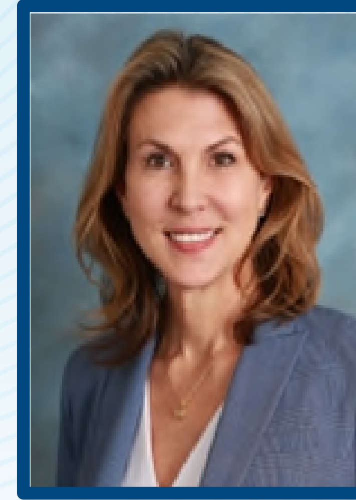
GRSM Women in Construction *Tuesday Talks*

Can You Keep a Secret – Construction Mediations: What is Confidential & Settlement Privileged?

Lisa M. Cappelluti
Meredith L. Thielbahr
Sarah Burke, Burke Alternative Dispute Resolution

Agenda/What We Will Cover

- What is the mediation privilege and what are exceptions to its general rule?
- Can offers of compromise be used against you in court proceeding or arbitration?
- Experts' roles at meditation and privileges extending to expert reports and opinions
- Non-disclosure agreements between the parties – protecting confidential information and encouraging ADR
- Mediations in today's world: use of video mediations post-COVID 19
- California and Washington States



Meredith L. Thielbahr is the Managing Partner of the Idaho and Spokane, Washington offices of GRSM and the Co-Chair of the Firm's National Government Contracts practice group. Ms. Thielbahr represents construction industry and government contract clients in both the commercial and public contracting arena. *Law360* honored her as one of the "Top 40 Under 40" attorneys in the Country in the field of Government Contracts (2023). Ms. Thielbahr has been selected a *Super Lawyers®* "Rising Star" in both Government Contracts and Construction Litigation consecutively each year. She is a Construction Lawyers Society of America Fellow. Ms. Thielbahr is licensed in Washington, Idaho, Oregon, Alaska and the District of Columbia.

Lisa M. Cappelluti is a partner at the San Francisco office of GRSM 50 and has been involved in construction law matters for over a decade. Ms. Cappelluti has also been recognized as a *Super Lawyers®* distinction in the field of Construction Litigation: Business (2016-2023). Currently, Ms. Cappelluti is involved with the State Bar of California Litigation Section as an Executive Committee Member (2005 to present) and was previously the Chair of the Committee in 2013.

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Sarah Burke is a mediator, discovery referee, special master and arbitrator practicing in Northern California. She brings firm and fair leadership as a Special Master and Discovery Referee and also has mediated personal injury, wrongful death cases, insurance coverage disagreements, employment, and landlord/tenant, subrogation, copyright, contract and myriad other disputes. Ms. Burke is a member of the Approved ADR Panels of all Northern California counties. Ms. Burke is the current Present of the Board of Directors of the Mediation Society and is a past Chair or the Marin County Bar Association ADR Section and the Alameda County Bar Associate ADR Section Executive Committee. Before becoming a mediator and special master, Ms. Burke represented developers, owners, contractors, subcontractors and suppliers in all types of construction litigation.

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Evidence Code & Statute Protections

Statements in Mediation

California Evidence Code – Mediation Privilege

- The California Evidence Code outlines the scope of the mediation privilege.
- Evidence Code, § 1119 – applies mediation privilege to written or oral communications during mediation, subject to exceptions.
- "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" Subsection (a).
- Also applies to writings. Subsection (b). Writings include expert reports. (*Cassel v. Superior Court* (2011) 51 Cal.4th 113, 125.)
- And "communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation" Subsection (c).

