Mediation Confidentiality: For California Litigants, Why Should Mediation Confidentiality be a Function of the Court in Which the Litigation is Pending?

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1. **Overview**

   In opening a mediation session, it is fairly routine for the mediator to promise comprehensive confidentiality to the participants.\(^1\) While there are a number of statutes, rules and cases that support confidentiality in mediation, a certain amount of skepticism and concern exists regarding the scope of protection that actually exists. This is true especially when the communications sought to be protected relate to what some might characterize as “bad” or “bad faith” conduct. As discussed below, the scope of protection available under California law is quite broad as compared to that available under federal law, which is unclear and minimal at best.

   Scholars have recognized that “as a legal matter, there is considerable uncertainty about the extent to which communications made during the process of mediating a dispute are protected from disclosure in subsequent legal proceedings.”\(^2\) One authority has opined that “[c]urrently, it is not an overstatement to say that no mediator or counsel in the country can, with confidence, predict the extent to which it will be possible to maintain the confidentiality of a mediation.”\(^3\)

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\(^1\) Indeed, in the context of an attorney-mediator’s ethical obligations, some courts have charged attorney mediators with the obligation to receive and preserve confidences in much the same manner as the attorney-client privilege. See, Poly Software Int’l, Inc. v. Su, 880 F.Supp. 1487 (D.Utah 1995) (law firm disqualified when one of the firm’s attorneys previously served as a mediator in the litigated matter); McKenzie Constr. v. St. Croix Storage Corp., 961 F.Supp. 857 (D.Vt. 1997) (same).


As discussed in the article, both state and federal courts recognize that a theoretical component of mediation is confidentiality. While California has express statutory provisions that provide for confidentiality protections and numerous Supreme Court decisions endorsing those protections, no similar protections are available under federal law. In view of the fact that mediation is a non-judicial alternative to litigation in the courts, the question posed by this article is: Why should mediation confidentiality be a function of where the litigation is pending?

2. Confidentiality as an Integral Part of Mediation

The inclusion of confidentiality as a defining feature of mediation comes from its theoretical underpinnings. “The salient features of mediation are an informal process, a neutral mediator without authority to command a result, disputants who participate voluntarily and settle of their own accord, and . . . confidentiality of mediation communications.” 4 Some have said that confidentiality is vital to mediation because compromise negotiations often require parties to reveal deep-seated feelings or sensitive issues or to make admissions and concessions which would be “impossible if the parties were constantly looking over their shoulders.” 5 Problem-solving discussions are a key part of negotiations and require the parties to provide reasons and explanations for their proposals, assumptions and expectations, which might require the exchange of personal, proprietary or otherwise confidential information in order for these discussions to be successful. In the context of an adversarial proceeding or

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4 Id.; see also, James J. Alfini, Etc., Mediation Theory and Practice, Chapter 5, p. 205 (“Confidentiality is generally considered to be an essential ingredient in mediation.”); Dennis Sharp, Handbook on Mediation, Chapter 6, p. 223 (“Confidentiality is one of the keys to the acceptability and success of mediation among parties to a dispute.”).

5 Michael L. Prigoff, Toward Candor or Chaos: The Case of Confidentiality in Mediation, 12 Seton Hall Legis. J. 1, 103 (1988).
other competitive relationship, the parties have legitimate reasons for being reticent about sharing information and expecting protection when they do.

There is general agreement that mediation is a communication process in which the goal is a negotiated resolution of a dispute, or at least progress towards that end, with the “job” of the mediator being to facilitate those communications. The willingness of the parties to “open up” is key to the mediator’s ability to engage parties in the problem-solving and negotiation aspects of mediation. 6 As one authority put it, “Mediation is a communication process; solving legal problems is simply a byproduct.” 7

3. California’s Strict Confidentiality Scheme

California has long favored private negotiation and settlement of civil disputes. The state legislature has expressly stated that “[t]he peaceful resolution of disputes in a fair, timely, appropriate, and cost-effective manner is an essential function of the judicial branch of state government.” 8 To effectuate this policy, the state legislature has expressly validated mediation as a process that “provides parties with a simplified and economical procedure for obtaining prompt and equitable resolution of their disputes and a great opportunity to participate directly in resolving those disputes.” 9 Because mediation provides a simple, quick, and economical means of resolving disputes, and because it may also help reduce the court


system’s backlog of cases, California has recognized that the public has an interest in protecting not only the mediation participants, but the mediation process itself.¹⁰

A. What Qualifies as a “Mediation” for Purposes of Confidentiality Protection?

The starting point for California’s mediation confidentiality scheme is Evidence Code Section 1115 which defines the processes that qualify for confidentiality protection. That protection extends to “mediations” and “mediation consultations.” A “mediation consultation” is defined as “a communication between a person and a mediator for the purpose of initiating, considering, or reconvening a mediation or retaining the mediator.”¹¹ A “mediation” is defined as a process in which “a neutral person or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement.”¹² The comments to Section 1115 make it clear that what qualifies as a mediation is to be determined by “the nature of a proceeding, not its label,” and that a proceeding might qualify as a mediation for purposes of the confidentiality protections “even though it is denominated differently.” The fact that a court may use the terms “mediation” and “settlement” interchangeably when referring to the process taking place or that a judicial officer might be assigned to preside over the talks will not transform the proceeding into a mandatory settlement conference without a


¹¹ Cal. Evid. C. § 1115(c).

clear record that such a conference was ordered.\textsuperscript{13} This is an important distinction because Evidence Code Section 1117(b)(2) provides that the confidentiality protections afforded communications in mediation do not apply to communications had during a mandatory settlement conference convened pursuant to Rule 3.1380 of the California Rules of Court.

The \textit{Archdiocese Case} is an example of how broadly the courts have construed what qualifies as a “mediation” for purposes of affording confidentiality protection to facilitated settlement discussions. In the \textit{Archdiocese Case}, the Roman Catholic Bishop of Los Angeles had been named as the principal defendant in nearly 500 lawsuits based upon allegations that various priests had committed acts of childhood sexual molestation on the plaintiffs. The court appointed a judge to facilitate “settlement and mediation” among the parties. As part of that process, the church prepared written summaries of its personnel and other files concerning more than 100 priests who had been identified as molesters and submitted them to the settlement judge for use in his settlement and mediation efforts. The church stated that it planned to release the summaries publicly once they were completed. In response, some of the accused priests filed a motion for protective order to bar public disclosure of the written summaries. In addition to privacy and privilege issues, the priests also objected that the proposed release violated the mediation confidentiality protections afforded by the Evidence Code. The trial court denied the motion, and the accused priests filed a petition for writ of mandate to reverse the trial court’s order and stop any public disclosure of the summaries. The

\textsuperscript{13} Doe I v. Superior Court, 132 Cal. App. 4th 1160, 1166-1167 (2005) (the “\textit{Archdiocese Case}”) (“Except where the parties have expressly agreed otherwise, appellate courts should not seize on an occasional reference to ‘settlement’ as a means to frustrate the mediation confidentiality statutes.”
court of appeal granted the petition, holding that disclosure of the summaries was barred by the mediation confidentiality privilege.

