Rachel Ehrlich
JUDICATE WEST

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
August 2017 Issue

Your own mediation-confidentiality agreement

MEDIATION CONFIDENTIALITY IS NOT AN ABSOLUTE, SO YOU NEED A STRATEGY AND POSSIBLY YOUR OWN AGREEMENT TO AVOID LATER PROBLEMS

Lawyers often wrangle over whether to mediate, when to mediate and who should mediate. They spend less time considering the contents of their "mediation confidentiality agreement." That can be a big mistake. Why? Depending upon where you are mediating and what you are mediating, the rules differ, with varying consequences and potentially some nasty surprises.

Reams have been written on mediation confidentiality generally and in California, particularly since the California Supreme Court's *Cassell* decision has prompted some form of legislative change in California. Various predictions already exist as to what happens to mediation confidentiality going forward in California once the door is cracked open.

Arguably, that door is already ajar. Practically speaking, mediation confidentiality is not the absolute that people believe it to be. Despite five California Supreme Court decisions and several California Court of Appeals decisions holding that mediation is sacrosanct, mediation communications are in some instances considered by trial courts to enforce settlement agreements, to obtain contribution from joint tortfeasors or contractual indemnitors and insurers, to unwind settlements, and more. In other instances, the California trial courts refuse to admit mediation communications into evidence. What follows is a discussion of the trend in the Ninth Circuit and how lawyers might want to change your approach to those mediation confidentiality agreements.

Confidentiality varies by jurisdiction

Several items to note. First, courts in some other jurisdictions are more strict than California courts in enforcing mediation confidentiality (or privilege) to exclude evidence relating to mediation discussions. Second, laws do not appear to permit parties to cloak in mediation confidentiality evidence that exists outside of mediation (in other words, just because something is used in mediation does not suddenly render it inadmissible or nondiscoverable). Third, while parties are otherwise largely free to customize their confidentiality agreement to fit their particular needs, a few other exceptions apply.

For example, some lawyers think that because their mediation is taking place in California, California's mediation confidentiality laws apply to their mediation-related communications. Others think that if they sign a mediator-supplied confidentiality agreement referencing California's mediation confidentiality laws, that is the law that will govern. Think about that for a minute … or fifteen seconds. If it is that simple, then nobody needs to be concerned about the *Erie* Doctrine, choice-of-law principles, or contractual choice-of-law clauses and everyone can keep signing the mediator-supplied confidentiality agreement. But it's not that simple.

The *Erie* Doctrine holds that a federal court hearing a case based on diversity jurisdiction applies the substantive law of the state in which it sits. Mediation confidentiality is governed by the California Rules of Evidence, but the courts differ as to whether the rules of evidence are substantive or procedural. Lawyers hoping to apply California law with respect to mediation confidentiality might consider, for example, specifying that California law applies to the underlying dispute and even its relationship to that dispute. Then it is both part of the substance of the later dispute and a term in a contract that is negotiated by the parties – not one of adhesion put before the parties by a person who is not a party to the dispute.

Does federal decisional law apply?

For those of you thinking that federal decisional law doesn't apply to your cases, time to think again. There are, in fact, several ways you may find your California mediated dispute in federal court, with different consequences for mediation confidentiality. For example:

- a personal injury caused by a power tool, product manufacturer can trigger removal to federal court based on diversity.
- a personal injury caused by a California resident, followed by an insurance company's refusal to pay the judgment, can trigger removal based on diversity.
- in an employment case against a religious institution, a plaintiff may choose federal court because federal laws arguably provide lesser protections than California does for the employer.
- an education-related case is in federal court based on substantive federal law although mediation took place through the state's program (which is mandatory).
- for many insurance coverage and bad-faith actions, the insurer will remove to federal court based on diversity.

Unlike California, there is no overarching federal statute or rule conferring confidentiality on mediation. The federal court default is Rule 408, but that is not specific to mediation. Here, it is necessary to look at each federal district court's rules for guidance. The Central District of California, the Northern District of California, and the Ninth Circuit all make provision for mediation confidentiality which applies *only* to mediation administered through that particular court's mediation program. (See, Ninth Circuit, Circuit Rule 33-1; Central District Local Rule 16-15.8 *Confidentiality* "This rule applies only to ADR Procedure No. 2, mediations conducted by the Court's Mediation Panel;" and Northern District ADR Local Rule 3-4 subd (b) "*Private ADR*. A private ADR procedure may be substituted for a Court process if the parties so stipulate and the assigned Judge approves. Private ADR proceedings, however, are not subject to the provisions of the ADR Local Rules including attendance, confidentiality, enforcement and immunity.")

Despite the ethos of confidentiality implied in those three rules, the Ninth Circuit has in fact made clear its willingness to admit into evidence mediation

See Ehrlich, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
August 2017 Issue

communications when it deems it appropriate to do so. A few decisions show this progression.