Statements in Mediation

California Evidence Code, § 1120 – Exceptions to Mediation Privilege

- Introducing material into mediation does not automatically make it privileged.
- "Evidence otherwise admissible or subject to discovery outside of a mediation or a mediation consultation shall not be or become inadmissible or protected from disclosure solely by reason of its introduction or use in a mediation or a mediation consultation." Subsection (a).
- The mere fact of an agreement to mediate and agreements not to take a default are not subject to mediation privilege. Subsection (b).
- Consider due process exceptions as well: For example, in *Rinaker v. Superior Court* (1998) 62 Cal.App.4th 155, due process outweighed mediation confidentiality. *Rinaker* held the **testimony of a mediator** regarding inconsistent statements of a witness during mediation could be compelled to protect the constitutional right of confrontation and impeachment of juveniles.

Statements in Mediation

Overview of California Evidence Code – Mediation Privilege

- Evidence Code, § 1121 - Mediator's reports and findings are not admissible in court unless parties agree otherwise.
- Evidence Code, § 1122 – Provides that parties may expressly agree in writing to waive mediation privilege if specified procedure is followed.
- Evidence Code, § 1123 – Written settlement agreements are not inadmissible if the agreement so provides that it is admissible, enforceable and binding, all parties agree, or the agreement is used to show fraud, duress, or illegality.
- Evidence Code, § 1124 – Conditions for Admissibility of Oral Agreements During Mediation.
- Evidence Code, § 1126 – Mediation Privilege continues after mediation ends: "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."
- Evidence Code, § 1129 – Provides that attorney must inform represented party of mediation confidentiality prior to mediation, and obtain a printed acknowledgement from client.

MEDIATOR'S RESPONSIBILITY – CALIFORNIA RULES OF COURT, RULE 3.854

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- **(a) Compliance with confidentiality law**
  - A mediator must, at all times, comply with the applicable law concerning confidentiality.
- **(b) Informing participants of confidentiality**
  - At or before the outset of the first mediation session, a mediator must provide the participants with a general explanation of the confidentiality of mediation proceedings.
- **(c) Confidentiality of separate communications; caucuses**
  - If […] a mediator speaks separately with one or more participants out of the presence of the other participants, the mediator must first discuss with all participants the mediator's practice regarding confidentiality for separate communications with the participants. Except as required by law, a mediator must not disclose information revealed in confidence during such separate communications unless authorized to do so by the participant or participants who revealed the information.
- **(d) Use of confidential information**
  - A mediator must not use information that is acquired in confidence in the course of a mediation outside the mediation or for personal gain.

LAWYERS DUTY OF CONFIDENTIALITY TO CLIENT IN THE CONTEXT OF MEDIATION

- Distinct from the evidence code, lawyers should also consider their ethical duty of confidentiality to their clients under their jurisdiction's rules of professional conduct, in setting fourth their mediation position.
  - Confidentiality is a key attribute of the mediation process which promotes candor and full disclosure. Information generated during mediation is generally subject to confidentiality and inadmissible.
  - Nevertheless, consult carefully with the client regarding their goals for mediation and potential risks. As always, *obtain the appropriate consent from the client*.
  - Lawyers should also know that the mediation privilege is not ironclad. As discussed, there are exceptions that lawyers must keep in mind.

Statements in Mediation - Washington

- Washington's Uniform Mediation Act, codified at Chapter 7.07 RCW
- RCW 7.07.030 provides that mediation communications are generally privileged, not subject to discovery, and inadmissible as evidence in a later proceeding.

What is a "Mediation Communication"?

- "Mediation Communication" means a statement, **whether oral or in a record or verbal or nonverbal**, that occurs during a mediation or is made for purposes of considering, conducting, participating in, initiating, continuing, or reconvening a mediation or retaining a mediator. *See* RCW 7.07.010(2).

- Types of Mediation Communications:
  - Public/Universal Statements – Shared with all parties
  - Private Statements – only shared with the mediator
  - Attachments/Exhibits to Mediation Statements protected from disclosure?
    - » No, if the evidence or information is otherwise admissible or subject to discovery, not admissible or protected from discovery solely by reasons of its disclosure or use in mediation. *See* RCW 7.07.030(3).

