

## IF ITS NOT IN THE MEDIATED SETTLEMENT AGREEMENT, IT DOESN'T COUNT

The mediation privilege bars introduction of parol evidence to explain the meaning of the terms of a mediated settlement agreement in any post mediation proceeding, if the parol evidence is based on communications (oral or written) during the mediation. It may also bar communications taking place before or after the mediation if the communications were "in furtherance of the mediation."

Many of you are aware that the mediation privilege (per California Evidence Code Section 1119) is an absolute bar to introduction of evidence of communications made during a mediation in any subsequent setting, such as a subsequent malpractice lawsuit. *Cassel v. Superior Court (Wasserman, Comden, Casselman & Pearson, L.L.P.)* (2011) 51 Cal.4th 113. You may also be aware that mediation confidentiality will even bar the admissibility of a mediated settlement agreement if the "magic" language prescribed in California Evidence Code Section 1123 is not included in the writing ("binding", "admissible", or "subject to disclosure" or words to that effect.) *Fair v. Bakhtiari* (2006) 40 Cal.4th 189.<sup>1</sup>

Ordinarily, evidence bearing on intent would be admissible to interpret a contract under the parol evidence rule in any proceeding to enforce the contract. However, it should come as no surprise that evidence of the intent of the parties to a mediated settlement agreement that would otherwise be admissible under the parol evidence rule is not admissible if the communication occurred during mediation or "in furtherance of the mediation." In a recent unpublished case, *Progressive Casualty Insurance, Inc. v. Noland*, 2016 Cal. App. Unpub. Lexis 571, extrinsic evidence that might otherwise have been admissible to interpret a mediated settlement agreement was excluded because the evidence consisted of communications that had taken place during the mediation process.

In that case, the mediated settlement agreement provided that upon payment of some \$500,000 in settlement of two personal injury claims, plaintiffs' counsel ("Noland") was required to indemnify and hold the insurance company harmless from any and all liens. Certain Arizona medical lien claimants later made demands on the insurance company to pay outstanding liens, and the insurer tendered the lien claims to the Noland. Noland refused the tender, and the insurance company sued to enforce the indemnity

<sup>1</sup> *Appropriate language to add to your mediated settlement agreement or mediator's proposal should be "Upon full execution, this Agreement is binding, admissible and subject to disclosure for enforcement purposes per California Evidence Code Section 1123, and may be enforced under California Code of Civil Procedure 664.6."*



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provisions of the mediated settlement agreement. In opposition to a summary judgment motion, Noland offered evidence of documents and discussions communicated during the mediation that allegedly made it clear that the insurance company had refused to pay any part of the settlement funds for medical bills from the Arizona medical providers, and that Noland had explained during the mediation that the indemnity provision did not apply to Arizona lien claims. The trial court excluded this purported evidence and the Court of Appeals affirmed, citing Cassel and the mediation privilege.

This case is an example of how a mediated agreement will only be judged by the actual language. *The words of the mediated settlement writing, and nothing else, will determine the rights and obligations of all bound by it.* This is a vital lesson to remember, particularly when drafting a mediated agreement late at night at the end of 10 or 12 hours of mediation.

The California Law Revision Commission is considering a modification of the mediation confidentiality rules to prevent the privilege from concealing fraud or producing unjust results. Any change to the privilege might result in a chilling effect on the willingness of the parties and the mediator to participate freely in the mediation process. We will all have to stay tuned to see what the Commission and the Legislature decide to do, if anything, to create new exceptions to mediation confidentiality.

If you would like further information, please contact your Rutan attorney.

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