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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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I. 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,² a certain amount of skepticism and concern exists regarding the scope of protection that actually exists.³ The uncertainty about the nature

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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 had served as a mediator in the litigated matter); *McKenzie Constr. v. St. Croix Storage Corp.*, 961 F. Supp. 857 (D.V.I. 1997).

2. See *infra* Part III.

3. See *infra* notes 5-6 and accompanying text.

and extent of what confidentiality protections exist for things said in mediation is especially apparent in federal court litigation disputes.⁴ 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 still considerable uncertainty about the extent to which communications made during the process of mediating a dispute are protected from disclosure in subsequent legal proceedings.”⁵ 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.”⁶

As discussed below, 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 of California decisions endorse those protections, no similar protections are available under federal law.⁷ Therefore, the confidentiality protections afforded California litigants with respect to communications had in mediation may depend on whether litigation is pending or ultimately filed in state or federal court. Because mediation is a *nonjudicial* alternative to litigation in the courts, the question posed by this article is: Why should mediation confidentiality depend upon (a) whether the dispute has escalated to the point of litigation, and (b) whether that litigation is pending in state or federal court?⁸

II. 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

4. See *infra* Part IV; see also DWIGHT GOLANN, *MEDIATING LEGAL DISPUTES* 218-220 (2009); Dennis Sharp, *The Many Faces of Mediation Confidentiality*, in *HANDBOOK ON MEDIATION* 223-236 (2d ed. 2010).

5. See Kenneth R. Feinberg, *Mediation—A Preferred Method of Dispute Resolution*, 16 PEPP. L. REV. S5, 28 (1989); Note, *Protecting Confidentiality in Mediation*, 98 HARV. L. REV. 441, 446-47 (1984); see also Lawrence R. Freedman & Michael L. Pigroff, *Confidentiality in Mediation: The Need for Protection*, 2 OHIO ST. J. ON DISP. RESOL. 37 (1986).

6. Ellen E. Deason, *Predictable Mediation Confidentiality in the U.S. Federal System*, 17 OHIO ST. J. DISP. RESOL. 239, 241 (2002).

7. See *infra* Part IV.

8. See discussion *infra* Part III (California statutory law makes communications in mediation inadmissible as evidence in any legal proceeding); Part IV (no similar counterpart exists under federal law). Therefore, a California litigant bears the risk that statements made or writings prepared during mediation of a state court dispute may become admissible as evidence in a subsequent or related federal court action.

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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.”⁹ Some have said that confidentiality is vital to mediation because compromised 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.”¹⁰ 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.¹¹ Because mediation is nonbinding and can only result in a settlement if and to the extent that the disputants agree to a negotiated resolution, parties have legitimate reasons for being concerned that statements made in an effort to resolve a dispute might be used against them should a full settlement not be achieved.¹²

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 mediator being tasked with the job of facilitating constructive dialogue between or among disputants.¹³ The willingness of the

9. Alan Kirtley, *The Mediation Privilege's Transition from Theory to Implementation: Designing a Mediation Privilege Standard to Protect Mediation Participants, the Process, and the Public*, 1995 J. DISP. RESOL. 1, 6 (1995); see also JAMES J. ALFINI ET AL., *MEDIATION THEORY AND PRACTICE* 205 (2d ed. 2006) (“Confidentiality is generally considered to be an essential ingredient in mediation.”); Sharp, *supra* note 4, at 223 (“Confidentiality is one of the keys to the acceptability and success of mediation among parties to a dispute.”).

10. Michael L. Prigoff, *Toward Candor or Chaos: The Case of Confidentiality in Mediation*, 12 SETON HALL LEGIS. J. 1, 103 (1988).

11. ALFINI, *supra* note 9, at 133, 205-06.

12. Sharp, *supra* note 4, at 225.

13. See SUZANNE MCCORKLE & MELANIE J. REESE, *MEDIATION THEORY & PRACTICE* 33 (2005).

Mediators listen to the disputants' stories, allow them to vent their frustrations, validate each person's worth and feelings, and provide appropriate feedback. Mediators are conduits of information. They allow parties to share information with each other and enable parties to understand each other's perspective. Mediators keep communication focused on important and relevant issues. They help disputants discover and express their own interests and goals. Mediators are links to additional expertise, data, or resources that may be required to settle a dispute. They know the services available in their community and assist the parties to determine if outside, objective data are required. Mediators are boundary keepers when they frame issues, moderate emotions, and contain the conflict within a productive range.

parties to “open up” is critical to the mediator’s ability to engage parties in the problem-solving and negotiation aspects of mediation.¹⁴ As one authority put it, “Mediation is a communication process; solving legal problems is simply a byproduct.”¹⁵

III. CALIFORNIA’S STRICT CONFIDENTIALITY SCHEME

California favors settlement of civil disputes, as evidenced by the enactment of Code of Civil Procedure section 1775, which states 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”¹⁶ 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 these disputes.”¹⁷ 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 mediation participants, but also the mediation process itself.¹⁸

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.¹⁹ This protection extends to “mediations” and “mediation consultations.”²⁰ 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.”²¹ Mediation is defined as “a process in which a neutral person or persons facilitate communication between the disputants to assist them in

Id.

14. Kirtley, *supra* note 9, at 6.

15. Kent L. Brown, Comment, *Confidentiality in Mediation: Status and Implications*, 1991 J. DISP. RESOL. 307, 309 (1991).

16. CAL. CIV. PROC. CODE § 1775(a) (West 2011).

17. *Id.* § 1775(c).

18. *See* Rojas v. Superior Court, 93 P.3d 260, 264-65 (Cal. 2004).

19. *See* CAL. EVID. CODE § 1115 (West 2011).

20. *Id.* § 1115(a), (c).

21. *Id.* § 1115(c).

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reaching a mutually acceptable agreement.”²² 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.”²³ The fact that a court may use the terms “mediation” and “settlement” interchangeably when referring to the process taking place or the fact that a judicial officer might be assigned to preside over the talks will not transform the proceeding into a mandatory settlement conference without a clear record that such a conference was ordered.²⁴ This is an important distinction because Evidence Code section 1117(b)(2) provides that the confidentiality protections afforded to communications in mediation do not apply to communications during a mandatory settlement conference convened pursuant to rule 3.1380 of the California Rules of Court.²⁵

The *Archdiocese Case* is an example of how broadly courts have construed what qualifies as a mediation for purposes of affording confidentiality protection to facilitated settlement discussions.²⁶ In the *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.²⁷ The court appointed a judge to facilitate “settlement and mediation” among the parties.²⁸ 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.²⁹ The church stated that it planned to release the summaries publicly once they were completed.³⁰ In response, some of the accused priests filed a motion for protective order to bar public disclosure of

22. *Id.* § 1115(a).

23. *Id.* § 1115(a) cmt. (1997).

24. *See Doe 1 v. Superior Court (Archdiocese Case)*, 34 Cal. Rptr. 3d 248, 252 (Ct. App. 2005) (“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.”).