B. What is Protected?

Confidentiality protection is provided not in the form of an evidentiary privilege but, rather, in the form of an evidence exclusion provision. Evidence Code Section 1119 bars – as evidence in a court proceeding – disclosures of (a) anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or mediation consultation;\textsuperscript{14} (b) any writing prepared for the purpose of, in the course of, or pursuant to, a mediation or mediation consultation;\textsuperscript{15} and (c) all “communications, negotiations, or settlement discussions” by and between participants in the course of a mediation or mediation consultation.\textsuperscript{16} The California Supreme Court has confirmed on several occasions that the “any” and “all” provisions of Section 1119 are to be interpreted quite literally and made it clear that the scope of protection intended by the statute is unqualified, clear and absolute,\textsuperscript{17} and is not subject to judicially crafted exceptions or limitations.\textsuperscript{18} The facts of the cases in which the California Supreme Court has been called upon to rule about the scope of protection afforded by Section 1119 have been somewhat extreme and serve to illustrate the breadth of what will be held as confidential if the communications (and sometimes conduct) occurred during a mediation.

\textsuperscript{14} Cal. Evid. C. § 1119(a).

\textsuperscript{15} Cal. Evid. C. § 1119(b).

\textsuperscript{16} Cal. Evid. C. § 1119(c).

\textsuperscript{17} See, Foxgate Homeowners Ass’n v. Bramalea Calif., Inc., 26 Cal. 4\textsuperscript{th} 1, 14 (2001) (“Foxgate”); Rojas, supra, 33 Cal. 4\textsuperscript{th} at 424; Fair v. Bakhtiari, 40 Cal. 4\textsuperscript{th} 189, 197 (2006) (“Fair”).

\textsuperscript{18} See Simmons, 44 Cal. 4\textsuperscript{th} 570, 588 (2008) (“Simmons”); Cassel v. Superior Court, 51 Cal. 4\textsuperscript{th} 113, 124 (2011) (“Cassel”).
The first case decided by the California Supreme Court was the 2001 decision in *Foxgate*. That case concerned party conduct and statements made during mediation with respect to one party’s non-participation (rather than the exchange of information or offers during the course of a mediation). The case concerned a construction defect claim for a 65-unit condominium complex. The court ordered the parties to mediation and the court’s notice instructed that the parties were required to bring their experts and the claims representatives for their insurers. Five days of mediation were reserved. On the first day, plaintiff’s attorney appeared with nine experts and defendant appeared with none because its counsel took the position that because of his vast knowledge in the field of construction defect litigation, he did not need any experts to engage in discourse with plaintiff’s experts. After the morning of the first mediation session, the mediator cancelled the subsequent mediation sessions because he concluded that they could not proceed without defense experts. Plaintiff then moved for sanctions against the defendant and its attorney for failure to participate in good faith in a court-ordered mediation and to comply with the order to mediation. Attached to plaintiff’s sanctions motion was a report of the mediator which described conduct, quoted statements made by defendant’s counsel, assessed defendant’s counsel’s conduct as amounting to “obstructive bad faith tactics,” and concluded with a recommendation that defendant and its counsel should be ordered to reimburse the plaintiff for expenses incurred in the mediation. Also attached to the sanctions motion was a declaration by plaintiff’s counsel which recited statements made by defendant’s counsel during the mediation. In granting the sanctions

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19 26 Cal. 4th 1.
motion, the trial court considered the mediator’s report and the declaration of plaintiff’s
counsel regarding what went on during the mediation over defendant’s objection.

The court of appeal affirmed the trial court’s sanction order, but remanded the matter
back to the trial court to make specific findings regarding the conduct or circumstances
justifying the sanctions order. The court of appeal rejected defendant’s argument that the
mediator was barred by Evidence Code Section 1121 from making a report to the court that
commented on party conduct during the mediation, and reasoned that the confidentiality
mandated by Evidence Code Section 1119 should be balanced against the policy recognizing
that, unless the parties and their attorneys participate in good faith in mediation, there is little
to protect. The Supreme Court affirmed the court of appeal’s reversal of the sanctions order,
but held that if, on remand, the plaintiff elected to pursue a sanctions motion, no evidence of
communications made during the mediation could be admitted or considered. In this regard,
the Supreme Court specifically rejected the notion that there is any need for judicial
construction of Evidence Code Sections 1119 or 1121 or that a judicially crafted exception to
mediation confidentiality was necessary. “The statutes are clear. Section 1119 prohibits any
person, mediator and participants alike, from revealing any written or oral communication
made during a mediation.”20 That Supreme Court noted, however, that while Evidence Code
Section 1121 prohibits the mediator from advising the court about conduct during a mediation,
it does not prohibit a party from so advising the court.21

20 See, Foxgate, 26 Cal.4th at 13.

21 Id. The Supreme Court specifically held that a mediator may not reveal communications made during a
mediation and that there are no exceptions to the statutory limits on the content of a mediator’s report as
provided by Evidence Code Section 1121. 26 Cal.4th at 13-16.
(2)  **Rojas Decision-2004**²²

The second case decided by the California Supreme Court was the 2004 decision in *Rojas*. That case involved information developed and prepared for use in mediation. This case also involved construction defect claims in which the owner of the apartment complex complained that the water leakage due to the construction defects had produced toxic molds on the property requiring its complete demolition. In order to encourage the parties’ candor in mediation, the court issued a case management order which provided that evidence of anything said and any document prepared for the purpose of, or in the course of, or pursuant to any mediation would be privileged pursuant to Evidence Code Section 1119 and not admissible as evidence at trial. The litigation between the owner and the contractors who built the complex was settled through mediation. Thereafter, several hundred tenants sued the owner and builder for damages resulting from health problems alleged to be the result of the mold infestation. In discovery, the tenants sought to compel production of the materials developed and prepared for use in the earlier owner/builder mediation. The tenants argued that this discovery should be ordered because there was no other evidence of the condition of the building before its demolition and repair. The trial court denied the motion under Evidence Code Section 1119 because the materials sought were created in connection with the mediation in the earlier case. On appeal, the court of appeal reversed, finding that Section 1119 did not protect “pure evidence,” but only the substance of the mediation. The Supreme Court then reversed and held that (a) the mediation privilege for “writings” covered witness statements, analysis of raw test data and photographs prepared during the mediation, (b) the

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²² 33 Cal. 4th 407.
mediation privilege was not subject to a “good cause” exception, and (c) the evidence exclusion provisions operated as a bar to discovery of such communications and materials.

