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"Ye shall know the truth, and the truth shall make you free"

Why California's strict confidentiality standards in mediation stand in the way of justice and fairness

Thomas Girardi told the Association of Business Trial Lawyers recently that juries are no longer asked to evaluate facts, but only philosophical questions. It has simply become too expensive and too risky to take cases to trial where both sides can evaluate the chances of proving liability and damages at anything better than 50/50. For that reason, only three to four percent of civil cases filed in Los Angeles get to trial. The rest are settled or won or lost during motion practice in the course of litigation.

The result of this phenomenon is that there is a growing cadre of career litigators that will never see a trial court, never participate in selection of a jury, and never become acquainted with the appellate courts. Most of those lawyers, however, will have extensive experience in mediations, settling 97 percent of their cases, and often referring those few that can't be resolved to "trial counsel" within the final 30 days before trial.

While lawyers are asked to evaluate cases by clients, they are often "evaluating in the dark," according to a November 2, 2010, article by Ralph B. Saltsman, Stephen W. Solomon and Stephen A. Jamieson in the Los Angeles Daily Journal. What's worse, according to a study called "Insightful or Wishful: Lawyers' Ability to Predict Case Outcomes," published in the May 2010 Law and Psychology journal by the American Psychological Association, they usually get it wrong.

That study "showed clear evidence of unrealistic litigation goals" among lawyers by 44 percent in an extensive study of 481 U.S. lawyers on both sides of civil and criminal cases that were six to 12 months from trial. Only 32 percent of lawyers' predictions turned out to be correct, leading clients to rely upon essentially unreliable predictions—and that was only as to whether the verdict would be in their client's favor, not accounting for the actual dollar value of the case once in the hands of 12 jurors.

Recap: Confidentiality provisions in California mediations are strict and absolute

In the 2011 California Supreme Court case, *Cassel v Superior Court* (2011) 51 Cal.4th 113, 119 Cal.Rptr.3d 437, the plaintiff engaged in a series of conversations with his lawyers about the valuation of a trademark infringement claim in preparation for a mediation hearing. None of the attorney-client communications that plaintiff later tried to compel his lawyer to produce as evidence took place in the presence of a mediator. After the settlement, which did take place at the mediation, Cassel claimed he was coerced into accepting an offer that was below the actual case value and sued his attorneys for breach of fiduciary duty and malpractice. In discovery, the attorneys refused to produce evidence of the conversations between lawyer and client, claiming the mediation privilege extended to "anything said…for the purpose of, in the course of, or pursuant to mediation." The trial court agreed, the Appellate Court reversed and the Supreme Court, after carefully balancing the benefits of confidentiality in mediation as against the potential of shielding attorneys from liability to clients for advice given in mediation, gave a win to confidentiality. I think they got it wrong.

While the statutes are clear and absolute (so the Supreme Court's decision was technically correct, in my view based upon current laws), the result creates a vacuum of information for trial lawyers and their clients. How can we ever prove the value of a case when 97 percent of them are settled through mediation, and there is strict confidentiality about the results? As my colleague and friend, Jeff Kichaven said in "Mediation, Confidentiality and Anarchy: The California Nightmare" published in the Los Angeles Daily Journal on February 17, 2011, we have turned mediation into anarchy, "where the rule of law is largely suspended and attorney malpractice goes without redress."

In another California case, *Wimsatt v Superior Court*, (2007) 152 Cal.App.4th 137 [61 Cal.Rptr.3d 200], the attorneys in a wrongful-death case arising out of a plane crash were sued by their former clients based upon the theory that they had violated their fiduciary duty to them by communicating via e-mail to the mediator between the first and second session of the mediation that the clients would likely accept a settlement in a particular range which the client's had not yet approved. The clients were present at the mediation and did accept the defendant's million-dollar-plus offer, but then sued their attorneys for breaching their duties to them by allegedly misrepresenting that they had their client's authority to settle at that value in advance of the hearing. During the discovery phase of the professional-negligence case, the plaintiffs sought to compel a copy of the e-mail between their lawyer and the mediator in the underlying case. The trial court, balancing the broad discovery statutes in litigation against the mediation privilege ruled in favor of the motion to compel. The appellate court reversed, holding that the strict confidentiality of mediation trumped the Discovery Act. The case is still pending in the Superior Court, but without what some would consider critical written evidence of the alleged breach.

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Confidentiality in federal-court mediations is less rigid

The issue of a need for limited disclosure is treated differently in federal court, where the rule of law is determined by whether the case is in federal court due to diversity jurisdiction or subject matter. In *Molina v. Lexmark International Inc.* (C.D. Cal. 2008) 2008 WL 4447678, Judge Margaret Morrow, a former Chair of the ADR Committee of the U.S. District Court for the Central District of California, 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).

