MEDIATION ETHICS

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Two ironies exist involving ethical standards in mediations. The first is that mediation, an important component of the civil justice system, is lightly regulated. That may be an oversight but, anecdotally, the system appears to be working well without the need for increased oversight. The second irony, as discussed later on, is that, because of the scope of mediation confidentiality provided by Evidence Code sections 1119 et seq., a violation of ethical standards will rarely result in judicial, legal or disciplinary repercussions.

The Judicial Council may eventually create ethical standards for private mediations but presently its rules in Title 3, Div. 8, rule 3.850 et seq. only apply to court-ordered mediations conducted by panel mediators. (Note that judges may only order matters to mediation in which the amount in controversy does not exceed $50,000 for each plaintiff [rule of court 3.891, subdivision (b)] although they often will "encourage" litigants in cases with greater potential damages to also engage in the process.) Despite the current absence of standards governing privately retained mediators, the existing rules should still be guideposts for all mediators, except where otherwise noted.

The Mediator's Ethical Duties

Privately retained mediators do not have formal conflict-of-interest disclosure obligations to prospective counsel and their clients. In contrast, **court-connected mediators must maintain impartiality toward all of the participants and make reasonable efforts to keep them informed about matters that reasonably could raise a question about their ability to conduct the proceedings impartially.** Matters which could raise questions about a mediator's motives include past, present, and current interests, relationships, and affiliations of a personal, professional, or financial nature and the existence of any grounds for disqualification of a judge specified in Code of Civil Procedure section 170.1. (Rule of Court 3.855, subdivisions (a), (b)(1)(A) and (B).) Court-connected mediators also have a continuing duty to disclose potential areas of conflict that might affect their impartiality. (Rule of Court 3.855, subdivision (b)(2).)

Privately retained mediators should also reveal the existence of substantial personal relationships with one of the attorneys or parties but the utility of requiring them to notify prospective counsel of all of the issues that are required of court-connected mediators is of questionable value since they generally have been vetted by the attorneys who are considering them whereas court-connected mediators are more often an

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unknown quantity to prospective attorneys.

The Northern District of California for the United States District, which has the most elaborate standards regarding the conduct of mediations of the four California federal districts, provides that the court's rules governing conflicts of interest apply to the appointment of mediators from the court's panel and that the parties may object to that appointment. (ADR local rules 2-5(d) and 6-3(a).) The Southern District provides that mediators appointed by the court may be disqualified, on motion, for bias or prejudice and that such mediators shall disqualify themselves for the same grounds as would a judicial officer. (Local rule 600-4(c).) The Eastern District provides that prospective neutrals must disclose grounds for disqualification under both 28 U.S.C. § 455(b) and where their impartiality might reasonably be questioned. (Local Rule 271(f)(3).)

Like any attorney with a healthy ego, mediators can occasionally be confronted with whether they are competent to handle a case that comes before them. And like any self-respecting attorney, they are supposed to **only mediate those legal issues with which they are familiar.** In that regard, court-connected mediators must self-assess their competence to conduct a mediation. (Rule of Court 3.856, subdivision (d).)

Mediators have the "power" to persuade and cajole but not to order the parties to do anything. (*Saeta v. Superior Court* (2004) 117 Cal.App.4th 261, 269, 271; *Travelers Casualty and Surety Company, et al. v. Superior Court* (2005) 126 Cal.App.4th 1131.) It is the parties, and not the mediator, who are in control of resolving the dispute. (*Ibid*.) After all, the system is designed to operate best when the parties and their counsel agree to commit to a settlement. It is ineffective when the mediator dominates the proceeding to the extent that the parties' exercise of free will is negated.

Since mediators have no actual power, they are not obligated to ensure the substantive fairness of an agreement reached by the parties. (Rule of Court 3.857, subdivision (b).) Also, while mediators "may present settlement options and terms" and "may also assist the parties in preparing (the) written settlement agreement," that assistance should be confined "to stating the settlement as determined by the parties." (Rule of Court 3.857, subdivision (h).) In other words, their role is merely that of a scribe in the preparation of a written settlement.

