Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
September 2015 Issue

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Mediations are supposed to be confidential… but are they really?

A look at the law of mediation confidentiality and why mediation, while confidential in theory, may not be so in reality

Either as a participant in a mediation or as the mediator, we have all learned the cardinal rule that mediations are confidential both in terms of the statements and other communications made during the mediation and the information the mediator keeps to herself, not sharing it with the other parties. Many times a mediator has analogized mediation confidentiality to the television ad, "What happens in Vegas, stays in Vegas" to explain the sacrosanct nature of mediation confidentiality.

But, are mediations really confidential? While in theory, they are supposed to be, in court proceedings, they are not always so. Although a review of both federal and state statutes and case law indicates that mediation confidentiality is to be strictly construed and applied, in practice, this does not always occur.

California statutes and case law

California Evidence Code sections 1115-1128, inclusive, govern not only mediation but also "mediation consultations" ("...a communication between a person and a mediator for the purpose of initiating, considering, or reconvening a mediation or retaining a mediator.").

The core rule is set out in Evidence Code section 1119 which provides three different protections, all of which are to occur "… for the purpose of, in the course of, or pursuant to, a mediation or mediation consultation." Subsection (a) provides that "no evidence, or anything said or any admission…" (i.e., oral communications) is admissible or discoverable while subsection (b) provides that "...no writing" is admissible or discoverable. Subsection (c) though is much broader by providing that "… all communications, negotiations or settlement discussions by and between the participants in the course of mediation or a mediation consultation shall remain confidential."

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Thus, by this section alone, not only are oral and written communications inadmissible and not discoverable, they are also confidential.

Unless waived, this confidentiality lasts forever. Section 1126 of the Evidence Code provides that inadmissibility and confidentiality remain "… to the same extent after the mediation ends." No time limit is given. To the extent that a "… reference is made to mediation during a subsequent trial..." it shall be deemed an irregularity in the proceedings and a ground for a new trial under Code of Civil Procedure section 657. If the reference is made during a noncriminal proceeding, it will be grounds to vacate or modify the decision in whole or in part. (*Ibid*.)

To waive mediation confidentiality, all parties – both the participants and the mediator – must do so orally or in writing. (Evid.Code, §§ 1122 and 1124.) And, to have any settlement agreement admitted into evidence, it must contain the "magic words" that it is "admissible, or subject to disclosure" or "enforceable or binding" or "words to that effect." (Evid. Code, § 1123.)

The California Supreme Court has broadly interpreted these statutes to the point of being a "near categorical prohibition against judicially crafted exceptions to mediation confidentiality." (*Amis v. Greenberg Traurig, LLP*, California Court of Appeal, Second Appellate District, (Case No. B248447, issued March 18, 2015) slip opinion at 2.) Starting with *Foxgate Homeowners' Association v. Bramalea California, Inc*. (2001) 26 Cal.4th 1, the Court held that mediation confidentiality precluded a party from seeking sanctions against opposing counsel on the grounds that the latter did not attend the mediation in good faith thereby causing the moving party to incur approximately $24,000 in mediator and expert fees. Ruling that an exception to mediation confidentiality cannot be created to punish bad faith participation in mediation, the Supreme Court stated:

> We do not agree with the Court of Appeal that there is any need for judicial construction of sections 1119 and 1121 or that a judicially crafted exception to the confidentiality of mediation they mandate is necessary either to carry out the purpose for which they were enacted or to avoid an absurd result. The statutes are clear.

(*Id*. at 652-3.)

Three years later in *Rojas v. Superior Court* (2004) 33 Cal.4th 407, the Court once again refused to allow plaintiffs to obtain evidence during discovery that had been "… prepared for the purpose of, in the course of, or pursuant to, a mediation…" even though the plaintiffs had no other means of obtaining the crucial evidence. Again, the Court refused to create a judicially crafted exception for "good cause" to mediation confidentiality, noting that there is no "absurd result" to be avoided here.

In *Fair v. Bakhtiari* (2006) 40 Cal.4th 189, the Court again held that mediation confidentiality precluded the admission of a memorandum of understanding in a motion to enforce the settlement memorandum because it did not contain the "magic words" of being binding, enforceable, admissible or words to that effect as required in Evidence Code section 1123.

