Understanding Mediation Confidentiality in California: Cases Construing California Evidence Code Sections 1115-1128

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California Supreme Court

Simmons v. Ghaderi (2008) 44 Cal. 4th 570, 2008 Cal. LEXIS 907, 2008 WL 2789224 (July 21, 2008).

In an action to determine whether a valid oral settlement agreement was formed during mediation, a party was not estopped to claim confidentiality for the mediation proceedings even though she had voluntarily declared the facts to be true, stipulated that she did not dispute them, submitted evidence of them, litigated their effect, and invoked mediation confidentiality for the first time at trial.

Fair v. Bakhtari (2006) 40 Cal.4th 189, 51 Cal.Rptr.3d 871, 147 Pac.3d 653.

Cal. Evidence Code section 1123, subd. (b) provides that a written settlement document prepared in mediation is not rendered inadmissible by the mediation confidentiality statutes if it "provides that it is enforceable or binding or words to that effect." While the language of the statute leaves room for differences in language, "arbitration clauses, forum selection clauses, choice of law provisions, terms contemplating remedies for breach, and similar commonly employed enforcement provisions typically

negotiated in settlement discussions do not meet the requirements of section 1123(b)." 40 Cal.4th at p. 199.

Rojas v Superior Court (2004) 33 Cal. 4th 407, 15 Cal. Rptr.3d 643.

Photographs and expert reports are protected from disclosure or discovery under California's mediation confidentiality statutes, especially Evidence Code section 1119. They are writings as defined by Evidence Code section 250, a statute which in turn is incorporated into section 1119. However, neither facts set forth in witness' statements nor physical objects are rendered inadmissible by section 1119. Under section 1120, a party cannot render otherwise admissible evidence inadmissible simply by using or introducing it in a mediation or even including it in a brief, declaration or consultant's report.

Foxgate Homeowners' Ass'n. Inc. v Bramalea California, Inc. (2001) 26 Cal.4th 1, 17, 108 Cal.Rptr.2d 642.

The mediation confidentiality statutes, Evidence Code § 1115 et seq., particularly Evidence Code section 1119, bar disclosure of communications and writings associated with a mediation "absent an express statutory exception." However, evidence of conduct is not rendered inadmissible by the mediation confidentiality statutes.

California Courts of Appeal

Estate of Thottam, B196933, filed August 13, 2008.

Evidence Code § 1123 provides that a written settlement agreement is not made inadmissible or protected from disclosure "if the agreement is signed by the settling parties and . . . (c) All parties to the agreement expressly agree in writing . . . to its disclosure."

In this case, the parties signed a confidentiality agreement prior to mediation. The agreement stated that all matters disclosed in the mediation "shall not be used in any current or future litigation between us (except as may be necessary to enforce any agreements resulting from the Meeting). . ."

At the mediation, the parties initialed a chart showing an allocation of assets at issue in the litigation. The parties later disputed whether there had been a settlement during the mediation. One party sought to enforce the alleged settlement agreement, and to introduce the chart into evidence. The Court of Appeal held the parenthetical phrase in the pre-mediation confidentiality agreement, which stated that disclosures were permissible to enforce a settlement, satisfied the requirements of Evidence Code section 1123 (c). This was so even though that agreement was signed before the chart existed, the chart did not state that it was a settlement agreement, and the chart had been initialed, not signed.

Campagnone v. Enjoyable Pools & Spa Service & Repairs, Inc., (2008) 163 Cal.App.4th 566, 77 Cal.Rptr.3d 551.

As established by *Foxgate, supra,* it does not violate mediation confidentiality for a party (but not a mediator) to advise the court about

conduct during a mediation that might warrant sanctions. Although a claim of an alleged failure to participate in a mediation in good faith will be barred if it requires revealing confidential communications, a failure to appear at a mediation is a form of conduct, not a communication. The unauthorized failure of a party, the party's attorney, or a representative of a party's insurance carrier, to attend a court-ordered appellate mediation constitutes conduct that warrants the imposition of sanctions. In the Third District, a party on appeal, and the party's counsel, will be sanctioned for a failure to notify insurance carriers with potential insurance coverage that appellate mediation has been ordered and that the carrier must have a representative attend all mediation sessions in person.

Wimsatt v. Superior Court (2007) 152 Cal.App.4th 137, 61 Cal.Rptr.3d 200.

Mediation briefs and related communications are barred from discovery or disclosure under section 1119. However, under section 1120, the contents of a private conversation are not automatically protected simply because they are referred to in a protected mediation brief or in protected e-mails. The party seeking to bar disclosure has the burden of showing that it is protected. The timing, context, and content of the communication must be considered. In this case, the parties seeking to bar disclosure had not brought forth sufficient evidence to show that the communication at issue should be protected.

Ombudsman Services of Northern California v. Superior Court (2007) 154 Cal.App.4th 1233, 65 Cal.Rptr.3d 456.

