

California Enacts New Mediation Legislation

By E. Scott Douglas, Esq., Mediator*

As of January 1, 1998, statutory provisions affecting mediation across seven different California codes went into effect. A new Evidence Code chapter, Sections 1115-1128, was enacted to govern mediation previously addressed by separate sections of the Evidence Code, Code of Civil Procedure, Government Code, Insurance Code, Labor Code, Welfare & Institutions Code, and Business & Professions Code.

The new Evidence Code provisions specifically define the mediation process and the role of the mediator (Section 1115). The new chapter provides specific requirements for enforceable settlements reached in mediation, whether oral or written (Sections 1123-1124). Mediation confidentiality issues formerly covered by repealed Evidence Code Section 1152.5(a) can now be found with minor revisions in Section 1119. Each of these revisions has been drafted to broaden the confidentiality protections provided by the former Evidence Code sections.

Of added significance to securities mediations, the new code explicitly applies in subsequent arbitration ac-

tions, as well as any civil or administrative proceeding.

Additional code sections have been added to clarify prior provisions dealing with mediator reports and communications (Sections 1121-1122), and a new section defines when the mediation actually ends (Section 1125). This may be important to maintaining confidentiality in those situations where the mediator continues to assist the parties in trying to reach a resolution after conclusion of the initial mediation hearing. Section 1125(a)(5) states, for example, that absent agreement of the participants, a mediation terminates after 10 calendar days during which there is no communication between the mediator and any of the parties to the mediation relating to the dispute.

Lastly, and of particular interest to securities practitioners and arbitrators, Evidence Code Section 1128 adds teeth to the prohibition against referring to mediation in subsequent non-criminal proceedings. Whereas the former Code of Civil Procedure Section 1775.12 prohibited reference to mediation only in a subsequent civil trial, the new section

extends the rule to administrative and arbitration proceedings. Any mention of mediation during such proceedings is grounds for vacating or modifying the decision, in whole or part, as well as granting a new or further hearing on some or all issues if the reference is determined to have "materially affected the substantial rights" of the other party.

While securities arbitrators and tribunals may not be governed by formal rules of evidence in arbitration proceedings, at least in California there are now specific statutory provisions governing mediation and its relationship to the arbitration process. Just as California has been one of the states at the forefront of alternative dispute resolution, look for other jurisdictions to enact similar mediation legislation in the years to come.

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