Exceptions to Mediation Privilege – Washington

- RCW 7.07.050(1)(e) – There is no privilege for a mediation communication that is sought (discoverable) or offered to prove (as evidence) a claim or complaint of professional misconduct or malpractice filed against a mediator.
- RCW 7.07.050(1)(f) – There is no privilege for a mediation communication that is sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediation party, nonparty participate, or representative of a party based on conduct occurring during a mediation.
- Mediation privilege does not apply if the parties agree in advance in a signed record, or a record of proceedings reflects agreement by the parties, that all or part of a mediation is not privileged. Actual notice of the party against whom the privilege is being enforced is required. *See* RCW 7.07.020(3).
- If, after a hearing in camera, the party seeking discovery or the proponent of the evidence can show that the evidence is not otherwise available, that there is a need for the evidence that substantially outweighs the interest in protecting confidentiality, and that the mediation communication is sought or offered in: (1) a criminal court proceeding involving a felony or (2) a proceeding to provide a claim to rescind or reform or a defense to avoid liability on a contract arising out of the mediation.
  - Only that portion of the mediation communication necessary for application of the exception from nondisclosure may be admitted. *See* RCW 7.07.050.

Can Offers to Compromise Be Used Against You?

California

- Evidence Code, § 1152:
  - "**Evidence** that a person has, in compromise or from humanitarian motives, furnished or offered or promised to furnish money or any other thing, act, or service to another who has sustained or will sustain or claims that he or she has sustained or will sustain loss or damage, as well as any conduct or statements made in negotiation thereof, is inadmissible to prove his or her liability for the loss or damage or any part of it." Subsection (a)
    - » Rule only relates to *admissibility*, not discovery of settlement negotiations. *See, Volkswagen of America, Inc. v. Superior Court*, 139 Cal. App. 4th 1481, 1494 (2006) [holding that settlement negotiations are not *per se* undiscoverable].
    - » § 1152(b) & (c) also provide express exceptions:
      - "Partial satisfaction of an asserted claim or demand without questioning its validity when such evidence is offered to prove the validity of the claim."
      - "A debtor's payment or promise to pay […] debt when such evidence is offered to prove the creation of a new duty on his or her part or a revival of his or her preexisting duty."

Washington

- Under Washington's evidence rules, an offer to compromise is not admissible in court.
- Evidence Rules of Procedure 408:
  - In a civil case, evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, **is not admissible to prove liability for or invalidity of the claim or its amount**. Evidence of **conduct or statements made in compromise negotiations is likewise not admissible**. **This rule does not require exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations**. This rule also **does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation** or prosecution.

Washington – ER 408

- In order for ER 408 to apply, there must be a dispute. Clearly, the filing of a lawsuit is a "dispute". Under ER 408, statements made in the context of negotiations prior to the initiation of litigation are admissible unless there was an actual dispute at the time or hints at the potential of future litigation.
- There is no bright line as to when a claim is "disputed" or at what point discussions become "compromise negotiations."
- What about a triggering event such as a pre-litigation demand letter? Are mere business communications sufficient?
- Courts look at the intent of the parties and objective characteristics of the discussions.
- Key to determine admissibility is when the dispute arose. *Buchanan v. Gray*, No. 75150-6-I (Washington Court of Appeals, Division I, Aug. 14, 2017) (unpublished).
- ER 408 does not prevent admissibility of offers to compromise to show bad faith.
- Rule contains express exceptions.
  - Bias or prejudice of a witness
  - Negating a contention of undue delay

Are Expert Reports or Opinions Protected?