In *Simmons v. Ghaderi* (2008) 44 Cal.4th 570, the Court again strictly applied mediation confidentiality holding that even though the defendant both in discovery responses and in her own motion for summary adjudication had discussed what had occurred during the mediation, her motion to preclude evidence about the mediation on the eve of trial (and 15 months after the mediation) was timely. The defendant had not waived mediation confidentiality by waiting until the eve of trial to first assert it.

Finally, in *Cassel v. Superior Court* (2011) 51 Cal.4th 113, the Court strictly enforced mediation confidentiality in a professional negligence action (i.e., legal malpractice) to preclude evidence of all discussions that occurred both in strategy sessions between plaintiff and counsel just prior to the mediation, and during the mediation both when the mediator was present and not present. As in its prior cases, the Supreme Court once again iterated:

> …judicial constructions, and judicially crafted exceptions, are permitted only where due process is implicated, or where literal construction would produce absurd results, thus clearly violating the Legislature's presumed intent. Otherwise, the mediation confidentiality statutes must be applied in strict accordance with their plain terms. Where competing policy concerns are present, it is for the Legislature to resolve them.

(Simmons, *supra*, 44 Cal.4th at 582-583; Foxgate, *supra*, at 14-17.) (*Id*. at 124.)

The California appellate courts have, likewise, strictly enforced mediation confidentiality. In *Eisendrath v. Superior Court* (2003) 109 Cal.App.4th 351, mediation confidentiality was invoked to preclude the use of statements that allegedly were inconsistent with those made during mediation. In *Doe 1 v Superior Court* (2005) 132 Cal.App.4th 1160, mediation confidentiality was applied to preclude the use of written statements demonstrating criminal conduct. In *Wimsatt v. Superior Court* (2007) 152 Cal.App.4th 125, mediation confidentiality precluded the use of direct evidence in a legal malpractice claim. Most recently in *Amis v. Greenberg Traurig, LLP*, Court of Appeal, Second Appellate District, Case No. B248447 (March 18, 2015), mediation confidentiality was invoked to preclude even the use of indirect or inferential evidence in a legal malpractice action. However, in *Lappe v. Superior Court of Los Angeles County* (*Murray Lappe, Real Party In Interest*) (2014), 232 Cal.App.4th 774, the court held that mediation confidentiality would not shield financial disclosure statements submitted during a marital settlement mediation since California Family Code sections 2100 et. seq. impose an independent, discrete duty to make "full and accurate disclosure of all assets and liabilities." (The California Supreme Court denied review.)

The only conclusion that one may reach from the above, is that, at least in California, mediation confidentiality is to be strictly applied and broadly construed.

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Other states

With respect to other states, every state in the union has one or more statutes mandating mediation confidentiality; some more expansive than others. (See, California Law Review Commission Study, *Relationship Between Mediation Confidentiality and Attorney Malpractice and Other Misconduct*—K-402, Memorandum 2014-35 (August 28, 2014) for an extensive discussion and exhibit listing most states' statutes, and Memorandum 2014-24 (June 6, 2014) discussing the *Uniform Mediation Act* adopted in 11 states and the District of Columbia. Other memoranda discuss the mediation confidentiality statutes of the remaining states.)

Federal statutes and case law

In 1988, Congress enacted the Alternative Dispute Resolution Act authorizing arbitrations in federal cases and then amended it in 1998 to include alternative dispute resolution processes in general. 28 USC §§ 651-658 (2012). (Public Law 105-315, 112 Stat 2993 (October 30, 1998).) Section 652(d) specifically states that, "… each district court shall, by local rule, provide for confidentiality of the alternative dispute resolution processes and to prohibit disclosure of confidential dispute resolution communications."

