THE CALIFORNIA MEDIATION PRIVILEGE

By
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As most family law practitioners already know, mediation can be a very effective and powerful method to settle dissolution of marriage cases. Mediation allows for flexibility in resolving a case, and typically results in far less attorneys fees to the parties than does litigation. In addition to these advantages, there is one consequence of a settlement reached in mediation which may be an advantage or disadvantage, depending on the circumstances of the case. As will be explained below, because all statements made in the course of mediation are confidential, setting aside an agreement reached during mediation can be an extremely difficult, and sometimes an impossible task.

The rules governing mediation in California are contained in several statutes, and in case law interpreting those statutes. The key concept regarding mediation is confidentiality. In very broad terms, all statements made in connection with mediation can be precluded from introduction as evidence at a hearing unless both parties explicitly waive mediation confidentiality. The mediation rules are, in reality, rules of evidence, which is why they are set forth in the California Evidence Code.

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These rules providing that statements made in the course of mediation are confidential have become known as the "mediation privilege." In a strict sense, the "mediation privilege" is not actually an evidentiary privilege. The statutes concerning mediation confidentiality never refer to a "privilege," and the true privileges, such as the attorney-client privilege, are contained in a different portion of the California Evidence Code. Because the evidentiary rules governing mediation are so commonly referred to as the "mediation privilege," however, this article will employ that term.

The mediation statutes are contained at California Evidence Code Section 703.5, and in Sections 1115 to 1128. An attorney involved in mediation in California is advised to review these sections, which are highlighted in this article.

As noted above, the heart of the mediation privilege is confidentiality. Essentially, by statute, the only statement or writing made in connection with mediation which can be disclosed without the express consent of both parties is the agreement reached during the mediation itself. Except for limited exceptions created by the courts, nothing else said or written during or in the course of the mediation, or for the purpose of the mediation, can be received in evidence, compelled in discovery, or compelled as testimony in any proceeding. (California Evidence Code Section 1119; 1121, 1123). One case, In re Marriage of Eisendrath (2003) 109 Cal. App. 4th 351, summarized the confidentiality provisions of mediation as follows:

> "Section 1119 states the fundamental rule regarding confidentiality of mediation communications. It provides: '(a) 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 or subject to discovery, and disclosure of the evidence shall not be compelled, in any … civil action … in which, pursuant to law, testimony can be compelled to be given. [¶] … [¶] (c) All communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential."

A party cannot, however, utilize mediation to protect from discovery otherwise discoverable evidence. (California Evidence Code Section 1120). In other words, if a party sends a document to the mediator, and that document would be discoverable in the absence of the mediation, the document remains discoverable.

Interestingly, a code section exists specifying when a mediation ends, but not when it commences. For this reason, it is prudent for the parties and their attorneys to enter into an agreement explicitly stating that they will engage in mediation with a specified mediator to resolve some or all issues pending in their family law case. The agreement should also specify when the mediation commences. Most mediators provide some form of engagement agreement which will usually suffice for the purpose of that determination.

Some guidance regarding this issue is found in the Section 1115(a), which 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." So, a fairly straightforward agreement to establish the commencement of a mediation could simply be that "Husband and Wife will retain retired Judge Smith, a neutral person with no affiliation with either party or his or her attorney, to facilitate communication between Husband and Wife to assist them in reaching a mutually acceptable agreement. The parties intend the mediation to be 'mediation' governed by California Evidence Code Section 1115 et. seq."

When the mediation ends is governed by Section 1125. Mediation ends, when (a) the parties sign a written settlement agreement that fully or partially resolves the dispute, (b) an oral agreement made in accordance with Section 1118 (recorded by a court reporter with joinder by all parties and counsel and reduced to writing within 72 hours) is reached that fully or partially resolves the dispute, (c) the mediator signs and sends a statement to the parties that the mediation is terminated (without resolution), (d) a party provides written notice to the mediator and to the other party that the mediation is terminated (without resolution), (e) for ten calendar days there is no communication between the mediator and either of the parties related to the mediation, however this time period may be shortened or extended by agreement.