In an opinion that discusses at length the statutory confidentiality protections for those who are authorized representatives of the Office of the State Long-Term Care Ombudsman ("OSNC") (*see* Cal. Welf & Inst. Code sections 9715 and 9725, and 42 U.S. C. § 3058(d)(a)(6)(C)(iii)), the court of appeal also discussed the California constitutional right of privacy. The court applied *Garstang v. Superior Court* (1995) 39 Cal.App.4th 526 (discussed *infra*), to set aside a discovery order that had ordered a representative of OSNC to disclose all records regarding all investigations at a long-term care facility over a period of several months. The discovery sought included information relating to strangers to the litigation.

Bono v. David (2007) 147 Cal.App.4th 1055, 54 Cal.Rptr.3d 837.

In this case, a petition to compel arbitration was not an appropriate vehicle for determining whether mediation confidentiality applied. The question of whether a third party had been acting as a mediator was not pertinent to the issue of arbitrability under the narrowly worded mandatory mediation and arbitration clause in dispute.

Dino v. Pelayo (2006) 145 Cal.App.4th 347, 51 Cal.Rptr.3d 620.

Sellers in a real estate action were not permitted to disqualify an attorney who represented the buyers and an agent. Sellers had no right to disqualification on the basis that the attorney's conflict interfered with their right to mediate confidentially. The court refused to adopt a rule which

"would in essence recognize a confidential relationship between a mediating party and the attorney jointly representing the opposing parties based solely on the potential exchange of confidential information as part of the mediating process." 145 Cal.App.4th at p. 356, 51 Cal.Rptr.3d at p. 627.

Morgan Phillips, Inc. v. JAMS/Endispute, LLC (2006) 140 Cal.App.4th 795, 44 Cal.Rptr.3d 782.

Defendants, JAMS and a mediator/arbitrator who worked through JAMS, argued a suit against them should be dismissed because they would be unable to defend themselves without disclosing mediation communications. The court refused to dismiss. "That evidentiary privileges might affect presentation of defense evidence at trial is not a basis for sustaining a demurrer." 140 Cal.App.4th at p. 803.

Volkswagen of America, Inc. v. Superior Court (2006) 139 Cal.App.4th 1481, 1496, 43 Cal.Rptr.3d 723, 733.

Forms such as personnel records or medical reports that were submitted to asbestos bankruptcy trusts were not barred from disclosure by Evidence Code section 1119. They were not prepared for use in a mediation.

Marriage of Kieturakis (2006) 138 Cal.App. 4th 56, 41 Cal.Rptr.3d 119.

The presumption of undue influence when interspousal transactions benefit one spouse to the disadvantage of the other does not apply to marital settlement agreements reached through mediation. *Olam, infra,* stated a nonstatutory exception to mediation confidentiality when "the need to do

justice" is balanced against "the potential for discouraging mediation." In light of *Foxgate,* and *Rojas,* this exception is "questionable."

Stewart v. Preston (2005) 134 Cal.App.4th 1565, 36 Cal.Rptr.3d 901.

The requirements of Evidence Code section 1123(a), which provides that a settlement agreement is not protected from disclosure if it "provides that it is enforceable or binding or words to that effect," were met where (1) the agreement stated it was exempt from the confidentiality provisions of Evidence Code section 1152 *et seq.,* and (2) the agreement stated that the settlement was enforceable pursuant to Code of Civil Procedure section 664.6.

The requirement in section 1123 that the agreement must be "signed by the settling parties" was also met where defense counsel, but not defendants or their insurers, signed the agreement. 134 Cal.App.4th at p. 1579, 36 Cal.Rptr.3d at pp. 912-913.

Doe 1 v. Superior Court of Los Angeles (2005) 132 Cal.App.4th 1160, 34 Cal.Rptr.2d 248.

Evidence Code section 1122(a) (2) prevented the disclosure of an admission made in mediation even when the party seeking to use the admission was the one against whom the admission would be used. Additionally, priests who did not participate in a mediation were participants in a mediation for the purpose of Evidence Code section 1122(a) (1), which allows the disclosure of mediation communications when all mediation participants consent to disclosure. Several of the priests were parties and

would have had to agree to any global settlement proposed. Additionally, there was evidence in the record of some involvement by counsel for the priests.

The court rejected the argument that the mediation at issue in this case might be a mandatory settlement conference under Cal. Rule of Court 222 and therefore not subject to the mediation confidentiality rules under Evid. Code section 1117, subd. (b)(2). If counsel wish to avoid the effect of the mediation confidentiality rules, they must make it clear at the outset that something other than a mediation is intended.

Travelers Cas. & Surety Co. v Superior Court (2005) 126 Cal.App.4th 1131, 1142, 24 Cal.Rptr.3d 751.

Insurers who participated in a mediation with the parties to the dispute were "parties to the mediation," for the purpose of section 1121, and could therefore object to admissibility of evidence.

Saeta v Superior Court (2004) 117 Cal. App. 4th 261, 11 Cal.Rptr.3d 610.

