LOS ANGELES SUPERIOR COURT, COMPLEX CIVIL DEPARTMENT

CHECKLIST FOR

PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

This checklist provides direction on what information and argument the court requires to grant a motion for preliminary approval of a class action settlement. All parties are urged to carefully review the checklist and fully comply with each item that applies to the case in order that the motion may be promptly ruled upon. The content of the motion should follow the same order as this checklist, as that is how the judge and research attorney review the motion.

I. MOVING PAPERS (Motion and Declarations)

All facts submitted for the court to consider must be provided in the form of a declaration or other admissible evidence. The court will not consider facts stated only in the motion.

A. Introductory Information

☐ Summary of the litigation, including identity of the parties, brief procedural history, claims asserted, and general factual basis for the claims.

B. Dunk/Kullar Analysis

☐ Summary of the case, including the legal and factual basis for each claim. (*Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 133 (*Kullar*); *Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles* (2010) 186 Cal.App.4th 399, 409.)

☐ Summary of the investigation and discovery conducted, including the specific documents reviewed prior to agreeing to settle the case. (*Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1802, as modified Sept. 30, 1996 (*Dunk*). If counsel's analysis was informed by a data sample, show that the sample is statistically reliable.

☐ Summary of settlement negotiations, including when the settlement was reached, and whether the parties were assisted by a mediator. (*Dunk, supra*, 48 Cal.App.4th at p. 1802.)

☐ A summary of the risks, expenses, complexity, and duration of further litigation if the settlement is not approved.

☐ A summary of the risks of achieving and maintaining class action status.

☐ Specific information sufficient for the court to make an independent determination that the consideration being received for the release of class members' claims is reasonable in light of the strengths and weaknesses of the claims and the risks of the particular litigation. (*Kullar, supra,* 168 Cal.App.4th at 129.) This discussion should specify the maximum realistic recovery of each claim asserted in the operative complaint, defenses asserted by Defendant, and any other relevant factors justifying the amount offered in settlement. If the settlement is predicated on a payment plan or is predicated on defendant's financial situation, admissible evidence of Defendant's financial situation should be provided, including appropriate financial documents such as a balance sheet, statement of cash flows, profit and loss statement, and the like.

☐ If approval of the settlement of class claims is requested together with approval of non-class claims (such as claims under the Labor Code's Private Attorney General Act (PAGA)) discuss why the amount allocated to the non-class claims is fair to those affected. See *Moniz v. Adecco USA, Inc*. (2021) 72 Cal.App.5th 56, 77 (*Moniz*).

C. <u>Class Certification</u>

☐ Numerosity: Total number of members in the settlement class and number of members in each sub-class (if applicable).

☐ Ascertainability: The manner by which members of the class will be identified and when. (*Noel v. Thrifty Payless* (2019) 7 Cal.5th 955.)

☐ Community of Interest: Discuss specific facts showing that the proposed class representatives have claims or defenses typical of the class and can adequately represent the class. (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435.)

☐ Adequacy:

Class Counsel: A summary of Class Counsels' experience and a listing of all prior cases in which each named Class Counsel has been approved by a court to act as lead or co-counsel. (See *Dunk, supra,* 48 Cal.App.4th at 1802.)

Class Representative(s); Provide evidence that each proposed class representative has agreed to act as same and understands his or her responsibilities. (See *Soderstedt v. CBIZ Southern California, LLC* (2011) 197 Cal.App.4th 133, 155-156; *Jones v. Farmers Ins. Exchange* (2013) 221 Cal.App.4th 986, 998-999.)

D. Claim Requirement (if applicable)

☐ If class members are required to submit a claim to receive compensation, explain why a claim form is necessary and either 1) provide an estimate of the anticipated claims rate or 2) provide an explanation why a claims rate cannot be provided.

☐ Provide a detailed explanation why a "claims made" settlement is appropriate.

☐ Indicate what actions class counsel will take to encourage claim submission.

☐ Explain why the claims process is not so burdensome that relief would be inaccessible to class members (if applicable).

E. Miscellaneous

☐ If appropriate, explain why the settlement includes terms that are outside the scope of the operative complaint. (*Trotsky v. Los Angeles Fed. Savings & Loan Assn.* (1975) 48 Cal.App.3d 134, 148.) If approval of settlement of a PAGA claim is requested provide a copy of Plaintiff's notice letter to the LWDA.

☐ If notice will be given in English only, explain why this is sufficient.

☐ A statement of any affirmative obligations to be undertaken by the class member or class counsel and the reason for such obligations.

☐ Provide information regarding any fee splitting agreement and whether the client has given written approval. (*Mark v. Spencer* (2008) 166 Cal.App.4th 219; Rules Prof. Conduct, rule 1.5.1; Cal. Rules of Court, rule 3.769.)

☐ Any agreement that has injunctive relief against a class representative or absent class member generally is not appropriate in a class action case. Provide the authority and factual reasons why this case is an exception. See *Moniz, supra,* 72 Cal.App.5th at 84. (**(**"[T]he preclusive effect of a prior judgment is determined by the court in which it is asserted, not the court that rendered it." (*Fireside Bank Cases* (2010) 187 Cal.App.4th 1120, 1131 [115 Cal. Rptr. 3d 80].))

☐ Explain why any proposed class representative enhancement is reasonable, including what the class representative did beyond the expected services of any class representative. (*Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles* (2010) 186 Cal.App.4th 399, 412; *Radcliffe v. Experian Information Solutions Inc.* (9th Cir. 2013) 715 F.3d 1157, 1165.) In PAGA settlements explanation should be provided as to why an incentive award is appropriate.

II. SETTLEMENT AGREEMENT

The settlement agreement should address the following:

A. The Basics

☐ Class definition. If a PAGA representative action is settled with a proposed Class Settlement consider whether there should be separate definitions for Class Members and Aggrieved Employees.

☐ Class and Release Period: If the class and release periods extend beyond the date of preliminary approval explain why this is appropriate.

B. Release of Claims

☐ Scope: The scope of any release given by class members must be defined with precision and clarity. Any released claims not presented directly in the operative complaint should be based on the facts alleged in the operative complaint. (See *Amaro v. Anaheim Arena Mgmt.* (2021) 69 Cal. App. 5th 521, 537 and FN. 5; *Uribe v. Crown Building Maintenance Co.* 70 Cal. App. 5th 986, 1005.)

☐Class cases which include a PAGA claim should have a separate release for the PAGA claim tied to the facts alleged in the notice given to the LWDA. Id.

☐ If PAGA and Class Settlement: The Release should provide an explanation that released claims include all PAGA claims that could have been premised on the facts alleged in the Plaintiff's Notice and aggrieved employees will release PAGA claims even if class members request exclusion from the class. See *Robinson v. Southern Counties Oil Co*. (2020) 53 Cal.App.5th 476.)

☐ A Civil Code section 1542 waiver is generally not appropriate in a class action case as to the putative class members (if applicable). Provide the authority and factual reasons why this case is an exception. (*Israel-Curley v. California Fair Plan* (2005) 126 Cal.App.4th 123, 129; *Salehi v. Surfside III Condominium Owners' Assn.* (2011) 200 Cal.App.4th 1146, 1159–1161.)

☐ Release Effective Date: Indicate the point in time at which the release will be deemed effective as to the absent class members. If the release will be effective before settlement funds are paid, explain why this is in the best interest of the class.

☐ Class Data: If there are confidentiality provisions, explain why they are in the best interest of the Class and whether they will impede Class Counsel's ability to discharge fiduciary duties.

C. <u>Monetary Terms of Settlement</u>

☐ Settlement Amount: Indicate the amount of the gross settlement, how and when the settlement will be paid, and information regarding payment plan, if any. If a class claim is being settled with a PAGA claim the amounts allocated should be separated and paid only to the aggrieved employees.

☐ Deductions from the settlement fund: Indicate the amounts to be deducted from the gross settlement for attorneys' fees and costs, plaintiff incentive awards, administrative costs, PAGA payment and allocation of award to LWDA and the parties, and any other existing deductions.

☐ If there are subclasses, explain why the monetary distribution is fair to each subclass. Insure there is a class representative who fits the definition of each subclass.

☐ Information about how attorney fees will be calculated. The percentage method, with or without a lodestar cross-check, may be used in common fund cases. (*Laffitte v. Robert Half Internat., Inc.* (2016) 1 Cal.5th 480, 503.) In other cases, counsel should fully brief how the fees are calculated.

