MEDIATION CONFIDENTIALITY

California Law

The California Supreme Court has held that there are no exceptions to the mediation privilege of Evidence Code §§ 1119 and 1121. Mediation communications may not be disclosed in any subsequent proceeding by the mediator or by any party to the mediation. Conduct during mediations may be disclosed by a party, but not by the mediator.

by Marsha Morrow

Foxgate Homeowner’s Association Inc., v. Bramalea California Inc.
(2001) 26 Cal.4th 1

The Foxgate Homeowners’ Association sued Bramalea California, Inc. a general contractor, and various subcontractors. A special master was appointed for mediation and the parties’ experts were ordered to participate. When counsel for Bramalea failed to produce experts, the mediator cancelled the session and filed a report concluding that counsel for Bramalea derailed the mediation for purposes of delay. The mediator recommended that Bramalea and its counsel reimburse all parties for their mediation expenses.

Plaintiff filed a motion for sanctions under Code of Civil Procedure § 128.5 supported by the mediator’s report and counsel’s declaration describing statements and conduct by Bramalea’s attorney during the mediation. Bramalea opposed the motion objecting to the evidence under Evidence Code § 1121. The trial court granted the motion and awarded sanctions of over $30,000 to plaintiff. The Court of Appeal recognized an exception to Evidence Code § 1121, allowing the mediator or a party to report the content and context of sanctionable conduct.

The Supreme Court rejected the Court of Appeal’s exception to the statutory mediation privilege. Evidence Code §§ 1119 and 1121 clearly and unambiguously mandate the confidentiality of mediation. Confidentiality is essential to effective mediation and promotes a candid and informal exchange regarding past events. This is achieved only if the participants know that what is said in the mediation will not be used against them in subsequent court or adjudicatory proceedings. A judicially crafted exception to the mediation privilege is unnecessary to carry out the legislative intent or to avoid an absurd result.
Thus, mediators are absolutely barred under Evidence Code §§ 703.5, 1119 and 1121 from disclosing any communication or conduct that occur during the mediation. Under those same sections, parties to a mediation are barred from disclosing written or oral communications made during mediation; however, parties are permitted to disclose mediation conduct.

The Court distinguished *Rinaker v. Superior Court* (1998) 62 Cal.App.4th 155 a juvenile case where statements made during mediation were admitted. *Rinaker* is consistent with the rule that due process entitles juveniles basic constitutional rights, including confrontation and cross-examination. Such due process rights were not implicated in the *Foxgate* setting.

*Comment:* The *Foxgate* decision is a sensible solution for the problem presented by disclosures of mediation communications during subsequent proceedings in the same case. No party should be permitted to rely upon statements made during settlement negotiations to prove liability or defenses to matters that are the subject of such negotiations. However, the decision creates pitfalls for attorneys and insurers who, after participating in mediation, are sued for professional liability or bad faith in a subsequent proceeding. Conceivably exculpatory evidence, such as the plaintiff’s rejection of a highly favorable settlement offer, could be precluded in a subsequent legal malpractice or bad faith action. It is inherently unfair to allow a party to assert liability, and at the same time rely upon the mediation privilege to bar exculpatory evidence on the basis of the mediation privilege. The Supreme Court’s acknowledgment of a possible due process exception to the mediation privilege presents a potential solution to this problem. Until this dilemma is resolved, attorneys and insurers should carefully document all settlement communications.