“In Foxgate, we stated that ‘[t]o carry out the purpose of encouraging mediation by ensuring confidentiality, [our] statutory scheme . . . unqualifiedly bars disclosure of ‘specified communications and writings associated with a mediation ‘absent an express statutory exception.’ . . . We also found that the ‘judicially crafted exception’ to section 1119 there at issue was ‘not necessary either to carry out the legislative intent or to avoid an absurd result.’ We reach the same conclusion here.”23

(3) Simmons Decision-200824

The third case decided by the California Supreme Court was the 2008 decision in Simmons. That case involved a “gaming” tactic that one party used against the other during negotiations had in a mediation. The case involved wrongful death / medical malpractice claims against a doctor brought by the patient’s mother and son. The parties went to mediation. Before beginning settlement negotiations, the defendant doctor executed a standard consent-to-settlement which authorized the claims specialist for her insurer to negotiate on her behalf up to a defined settlement value capped at $125,000. Plaintiffs and plaintiffs’ counsel then engaged in settlement discussions with the claims specialist and defense attorney hired by the insurance company, while the defendant doctor and her personal attorney waited in another room. At some point during these negotiations, the insurance

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23 33 Cal. 4th at 424.

24 44 Cal. 4th 570.
company offered $125,000 and plaintiffs orally accepted the offer. The settlement terms were then stated in a term sheet document for the parties to sign before leaving the mediation. At this juncture, the defendant doctor revoked the settlement authorization she had given to the claims specialist for her insurer and refused to sign the term sheet memorandum. Plaintiffs then amended their complaint to add a cause of action for breach of contract, alleging that the defendant doctor had breach an oral agreement to settle at $125,000. At trial, the defendant doctor asserted that Evidence Code Section 1119 precluded plaintiffs from proving the existence of an oral agreement and objected to the admissibility of the consent-to-settle, the term sheet memorandum, and other evidence offered with respect to the events at the mediation (including a declaration by the mediator). The trial court overruled defendant’s objections and found that plaintiffs and defendant’s agent (the claims specialist) had entered into a valid and enforceable oral contract before defendant withdrew her consent. The trial court ordered specific performance and entered judgment in favor of plaintiffs for $125,000. The defendant doctor appealed.

On appeal, the court of appeal affirmed the judgment, finding that a valid oral agreement had been reached during the mediation. The court of appeal found that during pretrial motions, both defendant and plaintiff had presented evidence of the occurrences at the mediation and defendant had failed to object to plaintiffs’ proffered evidence with respect to such motions. Accordingly, the court of appeal found that the defendant doctor was estopped from asserting mediation confidentiality at trial to bar admission of the mediation evidence. The California Supreme Court disagreed and reversed, holding that the court of appeal had
improperly relied on the doctrine of estoppel to create a judicial exception to the statutory requirements of mediation confidentiality as provided by Evidence Code Section 1119.

“Both the clear language of the mediation statutes and our prior rulings support the preclusion of an implied waiver exception. The legislature chose to promote mediation by ensuring confidentiality rather than adopt a scheme to ensure good behavior in the mediation and litigation process. The mediation statutes provide clear and comprehensive rules reflecting that policy choice."\(^\text{25}\)

(4) **Cassel Decision-2011\(^\text{26}\)**

The fourth and most recent case decided by the California Supreme Court was the 2011 decision in *Cassel*. This case involved private conversations had between an attorney and client during the course of a mediation. Prior to attending the mediation, Michael Cassel had met with his attorneys from Wasserman, Comden, Casselman & Pearson to discuss mediation strategy and, at that time, agreed that Cassel would accept no less than $2 Million from defendant to settle the lawsuit. After several hours of mediation, Cassel was told that the defendant would pay no more than $1.25 Million. Though he felt tired, hungry and ill, Cassel’s attorneys insisted that he remain until the mediation was concluded and pressed him to accept the offer, telling him that he was “greedy” to insist on more. At one point, Cassel left to have dinner and consult with his family. His attorneys called and insisted that he return to the mediation, at which time they threatened to abandon him at the imminently pending trial, misrepresented certain significant terms of the proposed settlement and falsely assured him

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\(^{25}\) 44 Cal. 4th at 588.

\(^{26}\) 51 Cal. 4th 113.
they could and would negotiate a side deal that would recoup the deficits in the settlement. They also falsely stated that they would waive or discount a large portion of the $188,000 legal bill if he accepted the settlement offer. Finally, at midnight, after 14 hours of mediation, when he was exhausted and unable to think clearly, the attorneys presented a written draft settlement agreement and evaded his questions about its complicated terms. Cassel signed the agreement believing that he had no other choice. After settling the business litigation dispute, Cassel then sued his attorneys for malpractice, breach of fiduciary duty, fraud and breach of contract. Prior to trial in the malpractice action, Cassel’s attorneys moved to exclude all evidence of any discussions they had had with plaintiff immediately preceding and during the mediation concerning mediation settlement strategies and the attorneys’ efforts to persuade plaintiff reach a settlement in the mediation. The trial granted the attorneys’ motion excluding the evidence of their mediation communications with their client.

On appeal, the court of appeal reversed. The court of appeal reasoned that the mediation confidentiality statutes were intended to prevent damaging use against a mediation disputant of tactics employed, positions taken, or confidences exchanged in the mediation, and were not intended to protect attorneys from malpractice claims of their own clients based on the attorneys’ advice-giving and other communications as counsel. The court of appeal concluded that an attorney sued for malpractice cannot use mediation confidentiality as a shield to exclude damaging evidence of their entirely private conversations had with the client during the mediation. On further appeal to the California Supreme Court, the Supreme Court reversed finding that the mediation confidentiality statutes must be strictly applied and do not
permit judicially created exceptions or limitations even where competing public policies may be affected.

“Here, as in Foxgate, Rojas, Fair and Simmons, the plain language of the mediation confidentiality statutes controls our result. . . . Section 1119, subdivision (a), extends to oral communications made for the purpose of or pursuant to a mediation, not just oral communications made in the course of the mediation. . . . The obvious purpose of the expanded language is to ensure that the statutory protection extends beyond discussions carried out directly between opposing parties to the dispute, or with the mediator . . . . All oral or written communications are covered, if they are made ‘for the purpose of’ or ‘pursuant to’ a mediation. . . . It follows that, absent an express statutory exception, all discussions conducted in preparation for a mediation, as well as all mediation-related communications that take place during the mediation itself, are protected from disclosure. Plainly, such communications include those between a mediation disputant and his or her own counsel, even if these do not occur in the presence of the mediator or other disputants.”

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The Cassel decision has been highly criticized from a legal ethics / legal malpractice standpoint on giving attorneys a free pass for “settlement malpractice” if it occurs in the

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27 51 Cal. 4th at 128. Cf., Porter v. Wyner, 183 Cal. App. 4th 949 (2010) (statements made between plaintiff’s attorney and defendant’s attorney purportedly causing plaintiff to lower his settlement demand were not protected from discovery in plaintiff’s subsequent legal malpractice action because there was no evidence that the statements were made for the purpose of or pursuant to a mediation).
Nevertheless, the *Cassel* decision demonstrates just how broadly the scope of the mediation confidentiality statute will be construed by the Supreme Court because of the *unqualified* language of the statute. As with the earlier cases, the Supreme Court has stated that it is up to the Legislature – not the courts – to define the contours of mediation confidentiality and acceptable/nonacceptable conduct in mediation.

