Shhhh! The Big Risk Associated With Mediation Confidentiality Nobody Talks About

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Supporting Effective Agreement

Confidentiality remains the keystone of mediation. Individuals and businesses alike widely regard mediated negotiation as a critical and necessary part of dispute resolution. Mediation confidentiality promotes candor and facilitates mutually beneficial solutions. Conversely, an absence of confidentiality can compromise the entire process. That said, in complex civil disputes there seems to be a consequence of mediation confidentiality that is at best not being discussed, or, worse not being considered: Proof problems in related disputes are the unintended consequences of mediation confidentiality.

What We Are Not Talking About

Litigants, disputants, and their insurance carriers are running a big risk due to inattention to the details of mediation confidentiality agreements. The risk is particularly great in California and other states with strict mediation confidentiality statutes (e.g., Maryland). However, even those states that follow the Uniform Mediation Act (UMA) are not immune to the risk.

Typically, the mediator provides, or in complex matters the attorneys representing the earliest and biggest stakeholders negotiate, the confidentiality agreement that then may be adopted by the Court in a Case Management Order or by a Special Master in a Pre-Trial Order. Frequently these confidentiality agreements focus on supporting resolution of the dispute at hand and do not contemplate related disputes that may arise during the pendency or after resolution of the subject dispute.

When a matter that was developed primarily in the context of mediation confidentiality settles, little or no otherwise admissible evidence regarding that dispute exists. Related disputes that necessarily rely on material and information that is developed for and in the course of mediation include:

- Contractual indemnity: Contractual indemnitees seeking indemnity from indemnitors.
- Coverage/Bad Faith: Policyholders seeking coverage from insurance carriers whether or not the action includes allegations of a carrier's bad faith in connection with the underlying matter.

- Contribution/Re-Allocation: Insurance carriers seeking contribution from other insurance carriers or seeking to re-allocate contributions.
- Reinsurance: Insurance carriers seeking coverage from reinsurance carriers.

The Legal Issue

In California, mediation confidentiality is governed by Evidence Code §§1115-1128. Mediation confidentiality agreements often incorporate these sections either by reference or by reproduction. The California Supreme Court has repeatedly upheld the stringent confidentiality provided for in these statutes. (*Cassel v. Superior Court* 51 Cal.4th 113 (2011); *Simmons v. Ghaderi* 44 Cal.4th 570 (2008); *Fair v. Bakhtiari* 40 Cal.4th 189 (2006); *Rojas v. Superior Court* 33 Cal.4th (2004); *Foxgate Homeowners' Assn. v. Bramalea California, Inc.* 26 Cal.4th 1 (2001).) However, the California Law Revision Commission is presently reviewing mediation confidentiality for possible changes to the Evidence Code. The issue is also before the Ninth Circuit Court of Appeals in *Milhouse v. Travelers Commercial Insurance Company* (No. 13-56959 9th Cir., on appeal from the US District Court, Central District of California).

Although decided a decade ago, the *Rojas v. Superior Court* case remains a seminal decision on mediation confidentiality and highlights the flaw in the process. There, the California Supreme Court upheld the strict confidentiality of all things relating to mediation as allowed by the statutes and agreed to by the parties. *Rojas* involved an attempt by a third party to obtain documents that had been prepared and presented in an earlier related construction defect matter that had been governed by a Case Management Order (CMO). The CMO in the related matter cited California Evidence Code §1119 and, in an unusual development, the settlement agreement stated "throughout this resolution of the matter, consultants provided defect reports, repair reports, and photographs for informational purpose which are protected by the Case Management Order and Evidence Code §§ 1119 and 1152, and it is hereby agreed that such materials and information contained therein shall not be published or disclosed in any way without the prior consent of plaintiff or by court order." (*Rojas* 33 Cal.4th at 412.)

As indicated, the settlement agreement provision is singular in that it purports to cede to a plaintiff or a court the power to decide whether to divulge otherwise confidential material or information. Under California's mediation confidentiality statutes in order for anything that is otherwise confidential to be admissible either *all* mediation participants, not just parties to the dispute, must explicitly waive confidentiality or the mediation participant for whom the material was prepared expressly agrees to disclosure. (See Cal. Evid. §1122.) Thus, unless all mediation participants were signatories to the settlement agreement, the validity of the apparent waiver by everyone aside from the plaintiff in the related matter is questionable. Since it is atypical for all participants to be signatories to the mediation settlement agreement — mediators, experts, family members, additional counsel, insurers, and others tend not to sign the settlement agreement even when the agreement is drafted and executed at the conclusion of a one-day mediation — it is an

unlikely and somewhat impractical place to address overall confidentiality of the mediation.

