JUDICIAL COUNCIL AUTHORITY AND THE PROPOSED AMENDMENT TO CALIFORNIA RULES OF COURT, RULE 3.1380

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I. Introduction

To the relief of some and the chagrin of others, last year's *Jeld-Wen*[1] decision dealt a blow to the mediation industry by prohibiting courts from ordering parties to attend and pay for private mediation. The *Jeld-Wen* court clearly articulated the definition of mediation as follows:

> Mediation is defined as a "process in which a neutral person or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement." [Citations omitted.] During this process, a neutral third party with no decisionmaking power intervenes in the dispute to help the litigants voluntarily reach their own agreement. (*Jeld-Wen*, supra at 540.)[2]

The Court of Appeal found that ordering parties to mediation is contrary to the voluntary essence of mediation. Accordingly, the Court held that trial courts "lack authority to force a party to attend and pay for mediation over the party's objection because such an order conflicts with the statutory scheme pertaining to mediation." (*Id*. at 543.)

Since *Jeld-Wen*, parties and courts have attempted to use the mandatory settlement conference procedure as a means of circumventing the *Jeld-Wen* decision's ban on court ordered private mediation.[3] Historically, mandatory settlement conferences were conducted exclusively by the court, at the expense of the county. However, courts now attempt to refer cases to privately compensated referees to conduct mandatory settlement conferences at the expense of the parties. One district Court of Appeal previously held that a court is not prohibited from appointing a referee under Code of Civil Procedure ("CCP") Section 639[4] to conduct a mandatory settlement conference in a complex case, despite the fact that the express terms of the statute confer no such authority on the courts.[5] This Court of Appeal opinion, and recent proposals to adopt its holding in the California Rules of Court, are discussed at length below.

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[1] *Jeld-Wen, Inc. v. Superior Court* (2007) 146 Cal.App.4th 536.

[2] Citing CCP Section 1775.1(a), Evidence Code Section 1115, and CRC Rule 3.852(1).

[3] "Court ordered private mediation," as used herein, does not refer to mediation pursuant to CCP Section 1775 et seq., which authorizes the court to order parties to mediation when the amount in controversy is less than $50,000.

[4] CCP Section 639 permits a court to appoint a referee without the parties' consent in just five specific instances, which do not include reference to conduct a mandatory settlement conference.

[5] See *Lu v. Superior Court* (1997) 55 Cal.App.4th 1264.

The most recent attempt to circumvent the *Jeld-Wen* holding and continue the practice of appointing privately compensated referees to conduct what is essentially mediation comes in a proposal to amend the California Rules of Court ("CRC"), Rule 3.1380.[6] The proposed amendment would enable a court to simply apply the mandatory settlement conference label to what is essentially mediation, and appoint a privately compensated referee to conduct multiple so-called "mandatory settlement conferences" at the parties' expense. As discussed below, the Judicial Council has no authority to adopt such a rule, and privately compensated referees cannot conduct a mandatory settlement conference.

II. Proposed Amendment to California Rules of Court, Rule 3.1380

A. Rule 3.1380 and the Proposed Amendment

Rule 3.1380 currently authorizes a court to set a mandatory settlement conference and order parties to attend. Rule 3.920(b) prohibits a court from using the judicial reference procedure under CCP Section 639 to appoint a mediator. The Advisory Committee Comment to Rule 3.920(b) states that it is not intended to prohibit a court from appointing a referee to conduct a mandatory settlement conference in a complex case. These rules, by inference, purport to operate on the assumption that there is some inherent functional difference between court ordered mediation and mandatory settlement conferences. However, neither the Rules of Court, the Code of Civil Procedure, nor caselaw on the subject has ever clearly drawn a distinction between mediation and mandatory settlement conference. So, while the *Jeld-Wen* decision prohibits a court from ordering parties to attend and pay for private mediation, Rule 3.1380 and cases such as *Lu v. Superior Court*, infra, attempt to allow a court to set multiple mandatory settlement conferences and appoint private referees to conduct them. This results in a practice where mediation is labeled a mandatory settlement conference in an attempt to circumvent the *Jeld-Wen* holding by blurring the distinction between these two dispute resolution processes.

The proposed amendment to Rule 3.1380 purports to clarify the distinction. The proposed Advisory Committee Comment to the proposed amendment reads, in pertinent part, as follows:

> To prevent confusion about the confidentiality of the proceedings, it is important to clearly distinguish between settlement conferences held under this rule and mediations. The special confidentiality requirements for mediations established by Evidence Code sections 1115-1128 expressly do not apply to settlement conferences under this rule.