C. **Special Rules Related to Mediators**

Evidence Code Section 1121 provides that unless the parties agree otherwise, the court may not consider any “report, assessment, evaluation, recommendation or finding of any kind” by the mediator concerning a mediation he/she conducted; that the *only* report a mediator may make is one that whether an agreement was or was not reached. The comments to Section 1121 explain the rationale behind this statutory provision was aimed at making sure a mediator would “not be able to influence the result of a mediation or adjudication by reporting or threatening to report to the decision maker on the merits of the dispute or reasons why mediation failed to resolve it.” Companion to Section 1121 is Evidence Code Section 703.5 which declares that a mediator shall be incompetent to testify as to any statement, conduct, decision, or ruling occurring in or in conjunction with a mediation that he/she conducted.

The special rules related to mediators do not apply to other mediation participants. In this regard, the courts have held that the foregoing exclusionary provisions do not prohibit a

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29 In this regard, the Supreme Court noted that when the mediation confidentiality statutes apply, they are unqualified absent express statutory exception and must be applied “in strict accordance with their plain terms.” 51 Cal. 4th at 124.
party from advising the court about conduct during the mediation that might warrant sanctions. In *Foxgate*, plaintiff attached a report by the mediator and a declaration by plaintiff’s counsel reciting statements made during the mediation session, which the Supreme Court found was prohibited by Evidence Code Sections 1119 and 1121.\(^{30}\) However, the Supreme Court noted that to the extent the declaration of plaintiff’s counsel stated that the mediator had ordered the parties to be present with their experts, there was no violation because “neither Section 1119 nor Section 1121 prohibits a party from revealing or reporting to the court about noncommunicative conduct, including violation of the orders of a mediator or the court during the mediation.”\(^{31}\) In 2008, the Court of Appeal for the Third District relied upon *Foxgate* to find that the failure to have all persons or representatives attend court-ordered mediation (as required by Local Rule) was “conduct that a party, but not a mediator, may report to the court as a basis for monetary sanctions.”\(^{32}\) Similarly, in 2010, the Court of Appeal for the Second District upheld an order imposing sanctions for the unauthorized failure of a party to attend a court-ordered mediation.\(^{33}\)

\(^{30}\) 26 Cal. 4\(^{th}\) at 18.

\(^{31}\) Id., n. 14.

\(^{32}\) Campagnone v. Enjoyable Pools & Spas Service & Repairs, Inc., 163 Cal. App. 4\(^{th}\) 566, 572 (2008). The court of appeal went on to note, however, that reporting on anything more than a party’s non-attendance might violate the confidentiality rules. Id.

D. Special Rules Related to Written Settlement Agreements Reached in Mediation

While the ultimate goal in mediation is for the parties to reach agreement on terms to resolve their dispute, a written settlement agreement or term sheet memorandum prepared with respect to the settlement are writings prepared during the course of mediation and, as such, are entitled to exclusionary protection under Evidence Code Section 1119. Pursuant to Evidence Code Section 1123, such writings shall not be inadmissible or protected from disclosure if any of the following conditions are satisfied:

(a) the agreement provides that it is admissible or subject to disclosure or words to that effect;34

(b) the agreement provides that it is enforceable or binding or words to that effect;35

(c) all parties to the agreement expressly agree in writing to its disclosure;36

or

(d) the agreement is used to show fraud, duress, or illegality that is relevant to an issue in dispute.37

In 2006, the California Supreme Court had occasion to construe the application of Evidence Code 1123 and interpreted it quite strictly and literally. 38 In Fair, the parties to a civil

34 Cal. Evid. C. § 1123(a).

35 Cal. Evid. C. § 1123(b).

36 Cal. Evid. C. § 1123(c).

37 Cal. Evid. C. § 1123(d).
dispute mediated their disputes over the course of a two-day period. At the end of the second day, plaintiff’s counsel drafted a handwritten memorandum which set forth the settlement terms the parties had agreed to, including an arbitration clause for any and all future disputes that might arise between the parties. Post-mediation, the parties exchanged formal settlement agreements, but were ultimately unable to reach agreement on the terms for a formal, written settlement agreement. Plaintiff then demanded arbitration under the arbitration clause included in the term sheet memorandum. Defendant rejected the demand and contended that the term sheet memorandum was inadmissible under Evidence Code Section 1119(b) because it represented a writing prepared in the course of a mediation. Plaintiff then moved to compel arbitration pursuant to the term sheet memorandum. Defendant opposed the motion and objected to the admission of the terms sheet memorandum and parts of plaintiff’s counsel’s declaration which referred to discussions had at the mediation under Evidence Code Section 1119. The trial court sustained defendant’s objection and excluded the term sheet and portions of plaintiff’s counsel’s declaration under Evidence Code Section 1119, and did so on the ground that the requirements of Evidence Code Section 1123 had not been met.

On appeal, the court of appeal reversed, holding that the inclusion of the provision providing for any and all disputes to be submitted to arbitration could only mean that the parties intended the term sheet to be enforceable and binding. On further appeal to the California Supreme Court, the Court reversed and held that the court of appeal had erred by concluding that the inclusion of an arbitration clause satisfied the requirements of Evidence Code Section 1123(b). The Court noted that although the Legislature had not provided the

38 Fair, supra, 40 Cal. 4th 189.
courts with a “bright line” with respect to what would qualify as “words to that effect” as a substitute for an express statement that the agreement was intended to be enforceable and binding, “a narrow interpretation of this clause is required.”

“The phrase ‘words to that effect’ . . . refers to language that conveys a general meaning or import, in this instance the meanings of ‘enforceable or binding.’ . . . Under section 1123(b), the use of such language will exempt a written settlement agreement from the general rule that documents prepared during mediation are inadmissible in future proceedings. The Legislature’s goal was to allow parties to express their intent to be bound in words they were likely to use, rather than requiring a legalistic formulation. The Legislature also meant to clarify the rules governing admissibility and reduce the likelihood that parties would overlook those rules. To meet these objectives, we must balance the requirements of flexibility and clarity, without eroding the confidentiality that is ‘essential to effective mediation.’”

The Supreme Court concluded that in order to fit within the exception to confidentiality provided by Evidence Code Section 1123(b), a settlement agreement must include a statement that it is intended to be “enforceable” or “binding.”

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39 40 Cal. 4th at 197.

40 Id., citing Foxgate and Rojas.

41 40 Cal. 4th at 199.
E. Special Rules Related to Oral Settlement Agreements Reached in Mediation

Evidence Code Section 1123(c) provides that an oral settlement agreement may be admissible if it satisfies the requirements of Evidence Code Section 1118. Pursuant to Evidence Code Section 1118, an oral agreement made “in accordance Section 1118” must satisfy all of the following conditions:

(a) recorded by a court reporter or reliable means of audio recording;\(^\text{42}\)

(b) the terms must be recited on the record in the presence of the parties and the mediator, and the parties must express on the record that they agree to the terms so recited;\(^\text{43}\)

(c) the parties expressly state on the record that the agreement is enforceable or binding;\(^\text{44}\) and

(d) the recording is reduced to writing and the writing is signed by the parties within 72 hours after it is recorded.\(^\text{45}\)

\(^{42}\) Cal. Evid. C. § 1118(a).

