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The Quick Brown Lawyer Jumped Over the Mediation Traps.

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Once thought to be a safe place for trial lawyers to take a day off, even the safe haven of mediation has produced a few traps to be avoided. Both traps arise out of mediation confidentiality, codified in Evidence Code § 1115, et. seq. The first trap is the what you need to say in your written agreement to make sure it is admissible and enforceable. The second trap involves the reliability of information supplied by an opponent at mediation.

What could possibly go wrong at mediation? Consider this. You are stuck in mediation for an entire day, work until midnight to produce an agreement, and reduce that agreement to writing at the mediation. You leave the mediation with the wonderful feeling of a job well done, a big fee earned without too much brain damage, and another case put behind you - only to later find out that your written agreement signed at the mediation is unenforceable. What the $#@!*[1] How can that be, you ask? All the parties signed. All had authority to enter into an agreement. All the terms needed for a settlement were there. Nevertheless, the agreement may be unenforceable because that written settlement agreement is confidential, and is neither admissible nor subject to disclosure outside of mediation under California Evidence Code § 1119. That section states: "No writing . . . that is prepared for the purpose of, in the course of . . . a mediation . . ., is admissible . . ., and disclosure of the writing shall not be compelled . . . in any civil action . . . ." That cannot possibly apply to the written settlement agreement, can it? Yes, it can.

In Fair v. Bakhtiari 121 Cal. App. 4th 1286; 18 Cal. Rptr. 3d 208; 2004 Cal. App. LEXIS 1432, 2004 Daily Journal DAR 10773 (2004), the trial court ruled that a written deal sheet, which had included all the terms of settlement and had been signed by all the parties, was privileged from disclosure under Evidence Code § 1119. The trial court determined that the deal sheet did not have the words "binding" or "enforceable" with its terms, and therefore held that it was not admissible or subject to disclosure as it did not meet any of the exceptions to the mediation privilege for written mediation agreement which are found in Evidence Code § 1123. In summary, Section 1123 takes a written settlement agreement out of the mediation privilege if the writing says that it is "admissible" (subd. (a)), "binding" or "enforceable" (subd.(b)), "subject to disclosure" (subd.(c)) or words to that effect. Section 1123 (d) also provides that the writing can be admissible to prove fraud, duress, or illegality.

The Court of Appeals reversed the trial court ruling, finding that the inclusion of a provision for arbitration of disputes regarding the agreement pursuant to JAMS arbitration rules, constituted "words to the effect" that the writing was binding and enforceable. In order to avoid

[1] $#@!* = Heck.

this problem altogether, your written agreement should include the magic words found in Evidence Code § 1123, which take the writing outside of the mediation privilege. Those magic words are "admissible," "enforceable," "binding," and "subject to disclosure."

Using all the belts and suspenders, your agreement can include the following:

"The parties intend this Agreement to be admissible, binding and enforceable, and subject to disclosure within the meaning of those terms in California Evidence Code § 1123 (a), (b) and (c), and this Agreement is expressly *not privileged* from disclosure under California Evidence Code § 1119. In addition, if the formal Settlement and Mutual Release Agreement contemplated hereinabove is [e.g., not executed within ten (10) days of the date of this Agreement] this Agreement may be enforced by motion under California Civil Code § 664.6 and the court shall retain jurisdiction over this Agreement until performance in full of the settlement terms herein."

Of course, stating that "this agreement is binding and enforceable" probably would be enough, but some of us get paid by the word.

The second trap involves whether bringing materials to a mediation session can render them admissible in subsequent proceedings and also involves the reliability of materials produced at mediation. This issue was the subject of a prior Orange County Lawyer article, which appeared in the March 2004 edition, entitled "Mediation is Confidential, Not Exactly," by yours truly. That article dealt with an appellate court ruling, which was then under review. Since that article, the Supreme Court decided *Rojas v. Superior Court*, 33 Cal. 4th 407; 15 Cal. Rptr. 3d 643, 93 P.3d 260; 2004 Cal. LEXIS 6281; 2004 Cal. Daily Op. Service 6189; 2004 Daily Journal DAR 8387 (2004). The Supreme Court concluded that: "the Court of Appeal erred in holding that photographs, videotapes, witness statements, and 'raw test data' from physical samples collected at the complex--such as reports describing the existence or amount of mold spores in a sample--that were 'prepared for the purpose of, in the course of, or pursuant to, [the] mediation' in the underlying action are not protected under section 1119." Id. at pp. 423, 424.

The *Rojas* case holds that *any* writing prepared for purposes of a mediation, even things that would be considered pure non-derivative evidence, such as photographs and videotape, are privileged from disclosure under California Evidence Code § 1119. Further, unlike the limited protection afforded writings protected by the work product privilege, derivative writings prepared for purposes of mediation, such as test results, charts, diagrams or compilations, are absolutely protected by the mediation privilege, regardless of whether the party seeking them can make a showing of good cause. Additionally, actual physical evidence, such as soils samples, are not writings and are not subject to the privilege. Finally, writings such as photographs, videotapes and raw test data, which are not privileged outside of mediation because they are not created for it,

do not become privileged simply because they are produced at mediation. The test is whether the writing was prepared "for the purpose of, in the course of, or pursuant to the mediation."

The primary message of *Rojas* is that any writing that is created for purposes of mediation is absolutely privileged. Therefore, you can comfortably share anything created for the mediation at the mediation session without fear of having to produce it later in the case, even such things as photographs and videotapes that would otherwise be considered "raw data." This does not mean that the opponent will not ask your witnesses questions on the subjects or details raised in mediation. It does mean that what was said or produced at the mediation cannot be used to contradict answers later given in discovery.

However, the other message of *Rojas* is that if you intend to rely on information supplied by your opponent at mediation, you need to have the information produced as part of formal discovery in advance of the mediation, because otherwise your opponent can bring in any information it wishes during mediation, without any later accountability.

In summary, being smart at mediation means that if you reach an agreement at mediation, it ought to be signed by the parties and specifically state that it is enforceable, so that the writing will be binding. Being smart also means that you should get whatever information you need from your opponent in formal discovery before a mediation session, or you take the risk that the information provided at mediation will not be reliable.

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