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by Judge Michael D. Marcus (ret.)

What Happens in MEDIATION...

Courts have carved out only very rare exceptions to mediation confidentiality

CONFIDENTIALITY dominates the mediation process in California. With rare exceptions, all writings and statements prepared for and made at mediation cannot be divulged. Confidentiality is a cornerstone of mediation because it enables all participants to discuss openly the legal and factual elements of their cases without consequence or detriment.[1]

Along with the clear advantages of confidentiality, however, are its less obvious and sometimes criticized byproducts, including the protection of misconduct and incompetence. Indeed, while an attorney is constrained from misleading a judicial officer[2] or opposing attorney,[3] misrepresentations to neutrals or other mediation participants are not subject to either sanctions or discipline.[4] The interpretation by courts of the scope of mediation confidentiality thus carries high stakes for all involved. As a result, practitioners should be aware of recent decisions by the California Supreme Court and a Ninth Circuit Court of Appeals case to fully grasp the current breadth of confidentiality applicable to mediation.

Mediation confidentiality in California's state courts derives from the California Evidence Code,[5] which states that every communication, whether oral or in writing, that was "made for the purpose of, in the course of, or pursuant to mediation" is confidential and not admissible at any subsequent proceeding or subject to discovery.[6] The source of mediation confidentiality in California's federal courts is based on local rules as well as case law and is thus more nuanced.[7]

The California Supreme Court's 2001 decision in *Foxgate Homeowners' Association, Inc. v. Bramalea California, Inc.*, is the natural starting point for an analysis of mediation confidentiality in California state courts. In *Foxgate*, the supreme court held that pursuant to Evidence Code Sections 1119 and 1121, a mediator may not report attorney misconduct or bad faith to a jurist with the underlying case on his or her calendar. According to the *Foxgate* court, "Neither a mediator nor a party may reveal communications made during mediation." Moreover, Section 1121 prohibits mediators "and anyone else from submitting a document that reveal[s] communications during mediation and [bars] the court from considering them."[8] The opinion further held that:

Although a party may report obstructive conduct to the court,

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none of the confidentiality statutes currently make an exception for reporting bad faith conduct or for imposition of sanctions under that section when doing so would require disclosure of communications or a mediator's assessment of a party's conduct although the Legislature presumably is aware that Code of Civil Procedure section 128.5 permits imposition of sanctions when similar conduct occurs during trial proceedings.[9]

The court elaborated on that point in an extensive footnote, stating in part that:

> The conflict between the policy of preserving confidentiality of mediation in order to encourage resolution of disputes and the interest of the state in enforcing professional responsibility to protect the integrity of the judiciary and to protect the public against incompetent and/or unscrupulous attorneys has not gone unrecognized. (Citations omitted.) As noted, however, any resolution of the competing policies is a matter for legislative, not judicial, action.
>
> Therefore, we do not agree with the Court of Appeal that the court may fashion an exception for bad faith in mediation because failure to authorize reporting of such conduct during mediation may lead to "an absurd result" or fail to carry out the legislative policy of encouraging mediation….[10]

The *Foxgate* court recognized, however, that occasionally it is necessary for courts to create a judicial exception to a statute to avoid "an absurd result."[11] Nevertheless, this was not required by the facts in *Foxgate* because Evidence Code Section 1119—which prohibits any person from revealing any written or oral communication made at mediation—and Section 1121—which prohibits mediators from advising the court about conduct during the mediation—were clear and unambiguous.[12]

A logical extension of *Foxgate* is *Rojas v. Superior Court*,[13] in which the supreme court in 2003 extended confidentiality to all writings, including exhibits, prepared for mediation. For example, a document created for mediation that summarizes a plaintiff's damages is protected, while a summary of the same damages prepared by a company bookkeeper during the course of the business's operation is not.

