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Enforcing mediation caucus agreements after *Cassel*

A primer on the admissibility and enforceability of agreements made in caucus-only sessions, especially agreements you make with your own clients

In *Cassel v. Superior Court* (2011) 51 Cal.4th 113, the California Supreme Court ruled that, absent meeting specified exceptions set forth in the Evidence Code, statements made in and during the course of a mediation that occur solely between an attorney and client are not admissible in a civil action. After several appellate cases that had differently construed the Evidence Code's mediation provisions regarding the admissibility of statements, agreements and conduct between only lawyer and client, *Cassel* is now the definitive ruling on the admissibility of statements made, documents created and conduct occurring between parties on the same side of a dispute, as well as between disputants themselves.

This article addresses the need to consider whether certain agreements made throughout a mediation that are solely between an attorney and a client, or between multiple plaintiffs, lienholders or other stakeholders on one side of a dispute, ought to be made admissible, and if so, how.

(Editor's note: All unlabeled statutory references are to the Evidence Code.)

In *Cassel*, a client brought a legal-malpractice action against his attorney, alleging that the attorney pressured the client into accepting a settlement for an amount far less than what was agreed or anticipated prior to the mediation. The court ruled that all of the statements and conduct preceding and during the mediation were inadmissible, even though all of the alleged conduct and statements occurred in private communications solely between the client and his attorney. The court held that "[a]bsent an express statutory exception, all discussions conducted in preparation for a mediation, as well as all mediation-related communications that take place during the mediation itself, are protected from disclosure." (*Cassel, supra,* at 128.) This holding was based upon an analysis of the language of Evidence Code section 1119, which broadly provides that (except as otherwise provided in the chapter), no evidence of anything said, nor any writing made for the purpose of, in the course of, or pursuant to a mediation or mediation consultation is admissible in any arbitration, civil action or administrative adjudication.

Common agreements

Consider the following situations where agreements are frequently made in plaintiff-side caucuses:

- Agreements to amend the written retainer agreement, including reducing the percentage of attorney fees, guaranteeing the client a base amount of recovery, guaranteeing or reducing the costs or liens;
- Agreements made on the telephone with a medical lienholder to reduce the amount of a lien;
- Agreements between multiple plaintiffs represented by the same lawyer (or by co-counsel) to take less than an equal percentage of the proceeds, for a variety of reasons (one plaintiff has greater medical specials or loss of earnings component; one plaintiff owes another money and agrees to offset it through an amended settlement proceeds distribution, one plaintiff has advanced costs and will receive a reimbursement of costs);
- Pro forma distribution statements made at the mediation.

In other words, if you make a side deal, or prepare a diagram or a set of figures that is useful for your clients, is that admissible? *Cassel* suggests that lawyers put on their confidentiality "antennae" upon contemplating, preparing for and engaging in mediations. Over a decade has passed since the legislation which clearly specifies the general presumption that communications in California mediations are inadmissible, with several specific exemptions provided for in the legislation allowing admissibility of evidence. Meeting the technical hurdles requires forethought and precision.

It has become commonplace for lawyers and mediators to either sign standard confidentiality agreements acknowledging the inadmissibility of statements made in mediation, or if they do not sign such agreements, to understand that everything discussed in mediation is inadmissible. It is also widely understood that written settlement agreements are admissible, provided they meet one of the requirements set forth in Evidence Code section 1123 (i.e., that the agreement states that it is enforceable or binding or words to that effect; that it is admissible or subject to disclosure or words to that effect; or that all parties to the agreement expressly agree in writing to its disclosure). What is not widely held in the consciousness of mediators and lawyers alike is that these and other special technical requirements in the Evidence Code, are necessary to admit into evidence agreements made with less than all of the usual settling parties.

This article suggests that lawyers and mediators ought to turn on their

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admissibility antennae and notice situations where side agreements or caucus agreements are made, and consider whether any special steps should be taken to ensure that they are admissible and consequently enforceable in the event of a subsequent dispute.

Agreements made with plaintiff

A common conversation between mediator, plaintiff and plaintiff's counsel occurs toward the end of the negotiations, when the client is being asked to consider accepting a particular offer. The conversation focuses on the net proceeds the client can expect to receive based upon accepting that offer. This net number is not always easy to determine because liens have not been negotiated and the exact costs advanced on the matter may not be readily available.

Counsel sometimes will advise the client that he can expect to receive a minimum of a certain dollar figure or "something in that range." Some attorneys offer to reduce their fees and/or costs so that the client can expect to receive a certain sum. When the liens cannot be negotiated as expected and misunderstandings between lawyer and client ensue, *Cassel* dictates that to the extent that such agreements are made during or in the course of the mediation, they must meet technical statutory exceptions in order to be admissible (only the written exceptions under Evidence Code sections 1122 and 1123 are covered in this article; *see also* exceptions in sections 1118 and 1124 for admissibility of oral agreements made in mediation, which are generally impracticable and rarely used).