While many of these terminating conditions are obvious, counsel should be particularly mindful of the ten day rule. If the mediation takes place over an extended period of time, counsel should agree to extend this ten day period as appropriate. It is also prudent not to entirely rely upon the passage of time to indicate that the mediation has ended. If one party desires to end mediation, the careful approach is to send written notification to the mediator and to the other party that the mediation had ended.

Sometimes in mediation the parties reach an agreement, but for certain reasons the agreement is not put into a signed writing. For example, the parties, attorneys or the mediator may be too exhausted from a full day of mediation to prepare a the writing reflecting the agreement. Section 1118 provides very strict rules for the enforceablity of an oral agreement reached in mediation. All of the following conditions must be met:

> "(a) The oral agreement is recorded by a court reporter, tape recorder, or other reliable means of sound recording.
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> (b) The terms of the oral agreement are recited on the record in the presence of the parties and the mediator, and the parties express on the record that they agree to the terms recited.
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> (c) The parties to the oral agreement expressly state on the record that the agreement is enforceable or binding or words to that effect.
>
> (d) The recording is reduced to writing and the writing is signed by the parties within 72 hours after it is recorded.

It is advisable to at least bring an audio recorder to the mediation sessions, and to ensure that each of these procedural requirements are met. The most reliable method of proving that the parties and the mediator were present when the agreement was recited is to videotape the recitation of the agreement.

With regard to calling the mediator as a testifying witness, California Evidence Code Section 703.5 provides (with certain exceptions not applicable here) that "no arbitrator or mediator shall be compelled to testify, in any subsequent civil proceeding, as to any statement, conduct, decision, or ruling, occurring at or in conjunction with the [mediation]..." Nevertheless, the courts have grafted two non-statutory exceptions to this provision, discussed below.

In a recent landmark opinion on the mediation privilege, California's highest Court, the California Supreme Court, held in Simmons v. Ghaderi (2008) 44 Cal. 4th 570, that a waiver of the mediation privilege could not be implied from a disclosure of statements made during the mediation. A waiver of the confidentiality assured by the mediation privilege must be explicit, joined in by both parties and must adhere to all statutory procedural formalities. In the Simmons case, plaintiff claimed that an oral agreement was reached during mediation, but the procedural requirements of Section 1118 were not satisfied. Plaintiff sought to enforce the alleged oral agreement. During subsequent litigation, the defendant disclosed statements which were made during the mediation, but later sought to exclude from evidence other statements made during

mediation. Plaintiff argued that defendant impliedly waived the mediation privilege by disclosing in that proceeding certain statements made during mediation. The Supreme Court held that defendant did not waive the privilege, which could only be waived by an explicit waiver. Voluntary disclosure of statements made during mediation, absent an express waiver, does not constitute a waiver of the mediation privilege.

The Simmons v. Ghaderi opinion stated that only two exceptions existed to compel a mediator to testify. One is where both parties explicitly waived the privilege. The second is when disclosure is needed to protect a constitutional due process right. Since neither exception existed in that case, the mediator could not be compelled to testify.

The Simmons v. Ghaderi case cited with approval another mediation privilege case in a family law context, Marriage of Eisendrath (2003) 109 Cal. Appl 4th 351. In Marriage of Eisendrath the husband claimed that an agreement he signed, which was reached during mediation, did not accurately set forth the true agreement of the parties. The husband's position was somewhat sympathetic. The agreement stated that the support he was to pay would not be tax-deductible to him. He claimed that he overlooked this provision, and that the support was supposed to be tax-deductible. The agreement also provided that if the wife remarried, support would continue for a duration and in an amount to be determined by wife. The husband claimed that this was a mistake, and that he, not wife, was supposed to have this decision-making authority.

