BUILDING BRIDGES BETWEEN DISPUTES AND RESOLUTION[SM]

CONFIDENTIALITY UPDATE

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There is an interesting, often unacknowledged, tension that runs through our mediation process. That tension stems from the importance of candor and transparency, on the one hand, and the companion though sometimes conflicting concept of confidentiality.

You know that confidentiality is a foundational pillar upon which the process is built. You know too from experience (and perhaps from reading prior issues of the "Ezine") that confidentiality is an evolving aspect of our mediation process. We ask all participants at a session to sign the "confidentiality agreement" before we begin the process, emphasizing its importance.

Over the past few months, California courts have spoken about and reaffirmed the importance of mediation in civil litigation in our State. The Court of Appeal and Supreme Court have also confirmed the fundamental "comprehensive statutory scheme of mediation confidentiality". One of the cases provides an interesting twist as it "upholds" a document claimed to be a settlement agreement over confidentiality objections. In this issue of our Ezine, we explore these three recent cases - *Estate of Thottam; Simmons v. Ghaderi;* and, *Wimsatt v. Superior Court* – in our quest to understand mediation confidentiality.

AS THE SUPREMES SEE IT: CONFIDENTIALITY 1, SETTLEMENT AGREEMENT 0

The Supreme Court's *Ghaderi* matter found our high court justices confronted with balancing enforcement of a claimed settlement agreement against the veritable sanctity of mediation confidentiality. As we will see, they struck that balance decisively in favor of confidentiality.

Apparently, during the mediation session, Dr. Ghaderi had given her insurer her consent to settle this medical malpractice case against her for $125,000. It seems, however, that the good doctor had a change of heart; you see, she retracted her consent and left the mediation *after* the mediator had drawn up the settlement agreement (the *mediator* drew it up? We'll leave that to another Ezine…). Plaintiffs, of course, seeking to enforce the settlement, got a declaration from the Mediator (that, too, is fodder for another Ezine cannon) summarizing the mediation's events as they had unfolded. Dr. Ghaderi objected: the Mediator's declaration, she claimed, breached mediation confidentiality and thus the oral settlement agreement should be deemed unenforceable.

Reversing the lower court, the Supreme Court stated that the "…Court of Appeal improperly relied on the doctrine of *estoppel* to create a judicial exception to the comprehensive statutory scheme of mediation confidentiality and that the evidence relating to the mediation proceedings

should not have been admitted at trial." As part of its review of that scheme and the litany of case law interpreting it, the Court emphasized the significance of mediation confidentiality. "… [B]y creating fixed procedures that allow only certain evidence produced at mediation to be admitted in later civil proceedings," the Court wrote, "the Legislature was undeniably aware that some agreements made during mediation would not be enforceable. The statutes thus reflect a policy judgment made by the Legislature when weighing the value of confidentiality. Creating exceptions to admit evidence [such as *estoppel*] that does not meet statutory requirements would run contrary to legislative intent."

FROM THE COURTS OF APPEAL: DIFFERING VIEWS?

The first of our two Court of Appeal opinions, *Wimsatt v. Superior Court*, arose from a legal malpractice case. The client-plaintiff claimed his attorney in the malpractice case emasculated his settlement demand when, without authorization, he cut it by more than one-half. Client-plaintiff sought discovery of all mediation briefs (yes, including the one prepared by his lawyer) and email messages quoting from the brief that were sent the day before the session. He believed these documents supported his "I did not authorize a reduced demand" claim.

By way of a writ of mandate, the Court of Appeal instructed the trial court to prohibit disclosure. Mediation confidentiality protects mediation communications related to the handling of the underlying settlement process in this Court's view, which relied on *Foxgate*, *Rojas, Bakhtiari* and the Evidence Code. From this Court's perspective, there are no exceptions to strict mediation confidentiality, *even where the result seems unjust*. Placing emphasis on the Supreme Court's prior refusal to "judicially create exceptions to the statutory scheme, even in situations where justice seems to call for a different result", this appellate court emphatically confirmed the importance of mediation confidentiality. Admissibility denied.

The Supreme Court has confirmed the Legislature's fundamental "comprehensive statutory scheme of mediation confidentiality"

Estate of Thottam brings us to the end of our confidentiality journey for this Ezine. The controversy here was among three siblings over distribution of Mom's estate. All parties had signed an agreement before the session began which affirmed mediation confidentiality except where "necessary to enforce any agreements resulting from the Meeting." The document in question here was a chart prepared during the course of the mediation showing how the estate would be disbursed among the three. Each of the three siblings had placed their initials in various places on the chart and signed and dated the top of the chart's column pertaining to each sibling. Over the objection of two siblings, the third sought to have the chart admitted at trial as evidence of their agreement.

The *Thottman* Court determined: (1) the mediation confidentiality agreement, including its exception language, was enforceable though made prior to any settlement being reached in the session; and (2) the allocation of assets chart was a settlement agreement and thus was exempt from the confidentiality bar to admissibility. Though perhaps not artfully drawn, the chart was deemed sufficiently detailed about asset allocation to confirm the

parties' respective obligations: it contained adequate manifestation of mutual consent of material terms, those terms were capable of being made certain, and the lacking formality did not change the result for Evidence Code §1123(c) purposes. Curiously, the Court did not decide whether the "agreement" was enforceable, only that it was admissible in spite of mediation confidentiality.

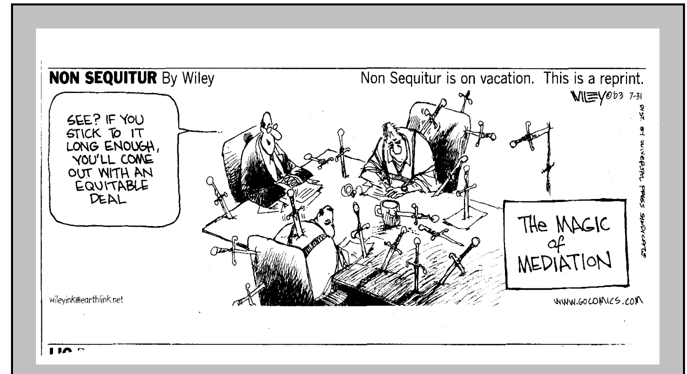
THREE THINGS TO CONSIDER

1. Make sure there is a mediation confidentiality agreement and that *all participants sign* it;
2. Make sure you know what it says and that it says what you want, including handling of certain documents, waivers or non-waivers of admissibility, and the like - if a specific document is to be kept confidential, refer to it;
3. Take the time to carefully write up the settlement at the conclusion of your session, including specific language about enforceability and admissibility – better yet, bring a draft settlement agreement with you to the session to reduce some of the pressure at the end of a long day

THE "PROFESSOR'S" CORNER

My affiliation with Judicate West brings with it the ability to give MCLE credits. Among the many topics we can cover, consider these: **Confidentiality – How to Protect Documents in Mediation; Settlement Agreements – What to Include to Enhance Enforceability**

Please give me a call or drop me an "E" so we can plan your next "brown bag" to full day training session.



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