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Evidence Code mediation rules

KNOW THE OFFICIAL RULES FOR MEDIATION AND KEEP YOURSELF OUT OF AVOIDABLE PREDICAMENTS

All California mediations are required to comply with California Evidence Code sections 1115 through 1129. This summary of the code sections and relevant cases is provided as a guide for all mediation participants.

Section 1115: Definitions

The first section of the mediation code sets out the following three definitions:

Mediation: "a process in which a neutral person or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement." (Subd. (a).) "The essence of mediations is its voluntariness," and courts do not have inherent power to order parties to private mediation. (*Jeld-Wen, Inc. v. Superior Court* (2007) 146 Cal.App.4th 536.)

Mediator: "a neutral person who conducts a mediation" and includes "any person designated by a mediator to assist in the mediation or to communicate with the parties in preparation for a mediation." (Subd. (b).)

Mediation consultation: "a communication between a person and a mediator for the purpose of initiating, considering, or reconvening a mediation or retaining the mediator." (Subd. (c).)

Note that Evidence Code sections 1115 (b) and (c) include members of a mediator's staff as "mediators." This means that communications with them are also protected by mediation confidentiality.

The definitions set out in section 1115 are surprisingly important for two reasons:

First: If a proceeding qualifies as a mediation rather than a settlement conference, the protections of the Evidence Code's mediation rules provide numerous benefits (or challenges, as the case may be), described later in this article. For a "settlement conference," those protections are inapplicable.

Second: If the proceeding is determined to constitute a mediation, the mediator may not take coercive action. This is so because mediation is supposed to be a process whereby the parties voluntarily reach "a mutually acceptable agreement" – not one foisted upon them by a pushy mediator.

In the past, settlement judges' coercive actions have proven problematic. For instance, in *Travelers Casualty and Surety Co. v. Superior Court* (2005) 126 Cal.App.4th 1131, the trial court referred a group of mass-tort cases to a sitting judge to attempt to effectuate a settlement. The trial court order stated that the settlement judge had the authority to report to the trial court about the "status and progress of the mediation." (*Id.* at 1139.) The settlement judge conducted an evidentiary hearing and concluded that the cases had a certain monetary value. He sought to make his value determination binding, presumably to manipulate the insurers. The settlement judge reported his valuations to the trial court.

On appeal, the court held that the judge was functioning as a mediator. It defined mediation as "a process where a neutral third party who has no authoritative decision-making power intervenes in a dispute to help the disputants voluntarily reach their own mutually acceptable agreement." (*Id.* at 1139.)

The court reasoned that the parties and the trial-court judges referred to the proceeding as a mediation, the trial court retained jurisdiction to decide the legal issues, the settlement judge had no decision-making power, and the settlement judge was supposed to function as a neutral third party. The court concluded that the proceeding should be treated as a mediation and emphasized that coercion is inconsistent with the concept of mediated self-determination. (*Id.*. at 1139; *accord Saeta v. Superior Court* (2011) 117 Cal.App.4th 261, 270.)

Section 1116: Effect of this section

Section 1116 states "[n]othing in this chapter expands or limits a court's authority to order participation in a dispute resolution proceeding." Nor does it authorize or affect "the enforceability of a contract clause in which parties agree to mediation." Nor does it make evidence admissible that is inadmissible pursuant to other statutes.

Section 1117: Evidence Code sections 1115-1129 apply to mediations, not settlement conferences

Section 1117 is significant because it states that sections 1115 through 1129 *do not apply to settlement conferences.* (Settlement conferences are governed by Rule 3.1380 of the California Rules of Court.) Therefore, do not expect the type of confidentiality that protects mediations and do not be surprised if the settlement conference judge communicates about the conference with the trial judge.

It is important to be clear that you are engaged in a mediation, not a mandatory settlement conference, when a sitting judge conducts the "mediation." The court may conclude that confidentiality is inapplicable if it decides that a settlement conference rather than a mediation occurred. (See *Doe 1 v. Superior Court* (2005) 132 Cal.App.4th 1160, 1166, where the court had to decide if the proceeding was a mediation or a settlement conference for purposes of confidentiality.)