The enforceability of mediation settlements was the supreme court's focus in *Fair v. Bakhtiari*,[14] a 2006 decision that discusses the language required to make a written settlement enforceable pursuant to Evidence Code Section 1123(b). Subdivision (b) states that a settlement agreement is enforceable if it "provides that it is enforceable or binding or words to that effect." The court concluded that the arbitration provision in the settlement at issue—with the language "Any and all disputes subject to JAMS (Judicial Arbitration and Mediation Services) arbitration rules"—did not comply with Section 1123(b) because it did not include a "direct statement to the effect that [the settlement] is enforceable or binding." The *Fair* court explained that the legislature's goal in drafting the phrase "words to that effect" was to allow the parties to use nonlegalistic terms to express their intent.[15] To effect that legislative aim and not erode confidentiality, *Fair* concludes that a writing, to satisfy the "words to that effect" provision, "must directly express the parties' agreement to be bound by the document they sign."[16] The arbitration provision at issue did not express that intent.

Due Process Exception

Simmons v. Ghaderi,[17] a decision by the supreme court in 2008, qualifies *Foxgate*, *Rojas*, and *Fair*'s strict interpretation of mediation confidentiality. In rejecting a challenge to mediation confidentiality, the *Simmons* court held that due process is the only judicially crafted exception to strict application of mediation confidentiality in the absence of legislative action.

The court in *Simmons* noted, as the *Foxgate* court had also observed, that "judicial construction of unambiguous statutes is appropriate only when literal interpretation would yield absurd results."[18] The court rejected the argument that a party, over the objection of an opposing party, can enforce an oral settlement agreement at mediation pursuant to a breach-of-contract theory. Moreover, since estoppel and waiver of mediation confidentiality were contrary to legislative intent, the *Simmons* court held that they cannot be adopted as judicial exceptions to the mediation statutes.[19]

In recognizing the due process exception to confidentiality, *Simmons* cites, with approval, *Rinaker v. Superior Court*.[20] The court of appeal in *Rinaker* compelled a mediator to testify at a juvenile delinquency proceeding regarding statements by the victim at a related mediation about the identities of the juveniles. The court found that a minor's due process right of confrontation outweighs the right of confidentiality.[21]

The federal counterpart to *Rinaker* is *Olam v. Congress Mortgage Company*,[22] which holds that a mediator's testimony can be compelled in a civil proceeding to establish whether a defaulting party was competent to enter into a settlement agreement that the opposing party is seeking to enforce. *Foxgate* factually distinguishes *Olam* because the parties in *Foxgate* had waived confidentiality. Otherwise, *Foxgate* acknowledges *Olam* as a comprehensive discussion of mediation law.[23]

Both *Rinaker* and *Olam* explain the process that a trial court should use to decide whether or not to compel a mediator's testimony. *Rinaker* states that a court should conduct an in camera hearing "to weigh the public's interest in maintaining the confidentiality of mediation against the minors' constitutionally based claim of need for the testimony, and to determine whether the minors have established that the mediator's testimony is necessary to vindicate their right of confrontation."[24] For example, the mediator would be excused from testifying in open court if he or she could not recall the statement needed to impeach the witness.[25] Also, the in camera process allows the trial court to assess the probative value of the mediator's testimony.[26] *Rinaker* rejects the suggestion that the moving party should be required to demonstrate that "there is no other evidence, unrelated to the mediation, which could be used to undermine" the testimony of the witness to be impeached.[27]

If a plaintiff is claiming undue influence at the mediation and seeking the voiding of the settlement, *Olam*, relying on *Rinaker*, allows the mediator to first testify in closed proceedings regarding the plaintiff's statements at mediation.[28] Like *Foxgate*, *Olam* notes that Evidence Code Section 703.5 confers on the mediator an independent privilege not to testify about statements or conduct in the mediation—and that *Rinaker* does not focus on that provision. The mediator in *Rinaker* had objected to testifying only on the basis of Evidence Code Section 1119, not Section 703.5.[29]

Olam posits a two-step approach for balancing the requirements of confidentiality and due process. According to the *Olam* court:

> [The goal of the first step] is to determine whether the harm that would be done to the values that underlie the mediation privileges simply by ordering the mediator to participate in the in camera proceedings can be justified by the prospect that (the mediator's) testimony might well make a singular and substantial contribution to protecting or advancing competing interests of comparable or greater magnitude.[30]
>
> In the second step, the court should weigh and assess: (1) the importance of the values and interests that would be harmed if the mediator was compelled to testify (perhaps subject to a sealing or protective order, if appropriate), (2) the magnitude of the harm that compelling the testimony would cause to those values and interests, (3) the importance of the rights or interests that would be jeopardized if the mediator's testimony was not accessible in the specific proceedings in question,

MCLE Test No. 209

The Los Angeles County Bar Association certifies that this activity has been approved for Minimum Continuing Legal Education credit by the State Bar of California in the amount of 1 hour.

