

Better Practice Tip:
Recognized Exceptions to Mediation Confidentiality and Remedies
That Every Litigator Should Know

(originally published on mediate.com January 2005)

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You are representing a client at mediation. You know the general rule: what happens in a mediation is confidential. However, during the course of the mediation, perhaps you observe that the mediator favors the other side. Or a party makes certain statements at the mediation which lead you to realize that the judge in your case has a material undisclosed financial interest. Perhaps a party appears medicated, unable to appreciate the meaning of the settlement reached at the mediation. Can anything be done? In many cases, the answer is yes.

The California Supreme Court emphatically and unanimously announced the confidential nature of mediation, stating:

“We conclude that there are no exceptions to the confidentiality of mediation communications or to the statutory limits on the content of mediator reports. Neither a mediator nor a party may reveal communications made during mediation” Foxgate Homeowners Association v. Bramalea California, Inc. (2001)26 Cal.4th 1, 4.

In Foxgate v. Bramalea, supra, a homeowner’s association sued a developer for construction defects. The parties were ordered to mediation, and they were ordered to produce their expert witnesses at the mediation. Plaintiff’s attorney appeared at the mediation with nine experts in tow, which plaintiff, an association of 65 condominium owners, had to pay for. Defendant’s attorney showed up late, was allegedly uncooperative and brought no experts. Deciding they could not proceed without defendant’s experts, the mediator cancelled the mediation sessions. Plaintiff brought a motion for substantial sanctions pursuant to Code of Civil Procedure Section 128.5 for defendant’s bad faith tactics, and tactics intended solely to cause unnecessary delay.

Would you award sanctions if you were the court? The trial court awarded \$30,000 in sanctions. The Court of Appeal reversed, and the Supreme Court affirmed the appellate court. The Supreme Court held that there is no exception to mediation confidentiality for a party acting in bad faith, that plaintiff violated confidentiality in bringing its sanction motion, and the remedy for plaintiff’s violation of confidentiality was to vacate the order imposing sanctions. The opinion is silent as to the fact that there was in effect no remedy against the defendant who allegedly acted in bad faith.

Three years later, the California Supreme Court again unanimously emphasized the important public policy interest in maintaining mediation confidentiality:

“‘[C]onfidentiality is essential to effective mediation’ because it ‘promote[s] a candid and informal exchange regarding events in the past... This frank exchange is achieved only if participants know that what is said in the mediation will not be used to their detriment through later court proceedings and other adjudicatory process.’

“‘To carry out the purpose of encouraging mediation by ensuring confidentiality, [our] statutory scheme...unqualifiedly bars disclosure of specified communications and writings associated with mediation ‘absent an express statutory exception.’” Rojas v. Superior Court (2004) 33 Cal.4th 407, 415-416 (2004), citing Foxgate v. Bramalea, supra

Although asserting these broad statements in favor of mediation confidentiality, the California Supreme Court actually held only that it would not allow additional judicially created exceptions to mediation confidentiality.¹ Numerous exceptions to mediation confidentiality do exist, both statutory and judicial in creation. The Foxgate and Rojas decisions affirm several examples.

Exception 1: Evidence Code Section 703.5(a)²: A mediator is competent to testify in a subsequent civil proceeding as to a statement or conduct that could “give rise to civil or criminal contempt.”

The §703.5(a) exceptions to mediation confidentiality would include: (i) failure to appear at a mediation by a litigant ordered to appear, or (ii) failure of an individual with appropriate authority to appear at a mediation, when a party is an entity. CRC 1634. Boisterous or violent behavior or disobedience of a court order are other possible examples of contempt. CCP §1209(a).

Exception 2: Evidence Code Section 703.5(b): A mediator is competent to testify in a subsequent civil proceeding as to a statement or conduct that could “constitute a crime.”

The §703.5 (b) “crime” exception would include: (i) obstruction of justice, such as an agreement that a material witness in a related action will receive money in exchange for an agreement that witness will not be available to testify; or (ii) a threatened “assault” of a mediation participant, during the mediation, by another mediation participant.

Exception 3: Evidence Code Section 703.5(c): A mediator is competent to testify in a subsequent civil proceeding as to a statement or conduct that could “be the subject of investigation by the State Bar or Commission on Judicial Performance.”

¹Rojas c. Superior Court, supra, at 424.

²Evidence Code Section 703.5 also expressly does not apply to a mediator with regard to any custody or visitation mediation under Family Code Section 3160 et seq. Foxgate Homeowners Association v. Bramalea, supra at 12, Footnote 9.