25. CAL. EVID. CODE § 1117 (West 2010).

26. *See Archdiocese Case*, 34 Cal. Rptr. 3d 248.

27. *See id.* at 249-50.

28. *Id.*

29. *Id.*

30. *Id.* at 1164.

the written summaries.³¹ In addition to privacy and privilege issues, the priests argued that the proposed release violated the mediation confidentiality protections afforded by the Evidence Code.³² 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.³³ The court of appeal granted the petition, holding that disclosure of the summaries was barred by the mediation confidentiality privilege.³⁴

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.³⁵ As evidence in a court proceeding, Evidence Code section 1119 bars disclosure of (a) "*anything said* or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation";³⁶ (b) *any writing "prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation";*³⁷ and (c) "[a]ll *communications, negotiations, or settlement discussions* by and between participants in the course of a mediation or a mediation consultation . . .".³⁸ The Supreme Court of California has confirmed on several occasions that "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, absolute,³⁹ and is not subject to judicially crafted exceptions or limitations.⁴⁰ The facts of the cases in which the Supreme Court of California 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.⁴¹

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* at 1173-74.

35. *See* CAL. EVID. CODE § 1119 (West 2011).

36. *Id.* § 1119(a) (emphasis added).

37. *Id.* § 1119(b) (emphasis added).

38. *Id.* § 1119(c) (emphasis added).

39. *See, e.g.,* Foxgate Homeowners' Ass'n v. Bramalea Cal., Inc., 25 P.3d 1117, 1126 (Cal. 2001); Rojas v. Superior Court, 93 P.3d 260, 207 (Cal. 2004); Fair v. Bakhtiari, 147 P.3d 653, 658-59 (Cal. 2006).

40. *See, e.g.,* Simmons v. Ghaderi, 187 P.3d 934, 945-46 (Cal. 2008); Cassel v. Superior Court, 244 P.3d 1080, 1087-88 (Cal. 2011).

41. *See infra* Parts III.B.1-4.

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1. *Foxgate* Decision (2001)

In 2001, the Supreme Court of California first addressed this issue in *Foxgate*.⁴² This case discusses party conduct and statements made during mediation with respect to one party's nonparticipation—rather than the exchange of information or offers during the course of a mediation.⁴³ The case concerned a construction defect claim for a sixty-five-unit condominium complex.⁴⁴ A special master appointed by the superior court to mediate and rule on discovery motions ordered the parties to mediation, and the court's notice instructed that the parties were required to bring their experts and claims representatives.⁴⁵ Five days of mediation were reserved.⁴⁶ On the first day of mediation, plaintiff's attorney appeared with nine experts, while defendants' attorney arrived late and with zero experts because, he believed, due to his knowledge in the field of construction defect litigation, he did not need experts to engage in discourse with plaintiff's experts.⁴⁷ After the morning of the first mediation session, the mediator cancelled the subsequent mediation sessions because he concluded they could not proceed without defense experts.⁴⁸ Plaintiff then moved for sanctions against defendants and their attorney for failure to participate in good faith in a court-ordered mediation and to comply with the order to mediate.⁴⁹ Plaintiff's motion for sanctions concluded with a recommendation that defendants and their counsel should be ordered to reimburse the plaintiff for expenses incurred in the mediation.⁵⁰ Also attached to the sanctions motion was a declaration by plaintiff's counsel reciting statements made by defendants' counsel during the mediation.⁵¹ The mediator also filed a report "recommend[ing] . . . that [defendants and

42. See *Foxgate*, 25 P.3d 1117.

43. *Id.* at 1119-20.

44. *Id.* at 1120.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* The sanctions sought reflected the cost to plaintiff from counsel's preparation for the sessions, the charge of plaintiff's nine experts for preparation and appearance at the mediation session, and the payments to the mediator which was no longer refundable. *Id.* Plaintiff's memorandum of points and authorities and declaration of counsel in support of the motion for sanctions recited a series of actions by Bramalea and Stevenson, that plaintiff asserted, reflected a pattern of tactics pursued in bad faith and solely intended to cause unnecessary delay. *Id.*

50. *Id.*

51. *Id.*

their attorney] be ordered to reimburse all parties for expenses incurred as a result of the cancelled . . . mediation sessions.”⁵² In granting the sanctions motion, the trial court considered the mediator’s report and the declaration of plaintiff’s counsel regarding what occurred during the mediation over defendants’ objection.⁵³

The court of appeal reversed the trial court’s sanction order and remanded the matter back to the trial court to make specific findings regarding the conduct or circumstances justifying the sanctions order.⁵⁴ The court of appeal rejected defendants’ 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, reasoning 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.⁵⁵ The Supreme Court of California 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.⁵⁶ 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.⁵⁷ The court reasoned that “[t]he statutes are clear. Section 1119 prohibits any person, mediator and participants alike, from revealing any written or oral communication made during a mediation.”⁵⁸ The 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.⁵⁹

52. *Id.* at 1121.

53. *Id.* at 1122.

54. *Id.*

55. *Id.* at 1125.

56. *Id.*

57. *Id.* at 1125-26.

58. *Id.* at 1126.

59. *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. *Id.*

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2. *Rojas* Decision (2004)

In 2004, the Supreme Court of California next addressed this issue *Rojas*.⁶⁰ This case involved the confidentiality of information developed and prepared for use in mediation.⁶¹ *Rojas* also involves 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.⁶² The court in *Rojas* issued a case management order which provided that evidence of anything said and any document prepared for the purpose of, 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.⁶³ The litigation between the owner and the contractors who built the complex was settled through mediation.⁶⁴ Following the settlement, several hundred tenants sued the owner and builder for damages resulting from health problems alleged to be the result of the mold infestation.⁶⁵ In discovery, the tenants sought to compel production of the materials developed and prepared for use in the earlier owner-builder mediation.⁶⁶ 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.⁶⁷ 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.⁶⁸ On appeal, the court of appeal reversed, finding that “section 1119 does ‘not protect pure evidence,’ but protects only ‘the substance of mediation’”⁶⁹ The Supreme Court of California 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 mediation privilege was not subject to a “good cause” exception; and (c) the evidence exclusion

60. See *Rojas v. Superior Court*, 93 P.3d 260, 262 (Cal. 2004).

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* at 262-63.

67. *Id.* at 263.