To accomplish this goal, the federal courts have adopted local rules mandating mediation confidentiality. For example, the United States District Court for the Central District of California enacted Local Rule 16-15 setting out the policy of the court re: settlement and ADR. Local Rule 16-15.8 provides that all mediations conducted by a panel mediator are confidential. Its definition of "confidential information" is seemingly more explicit if not broader than California's. Not only are written and oral communication occurring "… for the purpose of, in the course of or pursuant to the mediation deemed confidential information," but, in addition, "... anything that happened or was said relating to the subject matter of the case in mediation, any position taken, and any view of the merits of the case expressed by any participant in connection with any mediation…" shall also be deemed "confidential information." The court iterates this in paragraph 9 of its General Order 11-10 (August 15, 2011). Similarly, the Ninth Circuit Court of Appeals mandates mediation confidentiality in its Circuit Rule 33-1.

In those cases invoking the diversity jurisdiction of the court (28 U. S. C. §1332 (2012)), a U.S. District Court Judge may well apply the state's statutes pertaining to mediation confidentiality pursuant to Federal Rules of Evidence Rule 501 which, in part, provides that the state's law on privileges shall apply "… in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision." See, for example the unpublished decision of *Benesch v. Green*, 2009 WL 4885215 Case No. C-07-3784 EDL (N.D. Cal., Dec 17, 2009) in which the district judge relied wholly on California statutory and case law in ruling on mediation confidentiality.

However, in those cases in which the federal question jurisdiction of the court (28 U.S. C. §1331(2012)) has been invoked (with or without state law claims) or where the issue is one of procedure, then a federal court may or may not apply a common law mediation privilege. In *Babasa v. LensCrafters Inc.*, 498 F.3d 972 (9th Cir. 2007), the court ignored mediation confidentiality in deciding whether removal jurisdiction had been properly invoked, noting that, as the issue was whether diversity jurisdiction existed – a federal procedural issue – federal law, not state law applied.

Yet, in *Wilcox et al v. Arpaio et al,* 753 F. 3d 872 (9th Cir. 2014), the Ninth Circuit recognized that a federal common law mediation confidentiality privilege exists but side-stepped the issue of applying it by arguing that the parties waived it as both sides argued only the application of Arizona's mediation privilege laws and did not reference this common-law privilege. Further the Ninth Circuit noted that in the matter before it, the same evidence related to both federal and state law claims. As a result, federal common law on mediation confidentiality and not state law, would govern.

Presently pending in the Ninth Circuit is another case on mediation confidentiality. In *Craig Milhouse and Pamela Milhouse v. Travelers Commercial Insurance Company*, 982 F.Supp 2d 1088 (C.D. Cal 2013), plaintiffs sued their insurer for breach of contract and bad faith following the latter's alleged delay in paying plaintiffs for the total loss of their home and its contents stemming from a fire. Before filing suit in state court, the parties attended mediation; the matter did not settle. Plaintiffs sued in state court; defendant removed to federal court. During the trial, counsel for the insurer questioned witnesses about what had occurred during the mediation. The trial court allowed the evidence to be introduced. Citing prejudicial error, plaintiffs filed a motion for new trial. In its order denying plaintiffs' motion, the district court judge held both that plaintiffs' counsel had waived mediation confidentiality and, even if not waived, "due process" demanded that the insurer be allowed to put on evidence that it had not acted in bad faith.

> Due process demanded that the Court allow the jury to hear the testimony regarding the parties' mediation statements.
>
> The Milhouses argued extensively at trial that Travelers, "unreasonably or without proper cause, failed to pay or delayed payment of policy benefits." (Citation omitted) More specifically, the Milhouses contended that Travelers acted in bad faith by refusing to settle their claims.
>
> For the Milhouses, the case was one about a despicable insurance company that had a policy of not fairly and reasonably cooperating with its insureds to settle their claims after a tragic loss. They now argue the Court erred by allowing the jury to hear the parties' mediation statements. The Milhouses are wrong. Travelers needed to present the parties' mediation statements to provide a complete defense of its actions and to avoid paying millions of

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> dollars in bad faith and punitive damages for wrongfully refusing to settle the Milhouses' claim. (*Id*. at 1108.) … It was entirely proper for Travelers to present the parties' mediation statements to the jury. The evidence presented at trial clearly demonstrated that Travelers did not settle the Milhouses' claim because of the positions that were taken during and after the mediation by the Milhouses and their attorney. The jury therefore needed to hear all about what happened during and after the mediation so it could determine whether Travelers did in fact act unreasonably, maliciously, fraudulently, or oppressively by refusing to settle the Milhouses' claim. To exclude this crucial evidence would have been to deny Travelers' of its due process right to present a defense. (See *Cassel v. Superior Court* (2011) 51 Cal.4th 113, 119 ("We must apply the plain terms of the mediation confidentiality statutes to the facts of this case unless such a result would violate due process, or would lead to absurd results that clearly undermine the statutory purpose.") (Emphasis added.)…."

