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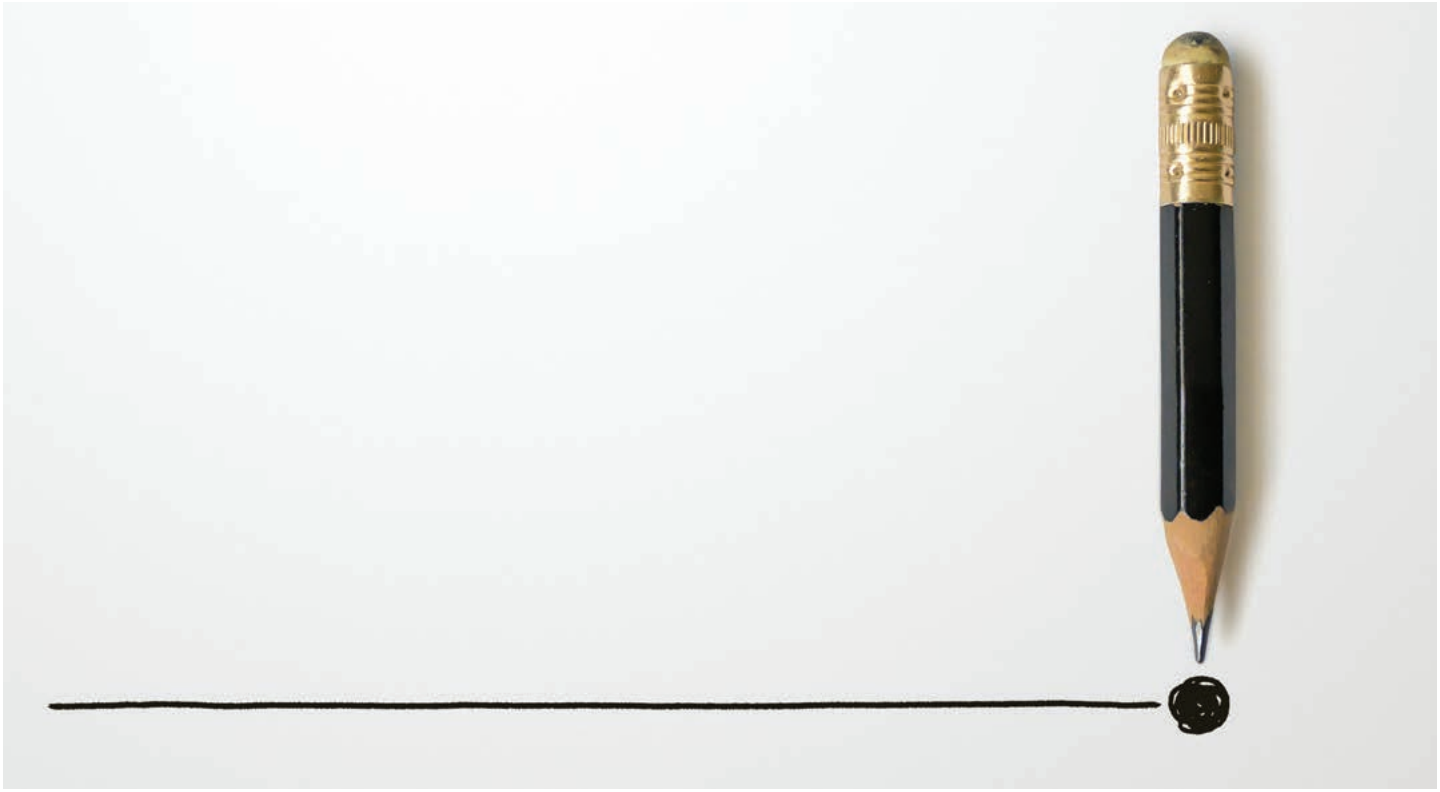

When does the mediation process begin and end?

A LOOK AT THE BEGINNING AND ENDPOINTS OF MEDIATION CONFIDENTIALITY

At first glance, the title question seems innocuous and of no consequence. The opposite is true. The commencement up to the conclusion of the mediation process determines when oral and written mediation communications are considered confidential, and, therefore, not disclosable in any further proceedings. Without boundaries of time, mediation confidentiality would be unrestricted.

Determining mediation confidentiality

Mediation confidentiality is established by Evidence Code section 1119, and it is enforced by the courts. Our Supreme Court has found mediation confidentiality in five important cases. Pointedly, the Court's most recent statement of its holding is in *Cassel v. Superior Court* (*Wasserman, Comden, Casselman & Pearson*) (2011) 51 Cal.4th 113, 117 that:

> All communications, negotiations, or settlement discussions by and between participants in the course of a mediation . . . shall remain confidential. . . . We have repeatedly said that these confidentiality provisions are clear and absolute. Except in rare circumstances, they must be strictly applied and do not permit judicially crafted exceptions or limitations, even where competing public policies may be affected.

