

MEDIATION:

NEW RULES AND NEW RIGHTS

by Diane R. Smith

I. Introduction

Two new California statutes will make mediation even more effective and allow lawyers to give clients the best possible service: sensible, practical results with low sticker prices to reach resolution. California's new laws address mediation confidentiality in general, and environmental mediation specifically. The new statutes set ground rules for participants, counsel and neutrals.

II. New mediation confidentiality statute

Mediation confidentiality laws were consolidated into one chapter of California's *Evidence Code* as of January 1, 1998. See generally §§1115-1128. The new chapter covers civil suits, insurance, environmental issues, family, labor and management, community, and agency actions, sets requirements for enforceable and admissible agreements, and greatly enhances the confidentiality protection of mediation and mediation-related activities and services.

"Mediation" and "Mediator" defined

The definition of "mediation" and "mediator" under the new statute is expansive, providing automatic confidentiality protection to activities such as inquiries concerning whether to mediate, "intake" discussions with a mediator's staff, initiation or recommencement of mediation and mediation conducted in multiple sessions, only some of which may include the actual "mediator."

Whether or not a proceeding is a "mediation" entitled to the statute's protection turns on the actual nature of the proceeding, rather than the name given to it by the participants. As defined in the new statute, "mediation" is a process of facilitated communication with the goal of reaching a mutually acceptable agreement.

A "mediator" is a neutral person who conducts a mediation, and any person designated by a mediator to assist with the mediation. A person may be a "mediator" even if he or she has a title such as "ombudsperson."

Confidentiality is enhanced

The heart of the statute, the confidentiality provisions, is very powerful. Except as otherwise

provided in the chapter, no evidence of anything said, and no "writing" (broadly defined to include any form of media, including recordings) which is prepared for the purpose of, in the course of, or pursuant to, a mediation is admissible or subject to discovery in any arbitration, administrative adjudication, civil action, or other non-criminal proceeding in which testimony can be compelled. The new Act therefore creates a disability of the evidence itself, in that, except as provided in the Act, evidence is not admissible at all, rather than not admissible for certain purposes, or not admissible due to some aspect of the evidence, such as hearsay. This is strong protection. The exclusion of criminal proceedings, however, does raise issues with respect to, for example, the environmental laws, which contain dual civil and criminal penalty provisions, allowing great prosecutorial discretion as to civil or criminal charges. Mediation participants could, for example, be compelled to disclose information revealed only in mediation, in a criminal prosecution. Significant caution is necessary, therefore, where facts raise questions of potential criminal sanctions. However, the new Act does explicitly extend evidentiary protection to arbitration and adminis-

trative mediation proceedings, which likely were not within the prior law's purview.

Under the new Act, abuse of mediation as a means of making otherwise admissible evidence inadmissible is prevented, since evidence which is otherwise admissible or subject to discovery outside of a mediation does not become protected from discovery solely because it is used in a mediation. The Act does not, however, limit admissibility of agreements to mediate, take a default, or extend time, nor does it prohibit disclosure of the mere fact that a mediator has served, is serving, will serve, or was contacted about serving as a mediator in a dispute. The Act does not prevent disputants from obtaining basic information about potential mediators, but it does not require disclosures by mediators. The legislature and numerous professional groups are currently studying the issue of mandatory mediator disclosure of potential conflicts of interest and prior association or involvement, and new legislation is expected in the near future to address the issue.

No coercion by mediators

Coercion of parties by mediators with statements such as: "Unless you are reasonable, I'll be forced to inform the judge that your attitude pre-

vented a settlement"; is prevented through a prohibition against mediators influencing results by threatening to report to a court on the merits of the dispute or the reasons why mediation failed. A mediator's report to a tribunal may disclose mediation communications only if all persons who participate in the mediation agree to the disclosure. No report, recommendation, or finding of any kind, other than a report that is ordered by a court or other law and which states only whether an agreement was reached, may be submitted to a court or other adjudicative body. Further, such a body may not consider such a report, unless all parties to the mediation expressly agree otherwise in writing. The Act, therefore, approaches confidentiality through restrictions and prohibitions on both providing and receiving parties.