☐ If wages are involved, explain how Defendant's share of taxes will be paid.

☐ Whether, and under what circumstances, amounts may revert to Defendant, and a justification for such reversion (if applicable). (*Cundiff v. Verizon California, Inc.* (2008) 167 Cal.App.4th 718, 728–729.)

☐ Payment Formula: Amount and manner of distribution of the compensation to each class member, including the estimated amount each class member will receive and the timeline on which payments will be issued.

☐ Tax allocation of settlement payments.

☐Nature of injunctive relief (if any), and valuation of such relief.

D. <u>Notice Administration</u>

The following issues regarding notice administration should be addressed in the settlement agreement. A copy of the proposed notice must be attached to the settlement agreement as an exhibit.

☐ Indicate the administrator for the settlement and why the bid for administration is fair.

☐ Provide the qualifications and experience of the Administrator, including evidence that the settlement administrator has procedures in place to protect the security of class data and adequate insurance in the event of a data breach or defalcation of funds.

☐ Indicate how/when the administrator will receive the class list.

☐ Indicate whether the list will be updated by the administrator prior to the initial mailing by use of National Change of Address Registry.

☐ Provide the deadline for the initial issuance of notice to class members.

☐ Ensure the content of the notice complies with California Rules of Court, rule 3.766(d). In wage and hour cases the notice should indicate the specific amount the class member will receive, and how that amount was calculated. A separate breakdown for PAGA payments should be provided. The terms of the release(s) should be reflected in the Notice.

☐ Ensure the notice accurately reflects the Court's current social distancing procedures for attendance at hearings and review of court files. (Counsel should check the Court website for most current information.)

☐ Indicate how and when payments will be processed.

☐ Indicate how notices returned to the administrator as undeliverable will be handled.

☐Explain how re-mailed notices, if any, will be handled. Will class members who receive re-mailed notices be given an extended deadline to respond (i.e., opt-out, object, and dispute workweeks)?

☐ Explain how notice of any change of the date or location of the will hearing be given.

☐ Indicate whether there will be a settlement website. If so, provide the URL.

☐ If publication notice will be given indicate the timing, locations, and manner by which publication notice will be disseminated.

☐ Explain how notice of final judgment will be given to the class. (Cal. Rules of Court, rule 3.771(b)) (e.g. Posted on claims administrator's website.)

E. Responses to Notice

☐ Description of the procedures for submitting written objections, requests for exclusion, claim forms (if applicable) and disputes to estimated payments.

☐ Indicate the deadline to submit objections, requests for exclusion, claim forms (if applicable), and/or disputes to workweeks. Confirm the deadline is reasonable and that class members who receive re-mailed notices will be given an extension.

☐ The objection procedure the same as the opt-out procedure, with the only requirement being that objections be mailed to the settlement administrator and not filed with the court.

☐ Do not include language indicating that class members may only be heard at final approval if they have complied with all objection procedures or that they must use specific language to request exclusion, or, if a specific procedure is sought explain why it is necessary. In general, the court will hear from any class member who attends the final approval hearing and asks to speak regarding his or her objection. accordingly.

F. Cy Pres Distribution

☐ Indicate the length of time from issuance for which settlement checks will remain valid.

☐ Identify the fund to which uncashed checks will be directed and detail the steps that will be taken to ensure compliance with Code of Civil Procedure section 384. The Court's Omnibus Trailer Bill of 2018 replaced the language of the prior statutory distribution scheme under Code of Civil Procedure, section 384 with a requirement that the Court re-open judgments following the final distribution of funds to include the cy pres in the judgment and to include the unclaimed amount, plus an unspecified amount of interest. Such information should be actively contemplated/provided for within the current terms of the settlement.

☐ Explain why any cy pres distribution fills the purposes of the lawsuit or is otherwise appropriate. (*State of California v. Levi Strauss & Co.* (1986) 41 Cal.3d 460, 472; *In re Microsoft I-V Cases* (2006) 135 Cal.App.4th 706, 722; *Nachshin v. AOL, Inc.* (9th Cir. 2011) 663 F.3d 1034, 1038–1041; *Dennis v. Kellogg Co.* (9th Cir. 2012) 697 F.3d 858, 865; Code Civ. Proc., § 384.)

☐ Provide declarations disclosing the interest or involvement (or lack thereof) by any counsel or party in the governance or work of the cy pres recipient.

G. <u>Miscellaneous</u>

☐ Assure the Settlement Agreement and Notice are consistent and that the Settlement Agreement has been signed by all parties and counsel. Carefully proofread both.

☐ The Settlement Agreement and paperwork derivative thereof should not suggest that the end result of court approval will be dismissal of the Action with prejudice or entry of a Final Judgment and Order dismissing with prejudice all claims. See California Rules of Court, rule 3.769(h).

III. EXHIBITS TO THE MOTION

☐ Provide proof of submission of the proposed settlement agreement to the LWDA. (Lab. Code, § 2699, subd. (l)(2).)

☐ Include a proposed Judgment, which should not include a dismissal or any findings not contained in the Final Approval Order. (Cal. Rules of Court, rule 3.769(h).)

☐ All exhibits should be bookmarked, as set forth in the Presiding Judge's First Amended General Order of May 3, 2019 re: Electronic Filing, available on the Court website.

Revision: February 2022

No. A127375
COURT OF APPEAL OF THE STATE OF CALIFORNIA FIRST APPELLATE DISTRICT DIVISION THREE

Kullar v. Foot Locker Retail, Inc.

191 Cal.App.4th 1201 (Cal. Ct. App. 2011) · 121 Cal. Rptr. 3d 353
Decided Jan 18, 2011

Nos. A127375, A127376.

January 18, 2011.

Appeal from the Superior Court of the City and County of San Francisco, Nos. CGC-05-447044 and CGC-09-487345, Richard A. Kramer, Judge.

1202*1202

Quails Workman, Daniel H. Quails, Robin G. Workman and Aviva N. Roller for Objectors and Appellants and for Plaintiffs and Respondents.

Miller Law Group, Tracy Thompson, Timothy C. Travelstead and Joseph P. Mascovich for Defendant and Respondent and for Defendant and Appellant.

OPINION

POLLAK, J. —

The defendant in these consolidated class actions appeals from an order denying its motion to disqualify the attorneys for parties who have objected to the proposed settlement agreement in the first of these cases and are the plaintiffs in the second action in which a class has not yet been

1203*1203 certified. We agree with the trial court that the filing of the second action has not created a conflict of interest requiring counsel's disqualification.

Background

This court previously vacated an order of the trial court approving a settlement of the class action brought on behalf of employees of Foot Locker Retail, Inc. (Foot Locker), against Foot Locker. (*Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116 [85 Cal.Rptr.3d 20].) The appeal resulting in that disposition was prosecuted by the law firm of Quails Workman, LLP (QW), on behalf of three objectors to the settlement, Crystal Echeverria, John Kissinger and Nichole Payton. This court held that the information that had been presented to the trial court was insufficient to support its determination that the settlement agreement was fair, reasonable and adequate, and we "remand[ed] the matter to permit the trial court to reconsider the fairness and adequacy of the settlement in light of such additional information as the parties may present concerning the value of the class members' claims should they prevail in the litigation and the likelihood of their so prevailing." (*Id.* at p. 120.)

Prior to the trial court's approval of the settlement in the *Kullar* action (*Kullar v. Footlocker*, No. CGC-05-447044 (*Kullar*)), Echeverria, represented by the same attorneys, had filed a partially overlapping putative class action against Foot Locker and others in the Alameda County Superior Court (*Echeverria v. Foot Locker, Inc.*, No. RG07317036 (*Echeverria I*)). Because of the pendency of the settlement in the *Kullar* action, the Alameda court entered an order staying *Echeverria I*, which remained in effect through the pendency of the *Kullar* appeal. On April 15, 2009, one month after issuance of the remittitur in *Kullar*, Echeverria and the two other objectors represented by QW filed an action in the San Francisco Superior Court, where *Kullar* was pending, asserting the same claims as were alleged

in the stayed Alameda action (*Echeverria v. Footlocker*, No. CGC-09-487345 (*Echeverria II*)). Based on the pendency of identical claims in *Echeverria I*, the San Francisco court on July 29, 2009, stayed proceedings in *Echeverria II.* In subsequent proceedings in *Kullar*, the court considered the additional showing made to establish the fairness of the proposed settlement, the three objectors' renewed objections to settlement approval, and on October 22, 2009, the court again granted final approval of the class settlement.[1] Echeverria dismissed the Alameda action and on November 17, 2009, the San Francisco court lifted the stay in *Echeverria II.*

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[1] Judgment was not entered at that time and the propriety of that approval is not now before the court or an issue in this appeal.