1. Mediation confidentiality in California's state courts is a product of both statute and case law.
True.
False.

2. The basis for mediation confidentiality in California's federal courts is found only in the Federal Rules of Evidence and not in common law.
True.
False.

3. Mediation confidentiality in California's state courts is absolute, with no exceptions.
True.
False.

4. A mediator may not report an attorney who misbehaves at the mediation to the superior court judge who has the underlying case on his or her calendar.
True.
False.

5. Mediation confidentiality prevents a mediator from reporting the failure of an attorney or party to attend a mediation to the superior court judge who has the underlying case on his or her calendar.
True.
False.

6. Mediation confidentiality allows attorneys to misrepresent facts and law to mediators and opposing counsel at the mediation.
True.
False.

7. A diagram drawn by a witness to an accident at the time of the accident becomes confidential if referred to or used by an attorney at a mediation.
True.
False.

8. A diagram drawn at a mediation by a witness to an accident is protected by mediation confidentiality.
True.
False.

9. A mediator's testimony about statements or conduct by parties at a mediation regarding whether one of the parties was competent to enter into the settlement agreement can be compelled in a federal civil proceeding to enforce the mediation settlement agreement.
True.
False.

10. When attempting to enforce a mediation settlement in state court, a party must show that the parties had expressly waived mediation confidentiality pursuant to language in the Evidence Code.
True.
False.

11. Mediation confidentiality protects attorneys in state court from being sued for legal malpractice by their clients for anything they said or did during a mediation.
True.
False.

12. Mediation confidentiality does not apply to communications between clients and their attorneys that were made outside the presence of the mediator and opposing counsel.
True.
False.

13. Communications between clients and their attorneys before the commencement of a mediation are not confidential.
True.
False.

14. In *Cassel v. Superior Court*, the California Supreme Court invited the state legislature to reverse the court's holding that mediation confidentiality applies to all communications made at mediation, including those that may involve legal malpractice.
True.
False.

15. Like the state courts, California's federal district courts strictly apply confidentiality to all communications and writings made during a mediation.
True.
False.

16. Despite the fact that federal courts are authorized to establish rules regarding dispute resolution, a recent decision makes it doubtful that they have the authority to create their own local rules concerning mediation confidentiality.
True.
False.

17. Parties engaged in court-ordered and private mediations in federal court proceedings can negotiate for the total confidentiality of mediation communications.
True.
False.

18. Communications in state court mediations conducted by court-connected or appointed mediators are as confidential as communications in private mediations.
True.
False.

19. California's attorney-client privilege in the Evidence Code is a further basis for protecting attorney-client communications at mediations.
True.
False.

20. Evidence Code Section 703.5 confers on a mediator an independent privilege not to testify about statements or conduct by parties at a mediation.
True.
False.

MCLE Answer Sheet #209

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5.	☐ True	☐ False
6.	☐ True	☐ False
7.	☐ True	☐ False
8.	☐ True	☐ False
9.	☐ True	☐ False
10.	☐ True	☐ False
11.	☐ True	☐ False
12.	☐ True	☐ False
13.	☐ True	☐ False
14.	☐ True	☐ False
15.	☐ True	☐ False
16.	☐ True	☐ False
17.	☐ True	☐ False
18.	☐ True	☐ False
19.	☐ True	☐ False
20.	☐ True	☐ False

and (4) how much the testimony would contribute toward protecting those rights or advancing those interests—an inquiry that includes, among other things, an assessment of whether there are alternative sources of evidence of comparable probative value.[31]

Rinaker and *Olam* are applicable when 1) a party to a mediation settlement agreement, in which all of the parties have expressly waived mediation confidentiality, wants the mediator to testify as to what took place at the mediation, and 2) a due process violation might occur if mediation confidentiality were to prevent a mediator's testimony.

