

Summaries of Select California Appellate Decisions Regarding Mediation Confidentiality

IMPORTANT NOTES:

The cases cited below are some of the most significant California appellate decisions regarding mediation confidentiality; however, this is not a complete list of all such decisions. Additional decisions may have been rendered after this list was prepared, and these decisions may expand on, clarify, modify, or overrule the decision on this list. Mediators should ensure that they are aware of developments in the law regarding mediation confidentiality.

The summaries that follow each case citation are those that precede the court's decision in the California Reports and California Appellate Reports. They are not part of the court's decision and may not include all of the material facts or all aspects of the court's decision.

Select Decisions of the Supreme Court of California

***Foxgate Homeowners' Ass'n, Inc. v. Bramalea California, Inc.* (2001) 26 Cal.4th 1, 25 P.3d 1117, 108 Cal.Rptr.2d 642.**

In a construction defects action, plaintiff homeowners association moved for sanctions against defendant developer and its attorney under Code Civ. Proc., § 128.5, for failing to participate in good faith in court-ordered mediation and comply with an order of the mediator. Attached to the sanctions motion were the report of the mediator and a declaration by plaintiff's counsel reciting statements made during the mediation session. The trial court granted the motion. (Superior Court of Los Angeles County, No. SC024139, Daniel A. Curry.) The Court of Appeal, Second Dist., Div. Five, No. B124482, reversed. It concluded that a mediator may reveal material necessary to place sanctionable conduct in context, including communications made during mediation, but that in this case the mediator's report included more information than was necessary.

The Supreme Court affirmed the judgment of the Court of Appeal, but only because the Court of Appeal had reversed the sanctions order. The court held that the Court of Appeal erred in judicially creating an exception to Evid. Code, § 1119 (confidentiality of mediation communications), and Evid. Code, § 1121 (confidentiality of mediator's reports and findings). The statutes unambiguously conferred confidentiality on the material at issue, and there was no need to create a judicial exception to carry out the purpose for which the statutes were enacted or to avoid an absurd result. The court held that if, on remand, plaintiff elected to pursue the sanctions motion, no evidence of communications made during the mediation could be admitted or considered. (Opinion by Baxter, J., expressing the unanimous view of the court.)

***Rojas v. Superior Court* (2004) 33 Cal.4th 407, 93 P.3d 260**

Tenants of apartment complex brought action against owners and builders of complex, contending that owners and builders conspired to conceal from tenants the building's defects and microbe infestation, which had caused tenants to suffer health problems. The Superior Court, Los Angeles County, Nos. BC214521 and BC224568, Anthony J. Mohr, J., denied tenants' motions to compel production of material produced by owners and builders in connection with mediation held in prior litigation. Tenants filed petition for writ of mandate. The Court of Appeal granted

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petition. The Supreme Court granted petition for review filed by owners and builders, superseding the opinion of the Court of Appeal.

Holdings: The Supreme Court, Chin, J., held that: (1) mediation privilege for “writings” applied to witnesses' statements, analyses of raw test data, and photographs prepared during mediation, and (2) mediation privilege was not subject to a “good cause” exception.

***Fair v. Bakhtiari* (2006) 40 Cal.4th 189, 147 P.3d 653**

Background: Civil litigants negotiated written “settlement terms” during mediation, including arbitration clause. When dispute arose over terms of agreement, and defendants indicated intent to pursue action in superior court, the plaintiff moved the trial court to compel arbitration. The Superior Court, San Mateo County, No. 417058, George A. Miram, J., denied motion to compel arbitration, finding that settlement agreement, containing arbitration clause, was inadmissible. Plaintiff appealed. The Court of Appeal reversed and remanded, but granted rehearing, superseding its opinion. On rehearing, the Court of Appeal again reversed and remanded. The Supreme Court granted review, superseding the opinion of the Court of Appeal.

