammed shut completely. In juxtaposing the *Foxgate* plaintiffs to the *Rinaker* plaintiffs, the *Foxgate* court stated that "plaintiffs have no comparable supervening due-process-based right to use evidence of statements and events at the mediation session." It is imaginable that under a different set of facts, the con-

The standard also addresses discretionary and mandatory withdrawal from mediation, use of other professionals during mediation and additional employment of the mediator where the employment is related to the subject mediation or to confidential information received in connection with the subject mediation.

■ **Standard 7** ("Competence") requires mediators to comply with the experience, training and educational requirements of the court, represent these qualifications truthfully to both the court and inquiring parties, report imposition of public discipline by any professional licensing agencies and report felony charges or criminal convictions other than infractions. Competency is identified as possessing the skills, knowledge and ability to facilitate communication, develop options, discuss alternatives and adapt to the context of the demands of the dispute.

Per the comments, the phrase "demands of the dispute," is inclusive of "the desire of parties to discuss or use legal or other professional information, to hear a personal evaluation or opinion of a set of facts as presented or to be made aware of the interests of persons who are not represented in the mediation."

The comments identify core skills as the ability to listen, deal with complex factual materials and use clear, neutral language in oral, written and other forms of communication.

Mediators have a continuing duty to assess their abilities and stay current in their mediation skills.

■ **Standard 8** ("Quality of the Mediation Process") requires mediators to act diligently. The comments define "diligence" broadly as exerting the necessary time and attention to meet the expectations of the parties and the court, conducting the mediation in a procedurally fair manner (although there is no mediator responsibility to assure the substantive fairness of the deal), outlining the parameters of the process, bringing to the table awareness of the effect of the agreement on non-participants, exercising caution when combining different dispute-resolution processes, providing clarity regarding the role of an attorney mediator, identifying the mediator's role as a scrivener in preparation of an agreement (unless given permission by the parties to make substantive suggestions) and identifying situations where discontinuance of the mediation is indicated.

■ **Standard 9** ("Solicitation of Mediation Business") proscribes direct solicitation of other business from mediation participants. The comments indicate that the standard does not limit general marketing activities or acceptance of additional business.

■ **Standard 10** ("Compensation") requires mediators to comply with compensation requirements of the court and to communicate fees in writing prior to the mediation. Unconscionable fees are prohibited. Fees may not be contingent on mediation outcome.

Remuneration for business referrals is prohibited for up to two years following the conclusion of a mediation. Receipt of any form of compensation not directly related to the provision of mediation services is prohibited.

Open public forums were held last month in San Francisco and Los Angeles to provide feedback to the Judicial Council.

Whether the final version of the standards will become rules of court having mandatory application to all California civil-court mediation programs, or will be discretionary standards of judicial administration, is an open question that the working group will face when it returns to the drafting table.

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verse could be true.

In another, very important development, the Judicial Council has issued a preliminary draft of ethical standards that would govern mediators in court-connected civil mediations. The standards address the frequently articulated core mediation concepts of voluntary participation, party self-determination, confidentiality, impartiality, conflicts of interest, disclosure, withdrawal, mediator competence, quality of the mediation process, marketing and mediator fees.

■ **Standard 1** ("Preamble") indicates that the purpose of the standards is to guide mediators, to inform and protect participants and to promote confidence in the mediation process and the courts. The comments indicate that the standards are not intended to create new civil causes of action or to affect the substantive legal duties of mediators.

■ **Standard 2** ("Application") states that the standards are minimum standards for mediators in court-connected civil mediation programs.

■ **Standard 3** ("Definitions") defines mediation, mediation consultation, mediator, participant and party.

■ **Standard 4** ("Voluntary Participation and Self-Determination") requires the mediator to inform the parties of mediation process choices, such as having the mediator include evaluations, opinions or recommendations about possible outcomes.

■ **Standard 5** ("Confidentiality") is stated as a general principle that mediation and mediation consultations are confidential. The comments reference Evidence Code Sections 1115 to 1128 and admonish practitioners to stay current in this evolving area of the law.

■ **Standard 6** ("Impartiality, Conflicts of Interest, Disclosure and Withdrawal") requires fair and even-handed mediations. It requires disclosure of matters that would raise a question regarding the mediator's ability to conduct an impartial mediation (as outlined by Code of Civil Procedure Section 170.1, which deals with judicial disqualification) and disclosure of any other past, current or future relationships, interests or affiliations, be they of a personal, professional or financial nature, which could reasonably be cause to question a mediator's impartiality.

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