There are two code sections in California law which allow a party to seek relief from a stipulated order or judgment entered into by mistake. (California Civil Procedure Section 473(b) and/or California Family Code Section 2122(e).) Husband brought a motion to modify the agreement based on his version of what was agreed to during the mediation. The court found that husband's motion "relies wholly, or in large measure, on confidential mediation communications that are admissible only with the parties' express consent." The court held that absent express waivers from both parties of the mediation privilege, no evidence of what transpired during the mediation could be admitted into evidence. This effectively doomed husband's case. The court in Eisendrath noted that this rule "gives [wife] a substantial measure of control over [husband's] ability to present evidence." The court justified this ruling, unfair as it was in application in Eisendrath, as following from the plain meaning of the applicable statutes, and an assumption that the Legislature which wrote the statutes was aware of and intended this outcome.

The mediation privilege is so protected, it even prevents disclosure of (non-criminal) sanctionable misconduct. (Foxgate Homeowners' Assn. v. Bramalea California, Inc. (2001) 26 Cal. 4th 1.)

One of the most important family law cases concerning the mediation privilege is In re Marriage of Kieturakis (2006) 138 Cal. App. 4th 56. This is a lengthy opinion, points of which can only be touched upon in this article. The Court in Kieturakis enunciated rules significantly enhancing the enforceability of settlement agreements reached in

mediation. The case involved a rule developed under California family law cases whereby an agreement which advantages one spouse is presumed to have been procured by undue influence. As an agreement procured by undue influence is invalid, unless the party seeking enforceablity can overcome that presumption, spouses entering into agreements advantaging one spouse over the other will find such agreements unenforceable in California.

The Kieturakis case pitted the presumption of spousal undue influence against the mediation privilege. As will be seen, the mediation privilege trumped the presumption of undue influence. The court held that this presumption of undue influence between spouses does not apply to agreements reached by spouses in mediation. If, therefore, spouses mediating their family law matter reach an agreement during mediation, a spouse (even a spouse disadvantaged by the agreement) who desires to set the agreement aside, bears the burden of proving the facts to justify setting the agreement aside and, further, cannot rely on any facts relating to the mediation itself.

In Kieturakis the wife and husband reached a written settlement agreement in mediation. The agreement was merged into a Judgment. Approximately two years after the agreement was signed, the wife brought a motion to set aside the Judgment and the underlying agreement based on alleged fraud, duress and lack of disclosure. Among various claims, the wife stated that “she acted under tremendous pressure” from the husband to sign the agreement. She claimed that the husband reacted with

uncontrolled anger and threats when he learned that she retained an attorney. Because of these threats, she alleged, she attended the mediation without her attorney. She stated that she could not remember most of the mediation, cried during parts of the mediation, and "just wanted it to end." She claimed that when she met with her attorney prior to the mediation, she could not remember most of the details regarding the parties' assets. Her attorney testified that the wife was clearly intimidated by her husband. A psychologist and psychiatrist interviewed the wife and they testified on her behalf that, essentially, she was depressed, insecure, and easily influenced by other people.

Husband presented the testimony of a psychologist to refute wife's experts. He also presented oral testimony and written evidence from the mediator (over the mediator's objection) refuting wife's claims that husband failed to disclosure the amount of royalties he could receive in the future from an invention of his.

In the agreement, husband was awarded, without any offsetting payment to wife, his medical practice, his business, and the future royalties from a product he invented during the marriage. The court found that "there is no dispute that the [agreement] favored [husband]."

The trial court found that because the agreement benefitted the husband, it was presumed invalid, and that it was husband's burden to offer evidence to defend himself.

At the trial, the wife had refused to waive the mediation privilege, seeking to prevent the husband from introducing any evidence in his defense of what transpired during the mediation. The trial court would not allow wife's claim of the mediation privilege to prevent husband from offering this evidence. Instead, the trial court allowed the husband, over the wife's objection, to introduce evidence of what transpired during the mediation, including evidence from the mediator. The trial court ruled that the husband's evidence defeated the wife's claim, that he had met his burden of proof, and ruled that the agreement was enforceable.