On December 2, Foot Locker filed motions to disqualify QW as counsel in both *Kullar* and *Echeverria II.* Foot Locker argued, "By knowingly representing both the objectors to the *Kullar v. Foot Locker* settlement and putative class members in the *Echeverria v. Foot Locker* case who want to participate in that settlement, Dan Quails has a conflict of interest that requires disqualification from both matters." At a hearing on December 17, the court denied both motions, explaining that it saw no conflict of interest in that QW and Mr. Quails were advocating consistent positions in both cases and that there was no reason to believe that the attorneys were acting out of any improper motives. Foot Locker has timely appealed.[2]

[2] Although the preferred and more expedient method of challenging an order denying a motion to disqualify counsel is by seeking a writ of mandate, such an order is appealable. (*Apple Computer, Inc. v. Superior Court* (2005) 126 Cal.App.4th 1253, 1263-1264 [24 Cal.Rptr.3d 818]; *Meehan v. Hopps* (1955) 45 Cal.2d 213 [288 iP.2d 2671.)

Analysis

The proposed settlement agreement in *Kullar* settles claims of a class of designated employees of Foot Locker during the period between November 23, 2001, and May 25, 2007. The clairas are based on numerous alleged violations of law, including the failure to compensate employees for the compulsory purchase of certain shoes and uniforms, the failure to compensate employees for time devoted to security searches, and the failure to provide mandated meal and rest periods and to pay appropriate wages by failing to compensate for time designated as meal periods when the employees were required to work. The complaint in *Echeverria II* seeks recovery on behalf of those employed by Foot Locker on an hourly basis during the period between four years of the filing of the *Echeverria I* complaint, i.e., March 22, 2003, and the filing of the complaint in *Echeverria II*, April 15, 2009, based solely on Foot Locker's alleged failure to provide those employees with meal periods and as a consequence to compensate them appropriately.

Foot Locker's motion to disqualify QW is based on the fact that members of the putative class described in *Echeverria II* are also members of the class covered by the proposed settlement agreement in *Kullar.* Foot Locker contends that "a simultaneous conflict of interest" arises from the attorneys purporting to represent these employees in *Echeverria II* and at the same time, representing objectors to the *Kullar* settlement, thereby "taking actions to block distribution of over one million dollars in settlement money to over 1,500 current and former Foot Locker employees," among whom are putative class members they seek to represent in *Echeverria II.* Foot Locker argues that by representing those who object to the settlement,

1205the attorneys *1205 are representing parties whose interests are directly antagonistic to the interests of all other members of the putative *Echeverria II* class who are also members of the *Kullar* class, who they assert have "affirmatively stated they favor" the *Kullar* settlement. While it is an

overstatement to say that the class members who have not objected to or opted out of the proposed *Kullar* settlement necessarily favor the settlement, it is reasonable to assume that some, and perhaps many or most, of these individuals prefer to accept the benefits of the settlement rather than pursue the claims for additional recovery in the *Kullar* action. Nonetheless, there are several reasons for which QW's participation in both of these cases does not violate the proscription against the representation of clients with adverse interests, as Foot Locker contends.[3]

[3] Foot Locker contends that QW's conduct violates rule 3-310(C) of the Rules of Professional Conduct, which provides, "A member shall not, without the informed written consent of each client: [¶] (1) Accept representation of more than one client in a matter in which the interests of the clients potentially conflict; or [¶] (2) Accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict; or [¶] (3) Represent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter."

Initially, since no class has yet been certified in *Echeverria II* (and no class was ever certified in *Echeverria I*), no attorney-client relationship has yet arisen between QW and the members of the putative class. (*Atari, Inc. v. Superior Court* (1985) 166 Cal.App.3d 867, 873 [212 Cal.Rptr. 773] ["We cannot accept the suggestion that a potential (but as yet unapproached) class member should be deemed 'a party . . . represented by counsel' even before the class is certified; we respectfully disagree to this extent with the federal courts which apparently would accept it."]; *Sharp v. Next Entertainment Inc.* (2008) 163 Cal.App.4th 410, 433 [78 Cal.Rptr.3d 37], citing com. 25 to rule 1.7 of the ABA Model Rules of Prof. Conduct ["When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying paragraph (a)(1) of this Rule [that restricts representation when there are concurrent conflicts of interest]."]; *In re McKesson HBOC, Inc. Securities Litigation* (N.D.Cal. 2000) 126 F.Supp.2d 1239, 1245; Cal. Compendium on Prof. Responsibility, L.A. County Bar Assn. Formal Opn. No. 481 (Mar. 20, 1995).)

Foot Locker cites cases that clearly are inapposite to establish that an attorney may incur fiduciary obligations to an individual even though an attorney-client relationship has not arisen. Most involve situations where there were preliminary consultations between the individual and the 1206 attorney *1206 looking to the retention of the attorney but the potential client did not hire the attorney. (*People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135 [86 Cal.Rptr.2d 816, 980 P.2d 371]; *Beery v. State Bar* (1987) 43 Cal.3d 802 [239 Cal.Rptr. 121, 739 P.2d 1289].) Closer to the mark is the court's statement in *In re GMC Pick-up Truck Fuel Tank Products Liability Litigation* (3d Cir. 1995) 55 F.3d 768, 801: "Beyond their ethical obligations to their clients, class attorneys, purporting to represent a class, also owe the entire class a fiduciary duty once the class complaint is filed." This statement — which, it should be noted, recognizes that putative class members are not clients of the attorney — was made in the context of considering the propriety of certifying a settlement class, with little application to the present situation. Moreover, assuming that QW assumed some fiduciary obligations to members of the putative class they seek to represent, no authority has been cited suggesting that those obligations preclude the attorneys from urging that a proposed settlement in related litigation is not in the best interests of the class. (Cf. *Schick v. Berg* (S.D.N.Y., Apr. 24, 2004, No. 03 Civ. 5513 (LBS)) 2004 U.S.Dist. Lexis 6842, *19, aff'd. (2d Cir. 2005) 430 F.3d 112 [attorney owed putative class

member a duty not to prejudice putative class member's rights in the action in which class certification was sought, but duty did not extend to refraining from advising a third party to sue putative class member].)

More fundamentally, as the trial court observed, there is no conflict of interest requiring disqualification. The issue to which the objectors and their attorneys directed their argument in *Kullar* is whether the proposed settlement is fair and reasonable, and whether the settling parties have made a sufficient showing that it is. While other unnamed class members in *Kullar* may not have filed objections to the settlement or opted out of the settlement, they have not expressly indicated they believe the settlement is in their best interests or that they are not entitled to a greater recovery than provided in the settlement agreement. As we pointed out in our prior opinion in this case, it is the court that has the ultimate responsibility to determine the fairness and adequacy of the settlement. (*Kullar v. Foot Locker Retail, Inc., supra*, 168 Cal.App.4th at p. 129.) The class representatives (and their attorneys, as well as Foot Locker and its attorneys) disagree with the objectors and their attorneys over this issue and they have submitted their respective arguments to the court for decision. While the consequence of the objectors prevailing would be to forestall the recovery class members will receive under the proposed settlement, such may nonetheless be in their best interests if they are likely to obtain a much greater recovery by pursuing the litigation. There is no more of a conflict between the objectors (and their attorneys) and the *1207 unnamed members of the class who favor the settlement than there is between the class representatives (and their attorneys) and unnamed members of the class who do not favor the settlement but who have refrained from expressing their views and do not want to be excluded from the recovery if the settlement is approved.