Holdings: The Supreme Court, Corrigan, J., held that: (1) for exception to general inadmissibility of communications made during mediation for mediated settlement agreement, writing was required to express parties' agreement to be bound; (2) arbitration clause in mediated written settlement did not render agreement admissible, as it did not directly express parties' intent to be bound; and (3) arbitration clause was not severable from inadmissible agreement.

***Simmons v. Ghaderi* (2008) 44 Cal.4th 570, 187 P.3d 934**

Background: In malpractice-based wrongful death action brought against physician by patient's son and mother, physician initially gave written consent to her malpractice insurer to settle case as part of mediation, but subsequently sought to revoke consent after plaintiffs' oral acceptance of offer. Plaintiffs amended their complaint to include cause of action for breach of contract with regard to settlement agreement. The Superior Court, Los Angeles County, No. BC270780, Richard L. Fruin, J., entered judgment for plaintiffs on breach of contract. Physician appealed. The Court of Appeal affirmed. The Supreme Court granted review, superseding the opinion of the Court of Appeal.

Holdings: The Supreme Court, Chin, J., held that: (1) evidence of alleged oral settlement agreement made in mediation was inadmissible; (2) physician was not estopped from invoking mediation confidentiality under doctrine of estoppel to contest jurisdiction; (3) physician was not equitably estopped from invoking mediation confidentiality; (4) statute permitting waiver of certain evidentiary privileges by conduct does not apply to mediation privilege; (5) mediation privilege may be waived only by express agreement under mediation confidentiality statutes; and (6) permitting physician to assert mediation privilege after litigating pretrial motions did not produce absurd results.

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***Cassel v. Superior Court* (2011) 51 Cal.4th 113, 244 P.3d 1080**

Background: Client brought action against attorneys who represented him in mediation for malpractice, breach of fiduciary duty, fraud, and breach of contract. Attorneys moved in limine under the mediation confidentiality statutes to exclude all evidence of communications between attorneys and client that were related to the mediation, including matters discussed at the premediation meetings and private communications among client and attorneys while the mediation was under way. The Superior Court, Los Angeles County, No. LC070478, William A. MacLaughlin, J., granted motion. Client sought mandate. The Court of Appeal granted mandamus relief. The Supreme Court granted review, superseding the opinion of the Court of Appeal.

Holdings: The Supreme Court, Baxter, J., held that: (1) attorneys' mediation-related discussions with client were confidential and, therefore, were neither discoverable nor admissible for purposes of proving claim of legal malpractice, and (2) application of the mediation confidentiality statutes to legal malpractice actions does not implicate due process concerns so fundamental that they might warrant an exception on constitutional grounds.

Select Decisions of the California Court of Appeal

***Rinaker v. Superior Court* (3 Dist. 1998) 62 Cal.App.4th 155, 74 Cal.Rptr.2d 464**

Two minors in a juvenile delinquency proceeding (Welf. & Inst. Code, § 602) filed a motion to compel a mediator to testify concerning statements previously made by a witness during confidential mediation of a civil harassment action, which was based upon the same allegations at issue in the delinquency proceeding. The mediator opposed the motion, on the ground that the statements made during the mediation were privileged, and that by voluntarily agreeing to participate in confidential mediation, the minors waived the right to compel her testimony. The juvenile court ruled in favor of the minors. (Superior Court of San Joaquin County, Nos. 52244 and 52266, Thomas M. Harrington, Judge.)

