Mediation Confidentiality

By Roderick M Thompson

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The Settlement That Isn't

A recurring scenario testing the bounds of mediation confidentiality is where an agreement is reached during mediation and some dispute later arises about its effectiveness or content. This may occur when the parties fail to adequately document their settlement and one side contends there was never a true meeting of the minds on material terms. See *Facebook, Inc. v. Pacific Northwest Software, Inc.*, 640 F.3d 1034, 1041 (9th Cir. 2011) (enforcing a confidentiality agreement "which everyone signed before commencing the mediation," to exclude evidence of mediation communications offered to support fraud or securities law claims related to a settlement reached during mediation).

The Malpractice Conundrum

To be sure, some mediations leave one or both parties dissatisfied. This can lead to claims by the parties that they were not well-represented by counsel or even that the mediator blundered. Alleged attorney malpractice can arise in mediation just as in any other context. However, the California Supreme Court has interpreted the governing statutes to foreclose any discovery of mediation communications to prove malpractice under any circumstance, even if the result is to bar the claim. See *Cassel v. Superior Court*, 51 Cal. 4th 113 (2011) (holding that the terms of California Evidence Code section 1119 "must govern, even though they may compromise petitioner's ability to prove his claim of legal malpractice").

A Major Problem: No Admissible Evidence

The strict evidentiary bar discussed above may also lead to practical problems in enforcing an agreement. Any resolution reached during mediation should be reduced to writing. So far so good. But to be enforceable in court, "the writing must make clear that it reflects an agreement and is not simply a memorandum of terms for inclusion in a future agreement." While the writing need not be in finished form to be admissible under Evidence Code section 1123(b), it must "be signed by the parties and include a direct statement to the effect

that it is enforceable or binding." *Fair v. Bakhtiari* 40 Cal.4th 189, 51 Cal.Rptr.3d 871, 873 (2006).

Non-Settling Parties

In multi-party cases, a mediated settlement may include some, but not all of the parties. When this happens—and it does occur frequently—there is a risk that the non-settling parties may attempt to seek discovery of mediation communications as potentially relevant to the remaining issues. Given the Cassel decision, the Evidence Code should protect these communications from disclosure.

But stay tuned: the Legislature may change the law to allow for some exceptions. The Cassel court acknowledged the competing policy concerns, but explained "it is for the Legislature, not the courts, to balance the competing policy concerns." Id., at 122. The Legislature, in turn, has asked the California Law Revision to examine "the relationship under current law between mediation confidentiality and attorney malpractice and other misconduct." The Commission's website states that it "is now in the process of formulating a tentative recommendation. After the Commission approves a tentative recommendation, it will be posted to the Commission's website and widely circulated for comment." See http://www.clrc.ca.gov/K402.html

Does California Law Govern?

Although the foregoing discussion presumes that California law controls the outcome, that is not necessarily the case. The law of another jurisdiction may govern the mediation, whether the proceedings are pursued due to a pre-dispute contractual procedure or by way of an agreement that was reached after the dispute reared its ugly head.

There is a split of authority as to whether there is (or should be) a Federal common law privilege governing mediation confidentiality. Two decisions from the Central District of California offered differing views on the issue. Compare *Folb v. Motion Picture Indus. Pension & Health Plans* 16 F. Supp. 2d 1164 (C.D. Cal. 1998), aff'd, 216 F.3d 1082 (9th Cir. 2000) (holding that "it is appropriate, in light of reason and experience, to adopt a federal mediation privilege applicable to all communications made in conjunction with a formal mediation") and *Molina v. Lexmark Int'l, Inc.*, 2008 U.S. Dist. LEXIS 83014; 2008 WL 4447678, at *9 (C.D. Cal. Sept. 30, 2008) ("The existence of a federal common law mediation privilege is not nearly as well established as [the defendant] suggests it is. No Circuit court has adopted or applied such a privilege; indeed, both the Ninth and the Fourth Circuits have expressly declined to consider whether such a privilege exists") citing *Babasa v. Lenscrafters, Inc.*, 498 F.3d 972, 975 n.1 (9th Cir. 2007) (declining to consider whether a federal mediation privilege exists); In re Anonymous, 283 F.3d 627, 639 (4th Cir. 2002) (same).

Tailor the Agreement

Given the foregoing discussion, the parties' written confidentiality provisions—whether in a protective order or separate agreement—should be tailored in light of applicable statutory provisions, case law or court rules to meet the needs of local practice.

PRACTICE TIPS

Plan Ahead: At the outset of the mediation, all participants in the mediation should enter into a written agreement providing for strict confidentiality, nondisclosure, and inadmissibility of all mediation communications—assuming that is the desired result after full disclosure to the parties who must always remain in control of the mediation process.

Prep Clients: Both the lawyer-advocate and the mediator should ensure that the clients/parties are fully informed of and understand the implications of strict confidentiality as a result of the parties' agreement and under California law.

Make any settlement agreement Admissible and Enforceable: The parties should include in any settlement agreement reached in mediation a statement to the effect that the "document is a binding settlement agreement." Ideally, to allow judgment to be entered on their agreement, the parties should state that "this agreement shall be 1) binding upon the parties and enforceable, including without limitation, pursuant to Section 664.6 of the California Code of Civil Procedure and 2) admissible pursuant to Section 1123 of the California Evidence Code in a proceeding in any court of law or arbitration for purposes of enforcement of this agreement."

Related Cases: Where appropriate, all parties in a case or set of related cases should include in any stipulated protective order whatever degree of mediation confidentiality they desire up to the strict protection now afforded by the California Evidence Code.

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