Wilcox v. Arpaio (9th Cir. 2014) 753 F.3d 872 (9th Cir. 2014) ("*Wilcox*") as summarized by the Ninth Circuit itself in *In re: TFT-LCD (Flat Panel) Antitrust Litigation, Sony Electronics, Inc.; Sony Computer Entertainment America, LLC v. Hannstar Display Corporation* (9th Cir. 2016) 835 F.3d 1155 ("*TFT-LCD* (*Flat Panel*)") involved and ruled as follows:

> In *Wilcox*, Mary and Earl Wilcox had filed an action against Maricopa County and several of its officials. (*Id.* at 874.) The plaintiffs filed both federal claims, under § 1983, and supplemental state claims. (*Ibid.*) They asserted that their claims had been settled through a county-established mediation program. (*Ibid.*) *The plaintiffs attempted to enforce their settlement and, in support of their motion, submitted an email from the county mediator stating that the claim had been settled*. (*Id.* at 874.) The county argued that the emails from the county mediator were inadmissible under Arizona privilege law. (*Id.* at 875.) The plaintiffs claimed that federal privilege law applied. (*Ibid.*) We agreed with the plaintiffs. Although state contract law governed whether the parties had reached a settlement, the underlying action that was allegedly settled contained both federal and state claims. (*Id.* at 876.) We held that "federal common law generally governs claims of privilege." (*Id.* at 876.) Because the evidence in *Wilcox* related to a federal as well as a state claim – the plaintiffs had sued under both federal and state law – federal law applied. (*Ibid.*). "*Where, as here, the same evidence relates to both federal and state law claims, we are not bound by Arizona law on privilege. Rather, federal privilege law governs.*" (*Ibid.*) (internal quotation marks omitted and emphasis added.)

In *Milhouse v. Travelers Commercial Insurance Company*, No.13-56959 (9th Cir. 2016), the court held that a party's failure to inform the trial court that California Evidence Code section 1119 applied meant that the party had waived the issue of whether state law or federal law applied to the issue in a matter before the court based on diversity jurisdiction.

In *TFT-LCD* (*Flat Panel*), HannStar and Sony participated in mediation. Ultimately, the mediator sent an email conveying a mediator's proposal which was accepted by both sides. HannStar's acceptance included a request for a "brief call with you [the mediator] about a couple of logistical matters …." The mediator's email to the attorneys informing them that there had been mutual acceptance of the proposal concluded with, "This case is now settled subject to agreement on terms and conditions in a written settlement document." HannStar then repudiated the agreement and Sony brought a claim for breach of contract. Sony settled the remainder of the antitrust claims and dismissed its antitrust claim against HannStar, pursuing only the state law breach of contract claim. The case remained in federal court based upon diversity jurisdiction. The 9th Circuit decided that the trial court should have considered mediation communications in deciding whether a settlement had been reached because at the time of the mediation the action involved federal claims.

Considerations in crafting your agreement

Hopefully these cases, statutes and some continuing uncertainty about the direction of the law will prompt you to consider what you can do in crafting your agreement to mediate to preserve confidentiality, such as:

- Choice-of-law in relation to mediation confidentiality.
- What dispute is being mediated.
- When mediation begins for purposes of determining when mediation confidentiality attaches.
- What oral and written communications are subject to mediation confidentiality.
- Choice of law in relation to litigating the agreement to mediate.
- Forum selection.
- Who is a participant in the mediation and who is not.
- Who is paying and how much (percentages or even amount).
- Where in-person mediation session(s) will take place.
- Electronic signatures.
- Consequences for breaching mediation confidentiality.
- Non-disclosure of otherwise non-confidential documents.
- White Waiver.
- Acknowledge that the mediator is neutral.

Bear in mind that all participants in mediation are going to be signing onto the agreement in order for them to participate. It may not be realistic to expect that the people who attend mediation can bind the entities participating to mediation confidentiality law, choice of law for disputes over the agreement to mediate itself, and forum selection. Therefore, having a dispute-specific agreement will require communication in advance of the mediation session. Some participants may want to preserve existing contractual rights to litigate in another jurisdiction or choice of law provisions, and others may wish to keep open the possibility of litigating in federal court.

The above list is not all-inclusive. Nor does one size fit all. The main takeaway here is to consider these various elements in the context of your particular dispute, and to do so before you show up for the mediation session. A little more wrangling here may make a big difference later.

Clauses for your agreement

If you are interested in a more detailed list of possible clauses, consider the following:

- Choice of law in relation to mediation confidentiality. Choose the applicable law that will govern disputes between the participants over mediation confidentiality. Agreeing to this by contract makes it less likely that, at least as for disputes among participants, that an unexpected body of law will be applied and therefore makes outcomes slightly more predictable.
- Define the dispute being mediated. Define the disputes that you want to have be subject to mediation confidentiality. Anticipate whether other disputes may

See Ehrlich, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
August 2017 Issue

arise during the mediation that you do or do not want to have be subject to mediation confidentiality. Now mediation confidentiality operates somewhat like criminal blanket immunity in that everything communicated in mediation may arguably be cloaked.

