

MEDIATION CONFIDENTIALITY
November 14, 2008
Justice Richard D. Aldrich
Second Appellate District, Division 3

1. DOES IT REALLY MATTER WHETHER A PARTICULAR FORM OF ALTERNATE DISPUTE RESOLUTION IS CALLED A MEDIATION OR A SETTLEMENT CONFERENCE?

Raygoza v. Betteravia Farms, (1987) 193 Cal.App.3d 1592, [personal injury action where Superior Court ordered the County to pay sanction for failure to participate in a voluntary settlement conference in good faith. C.A. held that the voluntary, privately conducted settlement conference “did not involve any court proceeding or process” therefore the court exceeded its jurisdiction. Court further found that Rule 227 (requiring parties to participate in good faith in conferences required by the rules only applied to mandatory settlement conferences under Rule 222 (requiring persons with authority to settle to be in attendance at MSCs.) See also paragraphs 2 through 7 below.

2. CAN AN EXCEPTION TO THE CONFIDENTIALITY STATUTES BE CREATED WHEN TO ENFORCE THEM WOULD PRODUCE AN ABSURD RESULT? [Sanctions for failing to participate in good faith in mediation.]

Foxgate Homeowners Assn. V. Bramelea California, Inc., (2001) 26 Cal.4th 1. [In construction defect case superior court appointed a retired judge (private) to act as both mediator and special master for discovery motions. Court noticed a mediation and ordered prior exchange of experts’ reports and attendance of each side’s experts. On date set for first day of mediation, defendant refused to produce experts. Told plaintiff that this is “your mediation, not mine.” Plaintiff spent about \$12,000 on having experts there. Mediator wrote a report to judge recommending sanctions of about \$30,000. The trial court imposed the sanctions. Court of appeal reversed. The Supreme Court affirmed only to the extent that the Court of Appeal reversed. In its opinion (Baxter, J.) held that the Court of Appeal was not authorized to create an exception to the confidentiality statutes that were unambiguous on their face.] The parties asked the Supreme Court to define the difference between a settlement conference and a mediation

for purposes of the confidentiality statutes but the Court declined to do so.

3. MAY AN AGREEMENT REACHED DURING MEDIATION AS TO SPOUSAL SUPPORT BE MODIFIED ON THE GROUNDS THAT THE WRITTEN MEDIATION AGREEMENT DID NOT ACCURATELY REFLECT THE AGREEMENT OF THE PARTIES?

Eisendrath v. Superior Court, (2003) 109 Cal.App.4th 351, [former husband moved to correct a spousal support agreement negotiated in mediation. Noting that at the time he was not represented by counsel, the former husband argued many of the conversations that occurred before the agreement was signed would demonstrate it did not accurately reflect the parties understanding. Court of Appeal ruled the discussions which purportedly were inconsistent with the finalized mediated agreement were inadmissible. In contrast to the confidentiality found in Evid. Code sec. 1152, mediation confidentiality may not be waived.]

4. IS THERE AN EXCEPTION TO MEDIATION CONFIDENTIALITY WHEN A PARTY WHO HAS A LEGITIMATE INTEREST IN A CASE IS PRECLUDED FROM OBTAINING NECESSARY PROOF TO ESTABLISH THE ELEMENTS OF HIS/HER CLAIM?

Rojas v. Superior Court, (2004) 33 Cal.4th 407, [First case between the owner of an apartment building and the general and subs. The matter was ordered to mediation. Prior to the mediation, reports were prepared by experts who had examined the construction defects which were leaks in the roof and flooring that caused mold. Photographs were taken as were samples of rotted wood. The case between the Owner and the Contractors was settled in mediation. The apartment building was repaired and parts were demolished.