In another federal case, I was asked to provide a declaration of the offers and demands made in the mediation of a civil-rights case that went to trial. The verdict was a mere $7,500, but was met with an attorney's fees motion for more than $55,000. In a motion to tax fees and costs, the defense argued that they would have paid the $7,500 at the mediation before me, and thus the time and fees expended in getting the matter to trial was unwarranted. Because I had the litigants sign a confidentiality agreement, I took the position that I would not voluntarily submit a declaration revealing any of the offers or demands made during the confidential mediation. However, it was apparent that the Federal Magistrate had the discretion to issue a subpoena requiring me to divulge that information, as no federal common-law privilege exists protecting private mediation.

As I stated in an article published in the Los Angeles Daily Journal, June 25, 2010, *Dear ADR Participants: Are your secrets really safe with me?* "It may have been clear to Judge Morrow in the *Molina v Lexmark* case, 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."

In the recent case of *The Facebook, Inc. et al. v. Pacific Northwest Software, Inc., et al.* U.S. Court of Appeals (9th Cir. 2011) 640 F.3d 1034, Chief Judge Alex Kozinski expressed the opinion that "It's doubtful that a district court can augment the list of privileges by local rule." Therefore, the Court upheld a written memorandum of settlement between the Winklevoss brothers and Zuckerberg, on behalf of Facebook, even in the face of an allegation that it was based upon securities fraud. The Court held that the confidentiality agreement that everyone signed before commencing the mediation controlled and as a consequence irrespective of local federal rules, any evidence of what occurred during the mediation process was neither discoverable nor admissible in any legal proceeding.

The confidentiality of settlements in federal court creates an additional obstacle where diversity actions, which require a showing that the amount in controversy is over $75,000 are involved. Even where agencies such as ADR Services, maintain records of settlements, those records cannot be disclosed to help lawyers or their clients establish a likelihood of a particular outcome in a particular type of dispute. Sometimes, the strict confidentiality provisions governing mediation and settlement outcomes seem to work against our traditional notions of fairness and accountability, creating a certain "lawlessness" that perhaps should now be addressed.

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Confidentiality obfuscates an accurate valuation of consumer cases for lawyers, clients and mediators

Most of us consider it our professional and ethical duty to evaluate our client's claims thoroughly when they initially consult us, when preliminary discovery has been accomplished and before a mediation or any other settlement discussion as well as before the ultimate trial. What's more, as these cases have highlighted, we have a duty to discuss our evaluations with the clients, and can only make offers or demands with their authority, lest we risk compromising our fiduciary duty towards them. This comes up more routinely than you might imagine where the attorneys and mediators have an easy, working relationship and can together evaluate the likely outcome of a particular hearing, but fail to bring the clients along in this process, leaving them to second-guess whether we've met our professional and ethical duties throughout the mediation hearing.

In preparation for and during every mediation hearing, we are constantly re-evaluating settlement numbers based upon evidence or information exchanged (or in some cases withheld), personalities or dynamics of witnesses, our clients and the decision-makers, the offers and demands made, the particular exigencies of costs of going forward balanced by the challenges of collection. Another factor that comes into play is each party's risk aversion or risk tolerance. Anyone who has attended mediation has seen this occur routinely as the possible outcome is weighed against the "BATNA" or best alternative to a negotiated agreement over and over throughout the mediation session. Options are explored liberally, and the value of the case, together with the settlement value is or should be constantly re-evaluated.

But how do we protect ourselves from the claims of breach of fiduciary duty or professional negligence based upon our advice to our clients to settle a case at a particular dollar amount if it's inconsistent with our original valuation?

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How do we predict the value of our cases with due diligence when the outcome of 97 percent of the cases litigated is held strictly confidential under the statutes in our state?

A proposal for balancing the public interest in disclosure of information with the increased utility of ADR by courts and litigants in California

In the new sitcom, "Fairly Legal," a lawyer-turned-mediator sits in her father's law office beside his widow (her step-mother) and conducts mediation in nearly every conflict. The show depicts an amusing view of the new "multi-door" law office, where the mediator sits in the office next door to the attorney, waiting for an opportunity to settle cases the lawyers in her firm can't easily resolve. Her results are almost never merely for money, but involve dropping criminal charges, naming public places after affected personal-injury victims and sometimes a good, old-fashioned apology. Still, at least Hollywood portrays a series of satisfied "clients" on a weekly basis. Where the outcome of a mediation is financial only, do we owe our clients at least a "fairly legal" explanation or justification for the result?

