



What's said in mediation stays in mediation, right?

A look at the scope of mediation confidentiality and its public policy grounds

BY FRED CARR

One of the many downsides to litigation is the fact that it takes place in a public forum. The simple filing of a complaint announces to the world that the parties are embroiled in a dispute of sufficient magnitude that they could not resolve it privately.

While there may be no such thing as “negative publicity” for a movie star; for mere mortals, negative publicity can be extremely damaging to both reputations and finances. While the unfortunate recipient of negative publicity can seek damages by way of pursuing an affirmative claim for libel and/or slander, there is no “unringing the bell” once it has been sounded. Further, bringing a defamation claim comes at significant additional cost, draws even more attention to the underlying adverse message, and does so at the risk of *confirming* the original alleged bad behavior! Hence, the increasing popularity of mediation.

This article explores the public policy grounds for mediation confidentiality, the rules themselves, the exceptions to confidentiality, as well as the salient California Supreme Court cases interpreting those rules.

A brief history of statutory law

So what “law” applies to mediation?

Ironically, given the significant role that mediation plays within civil litigation, there is a paucity of guidance with regard to participants’ behavior within the mediation setting. The only standards which directly address mediation conduct can be found within the California Judicial Counsel Rules of Court, Division 8

Alternative Dispute Resolution, Chapter 3, General Rules Relating to Mediation of Civil Cases.

Those rules are expressly limited to mediations in which a mediator: (1) has agreed to be included on a *superior court’s list or panel of mediators for general civil cases* and is notified by the court or the parties that he or she has been selected to mediate a case within that court’s mediation program; or (2) has agreed to mediate a general civil case pending in a superior court after being notified by the court or the parties that he or she was recommended, selected, or appointed by that court or will be compensated by that court to mediate a case *within that court’s mediation program.*” (Cal. Rules of Court, rule 3.851)

What’s more, little is noted within the Rules of Court regarding participants’ behavior within the mediation setting generally, and confidentiality in particular. Only one rule exists in this regard! Rule 3.854, which provides that a mediator must at all times comply with applicable law concerning confidentiality; he/she must provide the participants with a general explanation of the confidentiality of mediation proceedings; if private “caucus” is to take place, the mediator must “first discuss with all participants the mediator’s practice regarding confidentiality for separate communications with the participants, and unless required by law or authorized by a disclosing party, the mediator must not disclose confidential communications revealed while in caucus; and finally, a mediator must not use information that is acquired in confidence in the course of a mediation outside the mediation or for personal gain.

Given that the California Rules of Court only apply to court-ordered

mediations, what “law” applies to those mediated matters that exceed court-ordered mediation thresholds?¹ Essentially, none! That is, no “binding authority” governs such matters.²

How did we get here?

Implementing alternatives to judicial dispute resolution has been a strong legislative policy since at least 1986. The Legislature expressly declared that “In appropriate cases, mediation provides parties with a simplified and economical procedure for obtaining prompt and equitable resolution of their disputes and a greater opportunity to participate directly in resolving these disputes” and enacted provisions for dispute resolution programs, including but not limited to mediation, conciliation, and arbitration, as alternatives to formal court proceedings which it found to be “unnecessarily costly, time-consuming, and complex” as contrasted with non-coercive dispute resolution.”³ In 1993, the Legislature gave further impetus to the policy of encouraging mediation when it enacted Code of Civil Procedure section 1775 et seq. which created a mandatory mediation or arbitration pilot project for the County of Los Angeles.

Thus, in 1997, the Legislature adopted the California Law Revision Commission’s⁴ recommendations, and revised the extant mediation confidentiality statutes, and enacted Evidence Code sections 1115 et seq.⁵ creating an extensive statutory scheme governing mediation confidentiality and its exceptions.

What is the scope of mediation confidentiality?