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The putative class members favoring the proposed *Kullar* settlement may be adverse to objectors in the sense that they disagree as to the adequacy of the settlement and in their desire to have it approved or rejected (cf. *Lazy Oil Co. v. Witco Corp.* (3d Cir. 1999) 166 F.3d 581, 589), but their common interests in the outcome of the litigation are unaffected by that disagreement. There is no suggestion that QW has obtained any confidential information from the putative class members who favor the settlement, nor have the attorneys engaged in any conduct displaying disloyalty to any of the putative class members. Disqualification under the circumstances here would be no more justified than the automatic disqualification of class counsel whenever a dispute arises among class members or class representatives as to the advisability of settlement. (See *ibid.; In re Corn Derivatives Antitrust Litigation* (3d Cir. 1984) 748 F.2d 157, 162 (cone. opn. of Adams, J.); *In re "Agent Orange" Product Liability Litigation* (2d Cir. 1986) 800 F.2d 14, 18-19.)

The authority that comes closest to supporting Foot Locker's position is a decision rendered by a member of this panel when sitting on the District Court. (*Moreno v. AutoZone, Inc.* (N.D.Cal., Dec. 6, 2007, No. C05-04432 MJJ) 2007 U.S.Dist. Lexis 98250.) However, the situation in that case was significantly different from the situation here. In *Moreno*, the court disqualified attorneys from continuing to represent a putative class because, without obtaining waivers, the attorneys represented members of the putative class in opposing the settlement of a related class action and the putative class also included members who favored settlement of the other case. Unlike the situation here, the putative class members who favored settlement of the other action were not unknown or unspecified individuals with whom no attorney-client relationship had yet developed, but three identified persons from whom the attorneys had obtained declarations and who the attorneys personally represented at depositions in

the action in which they were disqualified. While the attorneys were representing persons who objected to the settlement of the other action, the three individuals with whom they also had an attorney-client relationship "approved the settlement, submitted claim forms, and await payment." (*Id.* at p. *13.) Moreover, the attorneys had withheld information from the three clients who favored the settlement. Still further, the court found that the attorneys had committed two other ethical breaches while involved in the litigation from which they were disqualified. There was no similar misconduct by QW in this case. The logic of *Moreno* does not require disqualification here.

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Disposition

The order denying the motions to disqualify counsel in both cases is affirmed.

McGuiness, P. J., and Jenkins, J., concurred.

The petition of respondent Foot Locker Retail, Inc., for review by the Supreme Court was denied April 27, 2011, S190995.

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Cal. Evid. Code §§ 1115 - 1129

Cal. Evid. Code § 1115. Definitions

As used in this chapter:

- (a) “Mediation” means a process in which a neutral person or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement.

- (b) “Mediator” means a neutral person who conducts a mediation.

- (c) “Mediation consultation” means a communication between a person and a mediator for the purpose of initiating, considering, or reconvening a mediation or retaining the mediator.

Cal. Evid. Code § 1116. Admissibility; discovery

Nothing in this chapter renders admissible evidence that is inadmissible under Section 1152 or any other statutory provision, or affects the law relating to attorney work product or to the privilege established by Section 47.

Cal. Evid. Code § 1117. Written settlement agreements prepared in the course of or pursuant to mediation

(a) This chapter does not apply to:

1. A written settlement agreement prepared in the course of, or pursuant to, a mediation, unless the agreement provides that it is, or is not, enforceable or binding or words to that effect.

2. An oral agreement made in the course of, or pursuant to, a mediation, if the oral agreement is recorded by a court reporter or tape recorded by a reliable means of sound recording.

(b) This chapter does not limit the effect of any rule of law requiring that the terms of a contract be memorialized in a writing.

Cal. Evid. Code § 1118. Admissibility of evidence otherwise admissible or subject to discovery

Evidence otherwise admissible or subject to discovery outside of a mediation or a mediation consultation shall not become inadmissible or protected from disclosure solely by reason of its introduction or use in a mediation or a mediation consultation.

Cal. Evid. Code § 1119. Confidentiality of mediation communications and writings

Except as otherwise provided in this chapter:

- (a) No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery, and disclosure of the evidence shall not be compelled in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.

- (b) No writing, as defined in Section 250, that is prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery, and disclosure of the writing shall not be compelled in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.

- (c) All communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential.

Cal. Evid. Code § 1120. Admissibility of evidence otherwise admissible or subject to discovery

Evidence otherwise admissible or subject to discovery outside of a mediation or a mediation consultation shall not become inadmissible or protected from disclosure solely by reason of its introduction or use in a mediation or a mediation consultation.

Cal. Evid. Code § 1121. Mediator’s report or finding

Neither a mediator nor anyone else may submit to a court, and a court may not consider, any report, assessment, evaluation, recommendation, or finding by the mediator concerning a mediation conducted by the mediator, except as required by Section 1124 or 1126.

Cal. Evid. Code § 1122. Admissibility of communication or writing; disclosure

A communication or a writing, as defined in Section 250, that is made or prepared in the course of, or pursuant to, a mediation is not made inadmissible, or protected from disclosure, solely by reason of it being made or prepared in the course of, or pursuant to, a mediation, if either of the following conditions are satisfied:

- (a) All persons who conduct or otherwise participate in the mediation expressly agree in writing, or orally in accordance with Section 1118, to disclosure.

- (b) The communication, document, or writing does not disclose anything said or any admission made for the purpose of, in the course of, or pursuant to, the mediation.

Cal. Evid. Code § 1123. Admissibility of written settlement agreements

A written settlement agreement prepared in the course of, or pursuant to, a mediation, is not made inadmissible, or protected from disclosure, solely by reason of it being prepared in the course of, or pursuant to, a mediation, if the agreement is signed by the settling parties and any of the following conditions are satisfied:

- (a) The agreement provides that it is admissible or subject to disclosure, or words to that effect.

- (b) The agreement provides that it is enforceable or binding, or words to that effect.

- (c) All parties to the agreement expressly agree in writing, or orally in accordance with Section 1118, to its disclosure.

- (d) The agreement is used to show fraud, duress, or illegality that is relevant to an issue in dispute.

Cal. Evid. Code § 1124. Admissibility of oral agreements

An oral agreement made in the course of, or pursuant to, a mediation is not made inadmissible, or protected from disclosure, solely by reason of it being made in the course of, or pursuant to, a mediation, if either of the following conditions are satisfied:

- (a) The agreement is recorded by a court reporter or by a reliable means of sound recording.

- (b) The agreement is made orally before the mediator, all persons who made the oral agreement expressly agree to its disclosure, and the agreement is reduced to writing and signed by the parties within 72 hours after it is made.

Cal. Evid. Code § 1125. Termination of mediation

For purposes of confidentiality under this chapter, a mediation ends when any one of the following conditions is satisfied:

- (a) The parties execute a written settlement agreement that fully resolves the dispute.

- (b) An oral agreement that fully resolves the dispute is reached in accordance with Section 1118.

- (c) The mediator provides the participants with a writing stating that the mediation is terminated.

- (d) For 10 calendar days, there is no communication between the mediator and any of the parties to the mediation relating to the dispute.

Cal. Evid. Code § 1126. Effect of end of mediation

Anything said, any admission made, or any writing that is inadmissible, protected from disclosure, and confidential before a mediation ends, shall remain inadmissible, protected from disclosure, and confidential to the same extent after the mediation ends.

Cal. Evid. Code § 1127. Professional misconduct by mediator

Notwithstanding any other provision of this chapter, evidence of professional misconduct or malpractice by a mediator may be admissible in an action in court or any other adjudicative proceeding. The admissibility of such evidence is not affected by the confidentiality provisions of this chapter.

Cal. Evid. Code § 1128. Failure to comply with legal obligations

This chapter does not limit the admissibility of evidence of an attorney's failure to comply with legal obligations in proceedings governed by this code.

Cal. Evid. Code § 1129. Informed consent to mediation; oral explanation of confidentiality protections; written acknowledgment

- (a) A mediator shall inform the parties in writing of the confidentiality of the mediation process, including the confidentiality requirements under this chapter.

- (b) The mediator shall also explain the confidentiality provisions orally prior to the commencement of the mediation, unless all parties have been represented by counsel throughout the mediation process.

- (c) All parties shall acknowledge in writing that they understand the confidentiality rules and protections provided by this chapter.

Lynne Bassis
ADR SERVICES, INC.

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Mediating employment cases when insurance is in play

CONCEPTS AND PRINCIPLES OF EMPLOYMENT PRACTICES LIABILITY INSURANCE (EPLI) AND THEIR EFFECT ON MEDIATION

A frequent reprise: "there's no insurance." Have you ever wondered what this *really* means? Have you felt that you've run into a brick wall and wonder if there's any way under or around it? Have you wondered whether it's because you've agreed to an early (pre-filing or pre-discovery) mediation or whether the reprise might change as the lawsuit evolves? Have you wished you could verify the "no insurance" status?

