

A Summary of the Impact of Senate Bill 1876 and Senate Bill 1369 on Mediations

By: Senior District Judge Rick Morris
with credits to Mike Amis and Tom Forbes

I attended the Annual Judicial Conference in September 2016, where SB 1876 & SB 1369 were a topic of discussion. They will impact our business of mediation. The following is my summary of the bills together with a little history. I will focus my attention primarily on the areas that affect mediators, and not other appointments.

Background

The 84th Legislature passed these two bills providing procedures and reporting requirements for court appointments, including mediators. SB 1876 enacted procedures for courts to follow when appointing attorneys ad litem, guardians ad litem, guardians and mediators. SB 1369 added new reporting requirements regarding the appointment and payment of persons covered under SB 1876. SB 1876 (appointing procedures) became effective May 1, 2015, and SB 1369 (reporting procedures) became effective September 1, 2016.

Before these two Senate Bills, the Supreme Court issued Misc. Docket No. 07-9188, in 2007, mandating reporting of fees paid to mediators and others every month when the amount paid was \$500 or more from court appointments. Many courts did not pay much attention to this Order, and sometimes ignored it altogether. This Supreme Court Order was terminated on August 29, 2016. Although SB 1876 (appointing procedures) became effective September 1, 2015, it seemed to fly under the radar, did not receive a high priority, and was also sometimes ignored. However, the full impact of these two bills became apparent when the September 1, 2016, reporting requirements kicked in. The reporting requirements cannot be ignored because failure to report will make the court ineligible for *any grant money awarded by the state or a state agency for the next state fiscal biennium*.

Chapter 37 (SB 1876) – Appointing Requirements

SB 1876 (appointing procedures) added Chapter 37 to the Government Code. It provides for the procedure for appointments of mediators and others in counties with a population of 25,000 or more. It applies to any court. It further mandates that a court is required to make an appointment of a mediator whose name appears first on a list of mediators to be maintained by the court. Once appointed, that mediator's name is moved to the end of the list. This list is composed of individuals who are “qualified to serve” in that capacity and those who “register” with the court. There is no guidance in the law to determine if a person is “qualified to serve.” Interestingly, all appointments (attorneys ad litem, guardians, ad litem, guardians, and competency evaluators) are required to be “qualified to serve,” except there is *no requirement for mediators to be qualified*. All the mediators have to do is to simply register. While there may not be qualification requirements in Chapter 37, we still have the qualification requirements in Sect. 154.052, Civil Practice and Remedies Code. That section requires 40 classroom hours of training plus an additional 24 hours training for family law. Chapter 37 does not allow a court to

create its own list based on the court's knowledge. To be placed on the court's list, courts across the state are requiring mediators to fill out a form stating their qualifications and requesting to be placed on the list. The parties may select their own mediator in which case there is no "appointment" by the court within the meaning of Chapter 37 and, hence, no duty to report under Chapter 36.

On a finding of good cause, the court may deviate from the rotation if the appointment of the specific mediator is required on a complex matter because the person:

- 1) possesses relevant specialized education, training, certification, skill, language proficiency, or knowledge of the subject matter of the case;
- 2) has relevant prior involvement with the parties or case; or
- 3) is in a relevant geographic location.

The finding of good cause should be reflected in the court's order appointing the mediator. Due to limited resources and time, courts are not likely to frequently utilize this section.

Posting the Lists

All courts are required to maintain the lists but the court's Local Administrative Judge (LAJ) is required to maintain the list at the request of one or more of the courts the judge serves. The courts are required to annually post the list "at the courthouse of the county in which the court is located and on any Internet website of the court."

Chapter 36 (SB 1369) Reporting Requirements

SB 1369, found in Chapter 36 of the Government Code, added reporting requirements effective September 1, 2016, with the first report (of Sept. activity) due October 15, 2016. This is a comprehensive reporting requirement that mandates, among other things, the following:

- name of person appointed;
- the judge name and date of order appointing;
- number and style of the case;
- number of cases each person was appointed in the month;
- the total amount of compensation paid to the appointee and the source of compensation, even if the source is from private funds; and
- if the compensation to any one person exceeds \$1,000, the number of hours billed for the work performed and the billed expenses.

