Supplement to the Los Angeles and San Francisco

Daily Journal

MAY 1, 2024

THE RESOLUTION ISSUE 2024

COLUMN

Mediator confidentiality: When does it end?

BY ANGELA REDDOCK-WRIGHT

Angela Reddock-Wright *is a neutral with Signature Resolution. Prior to taking on the role of a mediator, she served as an employment and labor law litigator and workplace and Title IX investigator. She can be reached at areddock-wright@signatureresolution.com.*

When parties to a legal dispute choose to mediate their issues, they do it for many reasons – expediency, certainty of results, and ability to control the outcome – but one of the key selling points for mediating a dispute is that all negotiations and any final settlement agreement will remain confidential. Evidence Code Section 1119 mandates that, whether a dispute is formally resolved at the mediation, or the parties reach an impasse, "[a]ll communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential."

Under Rule 3.854 of the California Rules of Court, all mediators, at the very beginning of each process, are required to "provide the participants with a general explanation of the confidentiality of mediation proceedings." They must treat with care separate communications they have with the parties, and only with a party's consent may they share information that is communicated to them by that party with the other side. Only with the consent of both parties may the terms of any settlement agreement be shared with third parties. "A mediator must not use information that is acquired in confidence in the course of a mediation outside the mediation or for personal gain."

Confidentiality is absolutely critical to the successful conclusion of mediation proceedings, but it is also important when no conclusion has been reached. For this reason, Evidence Code Section 1126 provides that "Anything said, any admission made, or any writing that is inadmissible, protected from disclosure, and confidential under this chapter before a mediation ends, shall remain inadmissible, protected from disclosure, and confidential to the same extent after the mediation ends."

But when does mediation actually end? According to Evidence Code Section 1125, mediation can end in one of several ways. The parties can enter a final settlement agreement orally or in writing, the mediator or any party can provide a signed statement that the mediation is terminated, or all communications between parties and the mediator can cease for 10 calendar days or some other period upon which the parties have agreed.

Assuming that no communications have occurred for 10 days, therefore, the mediation should have terminated, and with it any ongoing obligation of mediation confidentiality. But what happens if a party to that mediation later communicates with the mediator regarding the dispute? Is that communication confidential? Must the mediator notify the other party, and does the mediation now reopen?

When a communication occurs after the parties have ostensibly ended their mediation, the mediator is, technically, not bound by an obligation of mediation confidentiality. Confidentiality applies to all communications that occurred during the course of the mediation, but it stops when the mediation stops.

This does not, however, mean that mediators can do whatever they want with these new communications. Although the confidentiality obligation ends once a mediation has concluded, any new communication might signal an intent by one or more parties to restart the mediation process. If this is the case, all such communications should be considered confidential.

This is not a mere hypothetical. Over my years serving as a mediator of employment disputes, I have been contacted after the conclusion of the process by parties whose matters were not resolved during the mediation. Even if that contact occurred after the 10-day window, I have taken care to listen to their concerns and to handle their information appropriately and in continued confidence. This might include notifying the other party that I have been contacted, without disclosing the content of the communication received from the party that contacted me.

The reopening of settlement negotiations after a mediation process has officially terminated should bind the parties once more to confidentiality under Evidence Code Section 1119, especially if the same mediator will be re-engaged for subsequent settlement negotiations.

To ensure that all parties are on the same page with respect to confidentiality, counsel for the parties should, pursuant to Evidence Code Section 1129, provide their clients with disclosure forms regarding mediation confidentiality. Additionally, the mediator may also ask all parties to express in writing their intent that all new negotiations be subject to confidentiality.

CONCLUSION

Even when mediation has "officially" ended, the mediation confidentiality obligation may still need to remain in force. Counsel should, therefore, advise clients regarding the confidentiality rules and take appropriate steps to protect any future communications with the mediator, as well as with other parties. Once the barn door is open, it can be difficult – if not impossible – to recapture those wild horses.

Reprinted with permission from the *Daily Journal*. ©2024 Daily Journal Corporation. All rights reserved. Reprinted by ReprintPros 949-702-5390.