

RESOLUTION 10-02-06

DIGEST

Mediation: Exception to privilege

Amends Evidence Code section 1119 to provide an exception to the mediation privilege when an agreement reached in mediation is the subject of litigation.

RESOLUTION COMMITTEE RECOMMENDATION DISAPPROVE

History:

No similar resolutions found.

Reasons:

This resolution amends Evidence Code section 1119 to provide an exception to the mediation privilege when an agreement reached in mediation is the subject of litigation. This resolution should be disapproved because the policy interests favoring confidentiality outweigh the need to utilize oral statements to enforce settlement agreements.

Without the confidentiality protections established pursuant to section 1119, many agreements would not be reached at all. The California Law Revision Commission considered the issue of the admissibility of oral statements in mediation in subsequent proceedings and decided that those statements would only be admissible if all parties agreed in advance. The mediation provisions (Evid. Code, §§ 1115-1128) enacted by the California Legislature in 1997 reflect a policy that settlement agreements reached in mediation need to be in writing. Individual examples of bad faith during the mediation process do not warrant creating exceptions to the confidentiality protection provided under section 1119.

If parties and counsel fail to memorialize the material terms in a signed settlement agreement, then those terms are not enforceable and the parties should not have any expectation that a court will consider verbal agreements. The present statute makes it clear that only a written agreement obtained through mediation can be effectively enforced by the court. This proposal would mean that parties would subsequently seek to introduce verbal discussions in enforcement proceedings in order to materially modify the agreed upon terms. The benefits of carving out an exception to the broad confidentiality provisions of section 1119 do not outweigh the risks of opening up a floodgate of post-mediation motions.

SECTION/COMMITTEE REPORT

COMMITTEE ON ALTERNATIVE DISPUTE RESOLUTION

DISAPPROVE

The purpose of this Resolution is not entirely clear. It appears to authorize courts to receive extrinsic evidence based on communications in the mediation process to interpret settlement agreements. This is contrary to the clear legislative intent in enacting Evidence Code Sections 703.5 and 1115 et seq. to protect confidentiality to promote the candid and frank discussion that is essential to mediation. See *Foxgate Homeowners' Ass'n v. Bramalea California, Inc.* (2001) 26 Cal.4th 1, 14-15. As the California Supreme Court recognized in *Foxgate* and reiterated in *Rojas v. Superior Court* (2002) 33 Cal.4th 407, the confidentiality provisions *unqualifiedly bar* the admission of mediation communications in subsequent civil proceedings, absent a statutory exception. The proposed exception is inconsistent with the sound public policy behind mediation confidentiality.

To the extent this Resolution is intended to affect either written settlement agreements or oral settlement agreements that have been memorialized by the parties, it also is unnecessary. Under existing law, a court may receive evidence of an oral or written settlement agreement reached in mediation if the applicable requirements are satisfied. Under Evidence Code Section 1123, a written settlement agreement may be admissible if certain specified conditions are met. Under Evidence Code Section 1124, an oral agreement to settle may be admissible if it has been memorialized in accordance with the requirements of Evidence Code Section 1118.

This Resolution appears to be intended to create an exception to confidentiality for cases in which an oral agreement has not been memorialized as required by the Code. If that is in fact its purpose, it would represent a major change in public policy. In enacting the present statutory scheme, the Legislature made a conscious decision to preclude litigation over oral agreements that were allegedly made in the confidential setting of mediation.

In the California Law Revision Commission's 1997 Recommendation to the Legislature (<http://www.clrc.ca.gov/pub/Printed-Reports/Pub193-MediationConfid.pdf>), which formed the basis for Evidence Code Sections 1115 through 1128, the Commission addressed this situation. It noted that the law at that time "...fail[ed] to provide clear guidance concerning ...an oral compromise reached in mediation and a document reducing that compromise to writing." (Page 422.) The Commission referred to conflicting case law on the subject and the need to resolve that conflict. It concluded: "These recommended reforms on achieving an effective settlement are the most crucial element of the Commission's recommendation. They should enhance the effectiveness of mediation in promoting durable settlements. They will also reduce disputes over whether an oral compromise was reached in mediation, and whether a communication was a confidential mediation disclosure." (Page 424.)

The Legislature made a sound decision at the time, and the statute as enacted has served participants in mediation well. It lays down clear guidelines that are easy to follow. The Legislature should not undo its decision. It should not subject parties to claims based upon alleged agreements that have not been memorialized in accordance with the Code and that are supported only by evidence of alleged discussions that took place in confidence.

This position is only that of the State Bar of California's Committee on Alternative Dispute Resolution. This position has not been adopted by the State Bar's Board of Governors or overall membership, and is not to be construed as representing the position of the State Bar of California. Committee activities relating to this position are funded from voluntary sources.

TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to amend Evidence Code section 1119 to read as follows:

1 § 1119.

2 Except as otherwise provided in this chapter:

3 (a) No evidence of anything said or any admission made for the purpose of, in the
4 course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to
5 discovery, and disclosure of the evidence shall not be compelled, in any arbitration,
6 administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant
7 to law, testimony can be compelled to be given.

8 (b) No writing, as defined in Section 250, that is prepared for the purpose of, in the
9 course of, or pursuant to, a mediation or a mediation consultation, is admissible or subject to
10 discovery, and disclosure of the writing shall not be compelled, in any arbitration,
11 administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant
12 to law, testimony can be compelled to be given.

13 (c) All communications, negotiations, or settlement discussions by and between
14 participants in the course of a mediation or a mediation consultation shall remain
15 confidential.

16 (d) As a specific exception to the above stated provisions, in an action to enforce a
17 settlement agreement negotiated in mediation proceedings, the court may be permitted to
18 take evidence, including the agreement itself, to the extent necessary to determine the
19 validity and enforceability of the settlement agreement.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Sacramento County Bar Association

STATEMENT OF REASONS

Existing Law: Evidence Code section 1119 provides broadly that no evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given. The present law makes no exception to evidence from a mediation proceeding necessary to enforce a negotiated settlement agreement.

This Resolution: Grants the court authority to take evidence in camera to the extent necessary to determine the validity and enforceability of a settlement agreement negotiated during mediation. This proposed amendment would affect only duly executed agreements and the communications

pertinent to them. Furthermore, the privilege will remain intact to protect all communication occurring in mediation that is not relevant to the final agreement and its enforceability.

The Problem: The situation often arises after a mediation proceeding in which a settlement has been reached and one of the parties simply changes their mind and refuses to be bound to the terms of the settlement agreement. The non-breaching party may then be in the anomalous position where they may have negotiated in good faith a duly executed settlement agreement but are thereafter barred from any means to introduce evidence in order to support the agreement's enforceability and effect.

IMPACT STATEMENT

This resolution does not affect any other law, statute or rule.

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RESPONSIBLE FLOOR DELEGATE:

COUNTERARGUMENT

SAN DIEGO COUNTY BAR ASSOCIATION

The proposed amendment, as written, does not sufficiently limit the scope of evidence a court may permit. For example, it does not limit admissible evidence to the introduction of a signed settlement agreement or stipulation for settlement. Nor does the proposed resolution limit the method of taking such evidence to an *in camera* review. As such, the proposed exception is potentially subject to gamesmanship and may result in a chilling effect on parties' willingness to participate in mediation.