A Litigator's Guide to EFFECTIVE USE OF ADR IN CALIFORNIA

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Mediation Confidentiality

Elizabeth E. Bader

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§7.1 I. INTRODUCTION

Confidentiality is an essential ingredient of effective mediation. The parties must "feel free to be frank not only with the mediator but also with each other." *Foxgate Homeowners' Ass'n, Inc. v Bramalea Cal., Inc.* (2001) 26 C4th 1, 14, 108 CR2d 642. The confidentiality rules are intended to foster trust by assuring parties that their confidences "will not be used to their detriment through later court proceedings and other adjudicatory processes." *Foxgate Homeowners' Ass'n, Inc. v Bramalea Cal., Inc., supra,* quoting National Conference of Commissioners on Uniform State Laws, Uniform Mediation Act, §2, Reporter's Notes, p 1 (May 2001).

The principal statutory authority for mediation confidentiality is contained in Evid C §§1115–1128. The California Legislature has chosen to encourage and protect the mediation process by ensuring the confidentiality of any communication made "for the purpose of, in the course of, or pursuant to" a mediation. Evid C §1119. In doing so, the legislature struck a balance between competing public policies—disclosure of all relevant evidence on the one hand and protection of all communications made in mediation on the other. By deciding that mediation evidence would not be admissible or subject to discovery or disclosure absent agreement among the parties or other statutory exception, the legislature sought to promote mediation as an opportunity for the parties to engage in a candid and frank exchange about events in the past without worry that what they say will be used to their detriment in later civil proceedings. *Foxgate Homeowners' Ass'n, Inc. v Bramalea Cal., Inc., supra.*

§7.2 A. Scope of Chapter

This chapter discusses the application and use of mediation confidentiality provisions. The historical development of mediation confidentiality in California is discussed in §§7.3–7.4. For discussion of confidentiality policy issues that continue to be debated, see §7.5.

The uses and limits of mediation confidentiality afforded by Evid

If a mediator is improperly subpoenaed, the court or adjudicative body must award reasonable attorney fees and costs to the mediator against the person seeking the testimony or writing. Evid C §1127. See §7.32.

§7.44 K. Checklist for Analyzing Mediation Confidentiality Questions

After *Foxgate Homeowners' Ass'n, Inc. v Bramalea Cal., Inc.* (2001) 26 C4th 1, 108 CR2d 642, and *Rojas v Superior Court* (2004) 33 C4th 407, 15 CR3d 643, it is clear that any mediation confidentiality question should be analyzed first by looking at the language of the mediation confidentiality statutes. The following checklist suggests a number of steps that may be helpful to the analysis.

- ___ Do the mediation confidentiality rules (Evid C §§1115–1128) apply to the dispute between the parties (*e.g.*, general civil litigation)? See §§7.9–7.11, 7.38.
- ___ Was there a mediation or mediation consultation (Evid C §1115(a), (c))? See §7.8.
- ___ If so, when did the mediation or mediation consultation *begin*? When did the mediation or mediation consultation *end*? See §7.12.
- ___ Is the item of evidence at issue a statement or admission that falls within Evid C §1119(a), or a writing as defined by §§1119(b) and 250? See §§7.16–7.19.
- ___ Was the evidence prepared
  - ___ *for the purpose of* a mediation or mediation consultation,
  - ___ *in the course of* a mediation or mediation consultation, or
  - ___ *pursuant to* a mediation or mediation consultation? See §§7.16–7.17.
- ___ Is it evidence of the underlying *facts* of the litigation, which are not protected by §1119? See §§7.22–7.24.
- ___ Is it evidence that was prepared outside the mediation and merely used in the mediation, so that it falls under the limitation of Evid C §1120? See §7.25.
- ___ Is it evidence that was prepared outside the mediation and was then combined with evidence that was prepared for the mediation (*e.g.*, amalgamated materials under Evid C §1120(a))? See §7.26.

- ___ Do other express statutory limitations on mediation confidentiality apply? See §7.27.
- ___ If §1119 applies, is there a specific statutory exception that applies to make the evidence admissible, such as Evid C §§1122, 1123, or 1124? See §§7.33–7.37.
- ___ Is there a constitutional limit on the applicability of §§1115–1128, given the facts of the case? See §7.31.
- ___ Is there a constitutional limit on disclosure of the evidence, given the facts of the case? See §7.46.
- ___ Are other statutes or privileges applicable that could support an argument for nondisclosure? Are any exceptions to those privileges applicable? See §§7.47, 7.51–7.56.
- ___ Do the parties have a valid and binding confidentiality agreement requiring confidentiality? If so, are there defenses to the parties' confidentiality agreement? What would the consequences be for the client if the agreement is upheld or challenged (*e.g.,* attorney fee provision)? See §§7.48–7.50.

§7.45 III. ALTERNATIVE SOURCES OF CONFIDENTIALITY

Although California's mediation confidentiality statutes constitute an important source of legal protection against disclosure of communications and writings used in mediation, there may also be other legal grounds for claiming confidentiality of those same materials.

§7.46 A. Constitutional Right of Privacy

There is authority for the proposition that a party may claim a privilege against disclosure of mediation communications even apart from the mediation confidentiality statutes by invoking the right of privacy contained in the California Constitution.

Garstang v Superior Court (1995) 39 CA4th 526, 46 CR2d 84, established a qualified privilege of ombudspeople on the basis of California's right of privacy. Garstang, an employee at a private university, attempted to depose co-workers about statements made during informal mediation sessions with the university's ombudsperson. The appellate court held that although the mediation confidentiality rules did not apply (for reasons not relevant here),