The Court of Appeal held that the trial court erred in permitting husband's evidence to come in over wife's objections and that the mediation privilege trumped the undue influence presumption. As the wife did not waive the mediation privilege, it reasoned, then none of hudband's evidence of what transpired during the mediation should have been admitted at the hearing. (In holding that the presumption of undue influence was outweighed by the mediation privilege, however, the Court of Appeal concluded that the trial court should not have placed the burden of proof on husband, that instead wife carried the burden of proof and that, indeed, wife did not meet her burden.)

The opinion presents three reasons why the undue influence presumption must bend to the mediation privilege. First, the Court reasoned, the presumption does not apply to mediated agreements because mediators, by definition, work to balance any imbalances in negotiating skills between the parties, and to minimize any actual undue

influence. In this case, the trial court erred when it admitted evidence of the mediation over wife's objection. There are virtually no exceptions to the mediation privilege: either both parties waive the privilege, or no evidence of what transpired during mediation is admissible. In light of this rule, applying the presumption of undue influence would mean that any party to an unequal agreement could claim the mediation privilege, and automatically prevail because the other party would be prevented from offering any evidence to overcome the undue influence presumption. This result is contrary to the policy of the law to promote mediation. The court recognized that its holding advantages parties defending a mediated agreement, but that was a price it was willing to pay to uphold mediated agreements.

Second, because several years had passed since the agreement was signed, the policy of the law favoring finality of judgments puts the burden of proof on the party seeking to set aside an agreement.

Third, the agreement stated that the parties entered into it "fully aware of the contents, legal effect and consequences of this agreement and its provisions." It also state that the parties entered into it "voluntarily, free from duress, fraud, undue influence, coercion or misrepresentation of any kind." Although these provisions could themselves be the product of undue influence, a court should give them at least some meaning. It was the wife's burden to prove the undue influence in light of these recitals in the agreement.

Finally, at the end of the opinion the court made an intriguing statement. The court stated that it offered no opinion as to whether a mediator's testimony could be compelled (over the objection of the mediator) even if both parties waived the mediation privilege. That issue is left for another day.

Another interesting aspect of the mediation privilege was raised in a very recent case, Cassel v. Wasserman, Comden, Casselman & Pearson, L.L.P. (2009) 179 Cal .App. 4th 152. In Cassel, client sued its attorneys for malpractice. (This case is subject to possible further appellate review.) The client claimed that his attorney forced him to accept a settlement lower than the amount he instructed his attorneys to accept. The attorneys argued that, pursuant to the mediation privilege, all evidence of conversations between the attorney and the client, held outside of the presence of the other party or the mediator, are inadmissible in the malpractice action. The Court of Appeal ruled in favor of the client. The court reasoned that the attorneys "failed to demonstrate a sufficiently close link between the communications and the mediation to require application of mediation confidentiality to the communications." The dissent argues that the communications should be protected because they were clearly made for the purpose of the mediation. The majority opinion, according to the dissent, "seems to be founded primarily on its concern that protecting private communications between a client and his or her lawyer under the rubric of mediation confidentiality may shield unscrupulous lawyers from well-founded malpractice actions without furthering the fundamental policies favoring mediation." Instead of creating a "malpractice" exception

to the mediation privilege, the proper recourse is to request the Legislature to create a "malpractice" exception to the mediation privilege. Until then, for so long as the Cassel opinion remains valid law, the attorney should be aware that all discussions between an attorney and client could be admissible evidence if the client brings a malpractice action against the attorney.

CONCLUSION

Mediation is a powerful tool to resolve cases in an efficient manner. The client should be cautioned, however, that because of what has been called the "super-privilege" afforded the mediation process, he or she will likely forfeit the ability to set the agreement aside. Despite these disadvantages, the benefits to mediation in most cases will outweigh the cost of litigation or attempting to settle a case without the assistance of a mediator.