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"Hush Hush: New Provisions Address Confidentiality and Settlement"

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On Jan. 1, several important changes the California Evidence Code relating to mediations and mediated settlement agreements took effect. These changes affect civil actions, as well as insurance, environment, family, labor-management, community agency and other actions, and they build important safeguards into subsequent lawsuits, arbitrations and administrative proceedings.

Pursuant to an entirely new Evidence Code chapter, Sections 1115-1128, there is now a more coherent framework governing mediations, confidentiality, selection of the mediator and the enforceability of written settlement agreements. The new scheme, replacing Sections 1152.5 and 1152.6, also clarifies some gray areas surrounding confidentiality and prohibits certain excessively aggressive mediator tactics. It also contains some pitfalls of which counsel nee to be aware.

Oral or written admissions made "in the course of. . .a mediation consultation," regardless of whether the mediator is ever retained, are neither discoverable nor admissible, Section 1119(a) and (b), unless they would otherwise be discoverable or admissible, Section 1120(a). However, disclosure of the mere fact that a mediator was contacted, or even that a particular neutral served as the mediator of a particular dispute, is not limited by the chapter's confidentiality provisions. Section 1120(b)(3).

Evidence of facts conceded in the course of a mediation--either orally or in writing, expressly or inferentially--is undiscoverable and inadmissible in a subsequent trial. Section 119(a) now properly extends this confidentiality to arbitrations and administrative proceedings as well.

In complex cases, the mediation may continue for a second or third session, separated by days, weeks or even months. A potential trap for the unwary exists under Section 1125, which defines the temporal end of mediation confidentiality.

The occurrence of any of the following four events means that subsequent writings and statements do not enjoy the cloak of automatic statutorily conferred confidentiality; the execution of a written settlement agreement fully resolving the dispute; the reaching of an oral settlement agreement that complies with the provisions of Section 1118; written notice by the mediator or the parties that the mediation is terminated (tracking the American Arbitration Association's Commercial Mediation Rule 14); or the passage of 10 calendar days without communication between the mediator and any party to the mediation relating to the dispute.

Thus, absent a statutorily permitted agreement modifying the time frame, if more than 10 days pass without communication between the mediator and any of the parties; any subsequent settlement discussion are discoverable and admissible. Section 1125(a)(5) also seems to deny confidentiality protection to counsel's post-mediation communications that occur less than 10 days after the mediation but that leave the mediator "out of the loop."

A similar pitfall is contained in Section 1125(b), which immediately--without the benefit of even 10 additional days--terminates mediation confidentiality when a partial settlement is memorialized.

Thus, when documenting a partial settlement, counsel may wish to provide confidentiality for any additional settlement discussions, either by contractually creating a protected time frame for resolution of the remaining issues, or by treating subsequent settlement negotiations as a "new" mediation.

Section 1121 makes it clear that, absent written agreement by the parties to the contrary, even well-intentioned mediator communications with the decision-maker are impermissible and may not be considered. Section 1121 departs from its predecessor, Section 1152.6, in that it also prohibits "anyone else" from notifying the court (or arbitrator or other adjudicative body) of a party's failure to participate in good faith in the mediation process.

No attempt is made to reconcile the protections of this section with the mandate of California Rule of Court 1634, governing court-ordered mediations. Rule 1634 requires that all parties, including representatives of corporations and insurance representatives of covered parties, appear personally at the first mediation session and at any subsequent sessions. It further requires that all parties appear with authority to settle the matter. Enforcement of this rule appears to be stymied by Section 1121, since the party allegedly acting in bad faith is unlikely to consent to disclosure of his actions. (A mandatory settlement conference conducted pursuant to Rule 222 of the California Rules of Court is excluded from the purview of this new chapter of the Evidence Code.)

Section 1119(b) renders inadmissible and undiscoverable any writing prepared pursuant to, or in the course of, a mediation. Section 1119(a) extends the same protections to oral statements. Under what circumstances is an agreement reached through mediation admissible? How can parties enforce an oral settlement agreement? In a nutshell, to be admissible the agreement must manifest the parties intention that it be binding. Additionally, it can be used to show fraud, duress or illegality that is relevant to an issue in dispute. Section 1123.

While counsel have the option of enforcing written as well as oral settlement agreements, the latter option is more illusory than it appears at first blush because of the stringency of its requirements. "Going on the record" before a court reporter, assuming one were present at a mediation, or tape-recording the terms of the oral agreement in the presence

of the mediator, would be insufficient under Section 1118. The recording must also be reduced to writing and signed by the parties within 72 hours after it is recorded.

Attorneys should, therefore, have all parties sign, prior to leaving the mediation, at least a Code of Civil Procedure Section 664.6 memorandum outlining the terms of the settlement, unless it is their intention to build a 72-hour "cooling off" period, so that either party can repudiate the oral agreement. Section 1123 requires that a written settlement agreement, to be enforceable, contain language to the effect that it is admissible, subject to disclosure, enforceable or binding. Weary counsel could easily forget to comply with this provision at the end of a long mediation.

Counsel or the mediator should thus include in the agreement to mediate--the contents of which are admissible under Section 1120--language to the effect that any agreement reached pursuant to the mediation is intended to be binding, enforceable, discoverable and admissible.

In addition to clarifying certain confusing aspects of prior confidentiality provisions, the Legislature added teeth to the new scheme. Anyone who seeks to compel a mediator to testify or who subpoenas a document in a mediator's possession is subject to the imposition of reasonable attorney fees and cost to the mediator if the decision-maker determines that the testimony or document is inadmissible under the new chapter. Section 1127. (Under Section 703.5, mediators are deemed incompetent to testify regarding what transpired at a mediation.)

This statutorily-created attorney fee provision is not reciprocal. Mediators should therefore think twice before adding an attorney fee provision to their mediation agreements.

Similarly severe is Section 1128, which provides that any reference to a mediation during a subsequent trial constitutes an irregularity under Code of Civil Procedure Section 675. And any reference to a mediation in a noncriminal proceeding other that a trial is grounds for vacating or modifying the decision in that proceeding and granting a new hearing, assuming the reference is found to have materially affected a party's substantial rights.

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