68. *Id.*

69. *Id.*

provisions operated as a bar to *discovery* of such communications and materials.⁷⁰ The court reasoned:

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 here⁷¹

3. *Simmons* Decision (2008)

In 2008, the Supreme Court of California next addressed this issue in *Simmons*.⁷² This case involved a “gaming” tactic that one party used against the other during negotiations had in a mediation.⁷³ *Simmons* involves wrongful death and medical malpractice claims against a doctor brought by the patient’s mother and son.⁷⁴ The parties went to mediation.⁷⁵ Before beginning settlement negotiations, the defendant doctor executed a standard consent-to-settlement agreement which authorized her insurance claims specialist to negotiate on her behalf up to a defined settlement value capped at \$125,000.⁷⁶ Plaintiffs and their 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.⁷⁷ At some point during these negotiations, the insurance company offered \$125,000 and plaintiffs orally accepted the offer.⁷⁸ The settlement terms were then stated in a term sheet document for the parties to sign before leaving the mediation.⁷⁹ At this juncture, the defendant doctor revoked the settlement authorization she had given to her insurance claims specialist and refused to sign the term sheet memorandum.⁸⁰ Plaintiffs then amended their complaint to add a cause of action for breach of contract, alleging that the defendant doctor had breached

70. *Id.*

71. *Id.* at 271 (internal citation omitted).

72. *Simmons v. Ghanderi*, 187 P.3d 934, 936 (Cal. 2008).

73. *Id.* at 936.

74. *Id.*

75. *Id.* at 937.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

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an oral agreement to settle at \$125,000.⁸¹ 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 agreement, the term sheet memorandum, and other evidence offered with respect to the events at the mediation—including a declaration by the mediator.⁸² 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.⁸³ The trial court ordered specific performance and entered judgment in favor of plaintiffs for \$125,000.⁸⁴ The defendant doctor appealed.⁸⁵

On appeal, the court of appeal affirmed the judgment, finding that a valid oral agreement had been reached during the mediation.⁸⁶ The court of appeal found that during pretrial motions, both defendant and plaintiffs had presented evidence of the occurrences at the mediation and defendant had failed to object to plaintiffs' proffered evidence with respect to such motions.⁸⁷ 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.⁸⁸ The Supreme Court of California 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 1119.⁸⁹ Here, the court reasoned:

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.⁹⁰

81. *Id.* at 938.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* at 936.

90. *Id.* at 946.

4. *Cassel* Decision (2011)

The fourth and most recent Supreme Court of California case regarding this issue was the 2011 decision in *Cassel*.⁹¹ This case involved private attorney–client conversations during the course of a mediation.⁹² Prior to attending the mediation, Michael Cassel 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.⁹³ After several hours of mediation, Cassel was told that defendant would pay no more than \$1.25 million.⁹⁴ Although Cassel felt tired, hungry, and ill, his attorneys insisted that Cassel remain until the mediation was concluded and pressed him to accept the offer, telling him that he was “greedy” to insist on more.⁹⁵ At one point, Cassel left to have dinner and consult with his family.⁹⁶ 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 they could and would negotiate a side deal that would recoup the deficits in the settlement.⁹⁷ 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.⁹⁸ Finally, at midnight, after fourteen hours of mediation, when he was exhausted and unable to think clearly, Cassel’s attorneys presented him with a written draft settlement agreement and evaded his questions about its complicated terms.⁹⁹ Believing he had no other choice, Cassel signed the agreement.¹⁰⁰ After settling the business litigation dispute, Cassel then sued his attorneys for malpractice, breach of fiduciary duty, fraud, and breach of contract.¹⁰¹ Prior to trial in the malpractice action, Cassel’s attorneys moved to exclude all evidence of any discussions they had with plaintiff immediately preceding and during the mediation concerning settlement strategies and the attorneys’ efforts to persuade plaintiff to reach a settlement

91. *Cassel v. Superior Court*, 244 P.3d 1080 (Cal. 2011).

92. *Id.* at 1083-84.

93. *Id.* at 1085.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

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in the mediation.¹⁰² The trial granted the attorneys' motion excluding the evidence of their mediation communications with their client.¹⁰³

On appeal, the court of appeal reversed the decision.¹⁰⁴ 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 by their own clients based on advice and other communications made by counsel.¹⁰⁵ The court of appeal concluded that an attorney sued for malpractice cannot use mediation confidentiality as a shield to exclude damaging evidence of private attorney-client conversations during the mediation.¹⁰⁶ On further appeal, the Supreme Court of California 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.¹⁰⁷ The court reasoned:

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 to 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.¹⁰⁸

The *Cassel* decision has been highly criticized from a legal ethics and legal malpractice standpoint for giving attorneys a free pass for "settlement

102. *Id.* at 1083.

103. *Id.*

104. *Id.*

105. *Id.* at 1084.

106. *Id.* at 1085.

107. *Id.* at 1087.

108. *Id.* at 1090-91 (internal citations omitted); *c.f.* *Porter v. Wyner*, 107 Cal. Rptr. 3d 653 (Ct. App. 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).

malpractice” if it occurs in the context of mediation.¹⁰⁹ Nevertheless, the *Cassel* decision demonstrates just how broadly the scope of the mediation confidentiality statutes will be construed by the Supreme Court of California 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 and nonacceptable conduct in mediation.¹¹⁰

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 a mediator concerning a mediation, the only report a mediator may make is one that simply states whether an agreement was reached.¹¹¹ The comments to section 1121 explain that the rationale behind this statutory provision is aimed at making sure a mediator will “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.”¹¹² The 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 she conducted.¹¹³

The broad prohibition against mediators making a report of any kind to the court—beyond the statement that a settlement was or was not reached—does *not* prohibit a party from advising the court about *conduct* during the mediation that might warrant sanctions.¹¹⁴ 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 of California found was prohibited by Evidence Code sections 1119 and

109. Robert K. Sall, *Ethical Concerns Regarding Mediation Confidentiality and the Implications of Cassel*, ORANGE COUNTY LAWYER, Apr. 2011, at 42-45; Diane Karpman, *High Court Holds Lawyers are Not Accountable for Misconduct During Mediation*, CALIFORNIA BAR JOURNAL (Feb. 2011), <http://www.calbarjournal.com/February2011/Attorneydiscipline/EthicsByte.aspx>.

110. 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.” *Cassel*, 244 P.3d at 1087.

111. CAL. EVID. CODE § 1121 (West 2011).

112. *Id.* § 1121 cmt. (1997).

113. *Id.* § 703.5.

114. *Foxgate Homeowners’ Ass’n v. Bramalea Cal., Inc.*, 25 P.3d 1117, 1128 (Cal. 2001).

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1121.¹¹⁵ 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."¹¹⁶ In 2008, the California Court of Appeal for the Third District relied on *Foxgate* to find that the failure to have all persons or representatives attend court-ordered mediation—as required by local rules—was "conduct that a party, but not a mediator, may report to the court as a basis for monetary sanctions."¹¹⁷ Similarly, in 2010, the California 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.¹¹⁸

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 is a writing prepared during the course of mediation and, as such, is entitled to exclusionary protection under Evidence Code section 1119.¹¹⁹ Pursuant to 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.¹²⁰
- (b) The agreement provides that it is enforceable or binding or words to that effect.¹²¹
- (c) All parties to the agreement expressly agree in writing . . . to its disclosure.¹²²
- (d) The agreement is used to show fraud, duress, or illegality that is relevant to an issue in dispute.¹²³

115. *Id.*

116. *Id.* at 1128 n.14.

