Settlement Agreement Confidentiality

We have learned that mediation confidentially is protected in California by contract law, by the plain meaning of statutory law, and by our highest state court's confirmation that our statutory law means what it says. But what about our settlement agreements; what about the anticipated results of our mediations, are they confidential too?

The answer, as found by the Second California District Court of Appeal in the case of Estate of Thottam (2008) 165 Cal.App.4th 1331, is that it depends upon the agreements of the parties and the plain meaning of the applicable statute.

Evidence Code Section 1123 provides that:

> "A written settlement agreement prepared in the course of, or pursuant to, a mediation, is not made inadmissible, or protected from disclosure, by provisions of this chapter if the agreement is signed by the settling parties and any of the following conditions are satisfied:
>
> (a) The agreement provides that it is admissible or subject to disclosure, or words to that effect.
>
> (b) The agreement provides that it is enforceable or binding or words to that effect.
>
> (c) All parties to the agreement expressly agree in writing, or orally in accordance with Section 1118, to its disclosure.
>
> (d) The agreement is used to show fraud, duress, or illegality that is relevant to an issue in dispute."

In other words, a settlement agreement is not made inadmissible if the agreement provides that it is admissible, the agreement provides that it is enforceable, the parties to the agreement agree to its disclosure, or the agreement is used to show fraud, duress, or illegality.

The importance of these distinctions was made clear in Estate of Thottam, which involved a dispute among siblings regarding the distribution of assets from their deceased mother's estate. Before the mediation of this dispute, all three siblings and the mediator signed a "mediation and facilitation confidentiality agreement."

During mediation, a chart was prepared showing assets along the left margin and including three columns, one for each sibling. The chart was filled in to designate specific allocations of the listed assets, and each sibling signed and dated their respective column at the top of the chart and initialed each entry in their column. (No other "settlement" language was contained on the chart.)

After mediation, one of the siblings, Peter, prepared two agreements concerning the estate assets, both of which included the chart prepared in mediation, and neither of which would be signed by the other siblings. The other siblings, Elizabeth and Jameson, took the position that no agreement was reached in mediation.

Litigation ensued. Elizabeth refused to answer Peter's deposition questions concerning the chart prepared during mediation or discussions about the chart during mediation. Elizabeth sought a protective order and Peter sought to compel Elizabeth's testimony.

Peter's motion to compel was granted, based upon the fact that the "mediation and facilitation confidentiality agreement" between the parties stated that:

> "all matter discussed, agreed to, admitted to, or resulting from" the mediation would "(1) be kept confidential and not disclosed to any outside person (excluding spouses), (2) shall not be used in any current or future litigation between us (except as may be necessary to enforce any agreement resulting from the Meeting), and (3) shall be considered privileged and, as a settlement conference, non-admissible under the California Evidence Code in any current or future litigation between us."

Estate of Thottam 165 Cal.App.4th at 1334.

The judge granting the motion to compel deposition testimony decided that the exception to the mediation privilege found in Evidence Code 1123(c) was satisfied by the parties' agreement highlighted above. In other words, the court found that parties can agree to disclosure of a written settlement agreement before reaching or even discussing a written settlement agreement.

The chart was in.

The trial judge disagreed, taking the position that the Evidence Code 1123(c) could only be satisfied by a disclosure agreement executed after the parties had reached their settlement agreement.

The chart was out, and with it Peter's evidence that the siblings had reached any agreement in mediation.

The Court of Appeal, however, disagreed with the trial court, holding that there is no requirement that a section 1123(c) agreement concerning disclosure be made "at or after the time of settlement." The court further found that the chart was a written settlement agreement for purposes of Evidence Code 1123(c), and remanded the case for a new trial.

The chart was back in.

So, yes, a settlement agreement is confidential ("inadmissible"), unless (1) the agreement provides that it is admissible, or (2) the agreement provides that it is enforceable, or (3) the parties to the agreement agree to its disclosure before, at, or after the time of settlement, or (4) the agreement is used to show fraud, duress, or illegality.

Mediators are advised to review their mediation and confidentiality agreements in light of this decision.