Kluwer Mediation Blog

What Happens in Mediation Stays in Mediation: New Standards of Informed Consent to Mediation in California

Rafal Morek (DWF LLP) · Thursday, September 20th, 2018

Confidentiality of mediation encourages parties to speak freely and openly. This is because they do not need to fear (or much less fear; *ex natura* confidentiality protections are never ironclad) that their words could be used against them when revealed to an outsider to the mediation process, such as a judge in a court or a third party, including for example a market competitor.

Therefore, confidentiality is often perceived desirable, if not essential, for mediation to take place and to be successful. It is also expected that the confidentiality of mediation should be regulated and adequately protected by the law and other applicable norms. The editor of this blog, Nadja Alexander, included different dimensions of confidentiality (not only insider/outsider and insider/court, but also insider/insider) in the Regulatory Robustness Rating (RRR): The Guide to Mediation Regulatory Regimes. Having said that, both the possibility and the desirability of mediation confidentiality are from time to time questioned (see e.g. a thought-provoking piece of Charlie Irvine on this blog), or at least particular legal regulations pertaining thereto are criticized.

For example, Article 7 of the 2008 EU Mediation Directive provides for a minimum degree of compatibility and very basic standards only. While the current regulations in the EU Member States differ vastly, so do the consequences of a breach of the duty and a leak of confidential information.

In contrast, California adopted so-called "absolute confidentiality" rules (Cal.Ev. C. 1115, et seq.). The protection extends as far as – quoting the judgment in Wimsatt v. Superior Court (Kausch) (2007) 152 Cal. App. 4th 137 – mediation participants "*are, in effect, relinquishing all claims for new and independent torts arising from mediation, including legal malpractice causes of action against their own counsel*".

Such stringent and very broad approach to confidentiality unavoidably results in controversies and… more disputes as well as further legal battles. On the background of the Uniform Mediation Act (which provides for more detailed and generally stronger standards of confidentiality than in many other jurisdictions), the California law has been identified – to use the expression coined by James R. Coben – as "*the source of a disproportionate share of mediation confidentiality disputes*". This observation is illustrated by the following exemplary statistics:

> During the period from 1999 through 2005, judges decided a disputed mediation issue in a total of 2,219 cases. Of these cases, enforcement of the mediated agreement was the most common mediation dispute nationwide, occurring in 42.9% of all cases, and 13% of those enforcement cases came from California state or federal courts. In contrast, of the 237 confidentiality cases in the same time period, a disproportionate 21%, more than one-fifth, were from California.

The California Legislature in 2012 directed the California Law Revision Commission (CLRC) to examine the relationship between mediation confidentiality and attorney malpractice and other misconduct. In 2015 the CLRC began preparing a draft recommendation for exceptions to mediation confidentiality. The legislative process was long and difficult, and was finalized only last week when Governor Jerry Brown signed the Bill 954.

The Bill differs significantly from the original agenda and the CLRC's tentative recommendation. In the words of the Commission, reaction to its proposal was "decidedly negative". A finally adopted amendment to Section 1122 of the California Evidence Code requires attorneys to inform their clients of all confidentiality restrictions related to mediation and to obtain written disclosure that the clients understand them.

Under the new regulations, beginning January 1, 2019:
• An attorney must provide the disclosures to clients before the client agrees to participate in mediation;
• An attorney must provide the disclosures after being retained if the attorney is retained after the client agrees to participate in mediation;
• The client must sign the disclosure form which is detailed in the statute and includes the following:

> ***Mediation Disclosure Notification and Acknowledgment***
>
> To promote communication in mediation, California law generally makes mediation a confidential process. California's mediation confidentiality laws are laid out in Sections 703.5 and 1115 to 1129, inclusive, of the Evidence Code. Those laws establish the confidentiality of mediation and limit the disclosure, admissibility, and a court's consideration of communications, writings, and conduct in connection with a mediation. In general, those laws mean the following:
>
> • All communications, negotiations, or settlement offers in the course of a mediation must remain confidential.
> • Statements made and writings prepared in connection with a mediation are not admissible or subject to discovery or compelled disclosure in noncriminal proceedings.
> • A mediator's report, opinion, recommendation, or finding about what occurred in a mediation may not be submitted to or considered by a court

> or another adjudicative body.
> • A mediator cannot testify in any subsequent civil proceeding about any communication or conduct occurring at, or in connection with, a mediation.
>
> This means that all communications between you and your attorney made in preparation for a mediation, or during a mediation, are confidential and cannot be disclosed or used (except in extremely limited circumstances), even if you later decide to sue your attorney for malpractice because of something that happens during the mediation.
>
> I, _____________ [Name of Client], understand that, unless all participants agree otherwise, no oral or written communication made during a mediation, or in preparation for a mediation, including communications between me and my attorney, can be used as evidence in any subsequent noncriminal legal action including an action against my attorney for malpractice or an ethical violation.
>
> NOTE: This disclosure and signed acknowledgment does not limit your attorney's potential liability to you for professional malpractice, or prevent you from (1) reporting any professional misconduct by your attorney to the State Bar of California or (2) cooperating with any disciplinary investigation or criminal prosecution of your attorney.
>
> [Name of Client] [Date signed]
>
> [Name of Attorney] [Date signed]

No doubt California's mediation regulations, including its revised approach to mediation confidentiality, are peculiar and strongly tied to the legal culture and local tradition. For many outsiders they may even seem somewhat surprising, and not necessarily actually encouraging parties to use mediation. Naturally, there is also no reason why other jurisdictions should follow California and copy-cat its new regulations. What they may find inspiring, however, is the expressed need to ensure that users of mediation make informed choices and are aware of local particular regulations, when they agree to mediate.

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