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Hush, hush – it’s confidential.....

The many meanings of “confidentiality” in mediations

In California mediation, attorneys and clients are often confused about the meaning of the term “confidential.” And with good reason. The terms “confidential” and “confidentiality” are used by courts, lawyers and mediators to refer to a wide variety of situations in mediation that each have special meanings. This article discusses these varied meanings in the mediation context and suggests appropriate strategies for mediators and attorney advocates. These strategies are designed to protect client information from disclosure, allow for disclosure or admissibility of useful information, and

create admissible and enforceable agreements.

Source of the confusion

Clients commonly think of confidentiality as keeping a secret, or confiding in someone such as a friend or spouse about something private and intimate. Clients are generally familiar with the notion that their attorney will not reveal information given to the attorney by the client without permission. Beyond those general notions, the average client is unaware of the many meanings of the use of the term “confidentiality” in mediations.

California Evidence Code sections 1115-1128, commonly referred to as the “mediation confidentiality statute,” was enacted in 1997, replacing with greater detail the prior scheme of mediation confidentiality known as Evidence Code section 1152 *et. seq.* When the current statute was enacted there was much discussion by mediators at that time about the confusion created in referring to the evidentiary provisions as confidentiality provisions. Mediators and mediation advocates at that time, becoming familiar with the new comprehensive statute,

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knew that the Evidence Code provisions dealt with the presumptive inadmissibility of evidence, the inability to compel testimony of the mediator and the presumptive inability to compel production of mediation related documents.

These statutes were the culmination of several important public policy concerns: protecting the privacy of mediated communications in order to encourage settlement discussions without fear that things said or documents prepared in mediation would be used against someone in a court of law; disallowing any testimony by the mediator or participants in order to protect candid settlement discussions; and protecting the mediator from being dragged into court and forced to reveal information or be put in a situation that compromised the mediator's neutrality. As time has passed and the statute is no longer new, the author and others in the mediation community have noted the increase in bench, bar and even mediators possessing limited knowledge of the provisions of the Evidence Code provisions, the technical requirements for admitting information, and erroneously assuming the Evidence Code provisions apply to a broader meaning of the term "confidentiality."

The most common confusion is that an alarming number of attorneys and their clients assume that because one is in mediation, everything will be private and cannot be revealed. While that is true with respect to testimony and evidence at trial or arbitration, it is not so with respect to the mediation participants divulging information outside of court, which everyone is free to do without penalty. Likewise, especially in employment mediations, attorneys and their clients sometimes assume that it is unnecessary to enter into a specific written confidentiality agreement to not reveal the settlement terms arrived at in the mediation, thinking this is automatic by virtue of being in mediation or by signing an overall mediation confidentiality agreement at the beginning of mediation.

Three basic categories of meanings

There are three basic categories of meanings of the word "confidentiality"

that commonly arise in the mediation context, and several variations:

- Evidentiary rules about mediation confidentiality that apply only to the admissibility and discoverability of mediation-related evidence in civil adjudications, including arbitrations (Evid. Code, §§ 1115-1128);
- Non-Disclosure provisions of the Evidence Code that prohibit compulsion of testimony or writings that are mediation-related in civil adjudications, including arbitrations (§ 1119);
- Non-Disclosure obligations, and implied or explicit agreements of the mediator to the participants pursuant to the mediator's ethical obligations as adopted by the mediator and/or as promulgated by mediator trade associations, ADR providers or by court rules applicable to court annexed mediations;
- Non-Disclosure agreements created by and between some or all of the mediation participants pertaining to certain communications, agreements, or writings related to the mediation;
- Non-Disclosure obligations that are privileges, such as the attorney's obligation to keep confidential and protect from disclosure client information pursuant to California Rule of Professional Conduct 3-100. Privileges can only be waived by the holder of the privilege, in this case the client.

From this short list of commonly encountered situations, one can see that the term "confidentiality" is commonly, albeit confusingly, used to describe a wide spectrum of unique situations, from evidentiary exclusions, agreements to not disclose different types of information, ethical obligations to not disclose different types of information in different situations, and privileges.

Unfortunately the words "privilege," "disclosure" and "confidentiality" are sometimes used by courts without carefully distinguishing the context in which the information is protected, compelled or admissible, which is a source of much of the confusion in the jurisprudence. In fact, the trouble begins from the get-go because the term "confidential" has such a wide array of meanings in common life — attorneys and their clients need a

primer to understand the unique meanings and strategies available in mediation.

Confidentiality in employment mediation

Let's dissect the various meanings, and practical application of best practices employed by mediators and seasoned mediation advocates throughout the course of typical wrongful termination mediation. To make it interesting, assume a celebrity or privately owned high-profile company is the employer and that privacy about the dispute from the public is important. The terminated employee has alleged sexual discrimination and wrongful termination following an internal complaint the employee has made to the company, claiming incidents of inappropriate sexual conduct by a particular member of the senior management team.