This article attempts to shed light on issues surrounding these questions, as it explores the role of insurance in mediating employment cases while offering some practice pointers. It is *not* a primer on basic insurance coverage concepts and principles.

Types of insurance policies

There are multiple types of policies that potentially cover wrongful acts alleged in the employment lawsuit. Each policy type is unique for its definitions, coverages and exclusions. Notwithstanding the fact that nothing about coverage can be certain without reviewing the specific policy in play, seeking all policies should be a familiar refrain. Aside from Employment Practices Liability Insurance (EPLI), policies within which employment-related wrongful acts may be covered include: Commercial General Liability (CGL), Directors and Officers Liability (D&O), Errors & Omissions (E&O), Employers' Liability (EL), Employee Benefits Liability (EBL), Homeowners Liability or Workers' Compensation Insurance.

• ***Practice Pointer***

Plaintiff's counsel should be expansive when requesting insurance policies: "Any and all insurance policies which provide or potentially will provide coverage, including but not limited to: CGL, D&O, E&O, EL, EBL, Homeowners Liability, Workers' Compensation, excess, umbrella or any other type of insurance coverage."

EPLI history

Historically, non-EPLI policies excluded employment-related coverage. Within the last 25 years, EPLI has come into existence to fill this gap in coverage. Coverage can be in the form of an endorsement to a CGL policy or a stand-alone policy. In the opinion of one California EPLI broker, the EPLI market explosion in California has resulted in increased loss payouts and increased deductibles for insureds. This phenomenon, opined the broker, ultimately could make this market uninsurable. To whit, whereas $10,000 used to be a typical deductible for the EPLI product, it has increased today to $25,000, $30,000 or $50,000.

Types of claims EPLI covers

EPLI policies vary widely in their scope of coverage as well as terms and conditions.

Some policies may be very narrow, covering only wrongful termination. Others may include discrimination, harassment,

QUICK, GET ME A MEDIATOR!

retaliation, employment-related torts (e.g., misrepresentation, negligent supervision, training or evaluation, wrongful discipline, wrongful deprivation of a career opportunity, such as demotion or failure to promote) and claims under statutes such as Title VII, Equal Pay Act, Americans with Disabilities Act, Family Medical Leave Act and their state counterparts.

Typical exclusions include claims arising from or brought under statutes such as ERISA, NLRA, WARN and COBRA. Unemployment insurance benefits, labor disputes or negotiations (unless related to retaliation), breach of express written contract and misclassification are excluded. Some policies may exclude administrative complaints and some may cover them, seeing them as conditions precedent to the filing of a lawsuit. These days, EPLI policies exclude indemnity for wage-and-hour claims and frequently the cost of defense as well. Other exclusions typically include punitive damages and fines, whereas emotional distress damages associated with a covered loss are included. Again, only by reviewing the specific policy terms will the answer to whether a particular claim is covered become clearer.

• ***Practice Pointer***

If wage-and-hour claims are included in the EPLI policy, plaintiff's counsel should consider whether inclusion of the wage-and-hour claim will impact the case presentation in a negative way. If the gravamen of the case is violation of wage-and-hour law, the insurer will not be fooled by a feeble attempt to trigger coverage by including a throw-away claim for discrimination. On the other hand, a strong discrimination case may suffer by including the wage-and-hour claim, thus risking the possibility that the insurer may view the wage-and-hour claim as the driving force in the case. Consideration should be given to excluding it.

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• ***Practice Pointer***

Not all states prohibit insurance coverage for punitive damages. And unlike California, where a finding of malice, oppression or fraud is necessary to support a punitive-damages award, other states may permit punitive damages for conduct that would not justify a punitive award under California law, such as gross negligence or reckless conduct. In the case of a national policy where state law might govern, punitive damages not available in California may be permissible.

Duty to defend

A *duty to defend* obligates the insurer to provide competent counsel and pay costs (costs defined as including attorney's fees) for the defense of covered claims. This duty, up to the stated policy limits, includes: (a) claims *potentially* covered and (b) claims that would be covered if the factual allegations were true, even if they are in fact, groundless, false or fraudulent. A *duty to indemnify* obligates the insurer to pay settlements or judgments against the insured. Whereas the definitions appear to be straightforward, their application is not. Some EPLI policies offer only defense coverage whereas others offer both defense and indemnity.

Covered and non-covered claims

Once the duty to defend attaches, California generally requires an insurer to defend the entire lawsuit, including claims that are not potentially within the scope of coverage. But an insurer can reserve its rights to seek reimbursement for the cost of defending non-covered claims. Different policy forms may purport to limit the insurer's defense obligation to defending only potentially covered claims, but this argument has not yet been tested in California.

• ***Practice Pointer***

It is important to understand the difference between the insurer's *duty to defend* and the *duty to indemnify*, and the effect of the presence of both covered and non-covered claims in the lawsuit. As noted, discrimination and wage-and-hour claims are combined often in a lawsuit and wage-and-hour claims are not covered by EPLI insurance. Plaintiff's counsel may not appreciate that the insurer's indemnity (and therefore settlement) obligation pertains only to *covered* claims and may assume the insurer will defend and indemnify *all* claims. In this scenario, the mediator must point out that a barrier to settlement may have been created by inclusion of both covered and non-covered claims in the lawsuit. The insurer may assess the matter as primarily a wage-and-hour claim rather than a discrimination case that is covered under the EPLI policy, thus discharging its *duty to indemnify* in a very nominal way.

Claims made or occurrence coverage – Why it matters

Most EPLI policies are "*claims made and reported*" which require the *reporting* of wrongful conduct while the policy is in force, or during the *extended reporting period* (sometimes called a *tail),* if purchased. An "*occurrence*" policy provides coverage for injury, stemming from wrongful conduct, occurring within the policy period, irrespective of when the claim is reported.

• ***Practice Pointer***

Since most EPLI policies are written on a claims-made and reported basis, the insured is going to want to report to the insurer quickly to avoid a denial of coverage due to late reporting. Plaintiff's counsel should nudge the insured in the direction of reporting by including the following in its demand letter: "Please submit this to your carrier or insurance company to determine if appropriate coverage is available."

What triggers insured's duty to provide notice of the claim (tender) to insurer?

The policy itself will define circumstances in which the insured must inform the insurer that damages are being sought for wrongful conduct. The circumstances include the filing of a lawsuit or administrative complaint, the receipt of a demand letter or any circumstances that may give rise to a claim. Defense counsel has a responsibility to ask the insured about insurance. Sometimes a smaller employer may not know if insurance coverage has been purchased and may need to go on a hunting expedition within the business operations, including reaching out to the insurance broker who sold the policy, to get answers to whether there is available insurance.

After receiving a tender from the insured, what is the insurer's obligation?

A very complicated analysis occurs in determining whether coverage exists under a particular EPLI policy. Here's a taste: Is the alleged perpetrator covered by the policy? Is the employer or entity a named insured? Do any of the declarations, endorsements or exclusions suggest coverage does not exist for the wrongful conduct? Was the insured lax in paying premiums resulting in a policy cancellation? Did the insured make misrepresentations during the application process which led to rescission of the insurance policy?

Insurer's next move

Insurer will notify the insured of its decision regarding the presence or absence of insurance coverage. The most frequent response by the insurer, however, will be an agreement to defend the insured under a "*reservation of rights*." A *reservation of rights* means that uncertainty exists as to the insured's entitlement to coverage, be it a duty to defend only or a duty to defend and indemnify. By issuing a "*reservation of rights*" the insurer preserves its right to contest coverage at a later date when more is known about the claims.

• ***Practice Pointer***

Plaintiff's counsel should remember that as the litigation proceeds, a stronger argument may emerge that coverage exists. If this occurs, plaintiff's counsel should be proactive in his or her communication with defense counsel and press for the insurer to revisit the coverage issue.

What does "no insurance" mean?