Specifically, the Court upheld mediation confidentiality in the following cases:

Foxgate Homeowners' Assn. v. Bramalea California, Inc. (2001) 26 Cal.4th 1, 13-14 held that bad faith conduct during a mediation process is an inadmissible confidential communication at a later hearing.

Rojas v. Superior Court (Julie Coffin et al.) (2004) 33 Cal.4th 407, 415-417 held documents specifically prepared for and produced at mediation are confidential mediation communications and not discoverable.

Fair v. Bakhtiari (2006) 40 Cal.4th 189, 194 held that a written mediation settlement agreement that *fails* to reflect the parties' intention to resolve the issues is a confidential mediation communication and not correctable by the court.

Simmons v. Ghaderi (2008) 44 Cal.4th 570 held that a *written* mediation settlement agreement *must* specifically state the matter resolved during the mediation proceedings. Otherwise, evidence of an *oral* settlement made at mediation is inadmissible and subject to a mediation confidentiality objection.

Cassel v. Superior Court (*Wasserman, Comden, Casselman & Pearson*) (2011) 51 Cal.4th 113, 117 held *pre*-mediation

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discussions and *private* mediation discussions at the time of the mediation hearing between attorney and client are statutorily protected from disclosure and inadmissible in a malpractice action by the client against his attorney. The court cited subdivision (c) of section 1119 that states "communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation" remain confidential.

Application of the confidentiality restrictions

Under Evidence Code section 1126, entitled "Protection before and after mediation ends," enforcement of mediation confidentiality extends beyond the "end" of the mediation process, as follows:

> Anything said, any admission made, or any writing that is inadmissible, protected from disclosure, and confidential under this chapter before a mediation ends, shall remain inadmissible, protected from disclosure, and confidential to the same extent after the mediation ends.

Waiver of the confidentiality restrictions

The Evidence Code allows disclosure of mediation communications, documents, and writings under certain circumstances. (See Evid. Code, § 1122.) For a discussion of confidentiality waiver, see *Eisendrath v. Superior Court* (*Kathryn Pratt Roberts*) (2003) 109 Cal.App.4th 351.

Commencement of the "mediation process" and confidentiality

Unlike the Code's specification of meditation termination, *infra*, the Code does not specifically state when the mediation process commences. There is no one starting point. Commencement can take place at different times for the various parties.

Without knowing when the mediation process commences, confidentiality is in limbo. The Evidence Code, however, provides clues as to when the mediation process commences, as follows:

- Evidence Code section 1115 defines mediation as "a process in which a neutral person or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement." Taking this section literally, the mediation commences when the *mediator* first discusses the matter with any of the parties before the commencement of the actual hearing.
- Evidence Code section 1119, subdivisions (a) and (b) define the mediation process to include "oral communications and writings *made or prepared* for the *purpose of*, in the *course of*, or *pursuant to*, a mediation or a mediation *consultation*." (Italics added.) This section explains the several ways the mediation process can commence, and, therefore, when confidentiality commences for the participants.
- Evidence Code section 1119, subdivision (c) states "All communications, negotiations, or settlement discussions by and between *participants* in the course of a mediation or a mediation consultation shall remain confidential." (Italics added.) This provision most likely does not include negotiations that commenced *before* an agreement between or among the parties to commence a mediation process. (See *Wimsatt v. Superior Court (Corey Kausch)* (2007) 152 Cal.App.4th 137, 161.
  Also see Evidence Code section 1120, subdivision (a), which states "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 mediation consultation." [Nor is an agreement to mediate a dispute considered confidential. (Subd. (b)(1).) Also see subds. (b)(2)-(4) for items not confidential.].)
- Evidence Code section 1129 requires that "*after* an individual agrees to participate in the mediation or mediation consultation" the client's attorney is to provide a "printed disclosure" form advising that the prospective mediation procedure is confidential. The requirements of the statutory form are set out in the code, and the Judicial Council's ADR-200 form, entitled "Mediation Disclosure Notification and Acknowledgement" is available for use. Under section 1129, the mediation process commences for an attorney and client upon the client's agreement to participate in the mediation process. The section 1129 form is to be presented by the attorney to the client as an acknowledgment of the mediation commencement. Thereafter, all communications between attorney and client concerning any part of the mediation process are deemed confidential mediation discussions. The confidentiality period may commence at different times for varied mediation parties, depending on when the varied clients are advised of section 1129 by their attorney.