Trial lawyers and litigators are at a disadvantage in assessing a fair valuation of our cases in advance of mediation because there is so little data available to assist us. While we can usually estimate the cost of going forward, we can seldom predict with accuracy the likely result at trial or even at mediation, because there is such limited access to reports of those results. And according to psychologists, when we dare to make such predictions, the more certain we are of the outcome, the higher percentage of time we are off base. Even the fee shifting statutes long relied upon in certain types of cases are no longer certain where, as in the federal case I discussed earlier, early offers of settlement may serve to "cut off" a right to collect attorneys fees if the ultimate verdict does not justify the expenditure of fees after a mediation if the attorneys can produce evidence of such offers without invading the confidentiality statutes.

The fact that our clients have ready access to sensationalized verdicts in the press, as well as through social media serves to confound the problem. Between Facebook and Twitter and Google searches, clients can easily find reports or other results which are grossly inflated and don't accurately reflect the ultimate collection of dollars after post trial motions, appeals, and potential bankruptcy or other challenges in collecting those thrilling verdicts. We all know how rare it is that these "super-verdicts" get paid in full.

As trial lawyers, we take a risk each time we counsel a client to accept a settlement, though under the current state of the law, we can't be held accountable for inaccurate advice, even if it was negligent to provide it, if it's given in or in preparation for a mediation. Still, the value of a case is not a science, and even our best efforts at due diligence and best intentions may (and statistically usually do) prove to be inaccurate.

For these reasons, it would seem prudent to this mediator to encourage the parties to agree to a partial waiver of confidentiality (the kind the court references as "privilege") for limited purposes of publicity so that basic facts could be reported and disclosed without identifying the parties after the case has been settled. Just as the verdicts and settlements report outcomes at trial and settlements that don't occur through mediation, the parties, in each case, could

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agree to waive confidentiality for purposes of reporting the basics so that other lawyers would better know how to evaluate their cases. I am not suggesting that the rules of confidentiality be abrogated as between the parties during the negotiation, or if the negotiation fails to settle the matter. This, in my opinion, may thwart mediation's effectiveness and undermine the trust of the parties in the mediator and the process. But in those cases which do settle, it would seem to be valuable to allow the parties to reveal the particular reasons the case settled at the particular level it did without disclosing the identity of the clients.

Most mediators are struck by the disparity in case settlements among us, dependent upon the personalities and experiences of both counsel and their clients as much as any other factor that would otherwise be germane to a true prediction of outcome. Yet we are strictly constrained from weighing in on these values, based upon our vows of confidentiality. In so many ways, this leaves all of us somewhat "mediating in the dark."

Like horses in a race, mediators and litigants are asked to ignore our peripheral vision and evaluate each case as if it's the only one ever mediated on these facts and legal issues.

Loosening the reins of confidentiality might assist both sides of the bar in reaching more settlements at better rates and would still protect the mediator from being compelled to divulge anything that constitutes privileged information to the Court or any third party. (See *Foxgate Homeowners' Assn. v. Bramalea* (2001) 26 Cal.4th 1).

This would not only safeguard the trust and rapport necessary between mediator and clients, but would foster more use of mediation as a preferred means of settling lawsuits – because it would no longer be cloaked in secrecy, providing a more transparent result, giving our clients comfort that they achieved a valid and legitimate result. It would also protect attorneys from accusations of malpractice based upon allegedly wrongly given advice to settle, because there would be a body of cases upon which such an evaluation could be fairly and objectively assessed in advance of and during the mediation process.

Conclusion

In Saltsman, Solomon and Jamieson's view, "arrogance by either counsel has no place in settlement discussions." We are not hired by our clients to perpetuate or feed upon the misinformation propagated by popular media. We are hired to help make an educated estimate of the value of our cases, and then to help our clients get that value in the least expensive, most effective way.

Sir Winston Churchill once said, "Men occasionally stumble over the truth, but most of them pick themselves up and hurry off as if nothing ever happened." If we are to do more for our clients than merely "stumble over the truth", we should consider setting it free, at least insofar as it would allow us relevant and meaningful ways in which we could better evaluate our cases for settlement purposes and in advance of trial.

Jan Frankel Schau, Esq. brings value through mediation by helping to achieve the best possible outcome in negotiating tort, employment and business cases for lawyers and their clients. A panel neutral of ADR Services *since 2007, Jan has mediated over 1,000 litigated cases since beginning her mediation career in 2003 and brings over twenty years of litigation experience to the table. She can be reached at: 310-201-0010 or JFSchau@adrservices.org. Website: www.schaumediation.com.*