(*Id*. at 1108-1109.)

Seemingly, the trial court "judicially crafted" a due process exception to mediation confidentiality.

Plaintiffs have appealed, arguing that as this matter involved state law claims only, pursuant to Federal Rules of Evidence, rule 501, California statutory and case law must be followed. In contrast, the insurer has cross-appealed arguing, among other things, that this matter is governed by Federal Rules of Evidence, rule 408 permitting evidence of settlement discussions to be admitted for reasons not directly relating to liability, as for example, "… negating a contention of undue delay." (Fed. Rules. Evid. rule 408(b).) (See, Ninth Circuit Court of Appeals Case Nos. 13-56959 and 13-57029.)

As of this writing, the matter has been fully briefed and awaits oral argument and/or decision.

Agreements

In addition, the parties usually sign a mediation confidentiality agreement agreeing that all communications occurring within the mediation remain confidential.

Professor Coben's study

So, with all of this statutory and contractual protection, mediations should be confidential. However, a yearly analysis of cases in court regarding mediations conducted by James R. Coben, Professor and Senior Fellow, Dispute Resolution Center at Hamline University School of Law shows quite the contrary. Both in a recent webinar sponsored by the Section of Dispute Resolution of the American Bar Association, and in a law review article, Professor Coben demonstrates that quite frequently, mediations have been the subject of hearings in court, and confidentiality has been ignored. (See, ABA Section of Dispute Resolution, *The Ethics of Mediator Testimony: Tales from Recent Federal and State Case Law* by James R. Coben, Professor and Senior Fellow, Dispute Resolution Institute, Hamline University (September 2014 webinar); Coben, James R. and Thompson, Peter N., *Mediation Litigation Trends: 1999-2007,* 1 World Arbitration and Mediation Review 396 (No. 3) (2007).)

Professor Coben found that with each passing year, more and more cases have dealt with mediations. For example, in 2002, there were only 301 cases; by 2006 this number had more than doubled – to 677 cases. In 2013, there were 802 cases.

At the same time, the trend has been a decrease in state court cases but an increase in federal court cases. In 2003, of the 335 cases, 87 of them or 26 percent of the cases were in federal court while 248 or 73 percent were in state court. Ten years later, in 2013 – of the 802 cases, 444 of them or 55 percent of the cases were in federal court and 358 or 45 percent were filed in state courts.

What were the issues raised in these cases? Out of the 735 cases filed in 2012 – 272 of them or 37 percent involved the enforcement of the settlement agreement, 103 cases or 14 percent involved mediator fees, 66 cases or 9 percent involved confidentiality, 37 cases or 5 percent involved sanctions, and 22 cases or 3 percent involved ethics. Again, in 2013 – 9 percent or 73 cases involved confidentiality.

With respect to confidentiality alone, between 1999 and 2005 – there were 601 cases filed in which oral mediation communications were offered into evidence. Notably, the idea of mediation confidentiality or privilege was not even raised in 462 of them or in 76 percent.

During this same time period, in 125 cases, the mediator testified and again, in 85 of them or 68 percent of them, the notion of privilege was not even raised.

The subject of their testimony included:

- Attendance
- Who did the negotiating
- The terms of the settlement
- The mental and physical health of the parties
- The reasons why a settlement was not reached
- Who drafted the settlement, admissions and/or statements made against interest
- The content of the discussions, including releases, policy limits, attorneys' fees, guarantees, valuations and authority
- With respect to class actions – the quality of the bargaining on behalf of the class members and the quality of the settlements

In short, almost every topic that might arise during mediation was in an affidavit.

