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Mediation Advisory

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Do Not Rely on the Mediator to Authenticate a Signature on a Mediated Settlement Agreement

Do you remember Maxwell Smart trying to talk to the Chief in the Cone of Silence (for those of you younger than 50, you may be thinking of Steve Carrell, rather than Don Adams). A mediator is required to stay in the cone of silence after a mediation regarding all forms of communications during a mediation. This proscription includes any discussion regarding the mediated settlement agreement, and even the fact that the other party signed the mediated settlement agreement. In *Radford v. Shehorn*, 2010 Cal. App. LEXIS 1455 (Cal. App. 2d Dist. Aug. 19, 2010) the court was faced with a dispute over a mediated settlement agreement. A trustee and a trust beneficiary had a probate dispute over trust distributions. The matter was mediated, and an agreement was executed. When the trustee moved to enforce the agreement under CCP 664.6, the beneficiary objected, claiming that a waiver of mediation confidentiality respecting the agreement had not been executed, and therefore the mediated settlement agreement was unenforceable. Page 1 of the settlement agreement, according to the trustee, was a form document that included a waiver of confidentiality. Page 2 of the agreement was entitled, "Settlement Agreement" and was all handwritten. The trustee's attorney filed a declaration that said both documents were included in the settlement, that he had written page 1 of 2 on the form portion, and 2 of 2 on the handwritten portion, and argued that the agreement was admissible. The trustee also obtained a declaration from the mediator stating essentially the same thing.

The beneficiary objected to both the declaration of the attorney and the mediator. Respecting the attorney, the court ruled that the attorney was permitted to testify as to his conduct, which included marking the form "page 1 of 2," which the court differentiated from a communication. The court stated: "She concedes that section 1119 bars evidence of communications during **mediation**, but it does not bar testimony about conduct. (*Foxgate Homeowners' Assn. v. Bramalea California, Inc.* (2001) 26 Cal.4th 1, 18, fn. 14 [108 Cal.Rptr.2d 642, 25 P.3d 1117] [§ 1119 does not prohibit a party from revealing or reporting non-communicative conduct].)."

However, the mediator is prohibited even from testifying about conduct, citing Evidence Code "Section 703.5 provides in part: "[N]o … 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 … ." The court stated in unusually literate prose, "Like an actor whose concluding scene occurs in act 2, the mediator may not reenter the stage to play a part in act 3."

The court concluded that it was harmless error to admit the mediator's declaration, as the trustee's attorney's declaration was sufficient to establish the admissibility of both pages of the settlement agreement.

This case should serve as a reminder of that a mediated settlement will constitute an enforceable agreement, and that the communications of the parties that led to its execution, usually admissible under the parol evidence rule, will not be available to explain ambiguities in the executed document. It highlights the need to use care to draft a writing that you can enforce based on what is on the face of the document, and nothing else. This can be difficult at the end of a long mediation day, and requires advance planning – an assumption that the case is going to settle before you go to mediation. It also means that the most logical witness – the neutral party who observed the execution of the writing (your friendly local mediator,) cannot be called as a witness to prove the most basic of things. You cannot even call the mediator to prove that the other party signed the settlement agreement. (Frequently, the mediated settlement agreement is signed in private caucus, with no adverse party or attorney observing the signature.) A prudent attorney will not only make sure that the agreement stands on its own, for purposes of its conduct, but will also watch it signed so that he or she can attest to its execution by the adverse party.