\(^{43}\) Cal. Evid. C. § 1118(b).

\(^{44}\) Cal. Evid. C. § 1118(c).

\(^{45}\) Cal. Evid. C. § 1118(d).
4. The Non-Privileged/Under-Protected Status of Mediation

Confidentiality Under Federal Law

A. FRE 408

The starting place for understanding the federal perspective on mediation confidentiality is the common law rule that (a) the public is entitled to every person’s evidence, and (b) testimonial privileges are disfavored.46 There is no federal statute or rule of procedure or rule of evidence that expressly recognizes or provides confidentiality protection for communications had during or in connection with a mediation. The only express protection for settlement discussions is that provided by Rule 408 of the Federal Rules of Evidence, which makes “conduct or statements made in compromise negotiations regarding the claim” inadmissible to prove liability.47 Rule 408 thus provides an admission standard for proof offered at trial to prove liability or invalidity of a claim and speaks in terms of relevancy. Its purpose is “to encourage the compromise and settlement of existing disputes”48 so as to avoid “the chilling effect” that potential disclosure might have on a party’s willingness to make a compromise offer for fear of jeopardizing its case or defense if the matter is not settled.49

It is important to note that, by its terms, Rule 408(a) applies only to the admissibility of evidence at trial and does not apply to discovery of settlement negotiations or settlement

47 Fed. R. Evid. 408(b)(1) and (2).
48 See, Josephs v. Pacific Bell, 443 F.3d 1050, 1064 (9th Cir. 2006).
terms. On this issue, the courts are split as to whether Rule 408 precludes discovery.\(^{50}\) Moreover, Rule 408(b) expressly provides that exclusion is not required if the “offer and compromise” evidence is offered for a purpose that is not expressly prohibited by Rule 408(a). Among the “permitted uses” delineated in Rule 408(b) are evidence of settlement and compromise negotiations offered to prove bias or prejudice on the part of a witness; to prove that an alleged wrong was committed during the negotiations (e.g., libel, assault, unfair labor practice, etc.); to negate a claim of undue delay; or to prove obstruction of a criminal investigation or prosecution. Additionally, a number of courts, including the Ninth Circuit, have concluded that Rule 408 does not make settlement offers inadmissible in the removal context as evidence of the amount in controversy for purposes of establishing diversity jurisdiction or the date on which such information was first made available to the defendant for purposes of starting the clock running for removal.\(^{51}\)

In sum, Rule 408 is keenly focused offers of compromise and the negotiations had in connection with the making, accepting or rejecting of such offers. As such, Rule 408 appears to not provide protection of any sort for pre-negotiation communications or exchanges of


information that parties might have with or through a mediator, even though the goal of those discussions is to open settlement dialogue.

**B. FRE 501**

The only other source of confidentiality protection in federal cases is Rule 501 of the Federal Rules of Evidence. Rule 501 empowers the holder of a recognized privilege to use the legal process to prevent others from disclosing protected communications. It also vests the holder with the right to refuse to produce otherwise relevant evidence. What qualifies as a “recognized privilege” is not detailed in Rule 501. In federal question cases (28 U.S.C. § 1331), whether and to what extent a privilege exists is governed by federal common law, and may not be augmented by local court rules. In diversity cases (28 U.S.C. § 1332) where State law

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52 Fed. R. Evid. 501; see also Religious Technology Center v. Wollersheim, 971 F.2d 364, 367, n. 10 (9th Cir. 1992) ("Religious Technology"). Rule 501 raises a difficult question regarding which law shall apply in federal question cases with pendent state law claims. In the Ninth Circuit, that question has been resolved so that the law of privilege is governed by federal common law. See, Religious Technology, 971 F.2d at 367, n. 10 (court refused to apply California litigation privilege in copyright action with pendent state law claims); Folb v. Motion Picture Industry Pension & Health Plans, 16 F.Supp. 2d 1164 (C.D.Cal. 1998) ("Folb") (followed); see also, Hancock v. Hobbs, 967 F.2d 462, 467 (11th Cir. 1992) (per curiam) (the federal law of privilege is paramount in federal question cases even if the witness testimony is relevant to a pendent state law count which may be controlled by a contrary state law privilege); Hancock v. Dodson, 958 F.2d 1367, 1373 (6th Cir. 1992) (same).

53 See, The Facebook, Inc. v. Pacific Northwest Software, Inc. ("Facebook"), 640 F.3d 1034,1040-1041 (9th Cir. 2011) ("A local rule, like any court order, can impose a duty of confidentiality as to any aspect of litigation, including mediation . . . . But privileges are created by federal common law.” In Facebook, the Winklevosses sought to avoid enforcement of the settlement agreement between ConnectU and Facebook which was negotiated and entered into during a private mediation. The Winklevosses proffered evidence of what was said and not said during the mediation. The District Court for the Northern District of California excluded this evidence under its local rule that protected such communications as “confidential information,” which the court read as creating a “privilege” for “evidence regarding the details of the parties’ negotiations in their mediation. While the Ninth Circuit found that the District Court’s reason for excluding the evidence was wrong, it concluded that the court was nevertheless correct in excluding the proffered evidence because the parties had engaged a private mediator and had signed an express, written confidentiality agreement before the mediation commenced. Accordingly, the Ninth Circuit held that the Confidentiality Agreement signed by the Winklevosses precluded them from introducing any evidence of what Facebook said or did not say during the mediation.” Id. at 1041.
provides the rule of decision, the existence of a privilege is a matter of applicable State law.\textsuperscript{54} To date, there are only two cases in the Central District of California that have recognized a federal mediation privilege to protect communications made in conjunction with a formal mediation proceeding: the 1998 reported decision of District Judge Paez in Folb,\textsuperscript{55} and the 2008 unreported decision of District Judge Morrow in Molina.\textsuperscript{56}

(1) \textit{Folb Decision-1998}\textsuperscript{57}

In Folb, a former employee (Folb) complained that he had been terminated in retaliation for his whistle-blowing activities. The employer responded that Folb was terminated because he had sexually harassed a fellow employee (Vasquez). The employer and Vasquez had previously participated in a mediation in an attempt to settle Vasquez’s claims against the company arising from Folb’s alleged harassment. Folb then sought to compel production of a mediation brief prepared by Vasquez’s counsel for the mediation plus “related correspondence regarding settlement negotiations” between the employer and Vasquez. Folb argued that these documents would reveal that the employer had taken the position in mediation that Folb had not harassed Vasquez. The court held that Folb was entitled to discovery regarding settlement negotiations conducted after the close of the formal mediation, but concluded that a federal common law mediation privilege existed and protected the mediation briefs from


\textsuperscript{55} 16 F.Supp. 2d 1164.

\textsuperscript{56} 2008 WL 4447678.