Tenants brought suit for their personal injuries resulting from the mold and other allergic reactions. They sought discovery of the expert reports, photographs and samples taken from the buildings before repair. Tenants argued that since the building had been repaired, the only source of evidence of the defects causing their medical conditions was the reports and photos from the mediation in the prior lawsuit. They argued for a “good cause” exception to mediation confidentiality. The trial court denied the motion on the grounds of the mediation privilege. The court of appeal reversed (2 to 1) holding that the

confidentiality statutes does not protect pure evidence, but protects only “the substance of mediation, i.e., the negotiations, communications, admission, and discussions designed to reach a resolution of the dispute at hand.

Supreme Court granted review and reversed. It held that Evid. Code § 250 defines writing as handwriting, typewriting, printing, Photostatting, photographing, etc. All of this is covered by Evid. Code § 1119 and that section is not subject to a good cause exception.]

5. ARE THERE ANY EXCEPTIONS TO MEDIATION CONFIDENTIALITY?

Rinaker v. Superior Court (1998) 62 Cal.App.4th 155 , [In a juvenile delinquency case, the minors sought to compel the civil mediator to testify that in the mediation the victim admitted he had not seen who had committed the vandalism. The mediator objected claiming statements made during mediation were to remain confidential pursuant to Evid. Code § 1119. The court noted that juvenile delinquency proceedings are civil in nature and § 1119 is on its face applicable to civil proceedings, however, the court held mediation confidentiality had to give way to the constitutional rights of the minors to confront and cross examine witnesses against them. Therefore, the mediator was ordered to testify. NOTE: *Rinaker*, has been discussed in many of the mediation confidentiality cases and narrowly construed to apply ONLY when mediation confidentiality conflicts with a persons constitutionally protected liberty interests. Consider, for example, when a criminal defendant’s rights to confront and cross-examine witnesses, Fifth Amendment self incrimination issues are presented, whether mediation confidentiality would be sacrificed.]

6. CAN A PARTY TO A MEDIATION BE ESTOPPED TO CLAIM MEDIATION CONFIDENTIALITY?


Simmons v. Ghaderi (2008) 44 Cal.4th 570, [In medical malpractice action, Dr. Ghaderi gave written consent to settle to her insurance carrier. Based on the consent, insurance carrier settled at mediation for amount of the written authorization. Doctor, after being told of the settlement withdrew her authorization to settle and left the mediation. Later, trial court allowed an amendment to complaint to allege breach of contract. In trial of contract cause of action, trial court found for plaintiff and awarded damages in the amount of the

settlement authorization. Court of appeal affirmed (2 to 1) with the majority finding that once the doctor signed the consent to settle she was estopped to deny the authority of insurance carrier to settle. Supreme Court granted review and reversed the Court of Appeal, agreeing with the dissent in the Court of Appeal that relying on estoppel was a thinly disguised waiver analysis that statutes and case law have found non-waivable.]

7. IS IT IMPORTANT FOR LITIGANTS TO BE CLEAR ABOUT THE PROCESS BEFORE PARTICIPATING IN MEDIATION?

Wimsatt v. Superior Court (2007) 152 Cal.App.4th 137, [In a legal malpractice case client sought to discover files and communications made in preparation for mediation. Aldrich, J. in finding mediation confidentiality applied to certain of the documents sought to be discovered gave this warning in the opinion:

“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.

[14]  In light of the harsh and inequitable results of the mediation confidentiality statutes ([Evid.Code, § 1115 et seq.](#)), such as those set out above, the parties and their attorneys should be warned of the unintended consequences of agreeing to mediate a dispute. If they do not intend to be bound by the mediation confidentiality statutes, then they should “make [it] clear at the outset that something other than a mediation is intended. (*Doe 1, supra*, 132 Cal.App.4th at p. 1166, 34 Cal.Rptr.3d 248.)” (*Wimsatt v. Superior Court*, at p. 164.)

8. ADDITIONAL READING MATERIALS:

California Evidence Code, Sections 1115-1128

California Evidence Code, Section 1152

California Civil Procedure Code, Section 664.6