A defense counsel's statement of "no insurance" is susceptible of multiple

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meanings: (a) insured did not purchase EPLI; (b) non-EPLI policies do not provide coverage for insured's claims; (c) insured is covered by EPLI but none of the causes of action pled in plaintiff's complaint (or suggested in counsel's demand letter) come within the parameters of *potential* (need not be actual) coverage; (d) insured failed to properly tender (e.g., insufficient information was provided); insured's tender was untimely (failed to tender claim within the active period of the policy or the *extended reported acts* period or (e) the conduct falls within Workers' Compensation.

• ***Practice Pointer***

Frequently defense counsel's statement of "no insurance" has a colloquial meaning, i.e., "we'll never get there." At the time of the negotiation and purchase of EPLI, the insured can elect to retain a certain amount of risk called a *self-insured retention* (SIR). The obligation for the insurer to make contributions to defense costs kicks in only after the SIR is exhausted. The "we'll never get there" comment may mean there is an applicable insurance policy in place, but the value of the case will never exceed the insured's SIR.

Obtaining insurance-coverage information

In the case of early mediation, before a lawsuit has been filed, it is more difficult, though not impossible, to obtain insurance information. From the insurer's perspective, the resistance to providing information before a lawsuit has been filed stems from concerns that: (a) plaintiff's counsel is not privy to the insurance coverage analysis and by turning over the policy too early, may assume there is coverage when there isn't; (b) policy limits will be communicated and this may fuel plaintiff's lawsuit; (c) allegations will be tailored to conform to the policy coverages and (d) the insured's application for insurance, made a part of the insurance contract, would raise confidentiality and privacy issues if disclosed.

After litigation has commenced, Civil Code of Procedure, section 2017.210 and the employment interrogatories set forth permissible information that can be obtained regarding insurance, including the policy number, kind of coverage, policy limits for each coverage type, whether the insured is self-insured and whether any reservation of rights or controversy or coverage dispute exists between the insured and the insurer.

• ***Practice Pointer***

Obtaining insurance information before a lawsuit is filed may be a futile effort. On the other hand, efforts to engage in early settlement discussions or mediation may lead to defense counsel's willingness to disclose whether insurance is available, especially if a policy limits demand is contemplated or has been made. One should always ask.

Policy limits and beyond: Opening the policy

This means the insurer is exposed to liability in excess of the limits of the insurance policy. How does this occur? Plaintiff makes a policy-limits demand during negotiations or mediation. The demand is rejected. A trial ensues. A verdict is returned for plaintiff in a sum in excess of the policy limits. The insured sues the insurer (or the insured assigns its rights against the insurer to the plaintiff who sues the insurer). A judge or jury concludes the insurer breached its duty of good faith and fair dealing to the insured, i.e., exercised *bad faith* in its rejection of plaintiff's policy-limits demand. The insurer is responsible for the entire judgment, even if beyond the policy limits.

Bad-faith test

The ultimate question at trial is "would a *reasonable insurer* have paid the policy limits knowing what it knew (or should have known) at the time the demand was made?" An unjustified refusal to pay the policy limits, as *a reasonable insurer* would do, which may leave the insured in financial ruin, constitutes bad faith.

Making a legally sound policy-limits demand

A decision to make a policy-limits demand should not be a casual or impulsive negotiation move. Both the content and timing of the demand are critical to its success. The demand should set forth all information, the absence of which would provide defenses to the insurer, if a bad-faith trial were to ensue.

A well-drafted policy-limits demand will do the following: (a) make the case that liability is clear, and damages will exceed the policy limits, by providing all pertinent information; (b) make a showing that the unequivocal demand covers all potential claims by all claimants against all insureds; (c) state that plaintiff will be responsible for all outstanding liens; (d) include a reasonable deadline for response to the demand; (e) be reasonable with respect to the insurer's request for additional time to complete its investigation; (f) state how a request for additional time to conduct an investigation will be handled and by what criteria plaintiff will grant or deny an extension request and (g) request that the insured be informed of plaintiff's policy-limits demand.

What constitutes a reasonable policy-limits demand?

Some math is illustrative of the answer. Simply stated, if the policy limit is $50,000, the insured has a 50 percent chance of prevailing and the demand to settle the case is no more than $25,000, the demand is deemed reasonable. With the same facts, if plaintiff is demanding policy limits to settle the case, i.e., $50,000, the demand will be deemed unreasonable.

Settlement considerations in mediation: Burning limits policies

EPLI policies are "*burning limits*" or "*self-consuming*" policies, meaning that all defense costs and settlement monies come out of the same pool of money. Given this, plaintiffs' counsel may employ different litigation strategies. One approach is for plaintiff's counsel to be conservative insofar as discovery and motion practice, knowing that defense costs diminish the monies available for indemnity. Another strategy is to not

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refrain from discovery and motion practice, knowing that as soon as the insured's SIR is spent, insurance monies will be available.

• ***Practice Pointer***

As plaintiff's counsel frames the initial demand and makes negotiation moves during mediation, it is helpful to know what part of the EPLI policy has been consumed by defense costs and attorney's fees. As negotiations unfold, some defense counsel may disclose or hint at the amount of available funds remaining on the policy whereas some may not. Plaintiff's counsel should estimate what remains on the policy based on the activity in the case and the typically lower than market hourly rate for insurance defense counsel.

Insured's consent to a settlement

At first blush, given the oft-seen acrimony and discord between the plaintiff and the insured, it might appear that the insured could thwart a settlement. The "*Hammer Clause*" in an EPLI policy protects against this. It requires the insured to consent to a settlement, which must not be "unreasonably withheld." Depending on the specific policy, the "*Hammer Clause*" might relieve the insurer of payment of defense costs or a settlement beyond that for which the case could have been settled, but for the insured's refusal to consent. Other policies provide that any settlement and defense costs, beyond that for which the case could have settled at an earlier point in time, will be shared by the insured and insurer in a proportionate allocation. Some policies permit settlement without the insured's consent. Although governed by the policy terms, the resolution of this issue appears to be dynamic and negotiable.

• ***Practice Pointer***

Sometimes plaintiff and counsel may wonder what the delay is in the defense room. The delay may be related to an ongoing dialogue circling around the insured's belief that there was no wrongdoing and/or concern that settlement of the case might create an onslaught of future lawsuits. The insurer sees liability exposure. The fact that most insurers want to reach a consensus with the insured keeps the insurer from adopting a "that's your problem — we want to settle this case!" position. The hammer clause keeps the insured in line. Striking a balance around this important issue can be time-consuming, but ultimately may be the make or break of a settlement.

Understanding the insurer's mindset

The facts should be presented in a straightforward fashion, omitting hyperbole or embellishment. The insurer wants to make a hard core dollar evaluation, based on real economic damages and a nebulous amount for non-economic damages. The same case may command top dollar in one case and a lesser amount in another. The "X factor" is the identity of and reputation of plaintiff's lawyer. If plaintiff is seeking only the maximum dollar on his or her best day in court, a jury may need to speak.

• ***Practice Pointer***

Do not exaggerate the loss. If the loss is nominal, but attorney's fees loom large, say so and explain the legal issues that will be brought to bear.

Become a co-conspirator with the adjuster

Since the adjuster is the conduit between plaintiff and the insurer, it will help to become his or her ally, not harasser, and work collaboratively to identify obstacles the adjuster faces and brainstorm workarounds. The adjuster will appreciate being provided with a very thorough written presentation of the case two to four weeks before the mediation. This will give the adjuster ample time for the various levels of authority to weigh in on the case and for reserves to be set. Withholding critical information from the written analysis and springing it on the adjuster in mediation will not serve plaintiff well. Why? The surprise information will not have been vetted and it will not be taken at face value. Moreover, although it's 5:00 pm or 6:00 p.m. on the West Coast, it's the evening hours on the East Coast and a New York carrier will not be inclined to increase reserves, after hours, on a moment's notice.

• ***Practice Pointer***

Consider pre-qualifying the dispute before the mediation occurs. Has there been a preliminary discussion of money in advance of the mediation? Has the insurer done its due diligence in setting reserves? Is *real* authority planning to attend the mediation and if not, will this prevent a meaningful mediation from occurring? If the response is "not your business," plaintiff's counsel's reply could be: "just checking because until these things have occurred, mediation would be premature. We want everyone on your side of the table who has an interest in the case to know we're not just testing the waters." This type of discussion will yield far more benefit than becoming hostile, dismissing the adjuster as being incompetent or not having "real" authority or taking issue with the entire insurance industry.