The court reasoned that the attorney-client privilege and mediation confidentiality statutes achieve separate and unrelated purposes. The former "allows the client to consult frankly with counsel on any matter, without fear that others" may use these confidences, whereas the latter "serve the public policy of encouraging the resolution of disputes by means short of litigation."

As the supreme court noted in *Simmons v. Ghaderi*,[32] parties seeking the trial court's assistance in enforcing a settlement may avoid mediation confidentiality by expressly waiving its application. According to Evidence Code Section 1122(a)(1) and (2), a mediation writing is admissible if all participants agree to its disclosure and it does not reveal anything said or done during the mediation. To be valid, the waiver must be clear and unambiguous. Thus, a mediation settlement agreement should incorporate the language of Evidence Code Section 1123(a), (b) and (c) and state either that the agreement "provides that it is admissible or subject to disclosure…," is "enforceable or binding…," or "all parties to the agreement expressly agree in writing, or orally in accordance with Section 1118, to disclosure of the agreement."[33]

Thus *Foxgate* and its progeny allow attorneys and mediators to report to the trial court the failure of an attorney or party to appear at a mediation. However, unless disclosure is permitted by consent of the parties or required to uphold a due process right, all communications during the mediation process, no matter how scurrilous or misleading, are confidential in California's state courts—until the legislature states otherwise.[34]

The Impact of *Cassel*

This year, *Cassel v. Superior Court* reaffirmed the scope of mediation confidentiality in California's state courts.[35] The California Supreme Court was faced with two clear options—continue to hold that mediation confidentiality should be liberally construed despite the surrounding circumstances, or find that confidentiality should not be used to shield negligent attorneys from malpractice suits. The court chose to stay the course and held that mediation confidentiality has few exceptions.

In *Cassel*, the plaintiff filed a complaint against his former attorneys for breaching their professional, fiduciary, and contractual duties. The plaintiff claimed that the defendants forced him to settle a case through the use of bad advice, deception, and coercion. To prove his case, Cassel wanted to introduce as evidence his conversations with his attorneys immediately preceding and at the mediation. The trial court ruled that these discussions were inadmissible. The court of appeal granted mandamus relief, reasoning that mediation confidentiality statutes are not intended to prevent a client from using communications with his or her lawyer outside the presence of all other mediation participants in a legal malpractice case against the lawyer.

Cassel begins with a reminder that the legislature has provided only one exception to mediation confidentiality—an express waiver by the participants. Moreover, the judicially crafted exceptions are only available when "due process is implicated, or where literal construction would produce absurd results, thus clearly violating the Legislature's presumed intent."[36] The court reviewed *Foxgate*, *Rojas*, *Fair*, and *Simmons*—cases that, collectively, are authority for the broad application of mediation confidentiality.[37] With these decisions as a foundation for its ruling, the *Cassel* court held that the purpose of Evidence Code Section 1119(a)—which provides that "[n]o evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation…is admissible or subject to discovery…"—extends to all oral communications at a mediation, even if they only take place between parties and their own attorneys.[38]

The *Cassel* court also found that the plaintiff's discussions with his attorneys before the mediation concerning mediation strategy and settlement were confidential because Section 1119(a) and (b) applies to all utterances and writings "for the purpose of, in the course of, or pursuant to, a mediation." Instead of attempting to create a bright-line test for establishing when a pre- or post-mediation utterance or writing is related to mediation and thus confidential, the court simply held that the plaintiff's discussions with his attorneys came within the statute because they "concerned the settlement strategy to be pursued at an immediately pending mediation…[and] were closely related to the mediation in time, context, and subject matter.…"[39]

The court in *Cassel* notes that the mediation confidentiality statutes are unlike Evidence Code Section 958—which eliminates confidentiality protections otherwise afforded by the attorney-client privilege in suits between clients and their lawyers—because the mediation confidentiality statutes contain no exception for legal malpractice actions. The court reasoned that the attorney-client privilege and mediation confidentiality statutes achieve separate and unrelated purposes. The former "allows the client to consult frankly with counsel on any matter, without fear that others" may use these confidences, whereas the latter "serve the public policy of encouraging the resolution of disputes by means short of litigation."[40]