\textsuperscript{57} 16 F.Supp. 2d 1164.
discovery. In this regard, the trial judge stated that the privilege it was adopting applied only to “communications between parties who agreed in writing to participate in a confidential mediation with a neutral third party” — thereby leaving open whether a “mediation” conducted by an Attorney Settlement Officer as part of the court-ordered scheduling process would qualify for protection without an accompanying agreement to mediate between the parties. While such a distinction would not be available under California law due to the broad definition of what qualifies as a mediation for purposes of confidentiality, the Ninth Circuit’s decision in Facebook and the District Court’s decision in Molina suggests that whether or to what extent confidentiality protections are available under federal law may depend on (a) the label used to describe the parties’ facilitated settlement efforts, (b) who is seeking to disclose or compel disclosure, and (c) the purpose or use of the information.

58 16 F.Supp.2d at 1167.

59 16 F.Supp.2d at 1180. As to any other details concerning the federal mediation privilege, the trial judge simply observed that “the contours of such a federal privilege [will have] to be fleshed out over time.” Id. at 1179. In this regard, the trial court stressed that its recognition of a federal mediation privilege was limited to the factual context before it: namely, a situation in which a third party who did not participate in the mediation was seeking discover of mediation-related communications of the parties who did participate. Id. at 1180.

“On the facts presented here, the Court concludes that communications between parties during the mediation are protected. In addition, communications in preparation for and during the course of a mediation with a neutral must be protected. Subsequent negotiations between the parties, however, are not protected even if they include information initially disclosed in the mediation.”

60 See, Section 3(A), infra.

61 See, fn 53, infra, for discussion of the Facebook decision. See, Section 4(B)(2), supra, for discussion of the Molina decision. With regard to the label given to the facilitated settlement effort, there are several district court-level decisions where courts have denied confidentiality protection because the communications at issue did not occur in a “formal mediation.” See, e.g., E.E.O.C. v. Albion River Inn, Inc., 2007 WL 2560718, *2 (N.D.Cal., Sept. 4, 2007); California Service Employees Health & Welfare Trust Fund v. Advance, 2007 WL 2669823, *1 (N.D.Cal., Sept. 7, 2007).
(2) **Molina Decision-2008**

In *Molina*, Ron Molina filed a class action against his former employer, Lexmark International in state court in August 2005. In July 2008, two weeks before trial, Lexmark removed the case to federal court. Lexmark asserted that the court had jurisdiction under the Class Action Fairness Act ("CAFA") – specifically 28 U.S.C. § 1332(d) – which grants district courts original jurisdiction over any civil action in which the amount in controversy exceeds Five Million Dollars and any member of a class of plaintiffs is a citizen of a state different from any defendant. Lexmark claimed that it first became aware that the amount in controversy exceeded Five Million Dollars in July 2008 when it received a summary of damages prepared by Molina’s expert witness as part of the pretrial exchange. Molina filed a motion for remand, arguing that Lexmark’s removal application was untimely because it had been put on notice of the amount in controversy two years earlier when class counsel shared a damages analysis during a mediation. 28 U.S.C. § 1446(b) governs the timing of removal and provides that a defendant has thirty days to file a notice of removal once it learns that an action is removable. That thirty day period begins to run from the defendant’s receipt of the initial pleading only when the pleading reveals on its face the facts necessary for federal court jurisdiction, which in this case was the amount in controversy. 63 When the amount in controversy is not clear on the face of the initially pleading, however, the thirty day period for removal does not being to run until the defendant receives a copy of an amended pleading, motion, order or “other paper”

62 2008 WL 4447678.

63 See, Harris v. Bankers Life & Cas. Co., 425 F.3d 689, 690-691 (9th Cir. 1997).
from which it can determine that the case is removable. The court in Molina duly noted that a document reflecting a settlement demand in excess of the jurisdictional minimum constitutes an “other paper” sufficient to provide notice that a case is removable.

The “other paper” at issue in Molina was a damages analysis prepared by Molina’s expert that was shared during the May 2006 mediation. Lexmark denied having received a copy of the damages analysis. Even if it had, Lexmark argued that the federal common law mediation privilege articulated in Folb prohibited use of information exchanged during mediation for any purpose. Alternatively, Lexmark argued that because federal court jurisdiction was based on diversity, California’s mediation confidentiality protections should apply and under California law the information exchanged was clearly protected because it was developed for and used during the course of a mediation. The court rejected this latter argument, based because whether a case exceeds the amount in controversy requirement for federal court jurisdiction is governed by federal law and, as such, federal privilege law controls.

After going through a very thorough and lengthy analysis of mediation confidentiality, the court in Molina also rejected Lexmark’s argument that the information exchanged during the May 2006 mediation was privileged as a matter of federal common law. Looking at the

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64 See, Durham v. Lockheed Martin Corp., 445 F.3d 1247, 1250 (9th Cir. 2006).


66 Id. at * 6, citing Horton v. Liberty Mutual Ins. Co., 367 U.S. 348, 352 (1961). See also Lenscrafters, supra, 498 F.3d at 974-975 (state privilege law did not apply in determining whether a settlement letter sent in preparation for mediation was privileged and thus not an “other paper”); Breed v. U.S. Dist. Court for the N. Dist. Of Cal., 542 F.2d 1114, 1115 (9th Cir. 1976) (when a question of federal law is at issue, state law as to privileges may provide a useful referent, but is not controlling).
decision in Folb, the court noted that while the contours of the privilege recognized in that case were unclear, the holding was expressly limited to the factual context before the court: namely, a situation in which a third party who did not participate in the mediation was seeking discovery of mediation-related communications for use in a different legal proceeding. In this context, the court in Molina found that the issue presented in Folb was whether a privilege shielded mediation discussions from discovery by third parties. The situation presented in Molina involved communications had during a mediation between disputants’ counsel regarding the amount in controversy and raised the issue of whether a duty of confidentiality existed between the parties that required them to keep their mediation discussions confidential, which the court reasoned was distinguishable and different from a privilege.

“This distinction between evidentiary privilege and confidentiality helps clarify the issue in the present case. Although ‘confidentiality’ and ‘privilege’ are often used interchangeably in discussions of mediation, the terms refer to two distinct concepts. . . . ‘Confidentiality’ refers to a duty to keep information secret, while ‘privilege’ refers to protection of information from compelled disclosure. . . . Communications are confidential when the freedom of the parties to disclose them voluntarily is limited; they are privileged when the ability of third parties to compel disclosure of them, or testimony regarding

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67 Id. at * 8 (“the contours of such a federal privilege [will have] to be fleshed out over time”).
68 Id.
69 Id. at *11.
70 Id. at *10-11.
them, is limited. . . . Distinguishing between these concepts in the mediation context is sometimes difficult because the relationship between the parties to a mediation is different than the type of fiduciary relationship that typically gives rise to an evidentiary privilege or duty of confidentiality. . . .”71

The court in *Molina* determined that although Lexmark’s had argued “mediation privilege,” it was really seeking to invoke a “duty of confidentiality” to prevent other parties to the mediation from disclosing mediation communications voluntarily.72 Because of the distinction between a privilege and a duty of confidentiality, the court reasoned that Rule 408 of the Federal Rules of Evidence provided a better reference point for analyzing Lexmark’s confidentiality claim than did *Folb*. Similar to the general discussion contained in Section 4(A), the court ruled that Rule 408 does not make settlement offers inadmissible in the removal context for purposes of establishing evidence of the amount in controversy and, in this case, the date such information first was communicated to defendant. In so ruling, the court noted that “parties to a mediation generally have a duty to keep their discussions confidential,” but concluded that this duty does not prevent use of mediation discussions for the limited purpose of establishing the amount in controversy for purposes of determining whether federal court jurisdiction properly exists.

