



Laboring Results

A Monthly Dispute Resolution E-zine
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HAPPY NEW YEAR!

MEDIATORS BEWARE: JOINT SESSIONS ARE NOT CONFIDENTIAL UNDER THE ADMINISTRATIVE DISPUTE RESOLUTION ACT

As we all know, California distinguishes itself from the rest of the United States in many arenas. It is not a surprise that it is any different in the mediation world. Unfortunately, California mediators who mediate, for example, federal workplace disputes under the Administrative Dispute Resolution (ADR) Act (5 USC §574) are on auto pilot and assume that the confidentiality provisions are the same in both forums. However, the Administrative Dispute Resolution Act has confidentiality twists and turns. The biggest twist is that discussions during the joint sessions are *not* subject to confidentiality, unless the parties agree in writing to the contrary, and that documents the parties' exchange may be subject to disclosure pursuant to a Freedom of Information Act (FOIA) request.

Mediations in California proceed under an absolute confidentiality umbrella. As Evidence code section 1119 states, all communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential. A year ago, the California Supreme Court in Rojas v. Superior Court (July 13, 2004) upheld the provisions of the statute and held that documents disclosed and statements generated in mediation are absolutely privileged and cannot be used in subsequent litigation.

The ADR Act imposes similar confidentiality requirements on the mediator as in California, but is conditional rather than absolute. Under the ADR Act, a mediator shall not voluntarily disclose or through discovery or compulsory processes be required to disclose any dispute resolution communication or any communication provided in confidence. However, a court may order disclosure by a mediator only after carefully balancing

the need for disclosure against the damage to the integrity of the dispute resolution processes in general, using criteria stated in the ADR Act. If a demand for disclosure, by way of discovery request or other legal process is made upon the mediator, the parties must be notified and given an opportunity to object, prior to disclosure. Finally, if the parties and the mediator consent to disclosure in writing or the dispute resolution communication has already been made public or is required by statute to be made public, communications can be disclosed.

Joint Sessions

While parties also have the same obligations and exceptions to confidentiality as that of a neutral, there is a twist when it comes to joint sessions. Unless the parties have agreed otherwise, via a contractual confidentiality agreement, *parties may disclose what they and other parties said during a 'joint session'*. They may also disclose their own statements and information. However, they may not disclose communications generated by a mediator. This is a BIG difference from the law in California, where Evidence code section 1119 (c) specifically states that all communications by and between participants in the course of a mediation or a mediation consultation shall remain confidential.

However, parties may agree to change the confidentiality provisions of the ADR act as to the mediator's obligations and as they pertain to their own obligations. Many agencies have the parties enter into a confidentiality agreement that not only cites the ADR act but gives the parties an *option* to decrease or increase confidentiality protections. The ADR Act expressly allows parties by written agreement to waive the confidentiality obligations on themselves. If all parties agree in writing, then the parties may disclose a dispute resolution communication. A waiver agreement could be limited to certain topics or issues. Parties may agree to increase the mediator's and parties' confidentiality obligations, but they must inform the mediator prior to the commencement of the dispute resolution proceeding, if not the ADR act's confidentiality provisions apply. Most often such increase protection provisions address the confidentiality of party to party communications in joint sessions.

FOIA Requests

Despite the parties' agreement for additional confidentiality of communications in joint sessions, this agreement may still provide outside parties to access *documents*, which a party makes available to all other parties during the mediation, under the Freedom of Information Act. The ADR Act specifically exempts a dispute resolution communication which is between a mediator and a party from disclosure under FOIA. However, since under the Act communications in joint sessions between parties can

be disclosed, documents exchanged with another party may be subject to disclosure under the FOIA.

Mediators who are practicing under the Administrative Dispute Resolution Act must be familiar with the provisions of the Act as well as the agency's confidentiality agreement. It would be a disservice to the parties if the mediator failed to inform the parties that the discussions between the parties during the Joint Sessions are not confidential. To gain the trust of the parties and allow a free flow of communication between the parties, a mediator should follow the checklist below.

ADR Act Confidentiality Check List

- ✓ Prior to the commencement of the mediation, the mediator takes the time to explain the agency's confidentiality agreement to the parties, which includes the provisions of the ADR Act and that joint sessions or discussions between the parties during the mediation are not confidential.
- ✓ Prior to the commencement of the mediation, the mediator informs the parties that they have an opportunity to contract for additional confidentiality and that the agreement of increased confidentiality must be made in writing before the mediation begins.
- ✓ The mediator explains that documents exchanged between the parties during the mediation may be accessible too outside parties under the FOIA, despite a confidentiality agreement as to communications between parties during the joint session.
- ✓ The parties may contract to decrease confidentiality in order to disclose confidential communications pertaining to certain issues or allegations.
- ✓ The parties sign the confidentiality agreement.
- ✓ The mediator reminds the participants, at the conclusion of the session, of their obligation to maintain the level of confidentiality provided for by the ADR act or the confidentiality agreement they executed.

To ask a question, to request more information on dispute resolution services send an e-mail to emoreno@eampc.com or log on to www.eampc.com. To unsubscribe please send an e-mail to emoreno@eampc.com and type remove in the subject line. If you know anyone who is interested in Laboring Results, do not hesitate to pass it along.

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