Section 1118: Oral agreements

Oral statements made during a mediation are inadmissible in subsequent proceedings. (Evid. Code, § 1119.) This has proven calamitous where parties have entered into an oral settlement agreement during a mediation, and one side thereafter refused to sign a written

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agreement memorializing the oral settlement. *Ryan v. Garcia* (1994) 27 Cal.App.4th 1006, holds that the parties' oral settlement agreement was unenforceable because the confidentiality rules protected anything said at the mediation. The inequitable result in *Ryan* led to the enactment of many of the Evidence Code mediation rules. (*Simmons v. Ghaderi* (2008) 44 Cal.4th 570, 580.)

Section 1118 addresses the problem encountered in *Ryan* by providing a method for making oral agreements entered during the mediation admissible and binding. It is very useful because *it gives a party a way to make an oral settlement agreement enforceable during the mediation when a written agreement cannot be completed immediately* – a boon when the other side is flaky or untrustworthy.

Under section 1118, to be admissible the oral agreement must comply with all of the following:

(a) The oral agreement is recorded by a court reporter or reliable means of audio recording.

(b) The terms of the oral agreement are recited on the record in the presence of the parties and the mediator, and the parties express on the record that they agree to the terms recited.

(c) The parties to the oral agreement expressly state on the record that the agreement is enforceable or binding, or words to that effect.

(d) The recording is reduced to writing and the writing is signed by the parties within 72 hours after it is recorded.

Tips: (1) *the oral agreement can be recorded on a cell phone.* Remember, (2) the oral agreement must include a provision that it is admissible for purposes of enforcement, and (3) an oral agreement that fails to comply with section 1118 will be inadmissible. (*Simmons v. Ghaderi*, 44 Cal.4th *supra* at 581-582.)

Section 1119 subdivision (a): Admissibility of a written or oral communications

Section 1119 is the 800-pound gorilla, the alligator in the bathtub, of the Evidence Code. Subdivision (a) provides:

> Except as otherwise provided in this chapter:
> (a) No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery, and disclosure of the evidence shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.
> b) No writing, as defined in Section 250, that is prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation, is admissible or subject to discovery, and disclosure of the writing shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.
> (c) All communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential.

Under these rules, an agreement reached in mediation, *even if it is written*, cannot be admitted in evidence to enforce the agreement unless the parties have expressly agreed that it is admissible or subject to disclosure. (E.g., § 1123.)

The California Supreme Court has ruled the only exceptions to the confidentiality provisions of section 1119 are: (1) where the parties expressly waive those provisions, and (2) where due process is implicated. (*Simmons v. Ghaderi* (2008) 44 Cal.4th 570, 582.) The Court also held that there can be no implied waiver of the provisions of section 1119 through conduct. (*Id.* at 585-586.) Similarly, the waiver provisions applicable to privileges set forth in Evidence Code section 910 et seq. do not apply to undermine mediation confidentiality. (*Ibid.*) The provisions of section 1119 do not create privileges and principles concerning privileges that do not apply to mediation rules. (*Cassel v. Superior Court* (2011) 51 Cal.4th 113, 132-133.)

The confidentiality provisions are so unassailable that the Court of Appeal has stated that "[t]he Courts of Appeal *strictly construe the mediation confidentiality statutes, even when the equities in the case suggest contrary results.*" (*Wimsatt v. Superior Court* (2007) 52 Cal.App.4th 137, 155.)

These inequities can be serious. As the Court of Appeal has stated, they "include situations raising arguments about whether a mediated agreement was reached, whether there was fraud, duress or mistake, and whether the agreement violated public policy. The situations include cases where a party was lied to by her own attorney, the mediator, and a third party; a scrivener's error in a mediated settlement lead [sic] to a $600,000 windfall to one party; parties claimed their own attorney coerced them into signing a settlement agreement; a mother waived parental rights; and the parties agreed to perform an illegal act in the mediated agreement." (*Id.* at 164.)