The *Cassel* court also discussed the nonapplicability of the due process exception and the more general "absurd result" test to the facts before it. Due process was not a factor because "the mere loss of evidence" in a lawsuit for civil damages does not implicate a fundamental interest. Nor did the result produced by applying the plain terms of the statutes to the facts of the case create a result that was absurd or clearly contrary to legislative intent.[41]

In sum, the *Cassel* court reversed the appellate court judgment and left the plaintiff with the inability to introduce evidence of his attorneys' alleged misconduct immediately prior to and at the mediation. The short-term impact of *Cassell*'s extensive analysis should foreclose

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further lower court attempts to carve exceptions to mediation confidentiality. This effect may not last too long, however. While the court chose not to create a bright-line rule allowing clients to use communications with their attorneys at mediations in subsequent malpractice actions, it unambiguously invited the legislature to do so: "Of course, the Legislature is free to reconsider whether the mediation confidentiality statutes should preclude the use of mediation-related attorney-client discussions to support a client's civil claims of malpractice against his or her attorneys."[42] This far-from-subtle invitation may be hard for the legislature to ignore, especially if it also considers Justice Ming Chin's reluctant concurrence that shielding attorneys from being held accountable for their incompetent or fraudulent actions during mediation "is a high price to pay to preserve total confidentiality in the mediation process."[43]

The Ninth Circuit

The federal district courts and court of appeals in the Ninth Circuit take a different approach toward mediation confidentiality than do California's state courts. With no federal statute governing the concept, each of the four federal districts have adopted their own local rules.[44] For example, in a commentary to its local rules regarding mediation, the Northern District—while relying, in part, on *Foxgate*, *Rojas*, and *Simmons*—noted that the concept of absolute mediation confidentiality may be excused in "limited circumstances in which the need for disclosure outweighs the confidentiality of a mediation." These circumstances include threats of death or substantial bodily injury, the use of the mediation to commit a felony, and the right to cross-examination in a quasi-criminal proceeding.[45]

The Eastern District provides that all communications during that court's Voluntary Dispute Resolution Program (VDRP), except as otherwise required by law or stipulated in writing by all parties and the neutral, are privileged and confidential.[46] One exception to confidentiality in the Eastern District is that a communication may be disclosed to the assigned judge if "ordered by the court—after application of pertinent legal tests that are appropriately sensitive to the interests underlying VDRP confidentiality—in connection with a proceeding to determine: whether a person violated a legal norm, rule, court order, or ethical duty during or in connection with the VDRP session."[47] The Eastern District local rules do not apply to mediation proceedings conducted outside the court's VDRP unless stipulated to by the parties.[48]

The Central District has proposed that courts, mediators, all counsel, and other persons attending mediations "shall treat as 'confidential information' the contents of the written mediation statements, any documents prepared for the purpose of, in the course of, or pursuant to the mediation, 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."[49] The Southern District protects "[a]ll proceedings of the mediation conference, including any statement made by any party, attorney or other participant."[50]

The mediation confidentiality rules fashioned by the district courts in the Ninth Circuit were recently tested in the well-publicized case of *The Facebook, Inc. v. Pacific Northwest Software, Inc.*[51] In that case, twins Cameron and Tyler Winklevoss and Divya Narendra sued Mark Zuckerberg, Facebook's founder, for allegedly stealing the Facebook concept from them. In turn, Facebook sued the Winklevosses and Narendra. A Northern District Court judge ordered everyone into mediation, during which the participants signed a confidentiality agreement stipulating that all statements made during the process were privileged, nondiscoverable, and inadmissible "in any arbitral, judicial, or other proceeding."

In the mediation, the parties entered into a written settlement, with the Winklevosses and Narendra agreeing to give up their competing company for cash and an interest in Facebook. Facebook filed a motion seeking to enforce the settlement after negotiations over the form of the final deal documents fell apart. The Winklevosses and Narendra argued that the settlement agreement was unenforceable because it lacked certain material terms and had been procured by fraud.