117. *Campagnone v. Enjoyable Pools & Spas Serv. & Repairs, Inc.*, 77 Cal. Rptr. 3d 551, 555 (Ct. App. 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.*

118. *See Ellerbee v. County of L.A.*, 114 Cal. Rptr. 3d 756, 763 (Ct. App. 2010).

119. *See* CAL. EVID. CODE § 1119 (West 2011).

120. *Id.* § 1123(a).

121. *Id.* § 1123(b).

122. *Id.* § 1123(c).

In 2006, the Supreme Court of California had occasion to construe the application of Evidence Code section 1123 and interpreted it quite strictly and literally.¹²⁴ In *Fair*, the parties to a civil dispute mediated their disputes over the course of a two-day period.¹²⁵ 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.¹²⁶ Postmediation, the parties exchanged formal settlement agreements, but were ultimately unable to reach agreement on the terms for a final written settlement agreement.¹²⁷ Plaintiff then demanded arbitration under the arbitration clause included in the term sheet memorandum.¹²⁸ 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.¹²⁹ Plaintiff then moved to compel arbitration pursuant to the term sheet memorandum.¹³⁰ Defendant opposed the motion and objected to the admission of the term sheet memorandum and parts of plaintiff's counsel's declaration which referred to discussions at the mediation under Evidence Code section 1119.¹³¹ The trial court sustained defendant's objection and excluded the term sheet and portions of plaintiff's counsel's declaration under section 1119 on the grounds that the declaration failed to meet the requirements of Evidence Code section 1123.¹³²

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.¹³³ On further appeal to the Supreme Court of California, 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).¹³⁴ The supreme court noted that, although the legislature had not provided the courts with a "bright line" rule regarding

123. *Id.* § 1123(d).

124. *See Fair v. Bakhtiari*, 147 P.3d 653, 654 (Cal. 2006).

125. *Id.* at 655.

126. *Id.* at 654-55.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* at 194.

132. *Id.*

133. *Id.*

134. *Id.* at 197-98.

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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.”¹³⁵

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.”¹³⁶

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 is intended to be “enforceable” or “binding.”¹³⁷

E. Special Rules Related to Oral Settlement Agreements Reached in Mediation

California Evidence Code section 1123(c) provides that an oral settlement agreement may be admissible *if* it satisfies the requirements of section 1118.¹³⁸ Pursuant to Evidence Code section 1118, an oral agreement made in accordance with section 1118 must satisfy *all* of the following conditions:

- (a) The oral agreement is recorded by a court reporter or reliable means of audio recording.¹³⁹
- (b) The terms of the oral agreement are recited on the record in the presence of the parties and the mediator, and the parties express on the record that they agree to the terms so recited.¹⁴⁰
- (c) The parties to the oral agreement expressly state on the record that the agreement is enforceable or binding¹⁴¹

135. *Id.* at 197.

136. *Id.* (internal citations omitted) (citing Foxgate Homeowners’ Ass’n v. Bramalea Cal., Inc., 25 P.3d 1117, 1126 (Cal. 2001); Rojas v. Superior Court, 93 P.3d 260, 265 (Cal. 2004)).

137. Fair v. Bakhtiari, 147 P.3d 653, 660 (Cal. 2006).

138. CAL. EVID. CODE § 1123(c) (West 2011).

139. *Id.* § 1118(a).

140. *Id.* § 1118(b).

141. *Id.* § 1118(c).

(d) The recording is reduced to writing and the writing is signed by the parties within 72 hours after it is recorded.¹⁴²

IV. THE NONPRIVILEGED AND UNDERPROTECTED STATUS OF MEDIATION CONFIDENTIALITY UNDER FEDERAL LAW

A. *Federal Rules of Evidence 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.¹⁴³ There is no federal statute, rule of procedure, or rule of evidence that expressly recognizes or provides confidentiality protection for communications during or in connection with a mediation. The only express protection for settlement discussions is 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.¹⁴⁴ Thus, Rule 408 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"¹⁴⁵ 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.¹⁴⁶

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 terms.¹⁴⁷ On this issue, the courts are split as to whether Rule 408 precludes discovery.¹⁴⁸ 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

142. *Id.* § 1118(d).

143. *See* Jaffe v. Redmond, 518 U.S. 1, 7 (1996).

144. FED. R. EVID. 408(b)(1)-(2).

145. Josephs v. Pac. Bell, 443 F.3d 1050, 1064 (9th Cir. 2006).

146. Molina v. Lexmark Int'l, Inc., No. CV 08-04796 MMM (FMx), 2008 WL 4447678, at *11-12 (C.D. Cal. Sept. 30, 2008).

147. *See* FED. R. EVID. 408(a).

148. *Compare* Bottaro v. Hatton Assocs., 96 F.R.D. 158, 160 (E.D.N.Y. 1982) (barring discovery of settlement terms), *with* Bennett v. La Pere, 112 F.R.D. 136, 139-40 (D.R.I. 1986) (allowing discovery of settlement discussions), *and* NAACP Legal Def. & Educ. Fund, Inc. v. U.S. Dep't of Justice, 612 F. Supp. 1143, 1146 (D.D.C. 1985) (allowing discovery if information is relevant to other issues in the pending action).

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prohibited by Rule 408(a).¹⁴⁹ Among the “permitted uses” delineated in Rule 408(b) are evidence of settlement and compromise negotiations offered (1) to prove bias or prejudice on the part of a witness; (2) to prove that an alleged wrong was committed during the negotiations (e.g., libel, assault, unfair labor practice, etc.); (3) to negate a claim of undue delay; or (4) to prove obstruction of a criminal investigation or prosecution.¹⁵⁰ Additionally, a number of courts, including the Ninth Circuit, have concluded that Rule 408 does not make settlement offers inadmissible in the removal context where such offers represent evidence of the amount in controversy for the purpose of establishing the date on which such information was first made available to the defendant and thus started the thirty-day time period for removing a state court action to federal court.¹⁵¹ Numerous district court decisions have used the settlement letter to establish the amount in controversy.¹⁵²

In sum, Rule 408 is keenly focused on offers of compromise and negotiations involved in making, accepting, or rejecting such offers. As such, Rule 408 appears *not* to provide protection of any sort for prenegotiation 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.¹⁵³

149. FED. R. EVID. 408(b).

150. *Id.*

151. *See*, Babasa v. LensCrafters, Inc., 498 F.3d 972 (9th Cir. 2007) (holding that a letter sent by plaintiffs estimating the amount alleged put defendant on notice of the amount in controversy); Cohn v. Petsmart, Inc., 281 F.3d 837 (9th Cir. 2002) (“A settlement letter is relevant evidence of the amount in controversy if it appears to reflect a reasonable estimate of the plaintiff’s claim.”).