Showcasing plaintiff during the mediation

If plaintiff makes a good impression, plaintiff's counsel should consider orchestrating a presentation that puts plaintiff in the center of the stage. If plaintiff will not play well to a jury, reduced interaction between plaintiff and the adjuster is best. Some adjusters insist on meeting plaintiff before offering settlement dollars.

• ***Practice Pointer***

Remember, adjusters live and breathe these cases – after this one, the adjuster will face plenty more sitting on his or her desk. Plaintiff's counsel should avoid a cookie-cutter approach to mediation, even if the adjuster wishes to proceed in a formulaic manner. If plaintiff will speak, be certain the presentation is entertaining and is successful in segregating this case from all the others in the adjuster's office.

Don't forget the insured

Understand the respective roles of the insured employer and the insurer. Unlike in years past, before EPLI times,

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employers played a primary role in the mediation negotiations. Today, employers may feel that they are being marginalized during the mediation. Whereas employment mediation is not novel for the insurer, it may be a new experience, and quite an upsetting one at that, for the insured.

• ***Practice Pointer***

Plaintiff's counsel may want to seek a few minutes of face time with the insured. By reassuring the insured that the goal is not to put the insured out of business, by demonstrating an understanding that litigation is very disruptive to the insured's business, by showing appreciation for the fact that the insured may feel very negative about the plaintiff and by emphasizing that there's a strong desire to resolve the case quickly and fairly, a human factor is added that may be missing. These efforts may even help the defense counsel obtain the insured's consent to settle.

Mediating when a coverage dispute is looming

Mediating both the coverage and liability cases at the same time can be advantageous. The nature of the dispute will dictate the feasibility of this. In a duty to defend dispute, the insured will be responsible for plaintiff's damages and the mediation need not be postponed pending the resolution of this type of dispute. If the dispute is over the duty to indemnify, parties may insist on knowing the amount of loss before entering into mediation.

• ***Practice Pointer***

This indemnification coverage uncertainty could be used by the mediator to push all parties toward settlement. Knowing of the indemnity dispute, plaintiff's counsel may be receptive to a lower settlement paid out sooner. The presence of the third-party case may incentivize the insurer to contribute a greater amount to a settlement versus battling the indemnification issue with the insured. On the other hand, the insurer may offer less money to settle the case, seeking a discount on its contribution because of the indemnity question. The insured's offer may be paltry, given the indemnification uncertainty. By folding coverage counsel into the mediation, the coverage decision is able to be adjusted in real time, and this could lead to settlement.

Conclusion

Hopefully this article leaves the advocate feeling that the brick wall erected around EPLI is now a porous one, that early mediation does not have to be an insurmountable hurdle and that the "no coverage" mantra may change during the pendency of the lawsuit. Ultimately, by appreciating the insurance industry world and the needs of those who operate within it, and being willing to adjust attitude and practice, the mediation experience can be more fruitful, and the likelihood of settlement of an employment case, enhanced. At the very least, the advocate may understand that insurance professionals are not just "fill in the blank," but that they have a job to do and are functioning within and according to the insurance industry's norms.

Author's note:

I would like to extend my appreciation to individuals who offered their insights into the subject matter of this article, including insurance defense counsel, defense counsel, EPLI brokers and my mediator colleagues. Resources relied upon include: Chin, Cathcart, Exelrod & Wiseman, Cal. Practice Guide*: Employment Litigation (The Rutter Group 2016) ¶¶ 3:1 to 3:835, pp. 3-1 to 3-82; Friedman, Litigating Employment Discrimination Cases (James Publishing Revision 9, 11/14), volume 2, §§ 12:01 to 12:255, pp. 12-1 to 12-186; Advising California Employers and Employees: (Cont.Ed.Bar 2017) Coverage for Employment Claims, Part VII, chap 19, §§ 19.1 to 19.24, pp. 2-25.*

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MODEL STANDARDS OF CONDUCT FOR MEDIATORS

AMERICAN ARBITRATION ASSOCIATION

(ADOPTED SEPTEMBER 8, 2005)

AMERICAN BAR ASSOCIATION

(ADOPTED AUGUST 9, 2005)

ASSOCIATION FOR CONFLICT RESOLUTION

(ADOPTED AUGUST 22, 2005)

SEPTEMBER 2005

The Model Standards of Conduct for Mediators
September 2005

The *Model Standards of Conduct for Mediators* was prepared in 1994 by the American Arbitration Association, the American Bar Association's Section of Dispute Resolution, and the Association for Conflict Resolution[1]. A joint committee consisting of representatives from the same successor organizations revised the Model Standards in 2005.[2] Both the original 1994 version and the 2005 revision have been approved by each participating organization.[3]

Preamble

Mediation is used to resolve a broad range of conflicts within a variety of settings. These Standards are designed to serve as fundamental ethical guidelines for persons mediating in all practice contexts. They serve three primary goals: to guide the conduct of mediators; to inform the mediating parties; and to promote public confidence in mediation as a process for resolving disputes.

Mediation is a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision making by the parties to the dispute.

Mediation serves various purposes, including providing the opportunity for parties to define and clarify issues, understand different perspectives, identify interests, explore and assess possible solutions, and reach mutually satisfactory agreements, when desired.

Note on Construction

These Standards are to be read and construed in their entirety. There is no priority significance attached to the sequence in which the Standards appear.

The use of the term "shall" in a Standard indicates that the mediator must follow the practice described. The use of the term "should" indicates that the practice described in the standard is highly desirable, but not required, and is to be departed from only for very strong reasons and requires careful use of judgment and discretion.

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[1] The Association for Conflict Resolution is a merged organization of the Academy of Family Mediators, the Conflict Resolution Education Network and the Society of Professionals in Dispute Resolution (SPIDR). SPIDR was the third participating organization in the development of the 1994 Standards.

[2] Reporter's Notes, which are not part of these Standards and therefore have not been specifically approved by any of the organizations, provide commentary regarding these revisions.

[3] The 2005 revisions to the Model Standards were approved by the American Bar Association's House of Delegates on August 9, 2005, the Board of the Association for Conflict Resolution on August 22, 2005 and the Executive Committee of the American Arbitration Association on September 8, 2005.

The use of the term "mediator" is understood to be inclusive so that it applies to co-mediator models.

These Standards do not include specific temporal parameters when referencing a mediation, and therefore, do not define the exact beginning or ending of a mediation.

Various aspects of a mediation, including some matters covered by these Standards, may also be affected by applicable law, court rules, regulations, other applicable professional rules, mediation rules to which the parties have agreed and other agreements of the parties. These sources may create conflicts with, and may take precedence over, these Standards. However, a mediator should make every effort to comply with the spirit and intent of these Standards in resolving such conflicts. This effort should include honoring all remaining Standards not in conflict with these other sources.

These Standards, unless and until adopted by a court or other regulatory authority do not have the force of law. Nonetheless, the fact that these Standards have been adopted by the respective sponsoring entities, should alert mediators to the fact that the Standards might be viewed as establishing a standard of care for mediators.

STANDARD I. SELF-DETERMINATION

A. A mediator shall conduct a mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome. Parties may exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in or withdrawal from the process, and outcomes.

1. Although party self-determination for process design is a fundamental principle of mediation practice, a mediator may need to balance such party self-determination with a mediator's duty to conduct a quality process in accordance with these Standards.

2. A mediator cannot personally ensure that each party has made free and informed choices to reach particular decisions, but, where appropriate, a mediator should make the parties aware of the importance of consulting other professionals to help them make informed choices.

B. A mediator shall not undermine party self-determination by any party for reasons such as higher settlement rates, egos, increased fees, or outside pressures from court personnel, program administrators, provider organizations, the media or others.

STANDARD II. IMPARTIALITY

A. A mediator shall decline a mediation if the mediator cannot conduct it in an impartial manner. Impartiality means freedom from favoritism, bias or prejudice.

B. A mediator shall conduct a mediation in an impartial manner and avoid conduct that gives the appearance of partiality.

1. A mediator should not act with partiality or prejudice based on any participant's personal characteristics, background, values and beliefs, or performance at a mediation, or any other reason.

2. A mediator should neither give nor accept a gift, favor, loan or other item of value that raises a question as to the mediator's actual or perceived impartiality.

3. A mediator may accept or give de minimis gifts or incidental items or services that are provided to facilitate a mediation or respect cultural norms so long as such practices do not raise questions as to a mediator's actual or perceived impartiality.