In the examples given, this would mean that the client would be unable to enforce an agreement more favorable to the client than the retainer agreement unless it met the technical admissibility provisions of the Evidence Code, but it would not prevent a client from initiating a complaint with the State Bar (the admissibility of such evidence in a disciplinary setting is unclear). If an oral agreement made at the mediation was more favorable to the attorney than what the client understood was agreed, the lawyer will be unable to enforce the more favorable agreement. It is always good business practice to make certain that any agreements made between lawyer and client are clear and in writing. But is a scribbled note with you and your client's signature enough? The answers are probably not, and maybe.

Agreements with lienholders

During mediation, you, the plaintiff counsel, phone the primary doctor and negotiate the doctor's lien. Later, the doctor reneges on the agreement. Unless the attorney takes the time to create a writing that meets the technical statutory requirements of the mediation provisions of the Evidence Code, the agreement is not enforceable because it is not admissible. The same would hold true for a lien negotiation made on the way to mediation. How can you make sure this is binding on the medical provider?

Agreements with multiple plaintiffs

When you, or you and your co-counsel, represent more than one plaintiff, there are sometimes different amounts of money that each plaintiff will be offered and/or will accept. Usually these separate amounts will be set forth next to each plaintiff's name in a global settlement agreement presented at the end of the mediation. But consider these not uncommon occurrences:

- A mediator's proposal is needed to settle the case, and the plaintiffs will agree among themselves to their proportionate shares if the proposal is accepted.
- Your clients, on their own, determine to shift the allocations.
- The clients wish to adjust the allocations through a reallocation of the respective charge of attorney fees or costs set forth in the retainer agreement (thereby amending the retainer agreement).
- One of the clients, Client A, does not want to settle the case unless he receives $20,000, but only $17,000 is offered to him. The other three of your four clients is each willing to give $1,000 of their monies to Client A, but the defendant is unwilling to change its allocation as offered in the negotiations or in any final settlement agreement.

In these situations, the attorney should be focusing on making sure that the agreements between the clients are enforceable, as buyer's remorse and next day jitters are common occurrences for plaintiffs. Does an agreement they sign at the mediation among themselves work? Yes, but only if the technical requirements allowing its admissibility pursuant to sections 1122 and/or 1123 are met.

Agreements in the above circumstances that are made in advance of the mediation session will likewise necessitate satisfaction of the statutory requirements to be admissible if they are made or prepared "for the purpose of, in the course of, or pursuant to" a mediation. (Evid. Code, § 1119(a) & (b); *Cassel, supra,* at 128.)

Admissible settlement agreements

Pursuant to section 1123 a written settlement agreement meeting certain technical requirements is one of the statutory exceptions to the rule prohibiting admissions of statements and conduct in mediations. Attorneys participating in mediations should be well versed in these requirements, as these clearly apply to the primary disputants in any mediation, plaintiff(s) and defendant(s).

A written settlement agreement is admissible pursuant to section 1123 if signed by the settling parties and if one of these three conditions is met:

- The agreement provides that it is admissible or subject to disclosure, or words to that effect (Evid. Code, §1123(a);
- The agreement provides that it is binding or enforceable, or words to that effect (Evid. Code, § 1123(b); or
- The parties to the agreement expressly agree in writing, or orally in accordance with section 1118, to its disclosure (Evid. Code, § 1123(c).

A typical Stipulation for Settlement form that is customarily provided by the mediator or an ADR provider, for signature by plaintiff(s), defendant(s) and their respective counsel, is likely to contain something like the following:

> The parties agree that they have reached a full and final settlement of all claims arising from the events described in the complaint. This

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agreement is binding and it contains the material terms of the agreement between the parties. Pursuant to Section 1123 the parties agree that this agreement is exempt from the confidentiality provisions of Evidence Code Sections 1119, *et seq*., and is admissible in evidence to enforce the settlement.

This settlement language meets all three of the enumerated requirements of section 1123, only one of which must be met, in order for a written settlement agreement to be admissible (Evid. Code, § 1123(a), (b) and (c). Note, however, that the settling parties must sign the agreement. (Evid. Code, § 1123).

The author is a proponent of including admissibility language in a standard confidentiality agreement, signed by all participants and the mediator at the commencement of a mediation. The provision in the author's confidentiality agreement is as follows:

The undersigned agree that this confidentiality agreement and any written settlement agreement resulting from this mediation are binding, enforceable and admissible in any subsequent proceeding to enforce those agreements.