It may be tempting to turn a mediation into an agreed-upon arbitration but such temptations should be approached with caution because the mediator who becomes an arbitrator may have been compromised by hearing inadmissible argument. Despite this danger, **if the parties wish to have the mediator arbitrate their case, they should consent in writing to that process, which should include a warning by the mediator when the transition from mediation to arbitration is occurring.** (Rule of Court 3.857, subdivision (g).)

Even though most attorneys should know about the application of confidentiality to mediations, court-connected mediators are still required to advise the participants about the principle. (Rule of Court 3.854, subdivision (b).) **When speaking to one participant outside the presence of other participants, such mediators must also**

advise all participants about the confidentiality of separate communications with them and that they cannot divulge those communications without consent. (Rule of Court 3.854, subdivision (c).)

The Lawyer's Ethical Duties

From the perspective of a mediator, especially in court-connected mediations where the mediator is either performing without compensation or at a substantially reduced fee, it is galling for an attorney to cancel a mediation at the last moment or not show up at all. Although **the plaintiff or the party seeking affirmative relief are required to notify court-connected mediators that the matter has settled or been disposed of at least two days before the calendared hearing** (Rule of Court 3.1385, subdivisions (a)(1) and (2)), not all attorneys comply with this act of courtesy. The failure to provide this notice may result in monetary sanctions. (*Ibid.*) This is one of the few instances where sanctions can be imposed for non-compliance with ethical standards because this particular conduct occurs outside of the confidential mediation process.

In non-California jurisdictions, attorneys should advise their clients about all alternatives to litigation, including settlement opportunities. (See American Bar Association, Section of Litigation, Ethical Guidelines for Settlement Negotiations [ABA Guidelines], 3.1.1 which provides that "A lawyer should consider and discuss with the client, promptly after retention in a dispute, and thereafter, possible alternatives to conventional litigation, including settlement.") This standard may run counter to the aggressive attorney who believes that all cases should be tried. (Note that ABA ethical rules may be considered as a collateral source of proper professional conduct in California where there is no direct California authority and such rules do not conflict with this state's policies. [*State Compensation Ins. Fund v. WPS, Inc*. (1999) 70 Cal.App.4th 644, 655-656]; see also Rule of Professional Conduct 1-100, subdivision (A) stating that "Ethics opinions and rules and standards promulgated by other jurisdictions and bar associations may also be considered.")

Although California does not have a rule comparable to the ABA's 3.1.1, it can be argued that Business and Professions Code section 6068, subdivision (m) and Rule of Professional Conduct 3-500, which require lawyers to keep clients reasonably informed of significant developments relating to the representation, include the responsibility to advise the clients of settlement opportunities, including the availability of mediation. There are, however, no cases which have interpreted these regulations to require California attorneys to advise their clients about the availability of mediation.

Rule of Court 3.894, subdivision (b)(1), provides that **the parties to a court-connected mediation shall, at least five court days before the first mediation session, serve a list of their mediation participants on the mediator and all other parties.** Supplemental lists must be served promptly to reflect the presence of additional persons. The purpose of the participation list is not clear (perhaps it gives the mediator notice of the size of the room that might be needed); regardless, many attorneys ignore this rule.

A more important rule is that **all participants to a court-connected mediation, including insurance representatives, unless excused by the mediator, must appear personally at the mediation.** (Rule of Court 3.894, subdivisions (a)(1) and (2).) The party, attorney or insurance representative whom the mediator has excused or shall be allowed to participate by telephone "must promptly send a letter or an electronic communication to the mediator and to all parties confirming the excuse or permission." (Subdivision (a)(3).)

The four California federal districts have their own attendance requirements for parties, counsel and, in the case of the Northern and Eastern Districts, insurance representatives for mediations conducted through the respective courts. (See Northern District ADR local rule 6-10 and Eastern District local rule 271(l)(1); Central District local rule 16-15.5(b) and (c) and Southern District local rule 600-7(c).)