The real heart of mediation confidentiality is found in section 1119:

Except as otherwise provided in this chapter: (a) No evidence of anything



said or any admission made for the purpose of, or in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery, and disclosure of the evidence shall not be compelled in any arbitration, administrative adjudication, civil action or other non-criminal proceeding in which pursuant to law, testimony can be compelled to be given. (b) No writing, as defined in section 250, that is prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation, is admissible or subject to discovery, and disclosure of the writing shall not be compelled in any arbitration, administrative adjudication, civil action or other non-criminal proceeding in which pursuant to law, testimony can be compelled to be given. (c) All communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential.⁶

The consequences for violating section 1119 are addressed in section 1128:

Any reference to a mediation during any subsequent trial is an irregularity in the proceedings of the trial for purposes of section 657 of the Code of Civil Procedure. Any reference to a mediation during any other subsequent non-criminal proceedings is grounds for vacating or modifying the decision in the proceeding, in whole or in part, and granting a new or further hearing on all or part of the issues, if the reference materially affected the substantial rights of the party requesting relief.

Do the exceptions swallow the rule?

On its face, mediation confidentiality appears to have broad applicability: “arbitrations, administrative adjudications and civil actions.” However, *criminal* actions are expressly precluded from the statutory protections from discovery, disclosure and admissibility. What’s more, conspicuously absent from the statutory protections is any reference to non-judicial forums. Nothing in section 1119 prohibits publication or

dissemination of otherwise protected information in any other forum. Additionally, several code sections provide safe haven for disclosure of otherwise confidential communications and writings within those same *judicial* forums.

Section 1120 provides in pertinent part that “evidence otherwise admissible or subject to discovery outside of mediation does *not* become inadmissible or protected from disclosure solely by reason of its use in mediation.” Fair enough; participants can’t protect relevant (damaging) evidence by cloaking it in the veil of mediation confidentiality.

Section 1121 prohibits the use of any report, assessment, evaluation, recommendation, or finding of any kind, [prepared] *by the mediator* concerning the mediation, “*unless* all parties to the mediation expressly agree otherwise in writing...”

Similarly, section 1122 provides that “writings” are *not* confidential if all persons who participate in the mediation expressly agree to disclosure, *or* if the writing was prepared by or on behalf of fewer than all the mediation participants, those participants expressly agree to its disclosure, and the writing “does not disclose anything said or done or any admission made in the course of the mediation.”

A written Settlement Agreement entered into as a result of a mediation is also *not* protected if it so expressly provides, *or* if it provides that it is “enforceable or binding or words to that effect,” *or* if “all parties to the agreement expressly agree in writing...,” *or* if the agreement is “used to show fraud, duress or illegality that is relevant to an issue in dispute.” (See, §1123)

Likewise, *oral* agreements made in the course of or pursuant to mediation, (which satisfy statutory indicia of reliability found at section 1118), are also *not* protected if “all parties to the agreement expressly agree in writing... to disclosure,” *or*, “the agreement is used to show fraud, duress or illegality that is relevant to an issue in dispute.” (See, § 1124)

What’s more, “no person presiding at any judicial or quasi-judicial proceeding,

and no arbitrator or mediator, shall be competent to testify, in any subsequent *civil* proceeding as to any statement, conduct decision, or ruling, occurring at or in conjunction with the prior proceeding *except* as to a statement or conduct that could: (a) give rise to civil or criminal contempt, [or] (b) constitute a crime, [or] (c) be the subject of investigation by the State Bar or Commission on Judicial Performance, *or* (d) give rise to a disqualification proceedings under paragraph (1) or (6) of subdivision (a) of section 170.1 of the Code of Civil Procedure. [Grounds for Disqualification of Judges] However, this section does *not* apply to a mediator with regard to any mediation under Chapter 11 (commencing with section 3160) of Part 2 of Division 8 of the Family Code.” [Mediation of Custody and Visitation Issues] (Evid. Code, §703.5)

Supreme Court review

• Foxgate v. Bramalea (2001)