“[U]se of settlement offers as evidence of the amount in controversy has not hindered Rule 408’s goal of encouraging open and honest discussion during negotiation. This makes sense; concern that one’s adversary will use statements


72 Id. at *11.
during negotiation as proof of liability or wrongdoing, not concern that it will use
them as proof of the amount is controversy, is the primary obstacle to forthright
negotiation discussions.”\textsuperscript{73}

\textbf{(3) Ninth Circuit Decisions Which Have Avoided the Issue}

On at least three occasions, the Ninth Circuit has had the opportunity to say something
definitive about whether a federal mediation privilege will be recognized in this circuit.\textsuperscript{74} In both cases it has avoided the issue! In \textit{Dusek}, a 2005 decision, the issue concerned the propriety of the Magistrate Judge’s orders quashing notices of depositions and subpoenas aimed at discovery regarding settlement negotiations in related class actions that were settled. The Ninth Circuit found that because the appealing party failed to make the requisite foundational showing that class counsel in the settled matters had an actual or potential conflict of interest, it “need not address whether the Ninth Circuit should recognize a federal mediation privilege and, if so, whether it applies here.”\textsuperscript{75}

In \textit{Lenscrafters}, a 2007 decision, the issue was more squarely raised. In this case, counsel for the plaintiff class sent a letter to counsel for the employer in preparation for an upcoming mediation. The mediation did not end in a settlement. The employer then removed the action to federal court and the plaintiff class filed a motion for remand to the state court. The issue was whether the settlement letter was sufficient to put the employer on notice that

\begin{itemize}
  \item \textsuperscript{73} Id. at *13.
  \item \textsuperscript{74} See, \textit{Dusek v. Mattel, Inc.}, 141 Fed. Appx. 586 (9\textsuperscript{th} Cir. 2005) (“\textit{Dusek}”); \textit{Lenscrafters}, supra, 498 F.3d 972; \textit{Facebook}, supra, 640 F.3d 1034.
  \item \textsuperscript{75} 141 Fed. Appx. at 588.
\end{itemize}
the amount in controversy exceeded federal class action diversity jurisdiction requirements so as to support removal from state to federal court and start the 30-day clock running with respect to the time within which the employer could file a notice of removal. In opposing the remand motion filed by the plaintiff class, the employer objected to the settlement letter as evidence of notice, arguing that it was privileged under Evidence Code Section 1119. The Ninth Circuit avoided the issue of the applicability of California’s mediation protections by finding that federal law governs the determination of whether a case exceeds the amount in controversy necessary for a diversity action to proceed in federal court and, as such, federal privilege law (not State law) applied.\(^{76}\) As to the existence of any federal mediation privilege, the Ninth Circuit found that the employer had waived that argument because it failed to raise that argument before the district court or in its appeal briefs.\(^ {77}\)

In *Facebook*, a 2011 decision, The Facebook, Inc. sought to enforce a settlement reached during a private mediation with ConnectU (an entity owned by the Winklevoss twins). The Winklevosses sought to avoid enforcement of the settlement agreement between ConnectU and Facebook on the grounds that Facebook had misled them about the value of its shares which were given in an exchange whereby Facebook acquired all of ConnectU’s shares. In support of their action to rescind the settlement, the Winklevosses proffered evidence of what was said and not said during the mediation. The District Court for the Northern District of California excluded this evidence under its local rule that protected such communications as “confidential information,” which the court read as creating a “privilege” for “evidence

\(^{76}\) 498 F.3d at 974-975.

\(^{77}\) 498 F.3d at 975, n. 1.
regarding the details of the parties’ negotiations in their mediation. While the Ninth Circuit found that the District Court’s reason for excluding the evidence was wrong, it concluded that the court was nevertheless correct in excluding the proffered evidence because the parties had engaged a private mediator and had signed an express, written confidentiality agreement before the mediation commenced. Accordingly, the Ninth Circuit held that the Confidentiality Agreement signed by the Winklevosses precluded them from introducing any evidence of what Facebook said or did not say during the mediation.” 78 It is important to note that while the Ninth Circuit held that privileges are created by federal common law and cannot be augmented by local court rule, it also recognized that “[a] local rule, like any court order, can impose a duty of confidentiality as to any aspect of litigation, including mediation.” 79

The bottom line is that there is nothing in Rule 501 that recognizes a federal mediation privilege. That being said, there is nothing in Rule 501 that specifically recognizes any privilege. 80 Privileges are matters for the federal courts to define based upon considerations of public policy and may change over time. Whether a privilege should exist is determined by asking whether the need for the privilege is clear and whether the contours of the privilege are evident so that it is appropriate for the courts to craft it in common law fashion. 81 As the district court noted in Folb, in addition to the theoretical underpinnings of the mediation

78 640 F.3d at 1041.

79 Id.

80 As the discussed in Folb, Congress manifested an affirmative intention not to freeze the law of privilege and to provide the courts with the flexibility to develop rules of privilege on a case-by-case basis and leave the door open to change. 16 F.Supp. 2d at 1170-1171, citing Trammel v. United States, 445 U.S. 40, 47 (1980).

process and the long recognized policy of favoring and encouraging settlement, in assessing a proposed privilege, a federal court should examine whether a consistent body of state law exists adopting/recognizing a privilege. With regard to mediation, the district court noted that “every state in the Union, with the exception of Delaware, has adopted a mediation privilege of one type or another.”\textsuperscript{82} It would thus appear that a federal mediation privilege of some sort will eventually be recognized. However, as matters stand today, that protection does not exist.

(3) \textit{Olam Decision-1999}\textsuperscript{83}

In 1999, one year after Judge Paez’s decision in \textit{Folb}, Judge Brazil for the Northern District of California rendered an important decision on mediation confidentiality that has added to the confusion in this area. In \textit{Olam}, a borrower sued her lender for alleged violation of the Truth in Lending Act, in addition to asserting other federal and state law claims. A mediation was conducted as part of the court’s ADR program before a member of the court’s staff. A settlement was reached and the parties signed a memorandum of understanding which summarized the terms of settlement. Thereafter, the parties attempted to memorialize the agreement in the form of a formal settlement agreement and request for dismissal of the lawsuit. Those efforts failed. Defendant then filed a motion seeking to enforce the original settlement as set forth in the memorandum of understanding and to enter judgment thereon. Plaintiff opposed the motion on two grounds: the first, that the memorandum of understanding was unconscionable; the second, that she was subjected to undue influence and coercion in the manner in which the mediation was conducted. In support of this latter

\textsuperscript{82} 16 F.Supp. 2d at 1179.