[6] The proposed amendment would add Subsection (d), allowing a court to appoint a referee to conduct one or more settlement conferences, and be compensated by the parties. The full text of the proposed amendment is included in these West Coast Casualty Conference materials.

While this creates one distinction between mandatory settlement conferences and mediation -- the lack of confidentiality requirements applicable to mediation -- it does nothing to clarify the functional difference between mandatory settlement conferences and mediation. In fact, the proposed amendment further blurs the line between the two. Whether labeled court ordered mediation or a mandatory settlement conference, each includes judicial reference of a dispute to a privately compensated neutral third party for resolution outside of court.

The proposed amendment to Rule 3.1380 would allow a court to set multiple mandatory settlement conferences -- which have no functional distinction from prohibited court ordered mediation -- at the parties' expense, in circumvention of the Code of Civil Procedure and the *Jeld-Wen* decision. Because the California Rules of Court are only valid to the extent that they are consistent with statute, the Judicial Council has no authority to adopt the proposed amendment.

B. Rules Adopted by the Judicial Council Cannot Be Inconsistent With Statute

The Judicial Council's authority to adopt rules is limited by the California Constitution, which states:

> To improve the administration of justice the council shall survey judicial business and make recommendations annually to the Governor and Legislature, adopt rules for court administration, practice and procedure, and perform other functions prescribed by statute. The rules adopted shall not be inconsistent with statute. (Emphasis added.) (California Constitution, Article VI, § 6(d).)

The Judicial Council has no authority to adopt the proposed amendments to Rule 3.1380 because the amendments are inconsistent with CCP Section 639.

The Court of Appeal examined the meaning of the mandate that rules adopted by the Judicial Council "shall not be inconsistent with statute" in *California Court Reporters Association, Inc. v. Judicial Council of California* (1995) 39 Cal.App.4th 15 (herein "*CCRA*"). In *CCRA* the Judicial Council promulgated rules of court allowing for electronic recording of official superior court proceedings.[7] CCP Section 269 provides that the official record of superior court proceedings be taken down in shorthand by a certified court reporter. The California Court Reporters Association sought a petition for writ of mandate to prevent electronic recording under the newly promulgated rules of court, arguing that the rules were inconsistent with statute, in violation of Article VI, § 6 of the California Constitution.

In analyzing the issue, the Court of Appeal recognized that the Judicial Council's right to promulgate rules of procedure is secondary to the Legislature, which right the Council may only exercise when the higher authority of the Legislature has not been exercised. (*Id*. at 22.) "[The Judicial Council's] rulemaking authority is limited by existing law as enacted by the Legislature, thus making the legislative branch an inherently higher authority than the Judicial Council

[7] Former CRC Rules 33(e), 891, 892, 980.3.

itself." (*Id.*) Therefore, "the challenged rules must be measured for consistency against the legislative enactments." (*Id.*)

Next, the CCRA Court interpreted what is meant by the language of the Constitution requiring that a rule of court be "not inconsistent with statute." The Court rejected the trial court's method of determining inconsistency – i.e. whether it was impossible as a matter of law for both the statute and the rule to have a concurrent operative effect. (*Id.* at 24.) Instead, the Court concluded that courts "must determine the Legislature's intent behind the statutory scheme that the rule was intended to implement and measure the rule's consistency with that intent." (*Id.* at 25 – 26.)

In evaluating the legislative intent behind CCP Section 269, the court recognized that there is no statute expressly prohibiting a superior court from using electronic recording, rather than a shorthand reporter, to make the record. (*Id*. at 26.) However, it concluded by analysis of the statutory scheme that the Legislature implicitly intended that the record be made by shorthand reporters rather than by electronic recording. (*Id*.) Upon review of various statutes regarding the use of electronic recording of proceedings in courts other than the superior courts, the Court found that "whenever the Legislature has intended that electronic recording be permitted, it has expressed that intent by specific statutory authorization." (*Id.* at 30.) The CCRA Court concluded that although the statutes do not expressly prohibit the use of electronic recording to make the record in superior court proceedings, the fact the Legislature authorized its use by statute in other contexts strongly suggests that it did not intend to allow electronic recording in superior court proceedings. (*Id* at 31.)