Foxgate Homeowner’s Assoc. Inc. v. Bramalea California, Inc. (Cal. 2001) 108 Cal.Rptr.2d 642 is the seminal California Supreme Court case addressing mediation confidentiality. There, plaintiff sued a developer and general contractor for alleged construction defects. Relying upon a report to the court prepared by the mediator,⁷ the trial court sanctioned the defendants and their counsel for failing to bring their expert witnesses to a *court-ordered* mediation, and defendants appealed. The Court of Appeal reversed, reasoning that in spite of section 1119’s and 1121’s underlying policy to protect communications during mediation, it should “balance against that policy recognition that unless the parties and their lawyers participate in good faith in mediation, there is little to protect,” and concluded that “the Legislature did not intend statutory mandated confidentiality to create an immunity from sanctions that would shield parties who disobey valid orders governing the parties’ participation. [] In sum, section 1121 was not intended to shield sanctionable conduct.”⁸



Acknowledging that it was creating a “non-statutory exception” to the confidentiality requirements, the Court of Appeal thus held that notwithstanding section 1119 which governs confidentiality of communications, and section 1121, which limits the content of mediators’ reports, the mediator *may* report to the court, a party’s failure to comply with an order of the mediator and to participate in good faith in the mediation process, and in so doing, the mediator *may reveal information necessary to place sanctionable content in context, including communications made during the mediation.* However, the court concluded that here, the report included more information than was necessary⁹, and reversed the trial court’s sanctions order. Plaintiffs appealed to the high Court which granted review to consider whether any exceptions to sections 1119 and 1121 were applicable.

Reviewing both the statutory language as well as the legislative history of the subject statutes, the Court concluded that: the statutes “are clear and unambiguous,” section 1119 prohibits disclosure of any written or oral *communication* made during mediation, and section 1121 prohibits the mediator, (but not a party), from advising the court about *conduct* during mediation that might warrant sanctions; and because the language is clear and unambiguous, judicial construction of the statutes is not permitted, unless they cannot be applied according to their terms or doing so would lead to absurd results, thereby violating the presumed intent of the Legislature.

The Court further noted that “heretofore, the only California case upholding admission, over objection, of statements made during mediation in which no statutory exception to confidentiality applied, was *Rinaker v. Superior Court*, (1998) 62 Cal.App.4th 155, a case that is clearly distinguishable.” In *Rinaker*, a mediator was compelled to testify at a juvenile delinquency proceeding regarding statements by the victim at a related mediation, concerning the identities of the juveniles. The Court of Appeal held

that a minor’s due process right of confrontation outweighs the right of confidentiality. The *Foxgate* Court then held that here, “the plaintiff’s have no comparable supervening due process-based right to use evidence of statements and events at the mediation session.¹⁰ Reversing the Court of Appeal, the Court held that “even were the court free to ignore the plain language of the confidentiality statutes, there is no justification for doing so here.”

• ***Rojas v. Superior Court* (2004)**

In *Rojas v. Superior Court* (2004) 15 Cal.Rptr.3d, the California Supreme Court had the occasion to consider the scope of section 1119(b) in a matter arising out of a dispute between the tenants of an apartment complex against the owners and builders of the complex. The tenants alleged that the defendants conspired to conceal building defects and microbe infestation which caused the tenants to suffer health problems. The tenants sought production of various “writings” produced by the defendants in connection with a mediation conducted in a prior matter. The trial court denied the tenants motion to compel and the tenants filed a writ of mandate.