As a practical matter, all mediations work best when all parties, persons with settling authority and insurance representatives are present. If an integral person or party cannot appear, effective lawyering suggests that the attorney for that person or party advise the mediator ahead of time about the unavailability of the individual or entity. Accommodations may be arranged for that person's absence or, perhaps, the mediation may have to be continued; regardless, it is better to discuss this issue before the mediation rather than have it fall apart because a key person could not attend and no one was notified ahead of time of that problem.

Attorneys must provide their clients with competent representation at the mediation. (See Rule of Professional Conduct 3-110, subdivision (A) ["A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence."].) However, as pointed out earlier, any remedy, as a result of ineffective representation, such as a motion to set aside the settlement or a malpractice action, are unavailing because of mediation confidentiality. (See the discussion, *infra*, where the California Supreme Court held, in effect, in *Cassel v. Superior Court* (2011) 54 Cal.4th 113 that mediation confidentiality applies to pre-mediation and mediation meetings between only the client and his attorneys, whom he thereafter sued for legal malpractice.)

During mediation, attorneys must reasonably consult with their clients "respecting the means of negotiation of settlement, including whether and how to present or request specific terms." (ABA Guideline 3.1.3.) And, the final settlement terms are within the client's control and not the attorney's. "A lawyer can exercise broad general authority from a client to pursue a settlement if the client grants such authority, but a lawyer must not enter into a final settlement agreement unless either (a) all of the agreement's terms unquestionably fall within the scope of that authority, or (b) the client specifically consents to the agreement." (ABA Guidelines 3.2.1.)

An exception to the requirement that a client's consent to a settlement must be obtained occurs if the client is covered fully under an insurance policy that gives the insurer the right to settle the matter without the insured's consent. (*Fiege v. Cooke, et al*, (2005) 125 Cal.App.4th 1350 (2005).)

Attorneys who represent more than one party at a mediation must be careful not to enter into an aggregate settlement of a claim without the informed written consent of each client. (California Rule of Professional Conduct 3-310, subdivision (D).) For example, a $100,000 global settlement that is to be shared by two parties requires the informed consent of both. The better practice, to avoid the application of the above rule, is for each party to agree in the settlement to a specific division of the $100,000.

Mediation Confidentiality Applies to Both Mediators and the Participants

The confidentiality of the mediation process presents attorneys with the opportunity to argue creatively about the merits of their respective cases. There are, however, no legal consequences, because of that same confidentiality, when creativity turns into a misrepresentation. While an attorney cannot mislead a judicial officer (Business and Professions Code section 6068, subdivision (d); Rule of Professional Conduct 5-200, subdivision (B)), misrepresentations to mediators are neither sanctionable nor disciplinable. The analysis starts with *Foxgate Homeowners' Association, Inc. v. Bramalea California, Inc.* (2001) 26 Cal.4th 1, which states that mediators, pursuant to Evidence Code sections 1119 and 1121, may not report attorney misconduct to the judges who have the cases on their calendars.

Foxgate provides that "Neither a mediator nor a party may reveal communications made during mediation" (*id.* at p. 4) and that Evidence Code section 1121 prohibits both mediators "and anyone else from submitting a document that revealed communications during mediation and (bars) the court from considering them." (*Id.* at p. 13.) The opinion also holds that:

> Although a party may report obstructive conduct to the court, none of the confidentiality statutes currently make an exception for reporting bad faith conduct or for imposition of sanctions under that section when doing so would require disclosure of communications or a mediator's assessment of a party's conduct although the Legislature presumably is aware that Code of Civil Procedure section 128.5 permits imposition of sanctions when similar conduct occurs during trial proceedings. FN. 13.
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> FN.13. The conflict between the policy of preserving confidentiality of mediation in order to encourage resolution of disputes and the interest of the state in enforcing professional responsibility to protect the integrity of the judiciary and to protect the public against incompetent and/or unscrupulous attorneys has not gone unrecognized. (Citations omitted.) As noted, however, any resolution of the competing policies is a matter for legislative, not judicial, action.
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> Therefore, we do not agree with the Court of Appeal that the court may fashion an exception for bad faith in mediation because failure to authorize reporting of such conduct during mediation may lead to 'an