Member of a termination review board who had decisionmaking authority could not claim to be a mediator for the purpose of the mediation confidentiality statutes. A mediator should have no function in the dispute except as "a non-decisionmaking neutral." 117 Cal.App.4th at p. 270.

Eisendrath v Superior Court (2003) 109 Cal.App.4th 351, 134 Cal.Rptr. 2d 716.

Unlike statutory or common law privileges, mediation confidentiality is not subject to implied waiver. For mediation confidentiality to apply, it is not necessary that a discussion occur in the mediator's presence, "provided that these conversations are materially related to the mediation."

Greene v. Dillingham Construction (2002) 101 Cal.App.4th 418, 124 Cal.Rptr.2d 250.

Cal. Code of Civ. Procedure section 998 has no application to an informal settlement offer made during the course of a confidential mediation session. Otherwise, section 998 would frustrate the public policy favoring settlement by mediation. Disclosure of the settlement offer would also violate section 1119. 101 Cal.App.4th at p. 425, 124 Cal.Rptr.2d at p. 255.

Rinaker v Superior Court (1998) 62 Cal.App.4th 155, 74 Cal.Rptr.2d 464.

Mediation confidentiality did not protect a mediator from being compelled to testify in a juvenile delinquency proceeding. Due process concerns and concerns regarding the right to confront and the right to cross-examination trumped mediation confidentiality.

Federal Cases

Babasa v. Bredensteiner (9th Cir. 2007) 498 F.2d 972.

Under Fed. R. Evid. 501, the California mediation confidentiality statutes do not apply to the federal question of whether an amount in controversy exceeds the amount required for federal jurisdiction. Accordingly, a letter which was sent to counsel in preparation for a mediation was not inadmissible to prove when defendant had received notice of the amount in controversy for the purpose of the federal removal statutes. (See 28 U.S.C.S. section 1446(b).)

Folb v. Motion Picture Industry Pension & Health Plans (C.D. Cal. 1998) 16 F.Supp.2d 1164.

A district court erred in holding that it should apply California mediation law to plaintiff's state law claims as "a matter of comity." However, the court recognized a federal mediation privilege. Accordingly, it held the magistrate had correctly denied a motion to compel production of a mediation brief and communications between counsel to the extent those communications were made in anticipation of or during the course of the mediation.

Olam v Congress Mort. Co. (N.D. Cal 1999) 68 F Supp 2d 1110.

California's mediation confidentiality statutes apply in federal courts when a question of state law is in question. Under those statutes, a mediator can be forced to testify if all parties to the dispute agree to compel his testimony.

Cases Decided Under Former Section 1152.5

CAUTIONARY NOTE: THESE CASES MAY BE SUPERSEDED BY STATUTE. CHECK EVIDENCE CODE SECTIONS 1115 ET SEQ. BEFORE RELYING ON THESE DECISIONS. THE STATUTE INTERPRETED BY THESE CASES IS NOW SUPERSEDED.

Gilbert v. National Corp. for Housing Partnerships (1999) 71 Cal.App.4th 1240, 84 Cal.Rptr.2d 204.

The attorney for the plaintiff in a wrongful termination had participated in a prior mediation and settlement of related matters against the defendant while representing other plaintiffs. The other cases had settled pursuant to a confidential settlement agreement. The court disqualified the attorney from representing the plaintiff, over the plaintiff's objection, on the ground that the attorney had a conflict of interest because, among other things, he wanted to call his other clients as witnesses while curtailing the scope of their testimony to comply with the settlement agreement. The court held this impermissibly limited the scope of his representation in the current case, and also cited Evidence Code section 1152.5 as "probably" barring the attorney from introducing evidence he gained in connection with the mediation and negotiation. 71 Cal.App.4th at pp. 1240, 1254, fn. 9, 84 Cal.Rptr.2d at pp. 204, 213.
n.9.)

Barajas v. Oren Realty and Dev. Co. (1997) 57 Cal.App.4th 209, 67 Cal.Rptr.2d 62.

Section 1152.5 does not require that an attorney who participated in a successful mediation should be disqualified from participating in another case related to the one mediated.

Ryan v. Garcia (1994) 27 Cal.App.4th 1006, 33 Cal.Rptr.2d 158

In an action seeking to enforce an alleged oral agreement during mediation, evidence of certain statements were inadmissible. This was so even though the party seeking to introduce the statements argued that the mediation had been successfully concluded when the mediators convened the parties to recite the terms of their agreement.

Regents v. Sumner (1996) 42 Cal.App.4th 1209, 50 Cal.Rptr.2d 200.

Section 1152.5 did not bar evidence of oral statements defining the terms of a settlement after the conclusion of the mediation session.

Garstang v. Superior Court (1995) 39 Cal.App.4th 526, 46 Cal.Rptr.2d 84.

Statements made during mediation before an employer's ombudsman were not inadmissible under section 1152.5. Even if there had been a mediation as that term is used in the statute, the parties did not sign an agreement pursuant to section 1152.5(c). However, the statements were subject to a qualified privilege arising out of the right of privacy.