The Court of Appeal granted the writ, concluding that section 1119(b) does “not protect pure evidence,” but protects only “the substance of mediation, i.e., the negotiations, communications, admissions, and discussions designed to reach a resolution of the dispute at hand.” Mediation materials are protected much “in the same manner as the work product doctrine.”¹¹

Revisiting *Foxgate* and “the strong legislative policy” in favor of implementing alternatives to judicial dispute resolution, the broad definition of “writings” found at section 250, and section 1126’s express mandate that any writings that are protected from disclosure *before* a mediation ends, remain protected to the same extent *after* the mediation ends, the high Court concluded that the Court of Appeal’s holding “directly conflicts with

the plain language of these provisions” and reversed its decision.¹²

Specifically addressing the Court of Appeal’s reliance on a work product-like “good cause” exception to mediation protection, the high Court noted Code of Civil Procedure section 2018(b)’s provision for allowing discovery of certain types of attorney work product, if “the court determines that denial of discovery will unfairly prejudice the party seeking discovery in preparing that party’s claim or defense or will result in an injustice.” Admonishing the Court of Appeal, the high Court wrote: “[t]hus, the Legislature clearly knows how to establish a “good cause” exception to a protection or privilege if it so desires.”¹³

• ***Simmons v. Ghaderi* (2008)**

In *Simmons v. Ghaderi* (2008) 80 Cal.Rptr.3d 83, the Supreme Court considered whether the doctrine of estoppel created a judicial exception to the “comprehensive statutory scheme” of mediation confidentiality. *Simmons* arose out of a medical malpractice action and the plaintiffs’ attempt to enforce an oral settlement agreement that was allegedly reached during a mediation of that claim. At mediation, defendant was accompanied by her malpractice insurance provider’s claims specialist. Before the mediation hearing commenced, the defendant executed a standard “consent to settlement” form provided by her insurer, authorizing the insurer to settle the action for up to \$125,000. The form also provided that the insured’s consent could only be revoked in writing.

During the negotiations, the claims specialist authorized the mediator to offer the plaintiffs \$125,000; the plaintiffs orally accepted the offer and the mediator placed the material terms of the agreement in a document for the parties to sign. When the defendant learned that the case had been settled, she orally revoked her agreement and refused to sign the settlement agreement. Plaintiffs and their counsel signed the settlement agreement, but no one signed on behalf of the defendant or the insurer.



The plaintiffs ultimately moved to enforce the settlement on the grounds that an oral agreement had been reached with the insurer while the insurer had the defendant's consent to settle the action. Plaintiffs supported their motion with various documents as well as *declarations from their attorney and the mediator recapping the events at the mediation*. The trial court denied the motion on the grounds that the settlement agreement had not been signed by the defendants and therefore the requirements of Code of Civil Procedure section 664.6 had not been met.¹⁴ However, the court encouraged the plaintiffs to amend their complaint to allege breach of an oral agreement. The action then proceeded to trial on the breach of contract (settlement agreement) cause of action.

The defendant argued at trial that the mediation confidentiality statutes precluded plaintiffs from proving the existence of an oral settlement agreement. Notwithstanding that assertion, the claims' specialist testified about the events of the mediation. The trial court concluded that a valid settlement agreement had been reached before the defendant withdrew her consent, and entered judgment in favor of the plaintiffs. The defendant appealed. The Appellate Court affirmed, holding that because defendant herself had presented evidence of the events at mediation, she was estopped from asserting mediation confidentiality. The defendant appealed to the Supreme Court arguing that the Court of Appeal improperly relied upon the doctrine of estoppel to create a judicial exception to the statutory requirements of confidentiality of mediation proceedings.

Reviewing the legislative history of section 1124's exceptions to the admissibility of oral agreements arrived at in the course of mediation negotiations, the Court concluded that "mediation confidentiality now clearly applies to prohibit admissibility of evidence of settlement terms made for the purpose of, in the course of, or pursuant to a mediation unless the agreement falls with the *express*

statutory exceptions" [and these facts do not].¹⁵

Considering the estoppel argument, the Court criticized the Court of Appeal's reliance upon "inapt" estoppel cases, distinguishing them on the grounds that they involved estoppel to *contest jurisdiction*. Additionally, citing *Rinaker* and *Olam*,¹⁶ the Court confirmed that "except in cases of express waiver or where due process is implicated, we have held that mediation confidentiality is to be strictly enforced."