The minute the mediator is contacted and preparations for mediation begin, all mediation participants have entered into the "confidentiality" bubble created by the Evidence Code, which is not really about confidentiality in the usual sense of the term, but creates a presumption that nothing said or done, or any writings or documents produced pursuant to a mediation may be admitted, discovered, or compelled "in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which testimony can be compelled to be given." (Evid. Code, § 1119, subd. (a)(B).) The use of the word "confidentiality" for purposes of the Evidence Code is limited to only what can be produced, compelled or admitted into evidence in a trial, arbitration or other civil proceeding.

Mediation confidentiality agreement

The first thing many mediators do is ask all participants to sign and acknowledge the rules governing the admissibility of evidence in mediation by signing a mediation confidentiality agreement. There we go with the confusion! A standard form will recite the key provisions of the Evidence Code that presumptively preclude the introduction of evidence of

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anything said, or writings created in the mediation, and discuss the inability to compel the mediator to testify. The mediator explains that any settlement agreement reached will be reduced to writing and made admissible under the provisions of the Evidence Code.

The most important reason to sign a mediation confidentiality agreement at the beginning of mediation is to include a provision that clarifies that a settlement agreement signed as a result of the mediation will be admissible under Evidence Code sections 1122 and 1123. This creates a fallback provision to enforce a written settlement agreement that failed to comply with the technical requirements of Evidence Code section 1123. An increasing number of attorneys are unaware of the requirements that must be met in order for a written mediated settlement agreement to be admissible. To be admissible under Evidence Code section 1123, the settlement agreement must be signed by the settling parties and:

- Must provide that it is admissible or subject to disclosure, or words to that effect;
- Must provide that it is binding or enforceable, or words to that effect; or
- The parties to the agreement expressly agree in writing to its disclosure.

Even knowledgeable attorneys often miss this important language after a long protracted mediation session. This can especially happen when attorneys or insurance providers pull their favorite standard “boilerplate” agreements from their computers, or prepare their own agreement after the session without the mediator making sure they have created an admissible agreement. For more information on admitting agreements and documents, see the author’s article, “Enforcing Mediation Caucus Agreements after *Cassel*,” *Advocate* Sept. 2012.

Ethical obligations of mediator

Next, still at the beginning of the mediation, the mediator continues to explain the overall process and the many meanings of confidentiality, including the ethical obligations and duties of the mediator. These include:

- Mediator’s obligation to keep information about the mediation confidential from the public. (California Dispute Resolution Council Standards of Practice, Standard 4; for comparison see ABA Standards of Conduct for Mediators, Standard 5.)
- Mediator’s obligation to inform participants about the mediator’s policy regarding confidentiality for individual caucus communications with the participants. Most mediators announce they will keep private caucus information confidential unless explicitly permitted to disclose it to the other side to promote transparency. CDRC Standards of Practice 4B provides that the mediator shall not disclose information to the other participants when confidentiality is requested. California Rule of Court 3.854(c) – applicable to court-annexed mediations – provides that a mediator must not disclose caucus information unless specifically authorized to reveal it. Compare ABA Standard V.B which is similar to Rule of Court 3.854(c). One suggestion for mediators who keep private caucus information confidential is to write down and repeat before leaving the caucus what information can be transmitted to the other side, and clarifying that no further information will be revealed.
- Mediator’s obligation to limit reporting of information to any court or adjudicative body to information about whether an agreement was reached. (Evid. Code, § 1121.) Many court rules for court annexed mediation programs also require the mediator to provide information about the date the mediation occurred, the length of the mediation and whether all of the participants attended.

Attorneys should insist upon understanding the rules of the mediator as they pertain to revealing confidential information in caucuses to the other side. This can be achieved in the selection process, by speaking with the mediator, through reputation, or by inquiry at the mediation itself. Sadly, stories abound about mediators who are manipulative, reveal confidences and steer the mediation in certain directions, without fair warning to the participants about these

strategies. Mediators have many different styles and it is important to determine your mediator’s policy about disclosure to the other room before revealing important client-protected information, for example. Such information may be useful for the mediator to help identify needs and interests and help the parties find suitable resolutions, but might be disastrous if revealed to the other side by a mediator who customarily reveals such information. Knowing and trusting your mediator is important.