The issues relating to the proposed amendments to CRC 3.1380 vis a vis CCP Section 639 are directly analogous to the Court of Appeal's holding in *CCRA v. Judicial Council*, supra. CCP Section 639 provides authorization for reference (without the parties' consent) in just five specific instances. (CCP Section 639(a)(1) - (5)). While Section 639 does not expressly exclude appointment of referees to conduct a mandatory settlement conference, the Legislature clearly contemplated those instances in which it determined reference is necessary and proper. Following the holding in *CCRA*, one must conclude that the Legislature intended that the listed situations in Section 639 be exclusive, and that reference for any other purpose is improper.

As the Court in *CCRA* recognized, the Judicial Council's rulemaking authority is subordinate to the Legislature's, and may be exercised only when the Legislature has not acted. In enacting CCP Section 639, the Legislature has exercised its authority with respect to the superior court's power to appoint a referee. Accordingly, the Judicial Council has no authority to limit or extend the court's power of reference.

C. Legislative Intent of Section 639

CCP Section 639 lists five specific instances in which the Legislature has expressly authorized reference of matters without the parties' consent. (CCP Section 639(a)(1)-(5).) CRC 3.920 states that "A court may order the appointment of a referee under Code of Civil Procedure

only for the purposes specified in that section."[8] None of the five instances listed in Section 639 allows the appointment of a referee to conduct a mandatory settlement conference. In enacting Section 639, the Legislature contemplated the situations in which it deemed reference to be necessary and proper, and expressly authorized reference in those five situations. Had the Legislature intended to allow for the appointment of a referee to conduct a mandatory settlement conference, it could have done so by amendment to the statute. Following the holding in *CCRA*, it is clear that the proposed amendments to Rule 3.1380 are inconsistent with Section 639 in their attempt to authorize reference in a situation not allowed in Section 639.

More importantly, the California Supreme Court and Court of Appeal have clearly and consistently held that the five instances listed in Section 639 are to be interpreted as exclusive. (See *Williams v. Benton* (1864) 24 Cal. 424, 425-426; *Bird v. Superior Court* (1980) 112 Cal.App.3d 595, 598-599; *Aetna Life Ins. Co. v. Superior Court* (1986) 182 Cal.App.3d 431; and *Kim v. Superior Court* (1998) 64 Cal.App.4th 256, 261.) The California Supreme Court addressed the precise issue in *Williams*, wherein it unequivocally held that "[t]he character of the issue which may be referred is particularly described, and, by necessary implication, all issues not answering to that description are excluded from the operation of the section."[9] (*Williams*, supra at 425-426.) In *Bird,*[10] the Court states plainly that "[t]he authority of the court to make such a reference is defined and limited by Code of Civil Procedure sections 638 and 639." (Underline added) (*Bird,* supra at 598.)

The Courts that have examined the Legislative intent behind Section 639 have made clear that it is to be interpreted as being exclusive to its express terms, authorizing reference only in the five specific instances set forth therein.[11]

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[8] CRC 3.920(a) is an improper use of the authority of the Judicial Council. CRC 3.920(a) interprets application of a statute, which is not an authorized function of the Judicial Council. The Advisory Committee Comment to Rule 3.920 states that "Rule 3.920(b) is not intended to prohibit a court from appointing a referee to conduct a mandatory settlement conference in a complex case or, following the conclusion of a reference, from appointing a person who previously served as a referee to conduct a mediation." As will be explained, the comment to Rule 3.920 is invalid for the same reasons the proposed amendments to Rule 3.1380 are invalid.

[9] *Williams* analyzes Section 183 of the Practice Act, the predecessor of CCP Section 639. The quoted language was cited in direct reference to Section 639 in *Bird v. Superior Court* (1980) 112 Cal.App.3d 595.

[10] Overturned on other grounds. The *Bird* opinion concerns reference of discovery issues, which at the time was not expressly authorized under Section 639.

[11] The reference power of the Superior Court is inherently suspicious since it allows the Court to delegate its authority to privately compensated individuals. Naturally, the Legislature must closely monitor and control this practice. (See California Constitution, Article VI, § 22; *People v. Superior Court (Laff)* (2001) 25 Cal.4th 703, 721; and *Jovine v. FHP, Inc.* (1998) 64 Cal.App.4th 1506, discussing delegation of judicial power by trial courts.)

III. The Rules of Court Have Limited Authority

A. <u>The Judicial Council Cannot Adopt Caselaw Which Conflicts With Statute</u>

The proposed amendments to Rule 3.1380 incorporate the decision in *Lu v. Superior Court* (1997) 55 Cal.App.1264 in the proposed Advisory Committee Comment. In *Lu*, the Court of Appeal combined two creations of the Judicial Council -- the mandatory settlement conference and the complex litigation designation -- to circumvent the provisions of CCP Section 639.

