RUTAN
ATTORNEYS AT LAW

The Dark Side of Mediated Agreements.

May 22, 2006

William J. Caplan
Of Counsel, Trial Section

Published in the Spring 2006 edition of the Association of Business Trial Lawyers Report.

You leave a mediation session confident that the negotiations that led to the signed document leave no doubt of what the parties intended, and also that your client has assumed the risks in making the deal after getting proper advice from you. You are pleased to have settled the case, avoiding weeks of double-tracked depositions and a three-week trial. Be careful – there is a dark side lurking in this scenario.

When negotiations for a written settlement agreement take place during mediation, a cone of silence falls around the settlement negotiations that make them different from negotiations for other agreements. The mediation privilege in Evidence Code § 1119 makes all statements and other communications during mediation privileged, subject to exceptions that do not involve subsequent civil litigation. Rojas v. Superior Court (2002) 102 Cal. App. 4th 1062 applied this principle to discovery of mediation work product by parties in subsequent lawsuit. However, the privilege has a more immediate application – the interpretation of the very contract signed at the mediation. Parol evidence in the form of writings and statements made by parties or counsel at mediation, which would otherwise be admissible, will be privileged and therefore unavailable to prove the intent of the parties, unless every participant in the mediation waives the privilege.

The following hypothetical shows the impact the mediation privilege could have on a "mediation created" contract and the people who negotiate it. Geoff Lucas, an employee of a motion picture company, Paragon Films, writes a script, partially on company time and partially at home, about some wacky kid who travels at light speed and saves a federation of planets. Paragon contends that the script is company property under the terms of the employee policy manual and Lucas claims that it belongs to him. After a year of litigation, the parties go to mediation. Lucas brings along co-employee Steven Spielbaum to confirm his side of the story. During the mediation, Spielbaum says that Paragon's principal, Darryl Zanutt, is a "total bozo," but tempers soon cool and negotiations continue. The result of the mediation is a written agreement that provides that Lucas gets paid $10 million and Paragon gets the distribution rights for the film. The film is released and does well. Everyone is happy.

Now the film goes to DVD and pay-per-view. Paragon starts selling DVD's like mad and licenses the film to cable companies on earth and other planets. Lucas screams bloody murder claiming that this is non-theatrical distribution and Paragon has no right to do it. Paragon asserts that it has the full rights to distribute the film, without any reservations.

At trial, Lucas wants to testify that he told Zanutt during the mediation that he would not give Paragon the right to distribute videocassettes or television rights, but that Paragon would only get the right to distribute the film in movie theatres. He says everyone agreed at the mediation that the word "distribution" meant theatrical distribution only. Lucas pulls

out prior drafts of the settlement agreement that were prepared by Paragon's counsel during the mediation that show that originally Paragon had the words "distribution means distribution in any form, including theatrical release, beta max, vhs and any other form of dissemination" as well as a version, marked up that same day at the mediation, where those words were stricken using a black marking pen and the words "Theatrical Only," were written neatly by hand on the dark side of the page. Lucas sues Paragon and also sues his lawyer, Dirk Vader, for malpractice, asserting that his lawyer told him at the mediation that striking the language from the draft would mean that Paragon could never claim that the distribution rights included anything but theatrical distribution. In both cases, he calls the mediator as a witness to confirm that everyone agreed about what distribution rights meant. Later that week, Paragon fires Spielbaum for stealing office supplies. Spielbaum sues Paragon for wrongful termination, claiming that he was fired for supporting Lucas at the mediation, and not for the asserted basis of taking a company stapler home without written consent.

Had the meeting taken place in one of the lawyer's offices without any mediator present, the conversations and the drafts would be admissible to explain the meaning of the word "distribution" and its scope. See Subafilms, Ltd. v. MGM-Pathe Communications Co., 1993 U.S. App. LEXIS 4068, Copy. L. Rep. (CCH) P27068 (9th Cir. Feb. 17, 1993,) which is an unpublished opinion wherein the outcome of extrinsic evidence of this variety was crucial to the outcome. However, in this hypothetical, the extrinsic evidence was generated during mediation and is therefore absolutely privileged under Evidence Code § 1119. None of the communications may be admitted.

Additionally, the mediator cannot be called as a witness even if all the parties agreed to waive the mediation privilege, because under Evidence Code § 703.5 the mediator is "incompetent" to testify.

Also, the advice given during the mediation by the lawyer to client will likely be privileged in subsequent litigation between them. In another unpublished opinion, Malcolm v. Malcolm 2004 Cal. Unpublished LEXIS 10675, the court of appeals agreed that attorney advice during mediation was inadmissible in a subsequent malpractice action between them. In affirming the order, the court stated: [T]he provisions of the Evidence Code provide no support for the Husband's contention that the mediation confidentiality privilege is inapplicable when a party is suing his attorneys for ineffective assistance during mediation. …. The Legislature has not enacted an exception to section 1119 for discovery and disclosure of the mediation communications between an attorney and his or her client in an ensuing malpractice action, and this Court may not create one," citing Foxgate Homeowner's Association v. Bramalea California, Inc. (2001) 26 Cal 4th 1, 17.

As a result, in Lucas's lawsuit versus Dirk Vader, Lucas will likely be barred from offering evidence that Vader told him that he would protected by the dark side of the draft. While lawyers may take some comfort from the shield against being forced to disclose alleged bad advice given in mediation, a lawyer will be equally barred from offering

evidence of a verbal warning given to the client during mediation, or the client's knowing acceptance of a risk to make the deal work.

And what about poor Spielbaum, who was really fired because of what happened at the mediation, rather than the office supplies pretext? The insult and its circumstances are inadmissible. The mediation privilege attaches to all mediation "participants" not just the parties to the specific discussion. In Doe I v. Superior Court (2005) 132 Cal. App. 4th 1160, individual priests prevented public disclosure by the Los Angeles Diocese of a list of names for whom the Diocese had notice of prior acts of molestation– even though the Diocese consented to public disclosure. The court ruled that because not all the participants in the mediation consented to the disclosure, any participant could, by not agreeing, prevent disclosure of any mediation communication.

Like the balance between national security and civil liberties, the important public policy of unfettered settlement dialogue in mediation can produce unexpected violence to justice and liberty. This article is designed to give fair warning to lawyers and clients, that the giddy jubilation that usually follows the signing of a settlement agreement at mediation can quickly be turned to the dark side.

William J. Caplan is of counsel to Rutan & Tucker, LLP, and is a full-time mediator, specializing in resolving business, real estate, employment and construction disputes. Mr. Caplan's complete biography is available at www.rutan.com and he can be reached by telephone at 714 641 5100 or by email at bcaplan@rutan.com.