The *Wimsatt* court opined: "Given the number of cases in which the fair and equitable administration of justice has been thwarted, perhaps it is time for the Legislature to reconsider California's broad and expansive mediation confidentiality statutes and to craft ones that would permit countervailing public policies be considered. In light of the harsh and inequitable results of the mediation confidentiality statutes . . . the parties and their attorneys should be warned of the unintended consequences of agreeing to mediate a dispute." (*Ibid.*)

Another court has held that "non-communicative conduct" as to what someone did at a mediation can be admitted. (*Radford v. Shehorn* (2010) 187 Cal.App.4th 852, 857 [court could admit in evidence an attorney's declaration that he wrote "page 1 of 2" on first page of an agreement and "page 2 of 2" on second

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page of the agreement, establishing that page one was part of the agreement].)

Section 1119(b) and Section 1120: Evidence otherwise admissible

Sections 119 and 1120 should be read together. Section 1119, subdivision (b) provides: "(b) No writing, as defined in Section 250, that is prepared for the purpose of, in the course of, or pursuant to, a mediation . . . is admissible or subject to discovery, and disclosure of the writing shall not be compelled . . . ."

Section 1120, subdivision (a) provides: "Evidence otherwise admissible or subject to discovery outside of a mediation . . . shall not be or become inadmissible or protected from disclosure solely by reason of its introduction or use . . . in a mediation."

These two sections plowed into a head-on collision in *Rojas v. Superior Court* (2004) 33 Cal.4th 407. In *Rojas*, a property owner had sued a builder because water leaks had caused toxic mold in her building. The parties mediated. They had experts gather mold and drywall samples, conduct scientific tests, prepare written analyses of the tests, take photographs, and obtain witness statements. These were prepared *for* the mediation. The owner and builder settled. Later, tenants sued the owner for damages resulting from their exposure to toxic mold and tried to obtain the materials through discovery.

The Court in *Rojas* was asked to decide if the written analyses of samples, photographs and witness statements were protected by section 1119, subdivision (b) or constituted "Evidence otherwise admissible" pursuant to section 1120. The Court held the written analyses, photographs and witness statements were protected from disclosure and discovery pursuant to section 1119, subdivision (b) because they had been prepared for the mediation and constituted "Writings" under Evidence Code section 250. The mold and drywall samples were not "Writings" and thus were not protected. (*Id.* at 416-417.)

The *Rojas* Court observed that the materials were not alleged to be protected solely because they were *used* in the mediation; rather, they were protected because they were created *for* the mediation. Thus, any concern that mediation could be used "as a shield to hide evidence" was unjustified, as evidence not created for the mediation could not be hidden by being used in it. (*Id.* at 417.) The concept of work product and distinctions between derivative and non-derivative material did not apply and the legislative history also did not support finding an exemption from the confidentiality provisions of section 1119. (*Id.* at 418-424.) Of course, otherwise admissible evidence does not become protected simply because it is used in the mediation. (*Ibid.*)

Section 1121: Mediator's reports and findings

Section 1121 seeks to prevent coercion in mediation and provides in pertinent part: "Neither a mediator nor anyone else may submit to a court or other adjudicative body, and a court or other adjudicative body may not consider, any report, assessment, evaluation, recommendation, or finding of any kind by the mediator concerning a mediation conducted by the mediator, other than a report that is mandated by court rule or other law that states only whether an agreement was reached, unless all parties to the mediation expressly agree otherwise in writing, or orally in accordance with Section 1118."

As is discussed in *Travelers Casualty and Surety Co. v. Superior Court* (2005) 126 Cal.App.4th 1131, the purpose of mediation is to achieve a *voluntary* agreement between the parties and coercion is anathema to this goal. Section 1121 seeks to prevent coercion. In particular, the Law Revision Commission Comments to this section state that this section seeks to deter the mediator from threatening to report the parties to the trial court and mediators "should not have authority to resolve or decide the mediated dispute, and should not have any function for the adjudicating tribunal . . . except as a non-decisionmaking neutral."

