



CENTURION MEDIATION LLC

California Court Side Steps Mediation Confidentiality and Stretches to Find a Settlement Agreement

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Counsel can no longer assume that anything that happens, especially written notes, is protected by the confidentiality provision. Even if the parties sign the confidentiality agreement at the beginning of mediation that does not mean that everything is confidential, aside from a Settlement Agreement signed by the parties.

If a party produces, documents during the mediation, ask if this document is protected by the confidentiality agreement. If a party writes notes on a piece of paper, ask what is the purpose of the document and if it is a confidential writing. If it is confidential, it should be destroyed at the end of the mediation. Further, it should be identified in the confidentiality agreement that the writing is confidential. The parties or mediator should constantly question the protection of writings and conversations during mediation. If not, a party will find itself in the situation of the Thottams.

The California Court of Appeal in the case of Estate of Thottams (August 13, 2008) found that a document in chart form that was prepared during a mediation to demonstrate how assets should be allocated between the heirs, and initials placed next to each entry was a settlement agreement. Across the top of the chart were three columns, labeled with the first initial of each sibling. The chart was filled in to designate specific allocations of the listed assets. The siblings each signed and dated the top of the chart in the column with his or her initial, and initialed each entry in that column. Prior to the mediation, the parties signed an agreement which affirmed the confidentiality of the mediation “except as may be necessary to enforce any agreements resulting from the Meeting”

Following the mediation, one party brought a civil action to enforce what he claimed to be a settlement agreement reached in mediation. The court found that this chart regarding allocations of assets was a settlement agreement and was exempt from the confidentiality provision. The court held that the material terms of a proffered

contract must be sufficiently certain to provide a basis for determining what obligation the parties have agreed to. (*Weddington Productions, Inc. v. Flick*, 60 Cal.App.4th at pp. 811-812.) The court stated that “There are occasions in which ‘minor matters’ in elaborate contracts are left for future agreement. When this occurs, it does not necessarily mean that the entire contract is unenforceable.” (*Id.* at p. 813.) Applying these principles, the court concluded there was sufficient evidence before the court to establish the preliminary fact that the chart created at the mediation was a settlement agreement. The items on the chart, while lacking in formality, were sufficiently clear to determine the obligations to which the parties agreed. There were no complete sentences, nor formal descriptions of the assets being addressed, but the assets were named in shorthand which apparently was understood by the parties.

The court held that the chart was not a model of clarity, but the chart provided sufficient information about allocation of assets to indicate the intended obligations of the parties. Whether or not the document contained all necessary details for enforcement, it certainly contained adequate manifestation of mutual consent to material terms which were capable of being made certain. Without deciding its enforceability, the court concluded that the chart constituted a written settlement agreement for purposes of Evidence code section 1123, subdivision (c).

The lesson learned from Thottams is to question, question, and question during mediation. Mediators may not be tuned to the tricks of the parties, so the parties should always question the intent of the use of a document or writing during mediation. If a party wants to make certain that the document is protected by confidentiality, it should be noted in the confidentiality agreement.

Mediators should control the process so that they do not get caught testifying as to the intent of the parties following mediation. Mediators should have the parties sign a confidentiality agreement, if documents are later produced, question its confidentiality and note the document in the confidentiality agreement. If the parties need to illustrate a point, use a dry ink board. At the end of the mediation, erase what is on the dry ink board. If the parties want what was written on the board to become embodied in a settlement agreement, have the parties draft and sign a settlement agreement.

If these simple rules are followed, the court of appeal will no longer have to stretch to find an agreement when all the parties did not intend for it to operate as an agreement.