152. *See* Munoz v. J.C. Penny Corp., No. CV09-0833 ODW (JTLx), 2009 WL 975846 (C.D. Cal. Apr. 9, 2009) (settlement proposal letter was admissible to establish that the jurisdictional amount in controversy had been met for purposes of removing the case to federal court); *see also* Ray v. Am. Airlines, Inc., No. 08-5025, 2008 WL 3992644, *4 (W.D. Ark. Aug. 22, 2008) (settlement letter used to establish the amount in controversy); Haydel v. State Farm Mut. Auto. Ins. Co., No. CIV 07-939-C, 2008 WL 2781472, *8, n.8 (M.D. La. July 10, 2008); Finnegan v. Wendy’s Int’l, Inc., No. 2:08-cv-185, 2008 WL 2078068, *3 (S.D. Ohio May 13, 2008); Sulit v. Slep-Tone Entm’t, No. C06-00045 MJJ, 2007 WL 4169762, *3, n.1 (N.D. Cal. Nov. 20, 2007); Turner v. Baker, No. 05-3298-CV-S-SWH, 2005 WL 3132325, *3 (W.D. Mo. Nov. 22, 2005); LaPree v. Prudential Fin., 385 F. Supp. 2d 839, 849, n.9 (S.D. Iowa Aug. 17, 2005).

153. *See* FED. R. EVID. 408.

B. Federal Rules of Evidence 501

The only other source of confidentiality protection in federal cases is Rule 501 of the Federal Rules of Evidence.¹⁵⁴ Rule 501 empowers the holder of a recognized privilege to use the legal process to prevent others from disclosing protected communications.¹⁵⁵ It also vests the holder with the right to refuse to produce otherwise relevant evidence.¹⁵⁶ What qualifies as a “recognized privilege” is *not* detailed in Rule 501.¹⁵⁷ In federal question cases under 28 U.S.C. § 1331, the extent to which a privilege exists is governed by federal common law¹⁵⁸ and may not be augmented by local court rules.¹⁵⁹ In diversity cases under 28 U.S.C. § 1332, where state law provides the rule of decision, the existence of a privilege is a matter of applicable state law.¹⁶⁰ To date, there are only two cases in the Central

154. See FED. R. EVID. 501.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.* See also *Religious Tech. Ctr. v. Wollersheim*, 971 F.2d 364, 367, n.10 (9th Cir. 1992). 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 *id.* at n.10 (court refused to apply California litigation privilege in copyright action with pendent state law claims); *Folb v. Motion Picture Indus. Pension & Health Plans*, 16 F. Supp. 2d 1164, 1169-70 (C.D. Cal. 1998) (stating that the federal common law of privileges governs both federal and pendent state law claims in federal question cases); 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) (holding that the federal law of privilege is paramount to federal question cases).

159. See *Facebook, Inc. v. Pac. Nw. Software, Inc.*, 640 F.3d 1034, 1040-41 (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. *Id.* at 1040. The Winklevosses proffered evidence of what was and was not said during the mediation. *Id.* 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.” *Id.* at 1040. 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 with a private mediator and had signed an express written confidentiality agreement before the mediation commenced. *Id.* at 1041. 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.*

160. FED. R. EVID. 501. See also *Olam v. Cong. Mortg. Co.*, 68 F. Supp. 2d 1110, 1124-25 (N.D. Cal. 1999). That being said, federal law governs whether a case exceeds the amount in controversy requirement. See *Molina v. Lexmark Int’l, Inc.*, No. CV 08-04796 MMM (FMx), 2008

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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 v. Motion Picture Industry Pension & Health Plans*¹⁶¹ and the 2008 unreported decision of District Judge Morrow in *Molina v. Lexmark International, Inc.*¹⁶²

1. *Folb* Decision (1998)

In *Folb*, a former employee complained that he had been terminated by his employer in retaliation for whistle-blowing.¹⁶³ The employer responded that Folb was terminated because he had sexually harassed a fellow employee named Vasquez.¹⁶⁴ The employer and Vasquez had previously participated in mediation in an attempt to settle Vasquez's claims against the company arising from Folb's alleged harassment.¹⁶⁵ Folb then sought to compel production of the mediation briefs and "related correspondence regarding settlement negotiations" between his former employer and Vasquez.¹⁶⁶ Folb argued that these documents would reveal that, during mediation, his former employer had taken the position that Folb had not harassed Vasquez.¹⁶⁷ The court held that Folb was entitled to discovery regarding settlement negotiations conducted after mediation, but concluded that a federal common law mediation privilege protected the mediation briefs from discovery.¹⁶⁸ The trial judge stated that the privilege applied only to "communications between parties who agreed in writing to participate in a confidential mediation with a neutral third party."¹⁶⁹ This

WL 4447678, at *6 (C.D. Cal. Sept. 30, 2008) (citing *Horton v. Liberty Mut. Ins. Co.*, 367 U.S. 348, 352 (1961)).

161. *Folb v. Motion Picture Indus. Pension & Health Plans*, 16 F. Supp. 2d 1164 (C.D. Cal. 1998).

162. *Molina v. Lexmark Int'l, Inc.*, No. CV 08-04796 MMM (FMx), 2008 WL 4447678 (C.D. Cal. Sept. 30, 2008).

163. *Folb*, 16 F. Supp. 2d at 1166.

164. *Id.*

165. *Id.* at 1167.

166. *Id.*

167. *Id.* at 1168.

168. *Id.* at 1167.

169. *Id.* 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, namely, a situation in which a third party who

left open the question of whether a “mediation” or “settlement proceeding” conducted as part of a federal court’s alternative dispute resolution (ADR) program would qualify for protection without a written mediation and confidentiality agreement between the parties.¹⁷⁰ While such a distinction would not be available under California law due to the broad interpretation as to what qualifies as a mediation for purposes of confidentiality,¹⁷¹ the Ninth Circuit’s decision in *Facebook* and the district court’s decisions in *Molina* and *Folb* suggest that the extent to which confidentiality protections are available in federal court matters 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.¹⁷²

2. *Molina* Decision (2008)

In *Molina*, Ron Molina filed a class action against his former employer, Lexmark International, in state court in August 2005.¹⁷³ In July 2008, two weeks before trial, Lexmark removed the case to federal court.¹⁷⁴ 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 \$5 million and any member of a class of plaintiffs is a citizen of a state different from any defendant.¹⁷⁵ Lexmark claimed that it first became

did *not* participate in the mediation was seeking discovery of mediation-related communications of the parties who did participate. *Id.* at 1180.

On the facts presented here, the Court concludes that communications to the mediator and 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.

Id.

170. *See id.*

171. *See supra* Part III.A.

