

Workers' Compensation Section Proposes Division of Workers' Compensation Mediation Program

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A shared goal of all stakeholders in the California workers' compensation system is to achieve the timely resolution of claims. Consistent with that view, it has been a priority for the Division of Workers' Compensation (DWC) to insist on the timely setting of cases in all district offices and to promote the timely issuance of decisions on cases after trial. As part of an overall program to further this goal, the DWC has sought to increase the settlement skills of WCJ's by adding a mediation component to its judicial training.

In furtherance of this shared goal the Executive Committee of the Workers' Compensation Section of the State Bar of California has undertaken a project to develop a proposed DWC mediation program that could be established through the promulgation of regulations. A subcommittee of the Executive Committee drafted a proposal based primarily on the mediation rules that are found in the California Rules of Court. The proposal was then submitted to the Alternative Dispute Resolution (ADR) Committee of the State Bar with a request for their review and comment in order to improve the proposal by utilizing the Committee's expertise in ADR-related matters. The process was extremely helpful in improving the proposal. The ADR Committee endorses the proposal as it now stands, with the caveat that the Committee lacks expertise in the legal and policy issues pertaining to workers' compensation and did not express any views as to whether the proposed program, or any specific aspects of the program, would be desirable or appropriate from that perspective. They do, however, endorse the proposal from an ADR perspective.

Practitioners are increasingly using mediation to achieve negotiated resolutions in complex cases. A DWC mediation program would further this trend and encourage the practice while regulating the process when it is initiated through DWC. In short, the proposed regulations would establish a DWC mediators list, similar to the arbitrators list that currently exists. Requirements for individuals seeking placement on the list would include training and adherence to rules as to how mediation is to be conducted when initiated through the DWC program. Parties would not be limited to choosing a mediator on the DWC list, but when they did use it, they would be able to rely on the qualifications and performance of the mediators, which would be subject to regulation.

The proposal is grounded in the following basic principles:

1. The proposal is for a *voluntary* program. While the proposed regulations would provide the structure for judges to suggest mediation, it would not give them the authority to mandate it.
2. *Confidentiality* would be mandated.
3. *Competence, training, and quality* requirements would be imposed.
4. Rules regarding *disclosure and withdrawal* would be imposed.
5. A *complaint* procedure would be included.

Since the Workers' Compensation Law Section of the State Bar is very conscious of the variety of projects the DWC is presently facing (such as EAMS), in order to make the promulgation of a mediation program as efficient as possible, actual proposed regulations were drafted to reduce the amount of time and resources required in drafting regulations. It is the Section's hope that DWC will accept the proposed program.

The actual proposal submitted to the DWC is set forth below.

A Proposal
Division of Workers' Compensation
Voluntary Mediation Program

Introduction

Alternative dispute resolution through mediation and arbitration provides the parties in workers' compensation cases an effective method to achieve early resolution of complex cases while at the same time resolving the case with substantial litigation cost savings and with greater client satisfaction for both applicants and defendants.

All state and federal trial courts have developed and aggressively promote an alternative dispute resolution (ADR) program containing various ADR tools in order to help facilitate voluntary case resolution and thus take the pressure off an otherwise overburdened trial calendar. The ADR program for the United States District Court, Northern District of California, may be accessed by logging on to www.adr.cand.uscourts.gov/. Court- provided neutrals, made up of panels consisting of qualified participants, are paid a small amount by the Court to provide early neutral evaluation, mediation, and arbitration. The Court also encourages parties to consider using private ADR providers that offer mediation, arbitration, fact-finding, and special master services.

The ADR rules for the California Superior Courts can be found at www.courtinfo.ca.gov/rules/titlefive/, California Rules of Court Title V, Division III, and in particular with reference to mediation in civil cases, Chapters 4 and 5. The California Courts offer a mediation program that consists of private ADR providers that must meet specific program guidelines.

The only court system in California that does not at present provide any ADR services is the California workers' compensation system, except for arbitration authorized by Labor Code sections 5270 et seq. and ADR carve-out programs authorized by Labor Code section 3201.5 and/or 3201.7.

What Does ADR Do?

The website for the United States District Court, Northern District of California explains the benefits of ADR as follows:

Most cases can benefit in some way from ADR. The various ADR processes offer different types of benefits. Each ADR process offers at least some of the following advantages over traditional litigation or direct settlement negotiations.

Produce more satisfying results After litigating a case through trial, even the winners may feel they have lost.

The costs and time commitment on both sides may be enormous. Sometimes neither side is satisfied with the result—and any relationship that may have existed between the parties is likely to have been severely strained. On the other hand, ADR may:

- Help settle all or part of the dispute much sooner than trial
- Permit a mutually acceptable solution that a court would not have the power to order
- Save time and money
- Preserve ongoing business or personal relationships
- Increase satisfaction and thus result in a greater likelihood of a lasting resolution

Allow more flexibility, control, and participation In formal litigation, the court is limited in the procedures it must follow and the remedies it may award—and submitting a case to a judge or jury can be extremely risky. ADR processes are more flexible and permit parties to

participate more fully and in a wider range of ways. They afford parties more control by providing opportunities to:

- Tailor the procedures used to seek a resolution
- Broaden the interests taken into consideration
- Fashion a business-driven or other creative solution that may not be available from the court
- Protect confidentiality
- Eliminate the risks of litigation

Enable a better understanding of the case In traditional litigation, sometimes the parties stop communicating directly— and it is only after a significant amount of time and expensive discovery or motions that the parties understand what is really in dispute. ADR can expedite the parties' access to information. It can also improve the quality of justice by helping the parties obtain a better understanding of their case early on. It may:

- Provide an opportunity for clients to communicate their views