> absurd result' or fail to carry out the legislative policy of encouraging mediation. The Legislature has decided that the policy of encouraging mediation by ensuring confidentiality is promoted by avoiding the threat that frank expression of viewpoints by the parties during mediation may subject a participant to a motion for imposition of sanctions by another party or the mediator who might assert that those views constitute a bad faith failure to participate in mediation. Therefore, even were the court free to ignore the plain language of the confidentiality statutes, there is no justification for doing so here.

(*Id.* at p. 17.)

Rojas v. Superior Court (2003) 33 Cal.4th 407 extends confidentiality to all writings, including exhibits, that have been prepared for mediation.

Simmons v. Ghaderi (2008) 44 Cal.4th 570 qualifies *Foxgate*'s and *Rojas*'s strict interpretation of mediation confidentiality in holding that due process and express waiver are the only exceptions to that rule in the absence of legislative action. It cited, with approval, *Rinaker v. Superior Court* (1998) 62 Cal.App.4th 155, in which a mediator was compelled to testify at a juvenile delinquency proceeding regarding statements by the victim at a related mediation about the identities of the juveniles because a minor's due process right of confrontation outweighs the right of confidentiality. (*Id.* at p. 582.)

The federal counterpart to *Rinaker* is *Olam v. Congress Mortgage Company* (N.D. Cal. 1999) 68 F.Supp.2d 1110 which holds that a mediator's testimony can be compelled in a civil proceeding to establish whether a defaulting party was competent to enter into a settlement agreement that the opposing party was seeking to enforce. (*Foxgate Homeowners' Association, Inc. v. Bramalea California, Inc.*, *supra*, factually distinguished *Olam* because the parties in *Foxgate* had waived confidentiality but, otherwise, recognized *Olam* as a comprehensive discussion of mediation law. (*Id*. at p. 16).)

Both *Rinaker* and *Olam* provide the process that a trial court should go through in deciding whether or not to compel a mediator's testimony. *Olam* is more detailed in explaining that process.

Rinaker states that the court should conduct an in camera hearing "to weigh the public's interest in maintaining the confidentiality of mediation against the minors' constitutionally based claim of need for the testimony, and to determine whether the minors have established that the mediator's testimony is necessary to vindicate their right of confrontation." (*Id*. at p. 161.) For example, the need for the mediator to testify in open court would be excused if he or she could not recall the statement needed to impeach the witness. (*Id*. at p. 170.) Also, the in camera process allows the trial court to assess the probative value of the mediator's testimony. (*Ibid.*)

Rinaker rejected the suggestion that the moving party should be required to demonstrate that "there is no other evidence, unrelated to the mediation, which could be used to undermine" the testimony of the witness to be impeached. (*Id*. at p. 171.)

Olam, in reliance on *Rinaker*, allowed the mediator to first testify in closed proceedings regarding the plaintiff's statements at mediation who was now claiming that the settlement should be voided because of "undue influence" at the mediation. *Olam*, as does *Foxgate*, also noted that California Evidence Code section 703.5 confers on the mediator an independent privilege not to testify about statements or conduct in the mediation and that *Rinaker* had not focused on that provision. The mediator in *Rinaker* had objected to testifying only on the basis of Evidence Code sec. 1119 and not 703.5.