Disclosure only with consent

Information otherwise inadmissible under the statute can be rendered admissible only if *all participants* in the mediation specifically state in writing that such information is admissible. A verbal agreement will not suffice. "Participants" includes the mediator and any other nonparties attending the mediation, such as a spouse or an insurance repre-

sentative. The only exception is if the materials to be disclosed reveal nothing about the mediation discussions. The Act, therefore, prohibits disclosure of materials prepared by one or only some participants which could contain otherwise inadmissible information about the mediation. A mediation communication is admissible if either: 1) all persons who conduct or participate in the mediation agree to its admissibility; or 2) if the communication was prepared by or for fewer than all the participants, those participants expressly agree to admissibility, *and* the communication does not disclose anything said or done in the mediation.

Oral agreements

The new mediation confidentiality provisions make oral agreements reached in mediation effective only if they meet a very high standard of credibility. Specifically, oral agreements must be agreed to and recorded in the presence of the parties and the mediator, and the parties must *expressly state* that the agreement is enforceable, binding or words to that effect. The recording must be reduced to writing and signed by the parties within seventy-two hours. Basically, this section provides for a seventy-two hour "change of heart" or "recessionary period" with respect to unrecord-

ed oral agreements. Even *written* settlements prepared in connection with a mediation are not admissible *unless they are signed by the parties and state that they are admissible, subject to disclosure, enforceable, binding or words to that effect, and the settling parties* (as opposed to all participants) *expressly agree to disclosure*. The only exception is when a written settlement must be admitted to show fraud, duress or illegality.

Ending mediation

Under the new law, mediation ends, for the purpose of confidentiality, when the parties enter into an agreement that fully or partially resolves the dispute, the mediator provides the participants with a written notice stating that the mediation is terminated or words to that effect, or a party provides the participants with a similar writing. Unless the parties agree otherwise, a mediation terminates if there is no communication between the mediator and any of the parties relating to the dispute for ten calendar days. Confidentiality protection extends after mediation ends. Anything protected from disclosure remains inadmissible and confidential to the same extent after the mediation ends.

Withdrawing parties

A mediation involving more than two parties may proceed with the remaining parties even if other parties withdraw.

Attorneys' fees for unsuccessful challenges to some of the new Act's provisions

The legislature has taken steps to provide mediators with incentives and the financial wherewithal to resist attempts to force disclosures. The court or adjudicative body is directed to award reasonable attorneys' fees and costs to the mediator if there is an attempt to subpoena or compel a mediator to testify or produce documents and a later determination that the testimony or production is inadmissible under the new law.

Subsequent references to mediation information

Any reference to a mediation which materially affects a party's substantial rights during a subsequent trial is grounds for vacating or modifying the decision in that proceeding and granting a new or further hearing. This provision creates a potential new ground for over-

turning a subsequent arbitration award.

III. The Environmental Responsibility Acceptance Act

In addition to the general mediation confidentiality statute another new California law promotes voluntary, expedited resolution of environmental issues and requires mediation of environmental disputes.

The *Environmental Responsibility Acceptance Act* (the "Responsibility Act") requires owners of property to identify those responsible for certain releases of hazardous substances, to notify such parties of potential liability and to give them time within which to accept responsibility for and provide "commitments" to remedy releases. In exchange, owners agree to limit liability with respect to some measures of damages. Similarly, the Responsibility Act requires responsible parties to provide owners with notices of releases under certain circumstances. If an owner rejects a responsible party's commitment to perform the cleanup, mediation is required before litigation may be commenced. Because environmental mediation enjoys a tremendously high success rate (85% according

to some sources, 100% in the writer's cases) settlement is highly likely if mediation is commenced.