This includes cases that are sealed or made confidential by local rule. A report is required when an appointment is made, and when a fee has been paid. These reports are required to be filed with OCA, published with the court and on the court's website.

Exceptions to Reporting Requirements

The good news is that reporting is not required *on cases where the parties agree on the mediator.*

However, if the judge selects the mediator, the wheel must be utilized and reports must be made, even if the mediator is paid from private funds. Some courts are interpreting that in all Orders designating a mediator selected by the parties, the fees must be reported. Other courts have determined that if the Order designates a mediator selected by the parties, the fees need not be reported.

The new reporting requirements also do not apply to:

- 1) a mediation conducted by an alternative dispute resolution system established under Ch. 152, CPRC;
- 2) information made confidential under state or federal law (i.e. parental bypass laws). However, cases sealed, made confidential by local rule, and mental health cases must be reported;
- 3) a guardian ad litem or other person appointed under a program authorized by Sec. 107.031, Family Code (CASAs); or
- 4) an attorney ad litem, guardian ad litem, amicus attorney, or mediator appointed under a domestic relations office established under Ch. 203, Family Code.
- 5) a mediation conducted by a mediator selected by agreement of the parties.

Additionally, The Office of Court Administration has interpreted Chapter 36 to not apply to civil and family cases where the local rules mandate mediation for nearly all cases and the court does not maintain a list of mediators.

Constitutionality of SB 1876

On September 21, 2015, Representative Harold V. Dutton, Jr. filed a request for an Attorney General opinion regarding the constitutionality of SB 1876. Representative Dutton asked whether the Act violates the doctrine of separation of powers because it deprives judges of their discretion in making court appointments, and improperly interferes with how a court manages its docket. The Attorney General issued its opinion on March 17, 2016, in Opinion No. KP-0071, concluding that “A court is unlikely to conclude that Senate Bill 1876...is unconstitutional.”

However, Judge Judy Warne, 257th District Court of Harris County recently ruled SB 1876 to be unconstitutional as an attempt to legislate away the court’s judicial independence. To my knowledge, there was no appeal of this decision. Since I cannot locate any judge from anywhere who is happy about this law, it would not surprise me to find more orders on the unconstitutionality of SB 1876.

Some practical applications of SB 1876 and SB 1369

These two bills, like so many other laws emanating from the legislature, are unfunded mandates, with onerous reporting requirements, duties and responsibilities and no corresponding resources for the courts to implement the legislature’s mandates. As a result, many counties, like my home Bell County, are refusing to sign *any* order, agreed or otherwise, appointing a named mediator. Consequently, Bell County does not maintain a list of mediators. Bell County believes that even

signing an agreed order triggers the reporting requirement.

Travis County, on the other hand, does maintain a mediators list. To be on the list, Travis County requires that the mediator fill out a registration form setting forth the mediators qualifications. This form will be reviewed by a committee and, if approved, the mediator will be placed on the list. If an agreed order appointing a mediator is signed by the judge, the mediator's name and fee will be reported pursuant to Ch. 36, even if that mediator is not on the list.

In Summary

As stated above, all DRC's are exempt from the reporting requirements of Chapter 36. Further, most mediators are selected by agreement as lawyers typically oppose a mediator being imposed upon them, thus avoiding a court "appointment" so as to require reporting. Finally, OCA has interpreted Chapter 36 reporting is not required in counties where mediation is mandated in nearly all cases and the court does not maintain a list of mediators. It would seem then that these bills might not have a large effect or impact on our mediation business as a whole. However, many courts are being cautious and are soliciting fee information from us on any mediation orders they sign, agreed or otherwise, and whether the mediator is on the list or not.

It will be interesting to see what else may be coming from the Legislature this session to regulate and control the mediation business. For example, could OCA and the Legislature be using these bills as the first step in requiring all mediations to come from the wheel? Time will tell.

Rick Morris
Mediator/Arbitrator
Senior District Judge
P.O. Box 1163
Salado, TX 76571
(254) 718-3388
www.judgerickmorris.com