Olam states that the goal of the first stage of the two-step balancing process "is to determine whether the harm that would be done to the values that underlie the mediation privileges simply by ordering the mediator to participate in the *in camera* proceedings can be justified by the prospect that (the mediator's) testimony might well make a singular and substantial contribution to protecting or advancing competing interests of comparable or greater magnitude." (*Id*. at pp. 1131-1132.) In the second stage, the court should weigh and assess "(1) the importance of the values and interests that would be harmed if the mediator was compelled to testify (perhaps subject to a sealing or protective order, if appropriate), (2) the magnitude of the harm that compelling the testimony would cause to those values and interests, (3) the importance of the rights or interests that would be jeopardized if the mediator's testimony was not accessible in the specific proceedings in question, and (4) how much the testimony would contribute toward protecting those rights or advancing those interests -- an inquiry that includes, among other things, an assessment of whether there are alternative sources of evidence of comparable probative value." (*Id*. at p. 1132.)

Rinaker and *Olam* should be considered in two situations: (1) a party to a mediation settlement agreement, in which all the parties have expressly waived mediation confidentiality, wants the mediator to testify as to what occurred at the mediation and (2) a due process violation might occur if mediation confidentiality were used to prevent a mediator's testimony.

As noted in *Simmons v. Ghaderi*, *supra*, the parties may avoid mediation confidentiality, when seeking the trial court's assistance in enforcing a settlement, by expressly waiving its application. That waiver, to be valid, must be clear and unambiguous; thus, a mediation settlement agreement should incorporate the language of Evidence Code section 1123(b) which states, in part, that the agreement should provide either that it is admissible or subject to disclosure or it is enforceable or binding or that all parties to the agreement have expressly agreed in writing to its disclosure. (*Fair v. Bakhtiari* (2006) 40 Cal.4th 189.)

Foxgate and its progeny, therefore, allow attorneys to report mediation misconduct, such as the failure of an attorney or party to appear at a mediation, but all communications during the mediation process, no matter how scurrilous or misleading,

unless consented to by the parties or needed to uphold a due process right, are confidential until the legislature says otherwise. (See also *Wimsatt v. Superior Court (Kausch)* (2007) 152 Cal.App.4th 137 affirming the breadth of mediation confidentiality to extend to any writing or statement that would not have existed but for a mediation.)

The breadth of mediation confidentiality was reaffirmed in *Cassel v. Superior Court*, *supra*, 51 Cal.4th 113. In that matter, the California Supreme Court was faced with two clear options – continue to hold that mediation confidentiality is to be liberally construed despite the surrounding circumstances or find that confidentiality should not be used to shield negligent attorneys from malpractice suits. The Court chose to stay the course and held that mediation confidentiality has few exceptions.

In *Cassel*, the petitioner filed a complaint against his former attorneys for breaching their professional, fiduciary and contractual duties because they had used allegedly bad advice, deception and coercion at a mediation to force him to settle the case. Petitioner wanted to use his conversations with the attorneys immediately preceding and at the mediation to prove his case. The trial court ruled that discussions between petitioner and the lawyers two days and one day before the mediation, in which mediation strategy and settlement amounts had been discussed, and all communications and conduct at the mediation between petitioner and the lawyers, were inadmissible. A majority of the Court of Appeal granted mandamus relief, reasoning that mediation confidentiality statutes are not intended to prevent a client from using communications with his or her lawyer outside the presence of all other mediation participants in a legal malpractice case against that lawyer.

Cassel began with a reminder that the Legislature has provided only express waiver by the participants as an exception to mediation confidentiality and that the only judicially crafted exceptions are where "due process is implicated" and "literal construction would produce absurd results, thus clearly violating the legislature's presumed intent." The Court also reviewed *Foxgate Homeowners' Association, Inc. v. Bramalea California, Inc.*, *supra*, 26 Cal.4th 1; *Rojas v. Superior Court, supra,* 33 Cal.4th 407; *Fair v. Bakhtiari, supra,* 40 Cal.4th 189 and *Simmons v. Ghaderi, supra,* 44 Cal.4th 570 which hold, in their entirety, that confidentiality has been broadly applied.

With *Foxgate*, *Rojas*, *Fair* and *Simmons* as a foundation, *Cassel* held that the purpose of Evidence Code section 1119, subdivision (a), which provides that "[n]o evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation … is admissible or subject to discovery …" extends to all oral communications at a mediation, even if they only take place between parties and their own attorneys. (*Id.* at p. 128.)