\textsuperscript{83} 68 F.Supp. 2d 1110 (N.D.Cal. 1999) (“\textit{Olam}”).
objection, plaintiff alleged that she was left alone in a room all day and into the early hours of
the following day, while all of the mediation participants conversed in a nearby room. She
further claimed that she did not understand the mediation process; that she felt pressured to
sign the memorandum of understanding; that her physical and emotional distress rendered her
unduly susceptible to being pressured; and that she signed the memorandum of understanding
against her will and without reading or understanding its terms.

Defendants raised the issue of mediation confidentiality, which prompted Judge Brazil
to first analyze whether that issue was to be decided as a matter of federal or state law. Judge
Brazil concluded that California rule applied because the civil proceeding before the court was
defendants’ motion to enforce the settlement agreement. In such a proceeding, the court
reasoned, the only issue was whether an enforceable contract existed and that one substantive
question must be decided by state law because there is no general federal law of contracts.84
While the court concluded that California law concerning mediation confidentiality governed
whether, and to what extent, communications and conduct occurring during the mediation
were protected from disclosure or subsequent evidentiary use, it also held that it was not
subject to a “procedural straight jacket” and was thus free to define its own procedure for
applying California law so long as the court’s procedure caused “no greater harm to substantive
privilege interests than California courts would be prepared to cause.”85

Judge Brazil spent a great deal of time reviewing California’s mediation statutes,
including the “mediator’s privilege” against giving testimony provided by Evidence Code Section

84 68 F.Supp. 2d at 1121.
85 68 F.Supp. 2d at 1126.
703.5 and the broad mediation confidentiality protections provided by Evidence Code Section 1119. However, after this review, Judge Brazil concluded that the court could compel the mediator to testify because that was the most reliable evidence since the testimony of plaintiff and defendant was conflicting. Judge Brazil also reasoned that the fact that the parties and their attorneys signed a memorandum of understanding at the end of the mediation permitted California courts (and thus him) to consider, in the context of a hearing to determine enforceability, whether to admit evidence about what was said and done during the mediation itself. In determining whether, under California law, the district court should compel the mediator to testify, despite the statutory prohibitions set forth in the aforementioned Evidence Code Sections, Judge Brazil relied on the 1998 court of appeal decision in Rinaker v. Superior Court as standing for the broad proposition that a mediator can be required to submit to in camera examination by a judge and can be compelled to testify if, after in camera consideration of what the mediator’s testimony would be, the trial judge determines that the mediator’s testimony “might well promote significantly the public interest in preventing perjury and the defendant’s fundamental right to a fair judicial process.”

While the trial court in Rinaker did require the mediator to testify, the factual context of that case was unique and some would argue that the holding was limited to those special fact circumstances. In Rinaker, juveniles were charged with committing vandalism – a crime that could result in incarceration in a juvenile facility (and thus denial of liberty). The victim filed a

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86 68 F.Supp. 2d at 1131. Judge Brazil placed great significance on the written memorandum and stated that “[i]f there were no signed writing, and the alleged contract was oral, California law would not permit courts to use evidence from the mediation itself to determine whether an enforceable agreement had been reached.” Id.

civil harassment action and a mediation was conducted in that matter. During the mediation, the victim admitted that he had not actually seen who threw the rocks at his car. However, at trial in the criminal matter, the victim testified to the contrary during direct exam. The minors then sought to compel the mediator’s testimony to impeach the victim’s testimony in the delinquency proceedings. The trial court denied the juvenile’s motion to compel the mediator’s testimony. Court of Appeal reversed, holding that the confidentiality provisions of Evidence Code Section 1119 must yield when necessary to ensure the minors’ constitutional right to effective cross-examination and impeachment of an adverse witness in a juvenile delinquency proceeding. The court reasoned that neither the witness nor the mediator had a reasonable expectation of privacy in inconsistent statements made during the mediation because it has long been established that, when balanced against the competing goals of preventing perjury and preserving the integrity of the truth-seeking process of a juvenile delinquency proceeding, the interest in promoting settlements must yield to the minors’ constitution right to effective impeachment.

At the time Olam was decided, the California Supreme Court precedent discussed above did not exist. That precedent clearly states that it is not for the courts to craft judicial exceptions to the broad confidentiality protections which have been provided by statute. Essentially what Judge Brazil did was craft a judicial exception. One can only wonder if Judge Brazil would have decided this case differently in the face of the Foxgate, Rojas, Simmons and Cassel decisions if presented with the Olam facts today.
5. **Concluding Thoughts re Mediation Confidentiality**

There are several noteworthy “take aways” from the foregoing comparison of the confidentiality protections available to California litigants. The first one is that the California state court decisions have thus far made no attempt to suggest that a mediation convened pursuant to a court order is somehow different from a mediation convened voluntarily by private agreement. The focus has been on the substantive aspects of the process, not the label given to the process, for purposes of determining what qualifies as a “mediation” for purposes of the confidentiality protections afforded by the California Evidence Code provisions discussed above. As discussed above, the courts in the *Folb*, *Molina* and *Facebook* decisions all made special note of the mediations at issue in those cases having been convened before a private mediator and pursuant to an agreement to mediate. Additionally, as noted in footnote 61, several courts have declined to treat a facilitated settlement effort as a mediation where it was not a “formal mediation” convened before a private mediator pursuant to a written agreement.

A second “take away” is that while California’s confidentiality protections have been stated in the form of an evidence exclusion provision, the California courts’ have construed those provisions more like a privilege held by all participants that operates as a bar to compelled disclosure or compelled testimony without everyone’s consent. While the *Folb* and *Molina* decisions contained an acknowledgment that confidentiality is an important and integral part of the mediation process, in neither case was the court willing to stake out a general rule for broad application. Instead, both decisions pretty much said that whether and when and to what degree confidentiality protection is available depends on the facts of the case.
A third “take away” is the apparent difference in orientation about the perceived relationship between the mediation and litigation proceedings when the dispute involves a litigated dispute. The state courts take a hands-off approach: What happens in mediation, stays in mediation. The federal courts, on the other hands, cannot let go even when the mediation has ended successfully in a settlement. In the Facebook case, where a settlement was achieved through a mediation, the Ninth Circuit had an opportunity to find a basic duty of confidentiality imposed upon participants in mediation based upon the Northern District’s Local Rule regarding confidentiality protections afforded parties who tried to resolve their disputes through alternative dispute resolution. Instead, the Ninth Circuit chose to respect confidentiality as a matter of private contract because the parties had signed a written confidentiality agreement in connection with their agreement to mediate.

A final “take away” is that while confidentiality is theoretically an essential component of mediation, it would be an overstatement for a mediator in a federal court matter to represent to the parties or their counsel or other participants that their mediation communications, mediation briefs or materials developed for use at the mediation have any certain or predictable level of confidentiality protection even with a generous Local Rule. What this means in practice is more caucus and less willingness to work in joint session. It also encourages more formality by suggesting to participants that they negotiate, draft and enter into a confidentiality agreement so as to perhaps qualify for mediation confidentiality since the Facebook decision respected the parties’ confidentiality agreement in that case.