LOS ANGELES & SAN FRANCISCO

Daily Journal

www.dailyjournal.com

WEDNESDAY, JULY 2, 2025

The curious exclusion of inactive attorneys from mediation

In *Getzels v. The State Bar of California*, the Court of Appeal held that inactive attorneys are barred from serving as mediators or arbitrators — yet disbarred lawyers and bar exam failures, who are no longer or never were licensed, can still take on those roles.

By Marc D. Alexander

The California Court of Appeal held that Rule 2.30 of the State Bar, which precludes inactive licensees from serving as private arbitrators or mediators, does not violate the Equal Protection Clauses of the U.S. or California Constitutions. *Morris S. Getzels v. The State Bar of California*, No. B338089 (2/4 pub. 6/27/25) (P.J. Zukin, Justice Mori, and Judge Daum (sitting by assignment)). The rule withstands rational basis review and is constitutionally valid.

Morris S. Getzels, an active licensee of the State Bar of California, challenged State Bar Rule 2.30, barring inactive licensees from acting as private arbitrators and mediators unless they serve in specific public capacities (for example, as a temporary settlement judge). Getzels wished to continue serving such roles while being on inactive status. Getzels, a 1976 UCLA School of Law graduate, was and is still a licensed attorney in good standing. He argued Rule 2.30 violated equal protection by unfairly distinguishing inactive licensees from others, including non-attorneys and active licensees.

Getzels contended this classification infringed on the fundamental right to freedom of contract between ADR neutrals and participants, triggering strict scrutiny review. However, the court rejected this argument, explaining that freedom of contract is not a fundamental constitutional right under current jurisprudence. Instead, the court applied rational basis review.

The court found Rule 2.30 was rationally related to the State Bar's legitimate interests in regulating the legal profession and maintaining the integrity of its disciplinary and licensing systems. The rule reasonably distinguishes between licensees distancing themselves from legal practice (and thus paying lower or no fees) and those engaging in quasi-legal roles like arbitration and mediation. The State Bar could rationally conclude that allowing inactive licensees to serve as mediators and arbitrators would burden its regulatory system, justifying the requirement for active status and payment of fees.

This art was created with the assistance of Shutterstock AI tools

Because Getzels failed to demonstrate that Rule 2.30 was arbitrary or lacked a rational basis, his constitutional claim was legally insufficient. The appellate court affirmed the trial court's decision to sustain The State Bar of California's demurrer without leave to amend.

We are left with the curious result that a disbarred attorney, an attorney resigning from the bar under a cloud and who is no longer licensed, or a law school graduate who failed the bar exam, could practice as a mediator or arbitrator, whereas an inactive licensed attorney in good standing with 40 years of experience could not practice as a mediator or arbitrator. This is the potential result under well-intended legislation meant to protect the consumer.

One question not raised by the Getzels case is what effect the passage of SB 940 will have on the reasoning of the case regarding inactive licensees who wish to serve as mediators and arbitrators. SB 940 provides that "[t]he State Bar shall create a program to certify alternative dispute resolution firms, providers, or practitioners." Furthermore, the program "shall not require a firm, provider, or practitioner to be a licensee of the State Bar in order to be certified under the program." Because SB 940 does not require a certified mediator or arbitrator to be a licensed attorney, we presented the possibility that a disbarred attorney, one who has voluntarily resigned, or a law school graduate who failed the bar, could become a certified mediator or arbitrator. Presently a career as a certified ADR neutral is a path left open by SB 940 to unlicensed persons, whether or not they have had legal training, but not a path open to inactive licensees, confirmed by the ruling in the *Getzels* case.

For mediators and arbitrators, firms, and providers who want to be certified, SB 940 further requires "arbitrators to comply with the Ethics Standards for Neutral Arbitrators in Contractual Arbitration as adopted by the Judicial Council pursuant to Section 1281.85 of the Code of Civil Procedure." And mediators shall "comply with ethical standards that are equivalent to the Rules of Conduct for Mediators in Court-Connected Mediation Programs for General Civil Cases as provided in Rules 3.850 to 3.860, inclusive, of the California Rules of Court." But SB 940 does not appear to say anything about how attorneys, media-

tors, and arbitrators have behaved in the past - an issue perhaps to be addressed by the State Bar Working Group currently considering the implementation of the bill.

