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The Many Meanings of the Term "Confidentiality" in Mediations

March 2017

In mediations, attorneys and clients are often confused about the meaning of the term "confidential." And with good reason. The term is used by courts, lawyers and mediators to refer to a wide variety of situations in mediations and other contexts that each has special meaning.

There are several basic categories of meanings of the word "confidentiality" that commonly arise in the mediation context, and several variations:

- Evidentiary rules regarding the admissibility and discoverability of mediation related evidence in subsequent civil adjudications, including arbitrations (e.g., California Evidence Code Sections 1115-1128);
- Non-disclosure obligations of the mediator due to mediator ethical obligations and mediator agreements or ground rules;
- Non-disclosure obligations that arise due to contractual agreements between participants to mediation (e.g., not to disclose terms of a settlement); and
- The ethical obligation of attorneys to maintain client confidences, a non-disclosure obligation that is a client privilege.

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 that occur in mediations. These include evidentiary exclusions, agreements to not disclose certain types of information, ethical obligations to not disclose certain types of information, and privileges. In addition it is likely that the word "confidential" has layperson meanings that create additional confusion for mediation participants.

Using a mediation subject to the California Evidence Code (EC) as an example, the minute the mediator is contacted and preparations for mediation begin, all mediation participants have entered into a "mediation confidentiality" zone or bubble. EC Sec. 1115. Once in the mediation confidentiality bubble, a presumption is created 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." EC Sec. 1119 (a)(b). The mediation confidentiality bubble essentially changes the way evidence is treated for purposes of subsequent

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proceedings. Thus it is imperative that attorneys become aware of, and appropriately counsel their clients about the unique situations that arise when they enter into the mediation process.

In a recent article I wrote on this topic I explore these and other topics, including pre-mediation agreements, being strategic about selection of the mediator and clarifying the mediator's agreements to participants about use of information disclosure between participants, protecting client confidences in mediation, creating enforceable and admissible agreements, planning for admissibility (or not) of mediation created documents in subsequent litigation, and settlement based confidentiality agreements and gag orders.

Click here to read **Hush, Hush – It's Confidential……The Many Meanings of "Confidentiality" in Mediations**.

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