172. *See supra* note 160; discussion *infra* Part IV.B.2. With regard to the label given to the facilitated settlement effort, there are several district court decisions where courts have denied confidentiality protection because the communications at issue did not occur in a “formal mediation.” *See, e.g.,* EEOC v. Albion River Inn, Inc., No. C 06-05356 SI, 2007 WL 2560718, *2 (N.D. Cal. Sept. 4, 2007); Cal. Serv. Emps. Health & Welfare Trust Fund v. Advance Bldg. Maint., No. C06-3078 CW (BZ), 2007 WL 2669823, *1 (N.D. Cal., Sept. 7, 2007).

173. *Molina v. Lexmark Int’l, Inc.*, No. CV 08-04796 MMM (FMx), 2008 WL 4447678, at *1 (C.D. Cal. Sept. 30, 2008).

174. *Id.*

175. *Id.*

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aware that the amount in controversy exceeded \$5 million in July 2008 when it received a summary of damages prepared by Molina's expert witness as part of the pretrial exchange.¹⁷⁶ Molina filed a motion for remand, arguing that Lexmark's removal application was untimely because Lexmark had been put on notice of the amount in controversy two years earlier when class counsel shared a damages analysis during a mediation.¹⁷⁷

The timing of removal is governed by 28 U.S.C. § 1446(b) and provides that a defendant has thirty days to file a notice of removal once he learns that an action is removable.¹⁷⁸ This 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—in *Molina* it was the amount in controversy.¹⁷⁹ However, when the amount in controversy is not clear on the face of the initial pleading, the thirty-day period for removal does not begin to run until the defendant receives a copy of an amended pleading, motion, order, or "other paper" from which it can be determined that the case is removable.¹⁸⁰ 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.¹⁸¹

The "other paper" at issue in *Molina* was a damages analysis prepared by Molina's expert which was shared during the May 2006 mediation.¹⁸² Lexmark denied receiving a copy of the damages analysis¹⁸³ and argued that, even if it had, the federal common law mediation privilege articulated in *Folb* prohibited the use of information exchanged during mediation for any purpose.¹⁸⁴ Alternatively, Lexmark argued that because federal court jurisdiction was based on diversity, California's mediation confidentiality

176. *Id.*

177. *Id.*

178. *Id.* at *4.

179. *See Harris v. Bankers Life & Cas. Co.*, 425 F.3d 689, 690-91 (9th Cir. 1997) (Ninth Circuit joined "sister circuits" in their interpretation that 28 U.S.C. § 1446 begins to run from the defendant's receipt of the initial pleading when the facts reveal federal jurisdiction is necessary).

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

181. *Molina*, 2008 WL 4447678, at *4 (citing *Babasa v. LensCrafters, Inc.*, 498 F.3d 972, 974-75 (9th Cir. 2007) (settlement letter exchanged between counsel); *Ambriz v. Luxury Imps. of Sacramento Inc.*, No. C 08-01004 JSW, 2008 WL 1994880, *2 (N.D. Cal. May 5, 2008) (settlement demand letter); *Krajca v. Southland Corp.*, 206 F. Supp. 2d 1079, 1081-82 (D. Nev. 2002) (settlement letter)).

182. *Molina*, 2008 WL 4447678, at *17.

183. *Id.* at *2.

184. *Id.* at *6.

protections should apply—under California law, the information exchanged was clearly protected because it was developed for and used during the course of mediation.¹⁸⁵ The court rejected this latter argument because a case that exceeds the amount in controversy requirement for federal court jurisdiction is governed by federal law and, as such, federal privilege law controls.¹⁸⁶

After going through a very thorough 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.¹⁸⁷ Looking at the decision in *Folb*, the court noted that while the contours of the privilege recognized in that case were unclear,¹⁸⁸ the holding was expressly limited to the factual context before the *Folb* 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.¹⁸⁹ 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.¹⁹⁰ The situation presented in *Molina* involved communications 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.¹⁹¹ The court reasoned that a duty of confidentiality was distinguishable and different from a privilege.¹⁹²

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

185. *Id.*

186. *Id.* (citing *Horton v. Liberty Mut. Ins. Co.*, 367 U.S. 348, 352 (1961)). *See also LensCrafters*, 498 F.3d at 974-75 (state privilege law did not apply in determining whether a settlement letter sent in preparation for mediation was privileged and therefore not an “other paper”); *Breed v. U.S. Dist. Court*, 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).

187. *Molina*, 2008 WL 4447678, at *7.

188. *Id.* at *8 (“[T]he contours of such a federal privilege [will have] to be fleshed out over time.”).

189. *Id.*

190. *Id.* at *11.

191. *Id.* at *10-11 (internal citations omitted).

192. *Id.*

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privileged when the ability of third parties to compel disclosure of them, or testimony regarding 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 confidentiality¹⁹³

The court in *Molina* determined that although Lexmark 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.¹⁹⁴ 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*.¹⁹⁵ Similar to the general discussion contained in Section 4(A) of this Article, the *Molina* court ruled that Rule 408 does not make settlement offers inadmissible in the removal context for purposes of establishing evidence in the amount of controversy and, in this case, the date such information was first communicated to the defendant.¹⁹⁶ 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.¹⁹⁷

[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 during negotiation as proof of liability or wrongdoing, not concern that it will use them as proof of the amount in controversy, is the primary obstacle to forthright negotiation discussions.¹⁹⁸

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 on whether a federal mediation privilege will be

193. *Id.* at *10 (citing Scott H. Hughes, *The Uniform Mediation Act: To the Spoiled Go the Privileges*, 85 MARQ. L. REV. 9, 25-34 (2001)).

194. *Molina*, 2008 WL 4447678, at *11.

195. *Id.*

196. *Id.* at *12.

197. *Id.*

198. *Id.* at *13.

recognized in this circuit.¹⁹⁹ However, in all cases, it has avoided the issue! In *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.²⁰⁰ 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."²⁰¹

In *Lenscrafters*, a 2007 decision, the issue was more squarely raised.²⁰² In this case, counsel for the plaintiff class sent a letter to counsel for the employer in preparation for an upcoming mediation.²⁰³ The mediation did not end in a settlement.²⁰⁴ The employer then removed the action to federal court and the plaintiff class filed a motion for remand to the state court.²⁰⁵ The issue was whether the settlement letter was sufficient to put the employer on notice that the amount in controversy exceeded federal class action diversity jurisdiction requirements so as to support removal from state to federal court and start the thirty-day clock running with respect to the time in which the employer could file a notice of removal.²⁰⁶ 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 1119.²⁰⁷ The Ninth Circuit found that the confidentiality protections provided under state law were not applicable because federal law governs the determination of whether a case exceeds the amount in controversy necessary for a diversity action to proceed in federal court.²⁰⁸ As such, federal privilege law applied.²⁰⁹ As to the existence of any federal mediation privilege, the Ninth Circuit found that because the employer had failed to raise that argument before the district court or in his appellate briefs, the employer waived his right to raise the issue.²¹⁰

199. *Facebook, Inc. v. Pac. Nw. Software, Inc.*, 640 F.3d 1034 (9th Cir. 2011); *Babasa v. LensCrafters, Inc.*, 498 F.3d 972 (9th Cir. 2007); *Dusek v. Mattel, Inc.*, 141 F. App'x 586 (9th Cir. 2005).

