

CONFIDENTIAL MEANS CONFIDENTIAL

In matters within the jurisdiction of California state courts, mediated in accordance with California law, confidential means confidential.

California mediation confidentiality is defined by contract law, statutory law, and common law.

Contract law, because most mediators require parties, their attorneys and others in mediation to sign an agreement before mediation commences that includes words to the effect that:

“All statements made in preparation of or during the course of this mediation are privileged settlement discussions, are made without prejudice to any party's legal position, and are undiscoverable and inadmissible for any purpose in any legal, administrative, or other proceeding.”

Statutory law, because section 1119 of the California Evidence Code states that:

“Except as otherwise provided in this chapter:

(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 arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.

(b) No writing, as defined in Section 250, that is prepared 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 writing shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding 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.”

(See also Evidence Code Sections 1115 -1128.)

And common law, because California appellate courts have held that the California Evidence Code means what it says.

Foxgate Homeowners' Association, Inc. vs. Bramalea California, Inc. (2001) 26 Cal.4th 1, and Genoveva Rojas vs. Superior Court (2004) 33 Cal.4th 407, for example, are both early California Supreme Court opinions supporting the Legislature's definition of mediation confidentiality. In the words of the court:

“One of the fundamental ways the Legislature has sought to encourage mediation is by enacting several mediation confidentiality provisions. (Foxgate at 14.) As we have explained, confidentiality is essential to effective mediation because it promotes a candid and informal exchange regarding events in the past. This frank exchange is achieved only if participants know that what is said in the mediation will not be used to their detriment through later court proceedings and other adjudicatory processes. To 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. (Foxgate at 15.)”

Rojas 33 Cal.4th at 415-416 (internal quotation marks omitted).

There are, however, and will continue to be, efforts to define, or redefine, or construe, or limit mediation confidentiality. In the recent case of William Wimsatt vs. Superior Court (2007) 152 Cal.App.4th 137, the Court of Appeal upheld the broad standards of mediation confidentiality enacted by the California Legislature and protected by the California Supreme Court even though doing so, the court believed, may have prevented a party to the mediation from pursuing a legal malpractice lawsuit against his own attorneys. Accordingly, the Wimsatt opinion includes this comment by the Court of Appeal:

“Given the number of cases in which the fair and equitable administration of justice has been thwarted, perhaps it is time for the legislature to reconsider California's broad and expansive mediation confidentiality statutes and to craft ones that would permit countervailing public policies be considered.”

Wimsatt 152 Cal.App.4th at 164.

Until that day comes, or until the California Supreme Court permits the crafting of judicial exceptions to California's statutory mediation confidentiality scheme, confidential means confidential.

(I commend to you the fine article by attorney Michael Young entitled "Mediation Gone Wild" chronicling the consequences of breaching mediation confidentiality in another jurisdiction, available [here](#).)

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