The §703.5 (c) exceptions would include: (i) inappropriate communications from the trial judge to the mediator in an attempt to influence the outcome of the mediation, or (ii) an attorney discussing the litigation directly with an opposing party, in the absence of, and without the permission of, the counsel of the opposing party.

Exception 4: Evidence Code Section 703.5(d): A mediator is competent to testify in subsequent civil proceeding as to a statement or conduct that could “give rise to disqualification proceedings under paragraph (1) or (6) of subdivision (a) of Section 170.1 of the Code of Civil Procedure”.

The §703.5 (d) exceptions would include: (i) bias of a judge or arbitrator. Cobler v. Stanley, Barber, Southard, Brown & Associates (1990) 217 Cal.App.3d 518, or (ii) the judge’s personal knowledge of the facts of the case.

Exception 5: Evidence Code Section 1121 allows a mediation participant, and certainly a party, but not the mediator, to reveal or report to the Court about non-communicative conduct, including violations of the orders of the mediator or the Court during mediation. Foxgate Homeowner’s Association v. Bramalea, supra, at pp. 13-14, 18, fn. 14. However, this is a narrow exception. There is no exception to the rule of confidentiality for bad faith conduct occurring at the mediation if revealing such conduct would require disclosure of any verbal or non-verbal communication of a mediation participant or of an assessment by the mediator of a party’s conduct.

In litigation, our tools are words, not swords or fists. How often will there be a violation of a court order that can be expressed by “non-communicative” conduct only, and not in words? In most cases, a moving party will not be able to show that a mediation order has been violated without the moving party violating mediation confidentiality.

What if a party spends the entire mediation plugged into his personal MP3 player? Does that constitute non-communicative conduct that an opposing party may report to the court in seeking sanctions? Or is the party’s conduct of avoidance actually making a non-verbal communication that, “I don’t want to talk to you!” - - which is protected by mediation confidentiality? The boundary between verbal and non-verbal communications has not been defined by the courts, but probably will be in appropriate cases.

Exception 6: Surprisingly, while it is improper, and in violation of Evidence Code Section §1119, for a party to file a brief which describes communicative words or conduct that occurred at a mediation, a “failure to object to admission or evidence of events occurring during a prior mediation” is appropriately held to constitute a waiver. Regents of University of California v. Sumner (1996) 42 Cal.App. 4th 1209.³

³ Foxgate Homeowners Association v. Bramalea 26 Cal.4th at p. 10, fn. 7

Undoubtedly, the Regents case, which Foxgate discusses as dicta, is not meant to encourage a party to introduce confidential matter in a court proceeding in the hope the other side won't notice. In the unusual Regents case, the defendant arguing confidentiality was the party who introduced the transcript of a settlement agreement into evidence. The court found there was a waiver, and further that proceedings initiated by the plaintiff to enforce a settlement agreement did not encompass confidential mediation communications even though the settlement occurred at the end of the mediation. A similar result of waiver, by failure to object to introduction of confidential attorney-client and mediation communications made while convening a mediation, occurred in Furia vs Helm (2003) 111 Cal.App.4th 945.

Exception 7: When it becomes apparent that one of the parties to a settlement at a mediation lacked the mental capacity (i.e., drugs, alcohol, lack of mental capacity to understand its meaning) to enter into that settlement agreement at the time it was executed, testimony of the mediator as to the mental competency of a party is admissible in an action to enforce the settlement. Olam v. Congress Mortgage Company (N.D. Cal. 1999) 68 F.Supp.2nd 1110⁴

Exception 8: When significant constitutional rights in a quasi-criminal case are involved, the rights to put on a defense and confront, cross-examine and impeach a witness are more significant than the statutory confidentiality provisions, such that prior inconsistent statements made by a witness at a mediation may be introduced at a subsequent hearing in a delinquency matter. Rinaker v. Superior Court (1998) 62 Cal.App.4th 155. Rinaker involved a minor in a delinquency matter under Welfare and Institutions Code Section 602. The case is cited with approval as upholding a judicial exception.⁵ As the Foxgate court articulated, this exception is grounded in constitutional due process rights including the rights to confrontation and cross-examination. Presumably this exception applies to adult criminal proceedings as well.

Exception 9: Parties can agree contractually to waive confidentiality; and, by statute, confidentiality is not intended to exclude otherwise admissible evidence

Evidence Code Section 1122(a)(1) provides:

(a) A communication or a writing, as defined in Evidence Code Section 250, that is made or prepared for the purpose of, or in the course of, or pursuant to, a mediation or mediation consultation, is not made inadmissible or protected from disclosure, by provisions of this chapter if...(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.