The purpose of this "umbrella" provision is to safeguard against the failure to specifically state in the settlement agreement itself (usually drafted after everyone is exhausted) that it is either "admissible or subject to disclosure" or that it is "binding or enforceable" or words to that effect. Thus, by agreeing that a settlement agreement to be created in the future is admissible, the parties are protected in the event a deal memo is written and signed without the magic words contained in section 1123 (a) or (b). This would permit a barebones initialed deal point memo between the primary disputants in a mediation to be admitted. Note that this provision meets the exceptions of either section 1123(c) or 1122(a)(1), depending upon who signs it.

Admissible agreements signed only by participants in the plaintiff caucus

There are four suggestions for the admission of agreements signed only by participants in the plaintiff caucus:

• Written settlement agreements signed by the caucus participants

As discussed above, Evidence Code section 1123 provides an exception to the inadmissibility of agreements that are signed by the settling parties and that meet one of three technical requirements. It is probable that a side agreement between attorney and client, or attorney and lienholder would be considered a settlement agreement and therefore admissible if one of the requirements in section 1123 (a), (b) or (c) is met. After all, the participants in a caucus are resolving (settling) an issue between them by coming to an agreement about the issue (part of the *Cassel* holding is that attorney and client are distinct participants for purposes of the mediation confidentiality statute). It is suggested that somewhere the document they sign be referred to as a "settlement agreement."

There are a couple of caveats to the success of using a settlement agreement under section 1123 for caucus-only settlements. Section 1122(a)(2) provides that an admissible writing prepared by or on behalf of *less* than all the mediation participants may not disclose anything said or done or any admission made in the course of the mediation (Evid. Code, § 1122(a)(2); emphasis added). The California Law Revision Comments to section 1122(a)(2) state that the subsection facilitates the admission of unilaterally prepared materials if they reveal nothing about the mediation discussion. (Cal. Law Revision Com. com., 29B pt. 3B West's Ann. Evid. Code, § 1122(a)(2).) The comments to section 1122 further note that section 1123 (written settlement agreements) is an exception to section 1122. And the Law Revision comments to section 1123 refer to section 1122. What this means exactly is unclear, although taken together, the likely conclusion is that a settlement agreement signed by any of the participants in a mediation is admissible, including plaintiff caucus participants, if it meets one of the enumerated exceptions of section 1123.

A strong suggestion is to make sure that the settlement agreement between attorney and client, or attorney and lienholder, or between multiple clients keeps the recitals and agreements to a minimum and avoids discussing issues that pertain to communications, documents and writings with other participants at the mediation. About one thing we can be certain – this issue will be litigated, eventually.

An attorney might get into the practice of having a confidentiality agreement signed at the beginning of the mediation (by all participants per Evidence Code section 1122(a)(1)), that provides that any settlement or other agreements, including those between other than the primary disputants, are admissible settlement agreements pursuant to section 1123(c). That way, the legal pad scribbles evidencing the allocations of settlement dollars would be admitted.

• Written agreements to disclose communications that are *not* settlement agreements

Evidence Code section 1122 (a) provides for two other ways for written agreements in mediations to be admissible, if either of the following conditions is satisfied:

1122(a)(1) All persons who conduct or otherwise participate in the mediation expressly agree in writing, or orally in accordance with Section 1118, to disclosure of the communication, document, or writing; or

1122(a)(2) The communication, document, or writing was prepared by or on behalf of fewer than all the mediation participants, those participants expressly agree in writing, or orally in accordance with Section 1118, to its disclosure, and the communication, document, or writing does not disclose anything said or done or any admission made in the course of the mediation. (Evid. Code, § 1122(a)(1) and (a)(2).

• Written agreements to disclose communications signed by the mediator and all participants

Section 1122(a)(1) allows the mediator and all participants to expressly agree in writing to a disclosure of the communication or document. Providing a

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provision in the primary settlement agreement that any writings by and between an attorney and a client are admissible between them is one possible approach, provided the mediator and all participants are signatories. Another option is to sign a pre-mediation confidentiality agreement providing for admissibility of caucus-only agreements, where the mediator and all participants are normally present and signing.

• Written agreements to disclose communications signed by fewer than all participants.

Section 1122(a)(2) is the more likely provision to be used. A writing prepared on the attorney's legal pad that is signed by the client and the attorney and says that it is subject to disclosure, and has nothing more than the percentage or monetary allocations agreed to be distributed from settlement monies ought to be admissible under this section. While you are at it, however, make it a settlement agreement by calling it a settlement agreement, and state that it is binding or enforceable, as well as admissible and subject to disclosure. And make sure that all parties to the settlement agreement sign it. As discussed above, it is highly suggested that you include the magic language "provided that this agreement does not disclose anything said or done or any admission made in the course of the mediation." This avoids the potential conflict between sections 1123 and 1122(a)(2) discussed above.

