2020 CLM Focus Conference

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Virtual Conference

Narrative

OFF AND ON THE RECORD DIALOGUE AND THE IMPACT OF PROTECTED COMMUNICATION IN MEDIATIONS

a. MEDIATION STRUCTURE:

Mediation is defined as a "Private, informal dispute resolution process in which a neutral third person, the mediator, helps disputing parties to reach an agreement." See Black's Law Dictionary. As defined, the parties usually must agree to participate, or it will serve very little purpose. Additionally, the mediator must be an agreed upon neutral person with no skin in the game. Other considerations include, who will attend, what procedures are put in place to educate the mediator, where will the mediation take place and what will the schedule be. Finally, the timing of the mediation can be important. It must take place after both sides fully appreciate their respective risks and objectives, but before the expenses incurred of litigation could impact the decision-making process.

b. MEDIATION PRIVILEGE:

To facilitate frank and honest participation, most if not all mediations are usually confidential. What this means is that the participants and the mediator cannot use communications made during the mediation for any purpose following the termination of the mediation. This pertains to successful mediations as well as unsuccessful mediations. The obvious exception to this is when a mediation concludes but is followed by another at a later date.

Candor with the mediator is at the root of all successful mediations and to promote this, participants need to know that what they admit to and what they ask for, will not be used against them. Much of what is said is in private away from the adverse party and told to the mediator in confidence. The privilege attaches to both written briefs and verbal discussions. To facilitate this confidentiality, most mediators require the parties and participants to sign a written agreement that states the scope of the confidentiality agreement. Unfortunately, as with many written contracts, the language used can be subject to interpretation. The intent of the parties is another avenue to circumvent the prohibition in the agreements.

Statutes have also been enacted to facilitate and protect mediation communications. California has adopted a statute that institutes a mediation privilege. It states:

> Under Evidence Code § 1119(c), "All communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential."
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> Under Evidence Code § 1122, "A communication or a writing, as defined in Section 250, that is made or prepared for the purpose of, or in the course of, or pursuant to, a mediation or a mediation consultation, is not made inadmissible, or protected from disclosure, by provisions of this chapter if either of the following conditions is satisfied:
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> (1) All persons who conduct or otherwise participate in the mediation expressly agree in writing, or orally in accordance with Section 1118, to disclosure of the communication, document, or writing.
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> The communication, document, or writing was prepared by or on behalf of fewer than all the mediation participants, those participants expressly agree in writing, or orally in accordance with Section 1118, to its disclosure, and the communication, document, or writing does not disclose anything said or done or any admission made in the course of the mediation."

c. COMMON FORMS OF PROTECTED (PRIVILEGED) COMMUNICATIONS:

The most common form of communication in a mediation is the written Mediation Memorandum. The Mediation Memorandum can be confidential and only given to the mediator, public and given to all parties and participants or in some cases it can be separated for each. However, the fact that a written memo may be published to the opposition does not make it any less privileged. Typical information contained in the memorandum designed to inform both the mediator and the opposing parties contains:

- Procedural Posture of case
- Parties
- Claims
- Witnesses and their testimony
- Documentation
- Disputed evidence
- Applicable law
- Settlement posture

d. MEDIATOR CONFIDENTIALITY:

As mentioned, in most jurisdictions, all mediation proceedings are confidential. See Rojas *v. Superior Court ,* 33 Cal.4th 407 (2004). Information and admissions may not be referred to in further proceedings. This insures candor among the parties and a real opportunity to discuss all the issues which may lead to a just and fair outcome. The concept of "mediator confidentiality" is also important. Some mediators may take the position that if you tell me, everything you tell me is also going to be told to the other side. ("everything is on the table" during a mediation proceeding). However, most use the method that maintains confidentiality of matters discussed privately with the parties known as a caucus and only disclose otherwise confidential material with the parties' consent. This creates a partnership with the mediator and may lead to some self-searching among all sides. If the purpose of the mediation is for each side to speak with someone other than their attorney and express their positions, confidential mediator conversations are essential.

e. WHEN WOULD COMMUNICATIONS BE USED OUTSIDE OF MEDIATION?

As with anything, the best intentions often go awry. Focus now on the failed mediation and the protections that the mediation privilege of confidentiality affords. When and under what circumstances could all of the agreements and statutory protections find themselves under attack?

The first area usually is after a verdict. One side was more successful and wants to seek sanctions for having had to go through the trial. Either the verdict was higher than the offer (plaintiff is seeking sanctions) or it is lower (defendant is seeking sanctions). Assuming that the prevailing party was remiss in not converting the best final offer or demand in writing outside of mediation, there might be circumstance where writings or verbal discussions during mediation are "reference" in post-verdict motions. Use and admissibility of such "evidence" is jurisdictional, but certainly more often than not, rejected.

The second area is usually post judgment. This occurs when a judgment is obtained in excess of a policy limit and the plaintiff is seeking to collect more than the insurance proceeds. This is usually in the context of an assignment of a bad faith claim received by the plaintiff. What was offered and when is more problematic for courts to reconcile with the mediation privilege.

The final area is malpractice claims against handling attorney's and mediators. In this context, can the confidential nature of the communications be used as a defense or a sword? Again, depending on the circumstances, jurisdictions often struggle with the divergent positions.

f. CONCLUSION AND QUESTIONS:

Mediation Communication Privilege is based upon the premise that a mediation cannot be successful without candor from all sides. Mediation is favored by the courts and should be protected. Resisting the use of confidential communications is in everyone best interests.