The reference to *Lu* in the proposed comment is purportedly to "prevent confusion" in distinguishing between mandatory settlement conference and mediation under the proposed amendment. The comment is misguided since the *Lu* court expressly declined to even attempt to distinguish a mandatory settlement conference from mediation. In considering the distinction, the *Lu* Court stated:

> We will not use this case as a vehicle to attempt determine how or whether mediation differs from traditional court supervised settlement conferences. (*Lu*, supra at 1270.)

Indeed, rather than clarify the distinction between a mandatory settlement conference and mediation, the *Lu* opinion obfuscates it. The controversy in *Lu* involves an order appointing a referee, which states "[a]ll mediation sessions are deemed to be Mandatory Settlement Conferences of this Court, . . ." The facts of the case themselves blur the line between mandatory settlement conference and mediation, yet the *Lu* court declined to clarify the distinction. The reference to *Lu* in the proposed comment does not help to distinguish mandatory settlement conference from mediation.

Moreover, in creating another category in which the appointment of a referee is authorized, the *Lu* opinion ignores established caselaw holding that the provisions of Section 639 authorizing reference are exclusive. (See *Williams v. Benton* (1864) 24 Cal. 424, 425 - 426; *Bird v. Superior Court* (1980) 112 Cal.App.3d 595, 598 - 599; *Aetna Life Ins. Co. v. Superior Court* (1986) 182 Cal.App.3d 431; and *Kim v. Superior Court* (1998) 64 Cal.App.4th 256, 261.) As discussed above, courts have held that judicial reference is allowed only in the specific instances listed in Section 639. *Lu* concludes -- without citing or analyzing this existing caselaw -- that it is not appropriate "to hold that, absent express statutory authorization, courts are powerless to devise procedures to expedite and facilitate the management of complex cases." (*Lu*, supra at 1270-1271.)

The *Lu* opinion then goes on to say: "We need not here determine whether courts have authority under Code of Civil Procedure section 639 routinely to appoint references to conduct settlement conferences. This is not a routine case but a complex case under the complex litigation standard." (*Id.* at 1271.) Anyone familiar with construction defect litigation is aware that complex cases are in fact routine. Contrary to *Lu*'s own assertion, in the context of

construction defect, the *Lu* decision does attempt to determine the courts' authority under Section 639 to routinely appoint referees to conduct mandatory settlement conferences.

The *Lu* court next utilizes the complex litigation designation -- itself a creation of the Judicial Council -- to circumvent the provisions of Section 639. Nowhere in section 639 is there an exception for complex cases. As discussed above, had the Legislature intended that there be such an exception, it would have expressly stated so. More importantly, the Judicial Council cannot combine the impact of two of its own rules to circumvent Section 639. (See CRC 3.400 et seq., creating the "complex designation," and CRC Rule 3.920 and 3.1380 addressing mandatory settlement conferences). *Lu* improperly did so, and to that extent *Lu* is "bad law" which should not be promoted by the Judicial Council, especially in light of other conflicting authority.

B. The Judicial Council Cannot Perform Judicial and Legislative Functions

Even without regard to the soundness of the *Lu* decision, the Judicial Council has no authority to adopt and promote *Lu*, or any other Court of Appeal Decision. It is well established that a District Court of Appeal is not bound by the opinion of a Court of Appeal in another district. (*Wolfe v. Dublin Unified School District* (1997) Cal.App.4th 126.) By incorporating *Lu* into a California Rules of Court, the Judicial Council attempts to adopt caselaw interpretation of a statute (which is binding only in the district in which the case was decided) and then impose it statewide. Doing so impermissibly infringes on the other District Courts of Appeal's discretion on whether or not to follow *Lu*. This interferes with the well established principle that Courts of Appeal in different districts operate independently of one another.

Moreover, the interpretation and adoption of the *Lu* decision is an impermissible exercise of judicial authority by the Judicial Council. Judicial authority is vested in the courts of record of the state -- The Supreme Court, the Courts of Appeal, and the Superior Courts. (CA Constitution, Article VI, § 1.) The Judicial Council must not be confused with the Judicial branch, in which judicial authority is vested. It is not within the Judicial Council's purview to interpret caselaw, or to promote or adopt one Court of Appeal decision over another. (See *McClung v. Employment Development Department* (2004) 34 Cal.4th 467, 472; discussing the grant and scope of judicial authority.) Nor does the Judicial Council have the authority to promulgate rules where the Legislature has already exercised its authority on the matter. (*California Court Reporter's Association v. Judicial Council of California* (1995) 39 Cal.App.4th 15, 22.) It is the function of the California Supreme Court to resolve conflicting decisions among the state Courts of Appeal and determine what the law is on any given issue,[12] and only the Legislature has the authority to abrogate or codify a holding of the Supreme Court or Courts of Appeal. The Supreme Court has made very clear the distinction between Judicial and Legislative powers:

[12] In fact, a primary reason for granting Supreme Court review is to resolve conflict among the Courts of Appeal (See *People v. Davis* (1905) 147 Cal. 346; CRC 8.500(b)(1).)