In the ten years since the *Rojas* decision, litigants and their insurers have not insisted on a different way to address mediation confidentiality in related actions. This is noteworthy, even astonishing, when one considers that construction defect matters such as *Rojas* are a prime example of the types of litigation that spawn related disputes in which litigants and/or their insurers routinely refer to material and information that is subject to mediation confidentiality. In fact, these disputes are sometimes solely informed by such confidential material and information.

The Rock and the Hard Place: Waiver or Proof Problems

The mediation confidentiality conundrum presents a difficulty for both disputants and insurance carriers. Parties need to choose between waiver and proof problems. They need to consider whether to change mediation confidentiality agreements or make the choice to have proof problems in related disputes. This is not just a choice facing disputants with potential related disputes. Even plaintiffs with relatively straightforward claims will face this choice if the defense has potential related disputes of the nature set out above. Putting it simply, if any mediation participant wants to "pay-and-chase" then all mediation participants need to consider some sort of waiver of mediation confidentiality.

Mediation participants faced with related dispute complications, i.e., participants not wanting to pay-and-chase, are pressured to settle by others who accuse them of being in bad faith if they fail to pay. In jurisdictions with strict mediation confidentiality, the same proof problems created by confidentiality removes much of the force of this accusation. Exploration of circumstances under which it is forceful is beyond the scope of this article.

California's statutes require that *all* participants waive confidentiality if confidential mediation communications and materials are going to be admissible. The UMA requires that parties agree, either in writing in advance or by some sort of record, that all or part of a mediation is not privileged and as to privilege belonging to mediators or non-party participants, they too must expressly waive. Therefore the only practical option is to incorporate the waiver into the confidentiality agreement. Any up-front waiver agreement needs to be carefully crafted so as not to eviscerate confidentiality entirely. Counsel needs to anticipate the following:

- Participants may not agree to waive confidentiality when doing so will give adverse parties admissible evidence that could be used against them.
- Contractual indemnitors may not want to waive confidentiality as the presently confidential documents prepared for mediation and even their arguments or positions taken during mediation could be used against them.
- Insurance carriers may not want to waive confidentiality when doing so makes admissible the presently confidential documents prepared for mediation that may be the sole basis on

which someone might argue the nature and extent of coverage under their policies and the arguments or positions taken during mediation could be used against the carriers. These issues exist as to both disputes with policyholders and disputes with other insurers, i.e., contribution and reallocation matters

- Policyholders may not want to waive confidentiality when doing so makes admissible the presently confidential documents prepared for mediation that may be the sole source of information being relied upon by their insurance carrier(s) to deny coverage in whole or in part. Nor may policyholders want the arguments or positions taken during mediation to be admissible as these could be used against them.
- Plaintiffs who perceive mediation confidentiality's impact on related disputes to be only a problem for the defense may not want to waive confidentiality as the plaintiffs' expert reports, damages and liability related statements, and other such proof of their cases are not being presented by them as evidence.
- Experts who prepare material for mediation and who frequently participate in mediation by virtue of this, as well as site inspections, expert meetings, and other mediation-related activities, may not want to waive confidentiality because doing so would release into the public domain potential impeachment material.
- Creating a limited waiver of confidentiality such that the parties to the confidentiality agreement define the scope and use of the evidence has its own challenges. It is possible that, like a privilege waived, the rules of evidence, not the intent of the parties, control confidentiality. For a cautionary example relating to attorney-client privileged communication and the attorney work product doctrine. (See *McKesson HBOC, Inc. v. Superior Court* 115 Cal.App.4th 1229 (2004).)
- Professional licensure rules sometimes require reporting to governmental agencies when a settlement has been reached. Depending on the nature of that reporting and whether the governmental agency enquires further of either the professional or the insurance carrier involved in the dispute, the information sought and provided could violate current confidentiality statutes.

In Sum

This article presents issues that arise from mediation confidentiality and purposefully does not propose solutions because these need to be considered by mediation parties and non-party participants in the context of each particular dispute. Parties and participants should consult counsel before proceeding to either modify confidentiality agreements or address the proof problems in other ways. Methods addressing confidentiality issues depend on the type of related dispute(s) that may arise, i.e., contractual indemnity, insurance carrier contribution, insurance coverage and bad faith, and reinsurance. As mediation participants grapple with whether to waive confidentiality or face future proof problems, having a mediator with a sophisticated understanding of the issues presented by any related disputes is critical to successful resolution of any complex matter.

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