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Mediation is Confidential – Not Exactly.

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As a mediator, I routinely included in my opening spiel the statement that "Mediation is confidential, and no one can force you to repeat anything that you say during the mediation." That admonition is false and I will never say it again. The citadel of Evidence Code Sections (703.5, 1119, predecessor section 1152, and 1121) has been breached, and I thought you should know about it.

The Supreme Court has taken up the controversial case of Rojas v. L.A. County Superior Court (2003 Cal. LEXIS 13), so you will not find anything in the official reports at 102 Cal.App.4th 1062. However, the decertified appellate court decision in Rojas not only ruled that photographs taken by expert witnesses for purposes of submission at a mediation (and raw test data and witness statements) were discoverable in subsequent litigation, but also ruled that derivative materials (charts, diagrams, audit reports, compilations of entries in documents, databases, appraisals, opinions and reports of non-testifying consultants) may also be discoverable "where denial of discovery would unfairly prejudice the other party or result in an injustice."

Actually, the strict confidentiality rule was never without exception. Evidence Code Section 1120 clarifies that evidence existing prior to mediation does not gain privileged status merely by being exchanged during a mediation session. Also, a settlement agreement reached at mediation is admissible under Evidence Code Section 1123 so long as it 1) states that it is admissible or subject to disclosure, 2) provides that it is enforceable or words to that effect, 3) the parties agree orally or in writing that the settlement is subject to disclosure, or 4) the agreement is used to show fraud or duress.

However, neither of the above mentioned Code Sections or the exceptions raised eyebrows, because these exceptions make complete sense and deal with the simple situations. Of course evidence that was discoverable does not change its character just because someone brought it to a mediation. And of course, since the whole point is to get rid of the case, the fact that settlement has been reached should be subject to disclosure. But wouldn't you know it, with harder cases, more controversial rulings arose.

Rinaker v. Superior Court (1998) 62 Cal.App.4th 155 is a case that proves that my admonition ("don't worry, no one can compel you to repeat what you said") is false. If the statement made during a mediation would be one that would exculpate a criminal defendant in a subsequent proceeding, the person making the statement can be compelled to repeat it. Kristen Rinaker was the poor soul who mediated a civil harassment dispute between minors who were "having differences." The mediator ended up needing representation at the trial court level and on appeal to defend mediator confidentiality – and lost. It seems that during the mediation, one of the complaining witnesses admitted that he was not sure who had thrown a rock at his car. Thereafter, the mediator was

subpoenaed to testify at a juvenile delinquency proceeding over the rock throwing incident. The mediator objected, the trial court overruled the objection for the wrong reason (that the juvenile delinquency proceeding was not a civil action) and the court of appeal ruled that the quasi-criminal nature of a juvenile delinquency and the right to cross-examine witnesses outweighed the justifications for mediation confidentiality. The juvenile delinquency hearing exception is so narrow and unusual that the case is not very troubling. What did trouble me is that I was forced to read the confidentiality statute and realize that the confidentiality rule does not apply to any criminal proceeding. The section 1123 mediation privilege expressly applies only in "non-criminal proceedings." There tend to be more of those than juvenile delinquency hearings. Okay, now my admonition has to say everything is confidential, except you might have to repeat it in a criminal or quasi-criminal proceeding.

Next is Olam v. Congress Mortgage Company (1999) 68 F.Supp.2d 1110. Here, the Federal District Court in ultra-liberal San Francisco was forced to decide whether or not a mediator can be compelled to testify about whether or not a party who signed a Memorandum of Understanding after a twelve hour mediation session had signed under legal "duress." First, the Judge decided a very thorny "Erie" question in favor of California law.[1] Second, the court "balanced" the competing interests of protecting the mediator's confidentiality[2] against the need to determine the competency of the party and ruled in favor of having the mediator testify. So, after Olam, the new exception to my admonition is "unless I am called to testify about whether or not one of you are in or out of your mind."[3]

The Supreme Court tried to forestall open season on mediation confidentiality in Foxgate Homeowners Association v. Bramalea (2001) 26 Cal 4th 1, ruling that a mediator was not allowed to report to a court about a party's bad faith conduct at a mediation session, as it ran afoul of the mediation privilege.[4]

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[1] I mention this to show all the state court practitioners that people really do litigate choice of law issues.