C. If at any time a mediator is unable to conduct a mediation in an impartial manner, the mediator shall withdraw.

STANDARD III. CONFLICTS OF INTEREST

A. A mediator shall avoid a conflict of interest or the appearance of a conflict of interest during and after a mediation. A conflict of interest can arise from involvement by a mediator with the subject matter of the dispute or from any relationship between a mediator and any mediation participant, whether past or present, personal or professional, that reasonably raises a question of a mediator's impartiality.

B. A mediator shall make a reasonable inquiry to determine whether there are any facts that a reasonable individual would consider likely to create a potential or actual conflict of interest for a mediator. A mediator's actions necessary to accomplish a reasonable inquiry into potential conflicts of interest may vary based on practice context.

C. A mediator shall disclose, as soon as practicable, all actual and potential conflicts of interest that are reasonably known to the mediator and could reasonably be

seen as raising a question about the mediator's impartiality. After disclosure, if all parties agree, the mediator may proceed with the mediation.

D. If a mediator learns any fact after accepting a mediation that raises a question with respect to that mediator's service creating a potential or actual conflict of interest, the mediator shall disclose it as quickly as practicable. After disclosure, if all parties agree, the mediator may proceed with the mediation.

E. If a mediator's conflict of interest might reasonably be viewed as undermining the integrity of the mediation, a mediator shall withdraw from or decline to proceed with the mediation regardless of the expressed desire or agreement of the parties to the contrary.

F. Subsequent to a mediation, a mediator shall not establish another relationship with any of the participants in any matter that would raise questions about the integrity of the mediation. When a mediator develops personal or professional relationships with parties, other individuals or organizations following a mediation in which they were involved, the mediator should consider factors such as time elapsed following the mediation, the nature of the relationships established, and services offered when determining whether the relationships might create a perceived or actual conflict of interest.

STANDARD IV. COMPETENCE

A. A mediator shall mediate only when the mediator has the necessary competence to satisfy the reasonable expectations of the parties.

1. Any person may be selected as a mediator, provided that the parties are satisfied with the mediator's competence and qualifications. Training, experience in mediation, skills, cultural understandings and other qualities are often necessary for mediator competence. A person who offers to serve as a mediator creates the expectation that the person is competent to mediate effectively.

2. A mediator should attend educational programs and related activities to maintain and enhance the mediator's knowledge and skills related to mediation.

3. A mediator should have available for the parties' information relevant to the mediator's training, education, experience and approach to conducting a mediation.

B. If a mediator, during the course of a mediation determines that the mediator cannot conduct the mediation competently, the mediator shall discuss that determination with the parties as soon as is practicable and take appropriate steps

to address the situation, including, but not limited to, withdrawing or requesting appropriate assistance.

C. If a mediator's ability to conduct a mediation is impaired by drugs, alcohol, medication or otherwise, the mediator shall not conduct the mediation.

STANDARD V. CONFIDENTIALITY

A. A mediator shall maintain the confidentiality of all information obtained by the mediator in mediation, unless otherwise agreed to by the parties or required by applicable law.

1. If the parties to a mediation agree that the mediator may disclose information obtained during the mediation, the mediator may do so.

2. A mediator should not communicate to any non-participant information about how the parties acted in the mediation. A mediator may report, if required, whether parties appeared at a scheduled mediation and whether or not the parties reached a resolution.

3. If a mediator participates in teaching, research or evaluation of mediation, the mediator should protect the anonymity of the parties and abide by their reasonable expectations regarding confidentiality.

B. A mediator who meets with any persons in private session during a mediation shall not convey directly or indirectly to any other person, any information that was obtained during that private session without the consent of the disclosing person.

C. A mediator shall promote understanding among the parties of the extent to which the parties will maintain confidentiality of information they obtain in a mediation.

D. Depending on the circumstance of a mediation, the parties may have varying expectations regarding confidentiality that a mediator should address. The parties may make their own rules with respect to confidentiality, or the accepted practice of an individual mediator or institution may dictate a particular set of expectations.

STANDARD VI. QUALITY OF THE PROCESS

A. A mediator shall conduct a mediation in accordance with these Standards and in a manner that promotes diligence, timeliness, safety, presence of the appropriate participants, party participation, procedural fairness, party competency and mutual respect among all participants.

1. A mediator should agree to mediate only when the mediator is prepared to commit the attention essential to an effective mediation.

2. A mediator should only accept cases when the mediator can satisfy the reasonable expectation of the parties concerning the timing of a mediation.

3. The presence or absence of persons at a mediation depends on the agreement of the parties and the mediator. The parties and mediator may agree that others may be excluded from particular sessions or from all sessions.

4. A mediator should promote honesty and candor between and among all participants, and a mediator shall not knowingly misrepresent any material fact or circumstance in the course of a mediation.

5. The role of a mediator differs substantially from other professional roles. Mixing the role of a mediator and the role of another profession is problematic and thus, a mediator should distinguish between the roles. A mediator may provide information that the mediator is qualified by training or experience to provide, only if the mediator can do so consistent with these Standards.

6. A mediator shall not conduct a dispute resolution procedure other than mediation but label it mediation in an effort to gain the protection of rules, statutes, or other governing authorities pertaining to mediation.

7. A mediator may recommend, when appropriate, that parties consider resolving their dispute through arbitration, counseling, neutral evaluation or other processes.

8. A mediator shall not undertake an additional dispute resolution role in the same matter without the consent of the parties. Before providing such service, a mediator shall inform the parties of the implications of the change in process and obtain their consent to the change. A mediator who undertakes such role assumes different duties and responsibilities that may be governed by other standards.

9. If a mediation is being used to further criminal conduct, a mediator should take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.

10. If a party appears to have difficulty comprehending the process, issues, or settlement options, or difficulty participating in a mediation, the mediator should explore the circumstances and potential accommodations,

modifications or adjustments that would make possible the party's capacity to comprehend, participate and exercise self-determination.

B. If a mediator is made aware of domestic abuse or violence among the parties, the mediator shall take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.

C. If a mediator believes that participant conduct, including that of the mediator, jeopardizes conducting a mediation consistent with these Standards, a mediator shall take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.

STANDARD VII. ADVERTISING AND SOLICITATION

A. A mediator shall be truthful and not misleading when advertising, soliciting or otherwise communicating the mediator's qualifications, experience, services and fees.

1. A mediator should not include any promises as to outcome in communications, including business cards, stationery, or computer-based communications.

2. A mediator should only claim to meet the mediator qualifications of a governmental entity or private organization if that entity or organization has a recognized procedure for qualifying mediators and it grants such status to the mediator.

B. A mediator shall not solicit in a manner that gives an appearance of partiality for or against a party or otherwise undermines the integrity of the process.

C. A mediator shall not communicate to others, in promotional materials or through other forms of communication, the names of persons served without their permission.

STANDARD VIII. FEES AND OTHER CHARGES

A. A mediator shall provide each party or each party's representative true and complete information about mediation fees, expenses and any other actual or potential charges that may be incurred in connection with a mediation.

1. If a mediator charges fees, the mediator should develop them in light of all relevant factors, including the type and complexity of the matter, the qualifications of the mediator, the time required and the rates customary for such mediation services.

2. A mediator's fee arrangement should be in writing unless the parties request otherwise.

B. A mediator shall not charge fees in a manner that impairs a mediator's impartiality.

1. A mediator should not enter into a fee agreement which is contingent upon the result of the mediation or amount of the settlement.

2. While a mediator may accept unequal fee payments from the parties, a mediator should not use fee arrangements that adversely impact the mediator's ability to conduct a mediation in an impartial manner.

STANDARD IX. ADVANCEMENT OF MEDIATION PRACTICE

A. A mediator should act in a manner that advances the practice of mediation. A mediator promotes this Standard by engaging in some or all of the following:

1. Fostering diversity within the field of mediation.

2. Striving to make mediation accessible to those who elect to use it, including providing services at a reduced rate or on a pro bono basis as appropriate.

3. Participating in research when given the opportunity, including obtaining participant feedback when appropriate.

4. Participating in outreach and education efforts to assist the public in developing an improved understanding of, and appreciation for, mediation.

5. Assisting newer mediators through training, mentoring and networking.

B. A mediator should demonstrate respect for differing points of view within the field, seek to learn from other mediators and work together with other mediators to improve the profession and better serve people in conflict.