• Define when mediation begins for purposes of determining when mediation confidentiality attaches. California Evidence Code section 1119 when read in conjunction with the definitions in section 1115 arguably indicates that mediation confidentiality attaches the first time a mediator is contacted.

• Define what oral and written communications are subject to mediation confidentiality. Consider including a clause indicating that the parties agree not to subpoena or seek any Court Order or use any other legal process in attempt to demand the production of any records, notes, work product or the like of the Mediator in any legal or administrative proceedings. To the extent that they might have the right to demand these documents, they may wish to waive that right. Also, as to documents prepared by experts and parties, instructive here may be *Rojas v. Superior Court*, 102 Cal.App.4th 1062 (2002).

• Choice of law in relation to litigating the agreement to mediate. Choosing the applicable law that will govern litigation between the participants over all of the subjects addressed in the agreement to mediate.

• Forum selection.

• Who is a participant in the mediation and who is not. How are people on the phone defined? What about an insurance company that has not yet accepted a duty to defend but shows up at a mediation session?

• Who is paying and how much (percentages or even amount).

• Where in-person mediation session(s) will take place.

• Electronic signatures. Be aware of the requirements of the Uniform Electronic Transactions Act (UETA). Many disputes are resolving after all or some of the participants in mediation are not together and so cannot personally sign a settlement agreement. This happens with mediator's proposals and with telephonic follow-up. If your agreement to mediate includes a stipulation that email confirmation by a person will be binding as if the person signed an agreement, then you may be less likely to have the issues that gave rise to the *In re: TFT-LCD* (*Flat Panel*) *Antitrust Litigation* decision referenced earlier.

• Consequences for breaching mediation confidentiality. Right now, the only statutorily provided consequences for breaching confidentiality is that you don't get to use it because the court recognizes that it is inadmissible under the California Evidence Code and if it is mentioned anyway, then that is "grounds for vacating or modifying the decision in that proceeding …" (Cal.Evid.Code, § 1128). People are constantly expressing concern about sensitive information discussed at mediation getting out into the public domain and potentially being picked up by the media. The only direct remedy presently available to bring a separate action against whomever breached confidentiality for the damages consequent from the breach. If the matter or issues warrant, consider providing for liquidated damages or specific performance that might help ameliorate potential consequences of a breach.

• Non-disclosure of otherwise non-confidential documents. California Evidence Code section 1120(a) provides, "Evidence otherwise admissible or subject to discovery outside of a mediation or a mediation consultation shall not be or become inadmissible or protected from disclosure solely by reason of its introduction or use in a mediation or a mediation consultation." In other words, that which is admissible or discoverable does not lose that character just because it is used in connection with mediation. However, there may be material that is used or shared in mediation that parties do not want to have get out. An agreement to mediate may include a non-disclosure agreement. Bear in mind that non-disclosure agreements may not protect against waiver of other privileges (such as attorney-client privilege).

• White Waiver. For those not familiar with it, a White Waiver is a mechanism that emerged after the *White v. Western Title*, 40 Cal.3d 870 (1985), decision issued. They are most familiar to those who work in the first party insurance arena but they are used in connection with disputes of all types. Essentially, a White Waiver is an agreement between the parties to a dispute to cloak the parties' dealings for a period of time so that neither party may use what is said or done against the other in the event that they are unable to resolve the dispute. Many people believe that having a White Waiver in addition to mediation confidentiality is unnecessary. The *Milhouse* case demonstrates why it might make sense to have a separate agreement. Attorneys need to be cautious about this. First, it may not be in the client's best interest to have a full cloaking agreement in place. Second, merely asking for it might be used against the client with suggested inferences that the client sought the cloak because it intended to act badly.

• Acknowledge that the mediator is neutral, does not represent anyone participating in the mediation, and does not have any duty to assert or protect legal rights and responsibility of any party, to raise any issue not raised by the parties themselves, or to determine who should participate in the mediation. Also, that the parties may choose to solicit input from the mediator on such issues and the mediator may volunteer opinions on such subjects.

Rachel Ehrlich is a nationally recognized, multi-jurisdiction mediator specializing in complex civil disputes and is affiliated with Judicate West. *She mediates litigated and non-litigated matters involving insurance coverage and bad faith, real estate including landlord-tenant, personal injury, construction defect, environmental, and other subjects. Prior to becoming a full-time neutral, she spent 20 years in insurance as a coverage attorney, claims executive, and underwriter. Rachel mediates in several court programs including the Federal District of Northern California, trains mediators and mediation advocates, and regularly presents on mediation of insurance coverage, bad faith, mediation confidentiality, and ethics to varied audiences.*