California

- Are expert Opinions/Reports protected when used in mediation? It depends….
  - First, what "writings" are protected by Evidence Code, Section 1119?
    - "charts, diagrams, information compilations, **expert reports**, photographs of physical conditions, recordings or transcriptions of witness statements, and written or recorded analyses of physical evidence." *Cassel v. Superior Court* (2011) 51 Cal.4th 113, 125, citations omitted.
  - Was the report "made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation"?
    - Then it will be protected.
  - If the expert report was created with the intent to use it later in litigation, it may discoverable. Recall, an attorney is not able to turn a discovery documents and/or communication into a confidential communication, simply by using it in mediation.
    - Counsel should assess the application the work-product doctrine to protecting this work.
      - "[A]n expert's opinion regarding the subject matter about which the expert is a prospective testifying expert is discoverable, but the expert's advice rendered to the attorney in an advisory capacity is still subject to conditional work product protection." *DeLuca v. State Fish Co., Inc.* (2013) 217 Cal.App.4th 671, 690.

Washington

- Are expert Opinions/Reports protected when used in mediation? It depends….
  - First, we need to look at the purpose for which the report created?
    - Was this report created solely for mediation? Then, yes, it will be protected.
    - If the expert report was created with the intent to use it later in litigation, it is discoverable. Recall, an attorney is not able to turn a discoverable document or communication into a confidential communication simply by using it in mediation.
  - Draft expert opinions? Subject to testifying expert work product protections and are not discoverable, and therefore protected at mediation if marked confidential/for settlement purposes only.
  - Non-testifying expert – retained likely for the purpose of settlement/resolution, will likely be protected.
  - What about attorney providing written factual summaries to testifying experts for their use or consideration in formulating expert opinions? CR 26 requires disclosure of these facts; there is an argument that the attorney work product privilege is waived when the attorney intentionally submits the factual materials to the testifying expert.

Protection of Litigation Documents

- Tools that can be used to protect your documents and confidentiality during litigation
  - Stipulated Protective Order
  - Clawback Agreements – governs how parties can “clawback” documents inadvertently disclosed or not endorsed
  - Confidentiality Agreements
- CR 2A Agreement – an agreement utilized during mediation to memorialize a settlement reached during the mediation proceeding. Once signed, it binds the parties. A CR 2A is not binding can be used later in court.
- TIPS:
  - Always include meet and confer requirement in protective orders and clawbacks
  - Include dispute resolution provisions in confidentiality agreements
  - Expressly agree to and define what is confidential or protected, and what is not. For example, 1. Financial information, 2. Proprietary information, and 3. Trade Secrets
  - Construction Context: bids/pricing information is always deemed Confidential/For Use in Litigation Only

Remedy For Publication of Protected Information

General Suggestions / Best Practices

- The first step that you can take is to outline the consequences for disclosure of the protected information in your chosen NDA.
- Insert a provision that incorporates the sanctions rules for your jurisdiction or a fine, assuming the disclosing party does not attempt to remedy the disclosure.
- What if you are the party that accidentally shared another party's confidential information?
  - Immediately inform the affected party and outline how it is being remedied
  - If sent via email – ask that the email be disregarded.
  - What if the confidential information is filed????
    - » Retract the filing if possible. Call the clerk and ask that the document not be put on the docket. Explain that it was an inadvertent filing.
- What if you shared your own privileged information with the opposing party?
  - Make sure you are familiar with the Rules of Professional Conduct in your jurisdiction. Most RPC's outline a duty of confidentiality to client, but also provide guidance as to how you may remedy your inadvertent disclosures. Note, if you are an attorney who received privileged information and are put on notice, you cannot automatically keep the information and use it. Again, review the comments of your RPC for additional guidance in your jurisdiction.

Zoom Mediations: To Agree or Not Agree

- Pros
  - Lower cost – no airfare, no lodging, time away from business operations
  - Eliminates geographical barriers
  - Increased participation from clients and carriers
  - May encourage ADR for contentious matters
  - Allows for 1st and 2nd round of ADR?
- Cons
  - Less non-verbal communication; demeanor of parties
  - Less commitment; are you taking this seriously? Consider whether you will be paying $ or the other party(ies) payors
  - Technical issues; consider your mediator and party representatives that will be participating

Questions?

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