Effectiveness and notification dates

The Responsibility Act was effective January 1, 1998, but notification requirements do not go into effect until July 1, 1998. *See generally* S.B. 1081 *California Civil Code* §§850-853. The notification applies to releases which occur after, or which have already occurred when the notification requirements of the statute become

effective on July 1, 1998, if those releases occurred after January 1, 1995. Owners and responsible parties are required to provide notices regarding releases that occurred after January 1, 1995 but before July 1, 1998, on or before December 31, 1998.

Owners' carrots and sticks

Owners benefit from speed, low legal fees and incentives to encourage responsible parties to take action. The "stick" for owners is that, in exchange for the responsible party's commit-

ment and cleanup, some of the owners' potentially financial recoveries from responsible parties are limited. The Responsibility Act's procedures toll statutes of limitation and suspend owners' rights to bring lawsuits for specified damages during the time that the procedures outlined in the Responsibility Act are being implemented and the cleanup performed.

Responsible parties' carrots and sticks

The "carrots" for responsible parties are limitations on some particularly extreme levels of financial exposure both for cleanup costs and damages to the owner, and assistance in expeditiously commencing mediation to resolve disputes. Responsible parties can also avoid lawsuits from owners' successors, and make proposals to resolve environmental issues without the implications of weaknesses in their case. Further, operation of the Responsibility Act requires only cleanup to the level set by regulatory agencies, as opposed to more extensive, and therefore more expensive remediation, which might be demanded by owners. The "stick," from the responsible party's standpoint, is exposure to high damages and defense costs.

Mediation as a prerequisite to litigation

Failing acceptance of a responsible party's commitment, the parties are required to engage in mediation prior to commencing litigation, except as specified in the Act. Voluntary settlements reached in mediation supersede the ones in the Responsibility Act, which some parties may find unacceptable as written, providing another incentive for mediation.

New "thresholds" for reporting releases

Most environmental laws set "thresholds," which trigger reports or notices based on quantities of materials released, the location of the release or actual or potential exposures to persons or potential damage to the environment or to a public utility such as a water treatment plant. The Responsibility Act requires reporting of releases that meet either of two new types of thresholds. The first relates to the regulatory status of the property, the second to the effects of the release on the owner's interests. Under the Responsibility Act, a release must be reported if it is the subject of a response action which has been ordered by, or is

being performed by, an oversight agency, or the release is impeding the ability of the owner of the site to sell, lease or otherwise use the site. The first threshold is easy to recognize, but the second is not so easy. It is clear that the failure of an owner to give notice could be used to imply that the owner's sale, lease or use of the site has not been impeded. Such an implication could result in an owner's loss of rights to otherwise recoverable damages. While the statute states that failure of an owner to send a notice of potential liability for a release in a timely fashion shall not be deemed to create liability for the owner under a theory of negligence *per se*; no such exclusion exists for other legal theories which could diminish an owner's recoveries.

The crux of the matter for cleanup costs: Cleanup standards and damages

The Responsibility Act's focus on regulatory standards is often the crux of the matter in an environmental case, particularly, from a responsible party's standpoint, because cleanup standards determine, to a large extent, costs. As a result of recent regulatory climate changes, agency cleanup require-

ments are increasingly more likely to be set by environmental health and safety risk assessments. The incentives of the statute will help promote acceptance of meaningful, reasonable cleanup standards throughout the business, financial and real estate communities and the general public.

The Responsibility Act does, like most new legislation, contain internal ambiguities and uncertainties. It presents, however, a real opportunity to expand use of voluntary cleanups and mediation to resolve environmental disputes because it promotes voluntary mediation and settlements. Those mechanisms provide the means for owners and responsible parties to achieve the Responsibility Act's goals, making the Act's uncertainties and ambiguities less relevant, from a practical standpoint.