For lienholders, ask them to sign such an agreement that can be faxed, or ask if you may obtain their email signature in order to bind them to their commitments. This provision is also clearly intended to allow the admission of documents you and your client create in preparation for litigation, that just happen to be created while you are sitting around for hours at the mediation. Care should be taken that no mediation discussions regarding the larger mediation dispute are included in the writing.

• Retainer agreements

The lawyer's initial retainer agreement with a client is the best place to fashion agreements with clients about disclosure of any communications or agreements made in preparation of and during the course of the mediation. By agreeing to disclose documents you and your client create, reciting the statutory exception language of Evidence Code section 1122(a)(2), your legal pad scratch notes of the final allocations are admissible into evidence and expectations that clients and attorneys can air their disputes without the shield of mediation confidentiality will be honored.

• Final thoughts

As a mediation proceeds, lawyers ought to have heightened antennae regarding whether or not it is wise to take certain affirmative steps to make sure agreements between their clients and themselves and/or lienholders, spouses, and others are admissible and enforceable. Remember Evidence Code sections 1122 and 1123, and carry their provisions with you. Be mindful that there are technical requirements and take the time to study and implement them.

Also consider whether there are there other things besides an agreement you wish to have admissible and subject to disclosure. Is your client relying on a representation by the other side that ought to be a recital in a settlement agreement? Or might a particular document or set of communications be useful for enforcement or interpretation of an agreement? Sections 1122 and 1123 cover these situations.

Plaintiffs' lawyers will clearly sail through settlement to closed files with happy, referring clients, when they learn and implement the exceptions to the mediation confidentiality rules so that the agreements they make with mediation participants are kept – by being admissible and enforceable.

Suggested clauses

All suggested clauses are for discussion purposes only, are not to be considered legal advice and may not be suitable or legally enforceable for any particular mediation situation. Anyone using a suggested clause is advised to review the Evidence Code and applicable case law and/or obtain the advice of legal counsel.

• Pre-mediation or confidentiality agreement clauses (signed by the mediator and all participants)

The undersigned agree that this confidentiality agreement and any written settlement agreement resulting from this mediation are binding, enforceable and admissible in any subsequent proceeding to enforce those agreements (Evid. Code, § 1122(a)(1).

[Optional addition to the above]: A written settlement agreement for purposes of this paragraph includes any written agreement signed by less than all of the mediation participants to resolve, clarify or establish the outcome of any issue that arises solely between them during the course of the mediation (Evid. Code, § 1122(a)(1).

[Optional addition to the above]: In addition, other writings, statements or admissions made during the course of the mediation are admissible solely for the purpose of interpreting and enforcing the terms and provisions of any resultant written settlement agreement. (Evid. Code, § 1122(a)(1).

[Optional addition to the above]: In addition, any communications, documents or writings transmitted or prepared solely between a party and its respective counsel, is admissible and may be disclosed in any proceeding between the party and its respective counsel. (Evid. Code, § 1122(a)(1).

• Agreement that side agreement or other statements in the mediation may be admissible (signed by the mediator and all participants)

The parties agree, pursuant to Evidence Code section 1122(a)(1), that all statements, writings, communications, documents and conversations created and exchanged among and between them during, and as a result of the facilitated meetings with the mediator may be disclosed in any subsequent legal proceeding and are admissible as evidence.

All participants to the mediation agree that any side agreement, writings, or communications by and between one set of parties and/or their respective counsel is admissible in any subsequent proceeding, provided that the only

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parties competent to testify regarding the side agreement, writings or communications, are the parties who signed the side agreement or created the writings or made the communications, and that the other participants to the mediation, including the mediator, cannot be compelled to testify (Evid. Code, §§ 1122(a)(1), (a)(2).

• Caucus or side agreement clause to disclose written agreements (signed by less than all mediation participants)

The undersigned agree that this agreement shall constitute a settlement agreement between them regarding the issues therein, and that this agreement is binding, enforceable and admissible in any subsequent proceeding to enforce this agreement (Evid. Code, § 1122(a)(2); probably admissible under Evid. Code, § 1123, if signed by all of the settling parties).

The parties agree, pursuant to Evidence Code Section 1122(a)(2), that this settlement agreement, prepared solely between the signing parties, is binding and enforceable between them, and is admissible and may be disclosed in any subsequent proceeding between them, provided that, the communications, documents or writings do not and may not disclose anything said or done or any admission made in the course of the mediation between the main mediation disputants (Evid. Code, § 1122(a)(2); probably admissible under Evid. Code, § 1123, if signed by all of the settling parties).

• Retainer Agreement Clause (signed by the lawyer and client prior to the mediation)

Attorney and client agree that, pursuant to California Evidence Code section 1122(a)(2), any communications, documents or writings that are prepared, transmitted and communicated between them are subject to disclosure in any subsequent proceeding between them, provided that the communications, documents or writing do not disclose anything said or done or any admission made in the course of the mediation (Evid. Code, § 1122(a)(2).

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