The Court of Appeal issued a peremptory writ of mandate directing the juvenile court to vacate its order allowing the minors to question the mediator under oath, and to conduct further proceedings consistent with the appellate opinion. The court held that Evid. Code, § 1119 (no evidence of anything said in a mediation is admissible or subject to discovery in a civil action), did not bar the minors from calling the mediator to testify concerning statements previously made by the witness during the mediation, if those statements were inconsistent with the witness's testimony in the delinquency proceeding. Since a juvenile delinquency proceeding is a civil action, it comes within the plain language of Evid. Code, § 1119. Nevertheless, the confidentiality provision of Evid. Code, § 1119, must yield when it conflicts with the constitutional right to impeach a witness in a juvenile delinquency proceeding. The court also held that the constitutional right of privacy (Cal. Const., art. I, § 1) did not bar the minors from calling the mediator to testify. The privacy right is not absolute, and a competing interest may justify invasion of the privacy interest. The court further held that the minors did not waive their right to call the mediator to testify, notwithstanding that they agreed to maintain the

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confidentiality of the mediation proceedings, since they did not know the witness would make inconsistent statements during mediation concerning their alleged acts. However, the court finally held that the juvenile court should have conducted an in camera hearing before allowing the minors to question the mediator. An in camera hearing would maintain the confidentiality of the mediation while the juvenile court weighed the minors' right to confrontation against the statutory privilege and determined whether the minors established that the mediator's testimony was necessary to vindicate their rights. (Opinion by Scotland, J., with Puglia, P. J., and Morrison, J., concurring.)

***Eisendrath v. Superior Court* (2 Dist., 2003) 109 Cal.App.4th 351, 134 Cal.Rptr.2d 716**

After husband and wife reached spousal support agreement following mediation, in connection with dissolution of their marriage, and husband filed motion to correct agreement, wife sought to depose mediator, and husband moved for protective order to bar discovery and evidence regarding mediation communications, with exception of certain conversations between husband and wife which formed basis of his motion. The Superior Court, Los Angeles County, Richard E. Denner, J., denied husband's motion, finding that husband impliedly waived his confidentiality rights, and decided to hold in camera hearing on mediator's potential testimony to determine whether it should be admitted. Husband appealed.

The Court of Appeal, Curry, J., held that: (1) statutes which provided for implied waiver of certain protections for privileged communications did not apply to communications between husband and wife, on one hand, and mediator, on other; (2) evidence of conversations between husband and wife concerning spousal support agreement was inadmissible, absent suitable express waivers from husband and wife regarding such conversations; and (3) mediator was incompetent to testify in connection with husband's motion to correct agreement.

***Wimsatt v. Superior Court* (2 Dist., 2007) 152 Cal.App.4th 137, 61 Cal.Rptr.3d 200**

Background: Law firm and attorney in legal malpractice case petitioned for a writ of mandate compelling the Superior Court, Los Angeles County, No. BC354508, Rolf M. Treu, J., to vacate order denying law firm's application for a protective order pertaining to certain mediation related communications in client's personal injury action, which formed basis of malpractice claim.

Holdings: The Court of Appeal, Aldrich, J., held that: (1) law firm was entitled to a protective order with regard to the mediation briefs produced in underlying personal injury action; (2) e-mails from law firm regarding mediation of personal injury action were protected from discovery pursuant to the mediation confidentiality statutes; and (3) statements between client's attorney and defendants in personal injury action purportedly lowering client's settlement demand were not protected from discovery.

***Campagnone v. Enjoyable Pools & Spas Service & Repairs, Inc.* (3 Dist., 2008) 163 Cal.App.4th 566, 77 Cal.Rptr.3d 551**

Background: Consumers brought products liability action against manufacturer and seller. The Superior Court, Sacramento County, No. 04AS00851, Lloyd A. Phillips, Jr., J., entered judgment

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upon jury verdict for consumers. Defendants appealed. Consumers moved for sanctions against defendants and defendants' excess insurer for insurer's failure to appear in court-ordered mediation.

Holdings: The Court of Appeal, Third District, held that: (1) an unauthorized failure to attend court-ordered appellate mediation necessarily warrants sanctions under local rule; (2) henceforth, an insurer with potential coverage that fails to attend court-ordered mediation will be sanctioned under local rule; and (3) henceforth, a party that fails to notify an insurer of court-ordered mediation will be sanctioned under local rule.