For case law regarding the commencement of the mediation process see:

- *Cassel v. Superior Court* (*Wasserman, Comden, Casselman & Pearson*) (2011) 51 Cal.4th 113, 117, held attorney-client *mediation-related* conversations at any time before the start of the mediation hearing commences mediation confidentiality. Note that the impetus of Evidence Code section 1129, *supra*, was the *Cassel* case holding.
- *In Wimsatt v. Superior Court* (*Corey Kausch*) (2007) 152 Cal.App.4th 137, 161, the court found that not all negotiations are considered part of the mediation process: "[C]ommunications, negotiations, and settlements made in the regular course of litigation, not for the purpose of, in the course of, or pursuant to a mediation" can be routine discussions and not necessarily connected with a mediation process.

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Confidential communications end when the mediation process ends

As previously explained, mediation confidentiality continues until the mediation formally ends. Although the mediator can set time parameters for the mediation process, Evidence Code section 1125, subdivisions (a)-(c) provide explicit times when mediation can terminate. Section 1125 is explained as follows:

Resolving all issues ends the mediation process

Evidence Code section 1125(a)(1)-(5) provide that a mediation "ends" when any *one of the following* conditions is satisfied:

(1) All parties execute a *written* agreement that "fully resolves the dispute." The agreement must be the final draft, *signed* by all parties, *and must state* that the agreement is binding and enforceable by and for the parties executing the agreement. (Evid. Code, § 1125, subd. (a)(1).) For a discussion, see *Fair v. Bakhtiari* (2006) 40 Cal.4th 189, 199-200. (Also see Evid. Code, § 1123, subds. (a) & (b).);

(2) An *oral* agreement presented to a court by all parties that the parties fully resolve the issues of their dispute. The oral presentation must adhere to the requirements of Evidence Code section 1118. (Evid. Code, § 1125, subd.(a)(2); also see Evid. Code, § 1124.)

(3) A mediator's written and signed notification to the parties that the mediation "is terminated." (Evid. Code, § 1125, subd. (a)(3).) A report to the court may also be required under section 1121.

(4) A single party can terminate the mediation by written notification to the mediator and all other mediation participants that the "mediation is terminated, or words to that effect . . . ." The notification may also need to comport with the requirements of court-ordered mediation, as set forth in section 1121. The mediation process may continue among and between other parties. (Evid. Code, § 1125, subd. (a)(4).)

(5) When there has been *no* communication regarding the dispute between the mediator and the parties for "10 calendar days," or for a shorter period agreed to by the parties. (Evid. Code, § 1125, subd. (a)(5).)

Resolving some issues ends the mediation process

Evidence Code section 1125, subdivisions (b)(1) and (2) provide mediation termination when the parties partially resolve their dispute, under either of the following scenarios:

(1) All parties execute a written settlement agreement that partially resolves the dispute; or

(2) An *oral* agreement of a partially resolved dispute is presented to a court under the specific requirements of Evidence Code section 1118.

Ending the mediation process when no agreement is reached

Evidence Code section 1125, subdivision (c) explains that section 1125 does not prevent a party from ending a mediation when no agreement is reached. Nor does section 1125 "affect the extent to which a party may terminate a mediation." As set out above, section 1125, subdivision (a)(4) allows a party to terminate a mediation with a written declaration that the mediation is terminated "or words to that effect."

Commentary

Many of the reported confidentiality cases are legal-malpractice claims. The client's allegations usually concern attorney conversations, advice, and/or conduct before and during the mediation process. Unfortunately for the client, confidentiality precludes a client's recovery. See, for example, *Amis v. Greenberg Traurig LLP* (2015) 235 Cal.App.4th 331.

Reopening of settlement negotiations after the mediation process officially terminates may recommence section 1119 confidentiality, especially if the mediator is brought into the subsequent settlement efforts. To prevent or allow post-mediation negotiation confidentiality, it may be wise for the parties to express their intentions in writing.

Mr. Fields was CAALA's 2003 president. In 2016, he was awarded CAALA's prestigious Ted Horn Memorial Award for his contributions to CAALA and the legal profession. Since Mr. Fields' retirement from his 47-year personal injury law firm, he established an independent ADR practice under the name of Michael S. Fields, Esq., Arbitrator and Mediator Services. *Mr. Fields is also a consumer arbitration panelist for the American Arbitration Association. For nearly three decades, Mr. Fields has authored, contributed to, and edited several books and articles on arbitration, mediation, discovery references, and tort liens. Mr. Fields is available as an arbitrator, mediator, and discovery referee. To retain Mr. Fields' services, he can be reached at msflb@aol.com. His website is www.michaelsfieldslaw.net.*