Cassel further holds that petitioner's discussions with his attorneys before the mediation concerning mediation strategy and settlement were confidential because section 1119, subds. (a) and (b) apply to all utterances and writings "for the purpose of, in the course of, or pursuant to, a mediation." Instead of attempting to create a bright line test for establishing when a pre or post-mediation utterance or writing is mediation

related, and thus confidential, *Cassel* simply found that petitioner's discussions with his attorneys came within the statute because they "concerned the settlement strategy to be pursued at an immediately pending mediation … (and) were closely related to the mediation in time, context, and subject matter …" (*Id*. at p. 137.)

Cassel noted that the mediation confidentiality statutes, unlike Evidence Code section 958, which eliminates confidentiality protections otherwise afforded by the attorney-client privilege in suits between clients and their lawyers, have no exception for legal malpractice actions. The Court reasoned that the attorney-client and mediation confidentiality statutes achieve separate and unrelated purposes; the former "allows the client to consult frankly with counsel on any matter, without fear that others" may use these confidences whereas the latter "serve[s] the public policy of encouraging the resolution of disputes by means short of litigation." (*Id*. at p. 132.)

The Supreme Court then discussed the non-applicability of the two judicially crafted exceptions to mediation confidentiality, due process and absurd result, to the instant facts. Due process was not a factor because "the mere loss of evidence" in a lawsuit for civil damages does not implicate a fundamental interest. Nor did the result produced by applying the plain terms of the statutes to the facts of the case create a result that was absurd or clearly contrary to legislative intent. (*Id*. at p. 135.)

In sum, *Cassel* reversed the Appellate Court judgment and left petitioner with the inability to introduce evidence of his attorneys' alleged misconduct immediately prior to and at the mediation. For the short term, *Cassell's* extensive analysis of mediation confidentiality should foreclose further lower court attempts to carve exceptions to such confidentiality. Its impact, however, may not be lengthy because, while the Court chose not to take the fork in the road that would allow clients to use communications with their attorneys at mediations in subsequent malpractice actions, it unambiguously invited the Legislature to reconsider that issue. "Of course, the Legislature is free to reconsider whether the mediation confidentiality statutes should preclude the use of mediation-related attorney-client discussions to support a client's civil claims of malpractice against his or her attorneys." (*Id.* at p. 136.) The Court's less than subtle invitation may be hard for the Legislature to ignore; especially, if it also considers Justice Ming Chin's reluctant concurrence that shielding attorneys from being held accountable for their incompetent or fraudulent actions during mediation "is a high price to pay to preserve total confidentiality in the mediation process." (*Id*. at p. 138.)

The Supreme Court granted review in *Porter v. Wyner* (2010) 183 Cal.App.4th 949 shortly after granting review in *Cassel*. In *Porter v. Wyner*, clients sued their attorneys for, *inter alia*, breach of fiduciary duty, constructive fraud and negligent misrepresentation. The parties had been involved in a mediation in the underlying matter. In the subsequent trial, the defendant lawyers' motion in limine to bar the admission of evidence at the former mediation and to strike statements from the complaint made at that mediation were denied. The Porters thus testified to communications with the defendant lawyers during the mediation and also introduced documentary evidence of mediation communications. The defendant lawyers, as both adverse witnesses and in rebuttal,

discussed their mediation communications with the Porters. After the jury awarded damages to the clients, the trial court granted a new trial because of the mediation evidence.

The appellate court majority in *Porter v. Wyner* reversed the new trial ruling and returned the case to the trial court to rule on the JNOV based upon a review of the entire trial record including admissible attorney-client communications. It reasoned, in part, that "The communications in the attorney-client relationship like the ones at issue in this case fall outside those to which the confidentiality applies." (*Id*. at p. 961.) The majority was also concerned that mediation confidentiality could be used as a shield "against (an) attorney for any breached side agreements, representations and deficiencies that might take place or come to light during the mediation." (*Id*. at p. 962.)

