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DEAR ADR PARTICIPANTS: ARE YOUR SECRETS REALLY SAFE WITH ME?
By Jan Frankel Schau

One of the key principles of mediation in California is that the participants can feel free to communicate those sticky details, which often drive the ultimate settlement of the case without fear that these private communications will ever see the light of a courtroom. They are held strictly confidential under California Evidence Code Sections 1115-1128 with only a few narrowly drawn exceptions. In fact the mediator herself is deemed "incompetent" to testify in any subsequent civil proceeding under Section 703.5 of the California Evidence Code. But not so in the federal courts.

In cases arising out of diversity, the federal court will apply California law. But what happens when federal common law applies? California courts have repeatedly disapproved of "judicially created exceptions" to mediation confidentiality with the notable exceptions of *Cassell v. Superior Court* (2009) 179 Cal. App. 4th 152, and *Porter v. Wyner*, BC211398, both of which are now before the Supreme Court for review. For mediators, this gave us a level of comfort knowing that we would never be called upon to "take sides" on a dispute that came before us, and that we would never be asked to accurately recall all that was said - most of which is not memorialized in writing.

This creates a confusing analysis that begins with Federal Rule of Evidence 501, which essentially limits the federal court's duty to recognize state privileges (including the mediation privilege) to those cases in which "[s]tate law provides the rule of decision." Otherwise, the federal courts are free to develop rules of privilege on a case-by-case basis...and to leave the door open to change. The irony is that as pro-ADR (alternative dispute resolution) as California has become, there is still no "mediation privilege" under federal common law. To the contrary, under the U.S. Supreme Court case of *Jaffee v. Redmond* (1996) 518 U.S. 1, federal courts are guided primarily by the general rule that the public is entitled to every person's evidence and that testimonial privileges are disfavored. This leaves both mediators and disputants in an uncomfortable position. How much can you reveal in mediation without fear that it will be subject to later disclosure?

I learned the hard way that mediators may be compelled to testify in federal court actions. After a failed mediation in a civil rights action against a municipality, the matter proceeded to a verdict in favor of the plaintiffs. When plaintiffs' counsel submitted his post-trial attorney's fees bill, it was met with loud protests by the defense - who contended that they would have paid the amount awarded by the jury at the time of the mediation six months (and hundreds of billable hours) before. They both came to their mediator to request a declaration indicating the demands and the

offers that were communicated during the mediation. The attorneys had both agreed to waive the confidentiality privilege and asked the mediator to also agree.

There is no question but that in a state court action in California the Evidence Code would protect such evidence from being compelled by a court. I can assure the parties that come before me that they need not fear of my divulging any information with regard to offers and demands, or worse yet, the discussions that were not communicated to the other side about the zone of possible agreement in the case. But in federal court, the magistrate had the discretion to compel me to divulge the information over my objection. While I did not maintain notes that may have been compelled, I did recall the positions the parties had taken. Most of the communication that I wanted to protect was never communicated as an offer or demand to the other side. (For those curious about the result of this request, the mediator first refused and then contacted her insurance carrier, who, under a special "rider" prepared to bring a motion to quash. Evidently, this was sufficient for the parties to find a way to work out the dispute and the subpoena never issued.)

Congress adopted the ADR Act in 1998 with a view towards expressing a strong federal interest in protecting the confidentiality of communications that occur in federal court mediations. Unfortunately, as noted in *Olam v. Congress Mortgage Co.* (1999) 68 F. Supp. 2d 1110, it didn't provide directly for the protection of confidential ADR communications or prescribe specifically what the protection should consist of. Instead, the ADR Act required that each district court adopt it's own provisions for confidentiality under 28 U.S.C. Section 652. The Central District's Local Rule 16-15.8 broadly states: "All settlement proceedings shall be confidential. No part of a settlement proceeding shall be reported, or otherwise recorded, without the consent of the parties, except for any memorialization of a settlement and the Clerk's minutes of the proceeding."

The U.S. District Court has long acknowledged that rules protecting the confidentiality of mediation proceedings and the actual or perceived impartiality of mediators serve the same ultimate purpose: encouraging parties to attend mediation and communicate openly and honestly in order to facilitate successful alternative dispute resolution. (See *Folb v. Motion Picture Industry Pension & Health Plans* (1998) 16 F. Supp. 2d 1164). For that reason, it seems that it's a great time for our federal judges and magistrates to develop and adhere to a local rule that affords this protection - instead of leaving both mediators and disputants to wonder what, if anything, said or done will be subject to later disclosure.

U.S. Magistrate Judge Wayne Brazil wrote the opinion in the *Olam v. Congress Mortgage Co.* with a great deal of thought and obvious appreciation for what many have deemed the promise, and even on occasion, the magic of mediation. He acknowledged, for example, that the possibility that a mediator might be forced to testify over objection could harm the capacity of mediators in general to create the environment of trust that they feel maximizes the likelihood that constructive communication will occur during the mediation session. What's more, it is inconsistent with California law, which sometimes applies, under Federal Rule 501, and sometimes does not.

As Magistrate Brazil aptly noted, many mediators measure their success by whether or not the parties reach a settlement. For that reason, there is a vested psychological interest in supporting

the finality of the agreement, rather than undermining it. Indeed, the recent exceptions to the confidentiality statutes have all arisen in California courts (*Cassel v. Superior Court*, *Wimsatt v. Superior Court* and *Porter v. Wyner*) out of an argument that the parties' lawyer, not the mediator, unfairly exerted pressure or inaccurately communicated the facts to their own clients, causing them to agree to a settlement that was allegedly not in their best interest. The issues each arose upon an attempt to enforce an agreement that one of the parties wished to set aside or in a subsequent action against their own counsel.

Nonetheless, in California, not only must the parties waive confidentiality, but the mediator also must be willing to waive the privilege. In *Rinaker v. Superior Court* (1998) (62 Cal. App. 4th 155), the court compelled testimony from the mediator in a juvenile delinquency proceeding only after an in camera consideration of what the testimony would be and a determination by the trial judge that the testimony might well promote the public interest in preventing perjury and thus, the defendant's fundamental right to a fair judicial process. In making it's determination, the trial judge was asked to weigh all the competing interests, including the values that would be threatened not by public disclosure of mediation communications, but by ordering the mediator to appear at an in camera proceeding. The *Olam* court largely followed the two-prong test outlined and employed in *Rinaker*, while being extremely deferential to the attributes of the mediator's deep commitment to being and remaining neutral, non-judgmental and to building and preserving relationships with parties.

In the more recent case of *Molina v. Lexmark International Inc.* (2008) 77 Federal Reporter 905, Judge Margaret Morrow astutely noted that no circuit court had ever adopted or applied a federal common law mediation privilege. Accordingly, she permitted testimony of discussions during mediation for the limited purpose of establishing the amount in controversy while drawing an interesting distinction between confidentiality (as between the parties) and privilege (from disclosure to a third party). It may have been clear to Judge Morrow, but it certainly leaves the rest of us to wonder under what circumstances the general rule of confidentiality that we've come to rely upon in state actions in California will be applied in federal actions.

At least for this mediator's part, it would appear to be a good moment after 10 years of struggling with this, for the Central District of the U.S. District Court to attempt to strike a balance or at least refrain from adopting a privilege whose contours may be in disagreement with California law. The local rules should be modified in accordance with the analysis in *Olam* and consistent with California law. That way, perhaps we could answer the question raised at the outset: "Is your secret really safe with me?"

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