SB 940 creates three tiers of neutrals, depending on how ethically committed they are. However, SB 940 is explicit that the tiers are not to be construed as a measure of quality. As mediator and arbitrator John Derrick wryly observed all mediators are equal, but some are more equal than others. ("Navigating the complexities of SB 940: The debate over voluntary certification and its challenges," Daily Journal, April 23, 2025.) The ruling now in *Getzels* seems to guaranty consumer confusion about the value of the tiered system, for the ethical attorney who practiced for decades and is now on inactive status cannot serve as a mediator or arbitrator, whereas unlicensed practitioners, as well as licensees with a checkered past, can find a place somewhere among the tiers, provided they commit to act ethically and also have a complaint procedure.

Thus, the certification system created by SB 940 creates an additional regulatory scheme for active licensees who opt to be certified. Licensed attorneys who choose certification will be subject to State Bar discipline under the rules of professional conduct, and will be subject to disbarment or suspension of their license if they transgress. Non-licensed persons who obtain certification will need to commit to ethical rules and have a complaint procedure. Because non-licensed persons cannot be disbarred or have their licenses suspended, all the State Bar can do is remove their certification. And inactive licensed attorneys, under the *Getzels* ruling and Rule 2.30, will be nowhere with alternative dispute resolution because they are not allowed to practice as mediators or arbitrators.

Though SB 940 has yet to be implemented, it is unlikely that it would undo the rational basis analysis in *Getzels*. There will still be separate rules to follow for members of the State Bar and ADR neutrals who are not part of the State Bar, and differences in enforcement, leaving the court's argument that licensees may place some additional burden on the enforcement efforts of the State Bar, and therefore licensees should carry some of that burden by paying their bar dues as *active* licensees.

But from a practical point of view, SB 940 seems to diminish the difference in the regulatory burden between regulating inactive licensees who would like to practice as mediators and arbitrators (if the Bar were to permit them to do so) and active licensees, and non-licensees who can practice as mediators and arbitrators. First, SB 940 requires persons who choose to seek certification to be willing to pay a fee to support its regulatory scheme, and this scheme requires that such fees *cannot* come out of State Bar fees. Presumably, inactive licensees, were they allowed to practice as mediators and arbitrators, would also have to pay the SB 940 fee to support the SB 940 regulatory apparatus. Second, inactive licensees opting to be certified would then be bound by State Bar Rules, not just SB 940 rules, and the gap between State Bar rules and SB 940 rules of conduct seems narrow. As noted above, the rules under SB 940 must, *at a minimum*, meet the Ethics Standards for Neutral Arbitrators in Contractual Arbitration and comply with ethical standards that are equivalent to the Rules of Conduct for Mediators in Court-Connected Mediation Programs for General Civil Cases. Third, mediators and arbitrators tend to be less at risk than attorneys representing clients, because mediators are protected by mediation confidentiality, and arbitrators have some judicial immunity while they perform core arbitral functions. Fourth, if the real goal is to protect consumers, it is hard to see how an inactive licensee presents a greater risk to consumers than a non-licensee. And finally, as will be suggested, the predicament of inactive licensees who wish to practice as ADR neutrals could be finessed if a path can be found making a certified inactive licensee subject to State Bar discipline and SB 940 rules.

So where does *Getzels* leave the inactive licensee who wants to privately mediate or arbitrate? The inactive licensee can pay State Bar dues, comply with MCLE requirements, and regain active status at added expense and effort. Alternatively, inactive licensees can give up their license, describe themselves as a former member of the California State Bar if they wish, and submit to the requirements of SB 940, which also may include a fee still to be determined.

But *Getzels* was decided on demurrer. Unfortunately, evaluating the regulatory burden that attorneys who practice mediation and arbitration place on the State Bar takes place in a vacuum in the absence of a detailed itemized cost breakdown for the State Bar's policing of private mediator and arbitrator misconduct.

Should the State Bar consider creating another category for inactive licensees serving as private mediators or arbitrators who achieve certification under SB 940? This category would be for inactive licensees who *exclusively* mediate or arbitrate. Certified neutrals belonging to this category would be subject to State Bar discipline and to SB 940 loss of certification for misconduct, just like active licensees. State Bar dues could be charged to inactive licensees but significantly discounted, taking into account the actual cost of the regulatory burden likely to be created by private certified mediators and arbitrators, rather than the speculative burden.

Marc D. Alexander *is an ADR neutral with Alternative Resolution Centers, and will not be affected by the ruling in Getzels because he is an active licensee of the State Bar. He can be reached at AlexanderDisputeResolution@gmail.com.*