The Court also rejected the lower court's reliance upon *equitable* estoppel, as it requires among other things, a representation or concealment of a material fact and that the aggrieved party was induced to act on it. Here, the plaintiffs were never ignorant of the facts, nor did they change their position in reliance on the defendant's position, thus, estoppel principles did not apply.

The Court concluded that the "real issue" is whether a party can *impliedly* waive mediation confidentiality through litigation conduct. Considering the express exceptions to mediation communication confidentiality found at section 1122 and the Law Revision Commission's Comment that "*Agreement must be express not implied*,"¹⁷ the Court reversed the Court of Appeal and held that "[b]oth the clear language of the mediation statutes and our prior rulings support the preclusion of an implied waiver exception. The Legislature chose to promote mediation by ensuring confidentiality rather than adopt a scheme to ensure good behavior in the mediation and litigation process. The mediation statutes provide clear and comprehensive rules reflecting that policy choice."¹⁸

• **Cassel v. Superior Court (2011)**

Cassel v. Superior Court (2011) 51 Cal.4th 113 involved a legal malpractice action filed by a client against his attorneys based upon conversations and conduct between them during a mediation of an underlying lawsuit. The complaint alleged that by bad advice, deception and coercion, the attorneys induced him to

settle the underlying claim for less than the case was worth. Prior to the trial of the malpractice claim, the defendants moved, under the statutes governing mediation confidentiality, to exclude all evidence of private attorney-client discussions preceding and during the mediation concerning mediation settlement strategy and efforts to persuade the client to settle the case at mediation. The trial court granted the motion, but the Court of Appeal vacated the order.

The appellate court reasoned that the mediation confidentiality statutes are intended to prevent the damaging use against a mediation "*disputant*" of tactics employed, positions taken, or confidences exchanged in the mediation, not to protect attorneys from the malpractice claims of their own clients, thus, the attorneys cannot use mediation confidentiality as a shield to exclude damaging evidence.

The Supreme Court revisited *Foxgate*, *Rojas* and *Simmons* and the Commission's comments at length and concluded that "the plain language of the mediation confidentiality statutes controls our result." Section 1119(a) "clearly provides that "[n]o evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation ... is admissible or subject to discovery..." "Plainly, such communications include those between a mediation disputant and his or her own counsel, even if these do not occur in the presence of the mediator or other disputants." The court also relied upon the express exceptions identified in section 1122, allowing for admissibility of communications when fewer than all of the participants in a mediation stipulate to the disclosure of otherwise confidential information, as long as the disclosure does not reveal "anything said or done ... in the course of the mediation."¹⁹

The Court also rejected the Court of Appeal's focus upon "disputants," noting that "[t]he protection afforded by these statutes is not limited by the identity of the communicator."²⁰



Thus, once again, the Court declined the opportunity to create a judicially crafted exception to the express language of the mediation confidentiality statutes.

Conclusion

There is an unquestionable Legislative policy supporting the protection of oral and written communication and conduct associated with mediation. However, that protection largely focuses upon admissibility at *non-criminal*, judicial and administrative civil hearings. The Legislature has not expressly included disclosure in other public forums. What's more, the express language of the statutes themselves allow for significant disclosure (admissibility) under proscribed circumstances.

In spite of that rather limited protection, the Supreme Court has consistently rejected the opportunity to create judicially crafted exceptions to the mediation confidentiality statutes in all but the most compelling circumstances.

It is therefore advisable for all mediation "participants," as early in the process as possible, to enter into a Mediation Confidentiality Agreement that both expressly incorporates sections 703.5 and 1115-1128 by reference, as well as includes other provisions that address areas of concern not otherwise covered by the Code or that may be particularly sensitive to the parties, such as liquidated damages or injunctive relief for publication in non-judicial forums.