The district court found the settlement agreement enforceable, in part, because what was said and not said during the mediation was excluded under the Northern District's Alternative Dispute Resolution Local Rule 6-11. Because there are no federal rules or statutes concerning mediation confidentiality, California's federal district courts have adopted their own approaches to the matter. The court found that the rule creates a "privilege" for "evidence regarding the details of the parties' negotiations in their mediation."[52]

On appeal, Ninth Circuit Court of Appeals Chief Judge Alex Kozinski, writing for a unanimous court, affirmed the exclusion of the alleged mediation misrepresentations—but with reasoning that differs from the California Supreme Court's approach to the issue. *Facebook* undercuts the effectiveness of the district courts' local rules: "It's doubtful that a district court can augment the list of [federally created] privileges by local rule."[53] The court then proceeded to sidestep this

conundrum of its own making by holding that the local rules did not apply because the parties had used a private mediator.[54]

The Ninth Circuit further held in *Facebook* that the district court had been right to exclude the proffered evidence because the parties' confidentiality agreement provided that all statements made during the course of the mediation were privileged settlement discussions and inadmissible for any purpose, including in any legal proceeding.[55] Accordingly, the Ninth Circuit affirmed that the Winklevosses and Narendra had been properly prohibited from introducing evidence of any alleged mediation misrepresentations.[56]

Facebook unambiguously holds that parties in federal proceedings, when involved in private mediations, can negotiate for the total confidentiality of mediation communications. Less clear is the status of confidentiality in federal courts in the Ninth Circuit for mediations conducted by court-appointed neutrals. Added to this confusion is that each of the Ninth Circuit's four district courts has its own approach to confidentiality. In contrast, the mediation communications in *Facebook* would have been absolutely confidential in a California state court whether the mediator had been privately retained or court appointed and whether or not the parties had agreed in writing to apply confidentiality to all court proceedings—as long as the parties had complied with the requirements of Evidence Code Sections 1122 and 1123.

For now, practitioners in California state courts should know that the exceptions to mediation confidentiality are rare. However, the California Supreme Court in *Cassel* has invited the state legislature to revise the mediation confidentiality statutes so that they do not protect acts of legal malpractice. Practitioners in the federal courts in California should be aware that, in the absence of a controlling statute, the courts' approach to mediation confidentiality is more ad hoc. ■

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[1] Foxgate Homeowners' Ass'n, Inc. v. Bramalea Cal., Inc., 26 Cal. 4th 1, 14 (2001); Simmons v. Ghaderi, 44 Cal. 4th 570, 578 (2008); Cassel v. Superior Court, 51 Cal. 4th 113, 124 (2011).

[2] Bus. & Prof. Code §6068(d); Cal. Rules of Prof'l Conduct R. 5-200 (B).

[3] In the Matter of Katz, 3 Cal. State Bar Ct. Rptr. 430, 435 (Review Dept. 1995).

[4] Foxgate, 26 Cal. 4th at 13.

[5] Evid. Code §§1115 *et seq*.

[6] Evid. Code §1119.

[7] *See* the Alternative Dispute Resolution Act of 1998, 28 U.S.C. §651(b). The act gives U.S. district courts the right to authorize, by local rule, the use of alternative dispute processes in all civil actions.

[8] Foxgate, 26 Cal. 4th at 13.

[9] *Id*. at 17.

[10] *Id*. at n.13.

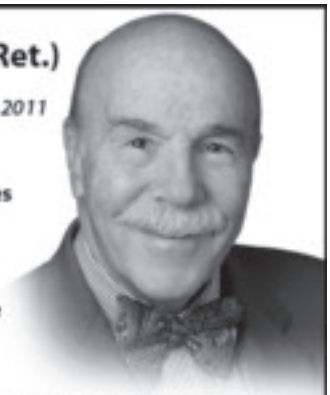
[11] *Id*. at 14.

[12] *Id*.

[13] Rojas v. Superior Court, 33 Cal. 4th 407 (2003).

[14] Fair v. Bakhtiari, 40 Cal. 4th 189 (2006).

Judge Michael D. Marcus (Ret.)



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