200. *Dusek*, 141 F. App'x at 586.

201. *Id.*

202. *LensCrafters*, 498 F.3d at 973-74.

203. *Id.* at 974.

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.* at 974-75.

209. *Id.*

210. *Id.* at 975 n.1.

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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.²¹¹ 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 given during an exchange in which Facebook acquired all of ConnectU's shares.²¹² In support of their action to rescind the settlement, the Winklevosses proffered evidence of what was said and not said during the mediation.²¹³ 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."²¹⁴ 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.²¹⁵ 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."²¹⁶ 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 rules, 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."²¹⁷

Consequently, there is nothing in Rule 501 that recognizes a federal mediation privilege.²¹⁸ In fact, there is nothing in Rule 501 that specifically recognizes *any* privilege.²¹⁹ Privileges are matters for the federal courts to

211. *Facebook, Inc. v. Pac. Nw. Software, Inc.*, 640 F.3d 1034, 1038 (9th Cir. 2011).

212. *Id.*

213. *Id.* at 1040.

214. *Id.*

215. *Id.* at 1041.

216. *Id.*

217. *Id.* (emphasis added).

218. FED. R. EVID. 501.

219. As 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 for change. *Folb v. Motion Picture Indus. Pension & Health Plans*, 16

define based upon considerations of public policy and may change over time.²²⁰ 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.²²¹ As the district court noted in *Folb*, in addition to the theoretical underpinnings of the mediation 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 when adopting or recognizing a privilege.²²² 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.”²²³ Thus, it would appear that a federal mediation privilege of some sort will eventually be recognized.²²⁴ However, as matters stand today, that protection does not exist.²²⁵

4. *Olam* Decision (1999)²²⁶

In 1999, one year after Judge Paez’s decision in *Folb*, Judge Brazil in the District Court for the Northern District of California rendered an important decision on mediation confidentiality that has added to the confusion in this area.²²⁷ In *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.²²⁸ A mediation was conducted as part of the court’s ADR program before a member of the court’s staff.²²⁹ A settlement was reached and the parties signed a memorandum of understanding which summarized the terms of settlement.²³⁰ Thereafter, the parties attempted to memorialize the agreement in the form of a formal settlement agreement and request for dismissal of the lawsuit.²³¹ Those efforts failed.²³² Defendant

F. Supp. 2d 1164, 1170-71 (C.D. Cal. 1998) (quoting *Trammel v. United States*, 445 U.S. 40, 47 (1980)).

220. *Folb*, 16 F. Supp. 2d at 1171.

221. *In re Grand Jury*, 103 F.3d 1140, 1154 (3d Cir. 1997).

222. *Folb*, 16 F. Supp. 2d at 1178.

223. *Id.* at 1179.

224. *Id.* at 1179-80.

225. *Id.*

226. *Olam v. Cong. Mortg. Co.*, 68 F. Supp. 2d 1110 (N.D. Cal. 1999).

227. *Id.* at 1110.

228. *Id.* at 1115.

229. *Id.* at 1116.

230. *Id.* at 1117.

231. *Id.*

232. *Id.*

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then filed a motion seeking to enforce the original settlement as set forth in the memorandum of understanding and to enter judgment thereon.²³³

Plaintiff opposed the motion on two grounds: first, that the memorandum of understanding was unconscionable and second, that she was subjected to undue influence and coercion in the manner in which the mediation was conducted.²³⁴ In support of this latter 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.²³⁵ She further claimed that: (1) she did not understand the mediation process; (2) she felt pressured to sign the memorandum of understanding; (3) her physical and emotional distress rendered her unduly susceptible to being pressured; and (4) she signed the memorandum of understanding against her will, without reading or understanding its terms.²³⁶

Defendants raised the issue of mediation confidentiality, which prompted Judge Brazil to analyze whether that issue was to be decided as a matter of federal or state law.²³⁷ Judge Brazil concluded that California rule applied because the civil proceeding before the court was defendants' motion to enforce the settlement agreement.²³⁸ In such a proceeding, the court reasoned, the only issue is whether an enforceable contract exists and such a substantive question must be decided by state law because there is no general federal law of contracts.²³⁹ 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, the court 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."²⁴⁰

Judge Brazil spent a considerable amount of time reviewing California's mediation statutes, including the "mediator's privilege" against giving testimony provided by Evidence Code section 703.5 and the broad mediation

233. *Id.*

234. *Id.* at 1118.

235. *Id.*

236. *Id.*

237. *Id.* at 1119.

238. *Id.*

239. *Id.* at 1121.

240. *Id.* at 1126.

confidentiality protections provided by Evidence Code section 1119.²⁴¹ However, after this review, Judge Brazil concluded that the court could compel the mediator to testify because that was the most reliable evidence considering the conflicting testimonies of plaintiff and defendant.²⁴² Judge Brazil also reasoned that, the fact that the parties and their attorneys signed a memorandum of understanding at the end of the mediation, California courts—and thus him—were permitted to consider, in the context of a hearing to determine enforceability, whether to admit evidence regarding what was said and done during the mediation itself.²⁴³ 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.”²⁴⁴ 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 factual circumstances.²⁴⁵

In *Rinaker*, juveniles were charged with committing vandalism—a crime that could result in incarceration in a juvenile facility, and thus denial of liberty.²⁴⁶ The victim filed a civil harassment action and a mediation was conducted.²⁴⁷ During the mediation, the victim admitted that he had not actually seen who threw the rocks at his car.²⁴⁸ However, at trial in the criminal matter, the victim testified to the contrary during direct examination.²⁴⁹ The minors then sought to compel the mediator’s testimony

241. *Id.* at 1127-28.

242. *Id.* at 1127.

243. *Id.* 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.*

244. *Id.* (citing *Rinaker v. Superior Court*, 62 Cal. App. 4th 155 (Ct. App. 1998)).

245. See *Foxgate Homeowners’ Ass’n v. Bramalea Cal., Inc.*, 25 P.3d 1117 (Cal. 2001) (“[T]he only California case upholding admission, over objection, of statements made during mediation in which no statutory exception to confidentiality applied, was *Rinaker v. Superior Court* . . .”).

246. *Rinaker*, 62 Cal. App. 4th at 161-62.

247. *Id.* at 162.

248. *Id.*

249. *Id.* at 162, 169.

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to impeach the victim's testimony in the delinquency proceedings,²⁵⁰ however, the trial court denied the motion.²⁵¹ The 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.²⁵² The court reasoned that neither the witness nor the mediator had a reasonable expectation of privacy regarding 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' constitutional right to effective impeachment.²⁵³

The Supreme Court of California precedent discussed above did not exist at the time *Olam* was decided.²⁵⁴ Such 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.²⁵⁵ Essentially, what Judge Brazil did was craft a judicial exception.²⁵⁶ 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.