Carr

Fred Carr, Carr & Venner ADR, is an international, AV®-rated attorney-mediator, with over 20 years of experience. He has served as lead counsel in trials and appellate matters in both Federal and State courts in California, Oregon, Washington, Hawaii and Arizona. He has represented clients on both the plaintiff's and defense sides of the bar and has managed litigation in the eight-figure range. He has also served as a legal consultant to the Emirate of Abu Dhabi, United Arab Emirates in the Middle East. As a mediator, Fred Carr is highly accomplished at analyzing litigation strategies and possesses strong conflict resolution, communication and leadership skills.

Endnotes

¹ The court may only *order* matters to mediation in which the amount in controversy does not exceed \$50,000 for each plaintiff. (See, Rule of Court 3.891(b).)

² It should be noted, however, that as a matter of legislative policy, California Rule of Professional Conduct 1-100, subdivision (A), provides in pertinent part that "*ethics opinions and rules and standards promulgated by other jurisdictions and bar associations may also be considered.*" The Fourth District Court of Appeal recognized this guidance in *State Compensation Ins. Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644, 655-656, stating that "ABA ethical rules may be considered as a collateral source of proper professional conduct in California where there is no direct California authority and such rules do not conflict with this state's policies." As such, mediators, counsel and participants alike, may all look to the guidance found within the Uniform Mediation Act, the Model Standards of Conduct for Mediators, the ABA and American Arbitration Assoc. Guidelines, as well as those of the Association for Conflict Resolution.

³ See, *Foxgate Homeowner's Assoc. Inc. v. Bramalea California, Inc.* (Cal. 2001) 108 Cal.Rptr.2d 642 at 653.

⁴ Hereinafter, the "Commission."

⁵ Unless otherwise indicated, all further statutory references are to the Evidence Code.

⁶ Regrettably, the trade-off between the policy sought by the legislature for "open and candid discussions" (with the expectation that "putting all the cards on the table" will allow

"reasonable minds" to find workable solutions), and the lack of cross-examination or impeachment within the mediation setting, allows both the participating attorneys as well as the litigants to argue "creatively" with complete impunity! Mediation confidentiality incorporates no prohibition from transforming "creativity" to outright misrepresentation!

⁷ Cf. Federal Rule of Evidence 408. Compromise Offers And Negotiations: (a) Prohibited Uses. Evidence of the following is not admissible — on behalf of any party — either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction: (1) furnishing, promising, or offering — or accepting, promising to accept, or offering to accept — a valuable consideration in compromising or attempting to compromise the claim; and (2) conduct or a statement made during compromise negotiations about the claim — except when offered in a criminal case and when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority. (b) Exceptions. The court may admit this evidence for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

⁸ The mediator, a retired judge, had been appointed by the court, through a Case Management Order (CMO), to serve as both a "special master" for ruling on discovery motions as well as mediator, and was given the power to make orders governing attendance of the parties and their representatives at those sessions. The CMO also provided that the mediator was to "schedule a premediation meeting of all experts to discuss repair methodology and the mediation."

⁹ *Foxgate* at 649.

¹⁰ Information was provided by the mediator that he believed that the defendants not only violated a court order, but did so intentionally with the apparent purpose of derailing the mediation, and the reasons for that belief.

¹¹ *Foxgate* at 654.

¹² *Rojas* at 647.

¹³ *Id.*, at 649.

¹⁴ The high Court also addressed the Court of Appeals' consideration of section 1120's exception to protection of otherwise admissible evidence, noting the legislative intent to limit "the scope of section 1119, so as to prevent parties from using mediation as a pretext to shield materials from disclosure. (*Id.* at 655).

¹⁵ Code of Civil Procedure section 664.6 allows the court to enter judgment pursuant to the terms of a *signed* settlement agreement entered into outside of the presence of the court.

¹⁶ *Simmons* at 92, emphasis added.

¹⁷ In *Olam v. Congress Mortgage Co.*, (N.D. Cal. 1999) 68 F.Supp2d 1110, at 1133, the parties themselves expressly waived confidentiality and therefore the policy driving mediation confidentiality had appreciably less force.

¹⁸ *Simmons* at 96, emphasis in original.

¹⁹ *Id.* at 97-98.

