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In Mediators We Trust: New Issues in Confidentiality

By Jan Frankel Schau

A colleague in the International Academy of Mediators who teaches a course at Cornell Law School on Alternative Dispute Resolution was rather astonished when he invited his students to critique the new USA Today sitcom “Fairly Legal” on how few exceptions to confidentiality there are when applying California law (the show is based in San Francisco as his clever students noted).

In the new sitcom, “Fairly Legal” the mediator is sometimes unwittingly engaged in mediating a street fight: between her cab driver and a bicycle rider, between a gunman and her coffee shop owner. Although she is not practicing law, she liberally doles out legal advice and counsel with impunity. In many instances, she reports her results and challenges directly to the Judge. Although her results are laudable (and her shoe collection gorgeous!), her methods would never be tolerated in California.

Here, the confidentiality of the mediation process has recently been so strictly enforced that even where legal malpractice is alleged, as long as the legal advice was given in the process of mediation, no evidence of the communications between lawyer and client can be introduced in a subsequent trial. Cassel v. Superior Court (1/13/11; __Cal. 4th __, 2011 WL 102710).

In a 2007 case, Wimsatt v Superior Court (2007) 152 Cal. App. 4th 137, the Court of Appeals reversed a trial court’s order compelling testimony of a physician’s oral consent to settle from the mediator, a retired Judge, who presided over the hearing in a medical malpractice case. There, the mediator had submitted a written memo to the Judge advising him that he had witnessed the Defendant provide oral consent, and therefore should grant the order to enforce the settlement under CCP Sec. 664.6. The trial court agreed, but the Court of Appeal refused, granting a writ and remanding the underlying case for trial.

There are a very limited number of exceptions under Evidence Code Sec. 703.5 (where the

mediator is asked to testify about conduct that "may give rise to civil or criminal contempt", or has been privy to a statement or conduct that could "constitute a crime" or subject the attorney to an investigation by the State Bar.) But the rule of thumb in common practice at least in our community, is that mediators are prohibited from testifying about anything seen or heard before, after or during the mediation, and are certainly prohibited from discussing any such issues with the Court. (See: Foxgate Homeowners Association v Bramalea California, Inc. (2001) 26 Cal. 4th 1.) The logic is that this fosters more settlements and facilitates a more frank discussion in the protected context of a formal mediation than the distinctly public forum of a courthouse.

In Federal court, by contrast, there have been a few notable exceptions to the strict confidentiality applied in State cases. For example, in Olam v. Congress Mortgage Company, N.D. Cal. 1999; 68 F. Supp. 2nd 1110, Judge Wayne Brazil allowed a mediator to testify for the limited purpose of establishing whether a particular party that was present at the mediation was mentally competent to execute the settlement agreement which her adversary was seeking to enforce over objections based upon those grounds.
Locally, Judge Margaret Morrow more recently allowed testimony about the discussions during the mediation for purposes of determining the amount in controversy in Molina v Lexmark International Inc. (2008) 77 Fed. Rptr. 905.

Still, both Federal and State Courts recognize that compelling testimony about a mediation, or from a mediator, should be used sparingly and only on an "absolutely necessary" basis.

As a private mediator, I am often faced with glaring ethical dilemmas and find that I am the only participant in the mediation armed with the knowledge of these issues: yet to fully reveal them would threaten to compromise my own neutrality.

For example, recently I presided over a challenging business litigation matter in which a business owner was bringing suit against his former loan broker for damages for failure to secure a loan in time to save the building project from its ultimate foreclosure. Two issues came up: first, the Plaintiff's lawyer brought along an as yet undisclosed third party expert, who sat in on all of the discussions and negotiations throughout the mediation. Would he have been disqualified from subsequent testimony because he heard so much about the opposing parties' position during the course of a confidential mediation?

Second, one of the primary motivating factors for settlement was the very real threat of a lawsuit for malicious prosecution that may have followed had Defendant achieved a verdict in her favor at trial. Of course, had that suit been initiated, it might have spawned yet another lawsuit for professional negligence against the attorney who had recommended the filing of this lawsuit, perhaps without probable cause. The ultimate settlement, broadly worded to fully and finally release all claims against all parties named or unnamed arising out of this litigation under Civil Code Section 1542, protected against all of that.

Because I mediate in California cases, I did not need to concern myself with being called upon

to testify on a motion to exclude expert testimony or provide declarations or other evidence in a subsequent professional negligence case. And because the case was resolved, I need not concern myself with the potential that either party will call upon me to provide evidence of anything that took place in this mediation.

California lawyers are lucky to practice here where confidentiality and mediation are so fully encouraged and accepted. Statistics suggest that less than five percent of cases filed in Los Angeles County ever get to trial. Yet I am left wondering whether such broad protections are also insulating the occasional unscrupulous lawyer from accountability to their own clients.

Abraham Lincoln famously said: "Discourage litigation. Persuade your neighbors to compromise whenever you can. As a peacemaker the lawyer has superior opportunity of being a good man. There will still be business enough."

While I am not advocating for litigation in place of mediation, I do believe that in light of California's far-reaching confidentiality statutes and the recent interpretations in case law, we need to be ever vigilant that compromise does not come at the expense of lawyers acting as "good men". If we all rise to the highest level of ethical conduct, there will, as Abraham Lincoln predicted, "still be business enough."

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