The seminal case concerning a mediator's reports and findings is *Foxgate Homeowners' Association, Inc. v. Bramalea California, Ltd.* (2001) 26 Cal.4th 1. There, a party failed to bring his expert to a mediation session, as ordered by the mediator. The mediator submitted a report to the trial court arguing the party should be sanctioned for trying to "derail" the mediation. (*Id.* at 6.) The California Supreme Court held that sections 1119 and 1121 had been violated by the mediator in submitting the report and by the trial judge in considering it. (*Id.* at 17-18; *accord Travelers Casualty and Surety Co.*, 126 Cal.App.4th, *supra* at 1141-1142.)

In mass-tort cases, complex-court judges have circumvented section 1121 by securing the consent of the parties to allow the mediator to engage in coercive conduct. For instance, in some cases, the mediator has been empowered to report parties to the trial judge for failing to conduct mediations in good faith – which is a euphemism for refusing to settle for the amount the mediator finds sufficient. The result of being reported can be that the reported party will not be given a trial date and will languish in limbo, unable to settle and unable to try the case. Parties who wish to avoid such deviations from the statutory scheme may invoke section 1121, *Foxgate* and *Travelers* in withholding their consent.

Section 1122: Communications or writings; conditions to admissibility

Section 1122 is necessitated by section 1119. To the extent that section 1119 makes writings inadmissible, there needs to be a way for parties who agree that a writing should be admissible are able to make it admissible. Section 1122, along with its parallel section 1124, was created to avoid the inequitable situation encountered in *Ryan v. Garcia* (1994) 27 Cal.App.4th 1006, where an agreement is reached at a mediation but cannot be

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enforced because it is inadmissible and protected from disclosure pursuant to section 1119.

Of course, there may be other types of writings created in connection with mediations that the parties want to exempt from the confidentiality provisions of section 1119. An example might be a report prepared by a party for the mediation.

It is common in this situation for one party to resist the other party's desire to share a document with third parties or the public. In *Doe 1 v. Superior Court* (2005) 132 Cal.App.4th 1160, 1163-1169, the Roman Catholic Church wanted to make public a report it prepared for a mediation, summarizing personnel files of priests accused of sexual molestation of minors, allegedly showing the Church's lack of notice as to some priests. The priests objected based on section 1119 and the Court of Appeal upheld their objections. Section 1122 establishes what must be done, and by whom, to exempt documents from the confidentiality provisions of section 1119.

Even non-parties such as insurance companies and the parties' attorneys are considered "participants" in the mediation, and they can assert the confidentiality of material prepared in connection with a mediation and block disclosure. (*Ibid.; Cassel v. Superior Court* (2011) 51 Cal.4th 113, 131.)

The Law Review Commission Comments to section 1122 indicate that spouses, accountants, corporate employees and even the mediator are "participants" who can block disclosure. (*Ibid.*) Thus, if the parties are unhappy with the mediator's conduct in the mediation, they will be hard-pressed to prove it.

Section 1123: Written settlement agreements; conditions to admissibility

You do not want to enter a written settlement agreement at mediation only to find that the settlement agreement is not enforceable because of mediation confidentiality. Section 1123 tells you how to make it enforceable.

A *written* settlement agreement reached at mediation is admissible and disclosable if all the settling parties *sign* it *and "any* of the following conditions are satisfied:"

(a) The written agreement provides it is admissible and subject to disclosure ["or words to that effect"];

(b) The written agreement provides it is enforceable and or binding ["or words to that effect"];

(c) The written agreement expressly sets forth that all parties agree to disclose the settlement agreement in writing or orally if it satisfies all of the four requirements set forth in Section 1118(a) through (d);

(d) The agreement is admissible to show fraud, duress, or illegality relevant to a disputed issue.

(Emphasis supplied.)

The California Supreme Court has interpreted the phrase in section 1123 "words to that effect" as "language that conveys a general meaning or import, in this instance the meanings of 'enforceable or binding.'" A "writing must directly express the parties' agreement to be bound by the document they sign." (*Fair v. Bakhtiari* (2006) 40 Cal.4th 189, 197, as modified, (December 14, 2006).)

If the parties "sign" and accept a mediator's proposal, it should have words to the effect that it is binding, enforceable, subject to disclosure, and/or admissible to ensure it will be enforced.