What Professor Coben also found, was that the simpler the statute, the more the litigation. California Evidence Code section 1119 has 163 words and section 1122 has 176 words. Yet in 2003, of all the appellate decisions filed anywhere within the United States on the issue of confidentiality, California parties filed 27 percent of them. In 2009 – the percentage was 63 percent.

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In contrast, fewer than 20 cases discussing confidentiality were filed in the 11 states and District of Columbia that adopted the Uniform Mediation Act (approximately 7500 words).

The area where mediation confidentiality seems to be ignored quite a lot has been class-action settlements. As these are often filed under the diversity jurisdiction of the federal court (28 U.S. C. §1332 (2012)), pursuant to Federal Rules of Evidence, rule 501, state law should apply. (See, *Class Action Fairness Act of 2005*, 28 USC §§1711-1715 (2012) (Public Law 109-2, 119 Stat 5 (Feb 18, 2005).)

Mediators have quite frequently submitted affidavits attesting to the quality of the bargaining process and fairness of the settlement. Quite frequently, the federal and state courts have relied on the reputation of the mediator as evidence that the mediation process was fair, and did not involve fraud or collusion, ignoring any objections of any class members who were not at the mediation. For example, in 2013 – there were 83 cases involving class-action settlements in which the involvement of a private mediator, if not her affidavit submitted to the court, played a role in the court determining that the bargaining was at arm's-length and not collusive.

Professor Coben cites three examples of cases heard in the California U.S. District Courts in 2013:

(1) *In Re MRV Communications Inc Derivative Litig.*, No. cv-08-03800 GAF (MANX), (a derivative action) arising in the Central District of California on June 6, 2013, the mediator's declaration was quoted in the process of approving the settlement; on page 11 of the Memorandum and Order approving attorney fees, the district court states:

> …And the mediator in the case concurs, urging that 'the separately negotiated attorneys' fees and expenses agreement was negotiated in good faith and is fair and reasonable and within the range of fees paid in similar shareholder-derivative cases.'

(2) *Johansson-Dohrmann v. CBR Systems, Inc*, 12 cv-1115-MMA (S.D. Cal. July 24, 2013) again quoting a mediator declaration in several different places in the process of approving the settlement;

> …the settlement is . . . fair and reasonable to all parties and provides significant benefits to the Settlement Class. (Page 8 of Order) and
>
> It was clear from the briefs and the discussions during the mediation that the parties and their counsel had a thorough understanding of the facts and law as well as the risks and uncertainties pertaining to the litigation. (Page 10 of Order)

That the parties "vigorously negotiated their respective positions," and that the settlement was the "product of arm's-length and good faith negotiations." (Page 10 of Order)

(3) M*oore v. Verizon Communications, Inc*. No. c-09-1823 SBA (N.D. Cal. August 28, 2013) noting that the mediator "unreservedly" recommended the settlement. (*Page 15 of Order*) Here, the mediator submitted a ten page declaration in support of the settlement.

Interestingly, in these cases, none of the judges really discussed the reasoning behind crediting the mediator's declaration. They just did so on the basis that the mediator was experienced, able, independent, nationally recognized, respected, prominent, well versed in the relevant law and other like conclusions. In short, they were *good people* and that was all that mattered.

While these cases do involve showing the fairness of class-action settlements, there appears to be nothing in the mediation-confidentiality statutes authorizing such as an exception. And while the parties may have waived confidentiality, many of the statutes require an express waiver in writing; rather than an implied waiver or simply ignoring the issue altogether as seems to have occurred here. (See, California Evid.Code, §§ sections 1118 and 1122.)

Conclusion

Like everything else in life, when it comes to mediation confidentiality, theory and practice sometimes diverge. While both the legislatures and courts throughout the United States have made it clear that mediation confidentiality is to be respected and enforced, in any given situation, this rule of confidentiality and/or admissibility may be disregarded or, not even raised. This may occur even if the parties have signed a mediation confidentiality agreement. There, too, both the parties and the court may ignore it.

So … while in theory, mediations are to be confidential … in practice, the buyer should be aware. Unlike Las Vegas, "it" just may not stay there.

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