California's endorsement of and the provision of incentives to both owners and responsible parties to utilize non-binding, voluntary mediation as the dispute resolution procedure of choice in environmental areas is significant and well-founded. Through mediation, parties are able to reach settlements much earlier and avoid expenditures for legal and expert fees. This is particularly important because litigation costs are especially high for environmental issues, due to frequent "battles of the

experts." Parties who frequently engage in environmental disputes recognize and already take advantage of mediation to avoid the substantial disadvantages, uncertainties and frustrations of environmental litigation. The Responsibility Act could go a long way towards bringing effective conflict management, rationality and business sense into what has been a wasteful, frustrating and highly criticized aspect of environmental issues generally.

IV. Tips for practitioners

In utilizing the new statutes to resolve environmental disputes, focusing on certain central issues will raise the likelihood of successful resolution and provide structure for reaching practical solutions and approaches. . . .

The very nature of environmental liability, which is generally strict, joint and several, and retroactive, increases the number of participants and the complexity of cases, making judicial resolution extremely difficult, costly and time-consuming. It is important to sort out and prioritize tasks and resolve pressing issues quickly to minimize damages. *It is essential, therefore, to understand what factors are driving the dispute and the need for action and/or settle-*

ment, so that a strategy tailored to resolution of the specific dispute in question can be formulated. Driving forces frequently include agency requirements, uncertainties about current and future regulatory standards, and owner, lessee and lender concerns regarding both future liability and the impact of carrying out a cleanup. Some of those issues can be addressed other than through the payment of money, such as through indemnities and agreements to mitigate the effects of remediation activities.

Use approaches that are available to ease the pain for disputants effectively and efficiently. Ability to resolve issues with existing tools, rather than "reinventing the wheel" is the difference between experienced parties and the less confident and effective. Such approaches include, most importantly, removing the problem from, or even avoiding the court system, and cooperating with other responsible parties on a timely basis to minimize collective costs, while agreeing on ways to resolve issues in the future.

Implementation of reasonable cleanup standards through effective negotiation with agencies, practical and cost effective use of technical consultants and technology, use of fair cost allocation systems, avoidance of excessive and unnecessary legal fees and attention to related problems such as property sales, leasing and financing, go a long way toward effective management. So do reassurances and documentation to concerned parties regarding health risks, obtaining credible cost estimates for cleanups and recognizing and dealing with issues through long-term cooperation. Other useful approaches include expeditious handling of conditions to prevent further harm, reduction of costs through sharing of mutually acceptable and jointly supervised "experts," reducing or eliminating demands for such items as "stigma" damages, and expanding the range of options and sources of funding.

Tolling agreements, dismissals without prejudice and resort to private, court-ordered or recommended mediation is the first major step, followed closely by cooperation, and avoidance of creating problems with regulatory agencies or the public by avoiding "battles of the experts" and promoting realistic expectations. Disputants must come to understand that their best, if not only, course of action is to promote acceptance of cleanup standards based on good science rather than fear or speculation. Knowing that some issues, such as lender's concerns, can often

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be taken care of other than with money and that there might well be some way to change the overall "pie," and maybe even expand it, by, for example, dividing up the increased value of remediated property, can also be very useful.

Cope realistically and fairly with the issue of allocation of costs and liability. Devising an allocation program before the cost of work is determined or the parties' shares are fully defined, is preferable to beginning such a discussion when discussions are more heavily colored by self-interest. Allocations should be set through a process of standards and general principles of fairness.

Characteristics of successful allocations include inclusion of confidentiality provisions, advance consensus on what information and data is (and is not) to be gathered and by whom, methods for the collection of data, and general principles to be observed in allocating, such as what to do about gaps in data, e.g., lack of several years of landfill records, volumetric responsibility for containers that may not have been truly "empty" but which were not full when discarded.

Whether, how and when issues such as toxicity and causation of harm are to be resolved, what the process will be for arriving at initial non-binding allocations, a process for challenging initial allocations, and workable dispute resolution procedures must also be part of any effective allocation scheme.