Section 1124: Oral agreements; conditions to admissibility

This section does for oral agreements what sections 1122 and 1123 do for written ones. Section 1124 provides several alternative methods for the parties to make their oral agreements admissible. The key is that they comply with section 1118 and, when they cannot comply with subdivision (c) thereof (probably because there is no court reporter present), they expressly agree in writing or orally in accordance with section 1118 to disclosure of the oral agreement.

Section 1125: End of mediation; satisfaction of conditions

Beware: The mediation does not end when you think it does.

It is important to know when the mediation is deemed to have ended because its protections will end at that time. Thus, statements made and writings created may be discoverable if made after the mediation's end, even if you think the mediation is still proceeding. Conversely, things you think are not confidential may turn out to be if the mediation is not deemed to have ended. Section 1125 provides important answers as to when a mediation ends, and it should be reviewed.

Did the mediation end when you reached an oral agreement with the other side during the session with the mediator? Did it end when the mediator went home in a snit? Ten days later, when you are still going back and forth with the mediator, has it ended or is it still proceeding?

The need for certainty was highlighted in *Ryan v. Garcia* (1994) 27 Cal.App.4th 1006, where the party who wished to enforce the oral agreement argued without success that the mediation ended when the parties reached the oral agreement at the mediation and that confidentiality ended at that time as well. (*Id.* at 1009.)

Under section 1125, *if you leave a mediation without the occurrence of an "affirmative act" terminating the mediation, it is deemed to be continuing for at least ten days* under subdivision (a)(5). (Law Revision Commission Comments, 1997 Addition, following section 1125.) If one party consults with the mediator on day 10, that period seems to extend itself for another 10 days, even if one party does not know the other party is still talking to the mediator. If the mediator calls you on day 10, whether you are interested in talking or not, it appears the mediation continues for another 10 days under subdivision (a)

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(5). Another call within the 10-day period appears to extend the mediation again.

Conversely, suppose you partially resolve a dispute with a written settlement agreement but keep talking to the mediator and your opponents about the remaining issues. In that case, it appears under subdivision (b)(1) that the mediation has ended, even if you still think it is proceeding.

Under subdivision (a)(5), the parties may extend by agreement the period during which the mediation is deemed to be occurring for as long as they want. This could be something a party might want to do or might find problematic. (See *Rojas v. Superior Court* (2004) 33 Cal.4th 407, 416-417 [expert analyses, witness statements, and photographs prepared for the mediation during mediation period were not discoverable].)

For an excellent treatment of this subject, see the article by Advocate's ADR Editor, Michael S. Fields, entitled "When does the mediation process begin and end" in the September 2021 edition of Advocate.

Section 1126: Protections before and after mediation ends

This section is important because it provides that once an admission or writing falls under the protection of the mediation confidentiality rules, it does not lose its protection after the mediation ends. It remains protected forever. (*Doe 1 v. Superior Court*, 132 Cal.App.4th, *supra* at 580.) Presumably, an agreement among the participants could change this result.

Section 1127: Attorney fees and costs

This section simply provides that "[i]f a person subpoenas or otherwise seeks to compel a mediator to testify or produce a writing," if the testimony or writing is determined to be inadmissible, the court shall award attorney fees and costs to the mediator.

Section 1128: Subsequent trials; references to mediation

Pursuant to this esction, *communicating about the mediation to the court could have dire consequences*. Section 1128 provides that "[a]ny reference to a mediation during a subsequent trial is an irregularity in the proceedings of the trial for the purposes of Section 657 of the Code of Civil Procedure. Any reference to a mediation during any other subsequent noncriminal proceeding is grounds for vacating or modifying the decision in that proceeding, in whole or in part, and granting a new or further hearing on all or part of the issues if the reference materially affected the substantial rights of the party requesting relief."

Section 1129: Client disclosure and confidentiality acknowledgment requirements

This section requires an attorney participating in medition to inform its client in writing about mediation confidentiality. It is suggested Judicial Council of California Form ADR-200 be presented to the client for the client's signature.

Conclusion

As one can see, knowledge of evidentiary mediation rules, some of which are counterintuitive, will enhance mediation preparation and resolution.

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