> Under fundamental principles of separation of powers, the legislative branch of government enacts laws. Subject to constitutional constraints, it may *change* the law. But *interpreting* the law is a judicial function. After the judiciary definitively and finally interprets a statute, . . . the Legislature may amend the statute to say something different. (Emphasis in original.) (*McClung v. Employment Development Department* (2004) 34 Cal.4th 467, 470.)

There are numerous decisions directly in conflict with *Lu*. (See *Williams v. Benton* (1864) 24 Cal. 424; *Bird v. Superior Court* (1980) 112 Cal.App.3d 595; *Aetna Life Ins. Co. v. Superior Court* (1986) 182 Cal.App.3d 431; *Raygoza v. Betteravia Farms* (1987) 193 Cal.App.3d 1592; and *Kim v. Superior Court* (1998) 64 Cal.App.4th 256.) The proposal for the amendment to Rule 3.1380 -- and the adoption of the *Lu* decision therein -- argues that because the *Lu* decision has been the law for more than 10 years, the Judicial Council should respect it as the governing law. If the Judicial Council is inclined to consider the longevity of a decision (which it should not), the Judicial Council should lend far greater respect to the decisions of *Williams*, supra (1864), *Bird*, supra (1980), *Aetna*, supra (1986), and *Raygoza*, supra (1987), which have been the "law" on judicial reference for much longer than *Lu*. (As discussed above, it is outside the scope of the Judicial Council's authority to weigh in on the merits of caselaw.) The *Lu* opinion fails to even consider these conflicting authorities in its analysis of the scope of Section 639, and is invalid to the extent it conflicts with the decision of the California Supreme Court in *Williams*, which held that judicial reference is limited to the express terms of Section 639. "Courts exercising inferior jurisdiction must accept the law declared by courts of superior jurisdiction. It is not their function to attempt to over-rule decisions of a higher court." (*McClung*, supra at 473.)

As discussed in detail above, the extent of the Judicial Council's rule-making authority is to adopt rules for court administration, practice, and procedure. (CA Constitution, Article VI, Section 6.) "A rule of court may go beyond the provisions of a related statute so long as it reasonably furthers the statutory purpose." (*Trans-Action Commercial Investors v. Jelinek* (1997) 60 Cal.App.4th 352, 364.) "However, if a statute even implicitly or inferentially reflects a legislative choice to require a particular procedure, a rule of court may not deviate from that procedure." (*Id.*) The legislature has clearly outlined the specific procedure and purposes for judicial reference in CCP Sections 638 and 639. Consequently, the proposed amendment to Rule 3.1380 is invalid because it deviates from that procedure, allowing reference in a situation not expressly authorized by statute. Should the Judicial Council attempt to adopt *Lu* and promote its holding over conflicting decisions, it would interfere with the function of the Supreme Court and infringe on the primacy of the Legislature's law-making power.

III. Conclusion

Caselaw distinguishes private mediation from mandatory settlement conferences by requiring that mandatory settlement conferences be conducted by the courts, at the expense of the county. (See *Raygoza*, supra.) Courts in construction defect litigation often misinterpret the

law and blur this distinction by attempting to order parties to attend and pay for mandatory settlement conferences. If the proposed amendment to Rule 3.1380 were adopted, it would perpetuate this misinterpretation of the law.

Private mediation and mandatory settlement conferences are distinguishable. The parties may voluntarily attend and pay for private mediation, but cannot be compelled by the courts to do so. Courts can compel parties to attend a mandatory settlement conference, but cannot appoint a private referee to conduct it. Courts have no power to circumvent the *Jeld-Wen* decision by simply re-labeling private mediation as a mandatory settlement conference.

Litigants cannot be compelled to attend mandatory settlement conferences conducted by privately compensated referees. To the extent the Rules of Court attempt to grant authority to courts to appoint referees, they are invalid and unenforceable.