It is critical, of course, that allocations systems be internally consistent, free of obvious errors, based on all key available information, sound in working assumptions, reasonably fair, and that they accommodate realities of collection and time available for the allocation process.

Allocation approaches that have worked successfully include, in various configurations, weighted or simple factors such as time occupying the property or operating the equipment, and known spills or releases. Allocations may be adjusted by evidence of either good or less than adequate past practices, and known chemical use or specific activities at problematic areas identified through reliable site investigations. Knowledge of former site configurations and use of process diagrams and aerial photos as well as documentary evidence produced by investigators and interviews are frequently used to adjust par-

ties' responsibility percentages. Reconstruction of history through, for example, waste disposal histories of service areas of recyclers, agreed upon presumptions and "discounts" for uncertainties in the data, "buyouts" by parties with little liability or special circumstances, acknowledgment and adjustments for relative toxicity of materials, and adjustments for causation of migration are also logical elements which can support an allocation scheme. Relative volumes of materials used or sent to the site, severability (i.e., asbestos disposal necessitating, for example, removal costs, versus liquid solvents necessitating groundwater remediation, the degree of individual parties' cooperation, or premiums to be paid for "hiding in the weeds" while others worked on the problem, as well as willingness to bring in other parties who are involved due to contractual arrangements (indemnities, assumptions of risk) also aid in overall allocation and resolution efforts. It is, of course, essential to maximize the use of sources of funding, and to take advantage of parties' abilities to contribute in terms of actual services or obtain special rates or arrangements that will cut the cost of cleanup. Using "common counsel" for specific tasks, devising a way to implement acceptable land use restrictions to limit cleanup necessity and joint negotiations with agencies and dealings with consultants/contractors can also cut costs and make allocation decisions easier and more rational.

Know why allocations fail. There are usually at least two major causes. First, the unsuccessful method falls more heavily on some parties while benefitting others, without a collective sense of "rough justice," about the overall process, an understandable rationale, or general acceptance of the hard realities. Second, unsuccessful attempts at allocations are often characterized by the lack of a reasoned "buy in" or understanding by the vast majority of the parties, resulting in delays, additional costs, fewer participants over which to share costs, intransigence, and difficulty, if not impossibility, of implementation.

Be prepared for special challenges. Choose effective mediators. Environmental mediation includes dealing with parties who, for whatever reason cannot make timely decisions, and "free riders" who want the benefit of collective effort but do not want to contribute to the solution. Striking a balance between the good, bad, large, and small players, and helping par-

ties come to terms with the astonishingly high price tags involved in cleanups and deal with "sticker shock" and high stakes issues is crucial. Handling differing attitudes toward contamination, helping parties to overcome disbelief and probe reality, vent outrage, explore possibilities for bringing the price down, evaluate other options, and develop abilities to handle disagreement over "scientific/technical"/"black magic" issues, are essential environmental mediator skills. So are the ability to evaluate risks and sell solutions that may only be "better than we might otherwise have received." Good environmental mediators need the ability to work effectively in both public and private sessions and create real dialogue, rather than showcasing for the participants. The ability to separate facts from emotions, evaluate, quantify, and justify cost savings to regulators, cut down on public friction, and identify and communicate with stakeholders are tremendous assets.

Finally, freedom from overwhelming bias on subject matter, and the ability to know when to allow parties time to adjust to reality rather than pushing to closure prematurely, are media-

tor characteristics that can make a huge difference in the effectiveness of mediation as an alternative to litigation.

V. Conclusion

California has traveled a long way to enhance and encourage mediation, which is the fastest growing form of dispute resolution. Practitioners and neutrals need to become familiar with changes in law with respect to mediation confidentiality and requirements for enforceable agreements and admissibility. Those involved in environmental disputes should utilize the new *Environmental Responsibility Acceptance Act* to greatly increase the effectiveness and economy of environmental dispute resolution and to speed up cleanups and define the cleanup parameters.