On April 20, the Supreme Court transferred *Porter* to back to the appellate court to vacate its decision and to reconsider the cause in light of *Cassel*.

The federal courts in California approach mediation confidentiality differently from the state courts. Because there is no federal statute governing the concept, each of the four federal district have adopted their own local roles. In a commentary to its local rules regarding mediations, the Northern District, while observing the confidentiality of mediation proceedings and relying, in part, on *Foxgate*, *Rojas* and *Simmons v. Ghaderi* for that proposition, notes that the concept of absolute confidentiality, regardless of the circumstances, may be excused in "limited circumstances in which the need for disclosure outweighs the confidentiality of a mediation," such as threats of death or substantial bodily injury; use of the mediation to commit a felony and the right to cross-examination in a quasi-criminal proceeding. (6-12 Commentary.) The Southern District allows sanctions for the failure of counsel or a party to act in good faith in the course of a mediation "in accordance with these rules." (600-7(g).) That sanction power appears to be inconsistent with Local Rule 600-7(d) which provides that no mediation statements shall be "made known to the trial court."

The above local federal rules were tested recently in *Facebook v. Winklevoss* (9th Cir. 2011) nos. 08-16745, 08-16873, 09-15021, 2011 U.S. App. LEXIS 7430. In this case, the Winklevoss twins and a third party sued Mark Zuckerberg, the Facebook founder, for allegedly stealing the concept from them. In turn, Facebook sued the Winklevosses. A California Northern District Court judge ordered everyone into mediation, during which the participants signed a confidentiality agreement stipulating that all statements made during the process were privileged, non-discoverable and inadmissible "in any arbitral, judicial, or other proceeding." During that mediation, the parties entered into a settlement with the Winklevosses agreeing to give up their competing company for cash and a piece of Facebook. Facebook filed a motion seeking to enforce the settlement after negotiations over the form of the final deal documents fell apart. The Winklevosses argued that the settlement agreement was unenforceable because it lacked certain material terms and had been procured by fraud.

The district court found the settlement agreement enforceable, in part, because what was said and not said during the mediation was excluded under the Northern District

Court's Alternative Dispute Resolution local rule 6-11, which it read to create a "privilege" for "evidence regarding the details of the parties' negotiations in their mediation." The resulting appellate decision provides an opportunity to compare the status of mediation confidentiality in California's state courts with the Ninth Circuit.

Chief Judge Alex Kozinski, writing for a unanimous court in *Facebook*, affirmed the exclusion of the alleged mediation misrepresentations but with reasoning that differs from the California Supreme Court's approach to the situation. Because there are no federal rules or statutes concerning mediation confidentiality, each of California's four district courts, as previously mentioned, have adopted their own approaches to the matter. *Facebook* undercuts the effectiveness of those rules by finding "It's doubtful that a district court can augment the list of (federally created) privileges by local rule." Having created this ambiguity, the Court then sidestepped the issue it had just created and held, in any event, that the local rules did not apply because a private mediator had been used.

Facebook then found that the district court had been right to exclude the proffered evidence because the parties' confidentiality agreement provided that all statements made during the course of the mediation were privileged settlement discussions and inadmissible for any purpose, including in any legal proceeding. Accordingly, *Facebook* affirmed that the Winklevosses had been properly prohibited from introducing evidence of any alleged mediation misrepresentations.

Facebook unambiguously holds that parties in federal proceedings, when involved in *private* mediations, can negotiate for the total confidentiality of mediation communications. Less clear is the status of confidentiality where the mediation has been conducted by a court-appointed neutral. Added to this confusion is that each of California's four district courts has its own approach to confidentiality. In contrast, the mediation communications in *Facebook* would be absolutely confidential in a California state court whether the mediator had been privately retained or court appointed and whether or not the parties had agreed in writing to apply confidentiality to all court proceedings. For the moment, therefore, the California courts are well ahead of their federal counterparts.