⁴ Foxgate Homeowners Association v. Bramalea 26 Cal.4th at p.16.

⁵ Foxgate Homeowners Association v. Bramalea 26 Cal.4th at p.15-16.

The most common example of this exception would be each time the mediation participants, during the mediation, enter into a full or partial settlement and memorialize it in writing with the intention of having it be enforceable pursuant to Code of Civil Procedure Section 664-6.

Exception 10: Evidence Code, Section 1122 (a)(2) provides:

(a) 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...[t]he 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.

Evidence Code Section 1122(a)(2) was enacted to provide a mediation participant control over whether evidence prepared for a mediation can be used in litigation outside of the mediation. Rojas, supra at p.423. Whereas subsection (a)(1) (Exception 9) by its language applies to “any” communication that is mutually agreed upon for disclosure, the one-sided nature of subsection (a)(2) is limited to communications or writings that were prepared for mediation, but do not disclose anything that occurs during the mediation.

A typical example of this would be the contents of an expert opinion prepared for and presented at the mediation by plaintiff or an IME report prepared for and presented at the mediation by defense counsel. These documents would not be “confidential” if the participants who present them expressly agree to non-confidential status pursuant to Evidence Code Section 1122(a)(2), although the mediation participants’ comments or reactions to the evidence at the mediation would remain confidential.

Exception 11: Facts known to percipient witnesses do not become inadmissible solely because they are introduced at mediation.⁶ This is not so much an exception as a statement that admissible evidence stays admissible, or rather, does not become inadmissible solely by reason of its introduction or use in mediation. Evidence Code Section 1120(a).

A police report of an auto accident does not become inadmissible simply because it was introduced at a mediation.

Exception 12: Pursuant to Evidence Code Sections 1123 and 1124, a binding written settlement agreement made in the course of, or pursuant to, a mediation, may be disclosed. Yet, these two sections also allow introduction of an allegedly void or voidable agreement, when:

⁶Rojas, supra, at p.423, fn 8

Section 1123:

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

Section 1124:

(c) The agreement is in accordance with subdivisions (a), (b), and (d) of Section 1118, and the agreement is used to show fraud, duress, or illegality that is relevant to an issue in dispute.”

Perhaps a settlement agreement that recites as true a fact which is not true may be used to show that the agreement was arrived at through fraud or duress. For example, consider a stipulation that diamonds are genuine, but the stones turn out to be high quality zirconium resulting with one party obtaining an unreasonable advantage over the other. The agreement might be used to show fraud or duress. Another example may be a settlement agreement which contains language expressing an illegal purpose. The settlement agreement may be used to prove the agreement void.

Remedies for Violating Mediation Confidentiality: A rule of law must be both enforceable and enforced to be effective. This is a problem with the statutory rules creating mediation confidentiality.

The remedies for the breach of mediation confidentiality are not punitive, and sometimes not even remedial. Economic sanctions of reasonable expenses, attorneys fees and up to an additional \$1,500 (payable to the Court) are each enforcement remedies. Sanctions may be awarded on a Noticed Motion for bad faith actions, or tactics that are frivolous or solely intended to cause unnecessary delay. CCP §§128, 128.5, 128.6., and 177.5 (limits judicial sanctions to \$1,500). Evidence Code §§1127, 1128. See also CRC 227. California Rule of Court 227 provides for an award of reasonable monetary sanctions to the Court or an aggrieved party, or both, including certain attorneys’ fees and costs for violation of court rules. Sanctions, however, are seldom a sure thing and are likely to be a rather modest amount. In any event, if a party is truly harmed by revealing confidential matter, a sanctions award may not be particularly helpful. It doesn’t unring the bell.

Of course, the bell may be “unrung” by the party whose reputation or relationships are harmed by a breach of mediation confidentiality pursuing a civil action for breach of the right to privacy or possibly breach of the implied covenant of good faith and fair dealing or other causes of action. But initiating a new lawsuit is rarely an attractive remedy.

Moreover, there is no advance way to know if it is proper to compel the testimony of a mediator. If a party subpoenas a mediator to testify or produce documents regarding a mediation, and it turns out that the court rules the testimony or documents are inadmissible because they are confidential, the court “shall” award reasonably attorney’s fees and costs to the mediator. Ev. Code §1127. Anyone seeking to compel the testimony of a mediator plays an economic Russian roulette with the outcome.

The rules protecting mediation confidentiality appear, at first blush, to be strict. In general, however, the remedies for enforcement are not sufficiently strict nor necessarily fair.