Confidentiality between participants

- **Settlement agreement confidentiality provisions commonly included in employment cases.** Usually during the course of an employment negotiation or during the negotiation of standard settlement terms, the paying defendant, the entertainment business in our example, wants the plaintiff to agree to not disclose or divulge to *anyone* the terms of the settlement (specifically, how much money was paid). This is a form of non-disclosure agreement between the parties that can be narrow or broad in its scope, and often provides for a liquidated damages remedy in the event of a breach of that particular non-disclosure agreement.
- **Verbal warnings** or advisements by the mediator and plaintiff’s counsel to not disclose anything said in the mediation to others *at the beginning* of the mediation are common practice by the author and others in employment mediations and high-profile suits. Because of the human connection to the Internet 24/7, it is important for participants to be aware of what will likely be asked of them at the end of the mediation. If they have already participated in exchanging texts, emails, phone calls and posting information on social media sites during mediation negotiations, there will be little value left in a non-disclosure agreement, which is often expected by the paying defendant.
- **Savvy plaintiff advocates** can properly advise their clients to not discuss the matter with anyone outside of the mediation session, and to ask any spouses or advisors outside of the mediation room

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to agree to not discuss the settlement with others.

- **Savvy defense advocates** can ask the mediator to obtain the verbal agreement or commitment of the plaintiff at the beginning of the mediation to not discuss the mediation settlement negotiations outside of mediation in anticipation of a written confidentiality provision when a settlement has been reached. In addition, defense counsel can request a written representation by the plaintiff in the settlement agreement that the plaintiff has not already disclosed to anyone outside of the mediation information about the dispute or the terms of the settlement.

- **Gag orders** in the mediation context are a term of art to refer to non-disclosure agreements that prohibit discussion by usually all of the mediation participants about anything that happens in the mediation, or outside the mediation as well, and often preclude any discussion about the underlying dispute or the litigation. In our hypothetical, a gag order would be a common provision desired at least by the high-profile employer and its executive to avoid press and use of social media. A gag order in this example is a contractual agreement between parties, but could also be part of a court-ordered stipulation. These would customarily be negotiated early in a case, perhaps before the mediation.

- At the beginning of a mediation, a good mediator practice is to float the idea to each side, knowing that social media is at hand 24/7, and alerting participants to the option of having some basic agreements in place about disclosures by participants to others outside of the mediation. It is best to keep any agreements at the beginning of mediation very simple, such as a few sentences about intent, a verbal agreement, or including a handwritten insert to a more standard mediation confidentiality that concerns admissibility of evidence under the Evidence Code (see above discussion). Otherwise the negotiation of this agreement can become protracted and detracts from the main dispute that the parties came to settle.

- When a case settles, the terms of this type of non-disclosure agreement can be tightened with remedies, and a carefully facilitated and crafted joint press release considered or created. The parties can agree to what they can say about the dispute publicly, and agree they will say nothing else about the dispute, the settlement, or their negotiations or communications. It is important to be mindful that stand-alone agreements must include the technical requirements of Evidence Code sections 1122 or 1123, as applicable, to be admissible and therefore enforceable if created in the course of a mediation.

Attorney's ethical obligation to maintain the confidence and secrets of the client

- Attorneys must keep, and not reveal, client confidences except with the informed consent of the client. (Bus. & Prof.Code, § 6068, subd. (e)(1); Rule of Professional Conduct 3-100.) This is really a privilege, which may be waived by the client. In mediations, attorneys generally counsel and encourage their clients to openly discuss their needs, interests and facts surrounding the case with the mediator as part of their encouragement to settle a matter. Sometimes the attorney is authorized to speak to the mediator regarding certain desires or concerns of the client, and the attorney should take care in those situations to discern the scope of disclosure permitted by the client, just as in any negotiation conducted on the client's behalf.

- Frequently mediators ask to speak with counsel outside the presence of the client, and usually with the permission of the client. Or lawyers will seek to speak privately with the mediator, sometimes to strategize how to best help a client who is struggling with the process. Lawyers often provide mediators with important dynamics about their cases, the other parties and their clients; these disclosures should not be made, however, unless the client has authorized the lawyer to speak frankly with the mediator about client confidences and legal strategies in order to assist in the settlement process.

Revealing private information to the

mediator in confidence is probably only a good idea where the attorney has carefully vetted the mediator in the first place, has heard the mediator's rule on disclosures to the other side about confidential caucus communications, and can be assured the mediator can keep the information confidential.

Conclusion

Attorneys should be well versed regarding the various types of confidentiality scenarios that present in the mediation context. Prepare the client for the expected agreements about confidentiality, and request that the client refrain from discussing the matter with outsiders in high profile or employment mediation, where a confidential non-disclosure agreement will likely be requested. Hire an experienced mediator and vet mediators you have not used before as to their caucus practices regarding disclosing information to the other side and make sure there is a fit with your preferred style of mediation. Armed with this information, lawyers can better implement strategies to protect private information, to admit, disclose or publish other information, and to create admissible and enforceable mediation settlement agreements concerning "confidential" information. Hush, hush!

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