V. CONCLUDING THOUGHTS REGARDING MEDIATION CONFIDENTIALITY

There are several noteworthy "take aways" from the foregoing comparison of the confidentiality protections available to California litigants depending on whether they are in state or federal court. First, the importance of confidentiality as a defining feature and essential ingredient of mediation seems to exist under both state and federal law.²⁵⁷ However, the scope of protection each system is willing to allow appears to represent the brightest line of demarcation between California's state and federal courts. Both are oriented towards "fairness of process," but have a different

250. *Id.* at 162.

251. *Id.* at 161.

252. *Id.* at 160-61.

253. *Id.*

254. Compare *Cassel v. Superior Court*, 244 P.3d 1080, 1090 (Cal. 2011), with *Olam v. Cong. Mortg. Co.*, 68 F. Supp. 2d 1110 (N.D. Cal. 1999).

255. *Cassel*, 244 P.3d at 1088.

256. *Olam*, 68 F. Supp. 2d at 1110.

257. See *supra* Part III (discussing California's strict confidentiality scheme); *supra* Part IV (discussing the nonprivileged status of mediation confidentiality under federal law).

emphasis. California courts focus on *the process* by making it clear what protection shall be afforded when disputants utilize mediation in an effort to resolve their differences.²⁵⁸ Additionally, California courts have made it clear that the scope of protection shall be broadly construed because the legislature chose to enact a statute detailing exceptions to confidentiality that are quite narrow.²⁵⁹ Through the *Facebook* and *Molina* decisions, the focus appears to be on *the participants*.²⁶⁰ Both cases suggest that federal courts could “tolerate” a duty of confidentiality between or among the participants in a mediation, provided there are exceptions which would allow the court to step in to redress any abuses (e.g. fraud, duress, coercion, or some other outcome that would constitute a miscarriage of justice).²⁶¹

A second “take away” is that while California’s confidentiality protections have been stated in the form of an evidence exclusion provision, California courts have construed this provision more like a privilege held by all participants which operates as a bar to compelling disclosure, discovery, or testimony without everyone’s consent. While the *Folb* and *Molina* decisions acknowledged 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.²⁶² Instead, both decisions ultimately

258. CAL. EVID. CODE § 1115(c) (defining the processes that qualify for confidentiality protections).

259. Doe 1 v. Superior Court (*Archdiocese Case*), 34 Cal. Rptr. 3d 248 (Ct. App. 2005).

260. See *Molina v. Lexmark Int’l, Inc.*, No. CV 08-04796 MMM (FMx), 2008 WL 4447678 (C.D. Cal. Sept. 30, 2008); *Facebook, Inc. v. Pac. Nw. Software, Inc.*, 640 F.3d 1034 (9th Cir. 2011).

261. See *Molina*, 2008 WL 4447678; *Facebook*, 640 F.3d 1034. The recently revised Local Rules of the United States District Court for the Central District of California provide an example of such qualified tolerance:

[T]his Court, the mediator, all counsel and parties, and any other persons attending the mediation shall treat as “confidential information” the contents of the written mediation statements, any documents prepared for the purpose of, in the course of, or pursuant to the mediation, anything that happened or was said relating to the subject matter of the case in mediation, any position taken, and any view of the merits of the case expressed by any participant in connection with any mediation. “Confidential information” shall not be: (1) disclosed to anyone not involved in the litigation; [or] (2) disclosed to the assigned judges

C.D. Cal. R. 16-15.8(a). *But see* C.D. Cal. R. 16-15.9 (allowing any judge or magistrate to dispense with the foregoing confidentiality protections “as the judge, in his or her discretion, determines to be appropriate”).

262. See *Folb v. Motion Picture Indus. Pension & Health Plans*, 16 F. Supp. 2d 1164, (C.D. Cal. 1998); *Molina*, 2008 WL 4447678, at *16. See also discussion *supra* Parts IV.B.1–2.

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concluded that whether, when, and to what degree confidentiality protection is available will depend on the facts of the case.²⁶³

A third “take away” is that *Facebook* presented the Ninth Circuit with an opportunity to recognize a “duty of confidentiality” based upon the northern district’s local rule. The Ninth Circuit did not need to mention the local rule because the mediation at issue was not conducted through the court’s ADR program. However, since the court did mention the rule, it could have affirmed the lower court’s exclusion of evidence based upon a finding of a duty of confidentiality since the underlying dispute was the subject of litigation venued in the northern district.²⁶⁴ Recognizing such a duty of confidentiality based upon the court’s policies and treatment per its local rules may have only been dicta in the context of the case before the court, but it nevertheless would have advanced the ball in terms of validating—at the federal level—the notion that some level of confidentiality protection should be afforded communications during a mediation, especially for mediations conducted through the federal court’s ADR program.²⁶⁵

A fourth “take away” from the *Facebook* decision is that parties to a mediation pending in federal court, or related to an existing or future federal court action, should execute a written confidentiality agreement covering anything the mediation participants might say or do during the course or in furtherance of the mediation. This makes sense considering the Ninth Circuit precluded the Winklevosses from introducing “any evidence of what Facebook said, or did not say, during the mediation” because they had signed a confidentiality agreement with respect to the mediation.²⁶⁶ Such agreements, however, are only contracts and therefore bind only those persons who are parties to the agreement. This means third-party litigants

263. See *Folb*, 16 F. Supp. 2d 1164; *Molina*, 2008 WL 447678, at *14. See also discussion *supra* Parts IV.B.1, IV.B.2.

264. See *Facebook*, 640 F.3d at 1036.

265. Under the Alternative Dispute Resolution Act of 1998, 28 U.S.C. §§ 651-52, all federal courts are required to provide civil litigants with at least one ADR process, including but not limited to mediation. 28 U.S.C. § 652(a). In connection with these programs, the district courts *must* adopt local rules that provide for the confidentiality of the ADR process and “prohibit disclosure of confidential dispute resolution communications.” 28 U.S.C. § 652(d). As such, the Ninth Circuit would not have been stepping out on much of a limb by validating the confidentiality protections provided under the northern district’s local rule. See 28 U.S.C. § 652(d) (requiring that district courts must adopt local rules that prohibit disclosure of confidential dispute resolution communications).

266. *Facebook*, 640 F.3d at 1040.

are not bound and can nevertheless seek to compel disclosure by the mediation participants by service of a subpoena.

A final “take away” is that confidentiality is an essential and integral part of mediation. It encourages the exchange of information between the parties and promotes problem-solving and interest-based negotiations, which can yield more durable settlements. Doubts about the existence or scope of confidentiality protections cannot help but lead to less sharing, less willingness to develop information for use in mediation, less work in joint sessions, more work in private caucuses, and more indirect communications through the mediator so as to preserve deniability. As this area of the law continues to develop, it will require a balancing of interests between mediation participants, courts charged with overseeing these disputes, third-party litigants, and the public.