[2] It was the mediator's confidentiality as issue, rather than the party because the party had expressly waived mediation confidentiality.

[3] You think I'm kidding, but the opinion actually states "the testimony from the mediator that would be most consequential would focus not primarily on what Ms. Olam said during the mediation, but on how she acted and the mediator's perceptions of her physical, emotional and mental condition."

[4] Mediation confidentiality has also been protected in Eisendrath v. Superior Court (2003) 109 Cal.App.4th 351 wherein the Second District ruled that is was impermissible for a party to compel a mediator to testify in support of a motion to correct a dissolution judgment based upon the conversations during mediation.

The Supreme Court is now asked to call balls and strikes again in Rojas. However, there is more than one pitcher and batter in this case. In addition to the parties, the mediation community have stepped up to the plate. However, even the mediation community cannot make up its mind about what to do. Letters and briefs have been filed with the Supreme Court by two California mediation associations who take opposing views. The California Dispute Resolution Council favors complete confidentiality for everything produced in anticipation of mediation. It argues that the fear that evidence prepared for mediation may be discoverable will produce "posturing and pretense and obstructs the negotiated settlement of disputes." [5] In contrast, the Southern California Mediation Association argues that "mediation should not be a tool to bury unfavorable evidence." [6] Even Max Factor III has weighed in on these issues in an article for Mediate.com.[7] He favors sweeping away mediation confidentiality with a broad brush, claiming that mediation confidentiality allows cover up of attorney malpractice (settling claims based on unsubstantiated mediation evidence) or mediator payoffs. Who ever thought Max Factor would be against covering up legal blemishes?

I anticipate that the California Supreme Court will take a strict view toward mediation confidentiality and overrule large portions of the Second District Opinion in Rojas. The Supreme Court is likely to reiterate that pre-existing evidence is not subject to the confidentiality privilege, and that derivative attorney-work product prepared for mediation is not discoverable, as the mental processes of the attorneys and their consultants are generally not proper subjects of discovery. The rationale to allow parties to keep their derivative work confidential is even more compelling with the overlay of the mediation privilege. Allowing access to derivative matter would foster game playing, lead to time consuming in camera judicial examinations, and encourage discovery to learn the opponent's litigation strategies, under the guise of "good cause." The remaining difficult question is whether raw data such as photographs taken solely in anticipation of litigation will be discoverable, as they have evidentiary value which may not be subject to being reproduced in subsequent litigation. On balance, I predict that raw data, such as photographs that are generated in anticipation of mediation, will be held to be an additional exception to the mediation privilege, because of its nature as "evidence otherwise admissible or subject to discovery" within the meaning of Evidence Code 1120. Once a photograph is taken, it constitutes admissible evidence that cannot later be rendered

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[5] "It's Alright Ma, I'm Only Bleeding," http://www.mediate.com/articles/krivis12.cfm

[6] Amicus Curiae Brief of Southern California Mediation Association in Support of Petitioners
http://www.scmediation.org/755%20amicus%20final.pdf

[7] "The Trouble with Foxgate and Rojas; When Should Public Policy Require that Mediation Confidentiality in California be Subject to Certain Common Sense Exceptions?" www.mediate.com/articles/factorM1.cfm

"inadmissible" by submission during mediation. The fact that the photograph is taken for litigation does not mean that it is not evidence from the moment it is taken.

So now my admonition can be "Anything you say or submit during mediation cannot be forced out of you later, except of course for the settlement agreement you reach at the end if certain conditions are met, or if you later claim that you were crazy when you signed it, but not to prove that you participated in this mediation in bad faith or to prove that your understanding of the settlement agreement did not come out right in the written settlement agreement, and it's anybody's guess whether materials prepared for purposes of the mediation will be admissible in a subsequent proceeding, unless its criminal or quasi-criminal, where it would all be fair game, but at least you get to have an hearing on derivative stuff where the court will balance a bunch of factors that are too numerous for me to recall and even harder to weigh. On second thought, I think I should say "this proceeding is not very confidential – your lawyer can explain what I mean by this."

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