

California's Mediation Confidentiality And Insurance Bad Faith

By Kirk Pasich

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I. Introduction

Settlement conferences have been replaced to a large degree by mediations. And, like settlement conferences and other settlement discussions, mediations typically are subject to certain confidentiality provisions. For example, [California Evidence Code section 1152 Shepardize](#)(a) states that when a person makes an offer to compromise a dispute, evidence of that offer "is inadmissible to prove his or her liability for the loss or damage or any part of it." However, California also extends broader protections for communications in or related to a mediation. See [Cal. Evid. Code §§ 1115-1128. Shepardize](#) These broader protections provide both advantages and disadvantages for participants in mediations. Among other things, the rules severely restrict the use of mediation communications. These restrictions present significant issues in dealings between insureds and insurance carriers, and in disputes between insureds and insurance carriers.

II. California's Mediation Provisions

[California Evidence Code section 1119 Shepardize](#) states, in relevant part:

No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery, and disclosure of the evidence shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.

[Cal. Evid. Code § 1119 Shepardize](#)(a).

Section 1119 also addresses writings, stating:

No writing . . . that is prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation, is admissible or subject to discovery, and disclosure of the writing shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.

Id. § 1119(b).

Section 1119 also cloaks communications with confidentiality:

All communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential.

Id. § 1119(c).

The Evidence Code also precludes the submission to a court or any other adjudicative body of "any report, assessment, evaluation, recommendation, or finding of any kind by the mediator concerning a mediation conducted by the mediator," other than reports mandated by law. *Id.* § 1121.

Thus, the Evidence Code provides broad restrictions on the use of communications and writings in connection with the mediation. However, the Evidence Code also provides certain exceptions. Those exceptions are when either of the following occurs:

(1) All persons who conduct or otherwise participate in the mediation expressly agree in writing, or orally . . . , to disclosure of the communication, document, or writing.

(2) The communication, document, or writing was prepared by or on behalf of fewer than all of the mediation participants, those participants expressly agree in writing, or orally . . . , to its disclosure, and the communication, document, or writing does not disclose anything said or done or any admission made in the course of the mediation.

Id. § 1122(a). Thus, all participants, including the mediator, must agree to the disclosure, unless the communication or document to be disclosed was prepared by less than all the participants (in which case all of those who participated in preparing the communication or document must agree to its disclosure).

If the restrictions established by the Evidence Code are violated, the consequences can be severe:

Any reference to a mediation during any subsequent trial is an irregularity in the proceedings of the trial Any reference to a mediation during any other subsequent noncriminal proceeding is grounds for vacating or modifying the decision in that proceeding, in whole or in part, and granting a new or further hearing on all or part of the issues, if the reference materially affected the substantial rights of the party requesting relief.

Id. § 1128. Therefore, reference to the mediation in a trial may result in a verdict being vacated or any other decision being modified or vacated, with a new trial. See Cal. Code Civ. Proc. § 657 (the verdict may be vacated and any other decision may

be modified or vacated and a new or further trial granted on all or part of the issues for any irregularity in the proceedings “materially affecting the substantial rights” of a party). Likewise, a reference to a mediation in any other proceedings, such as an arbitration, may be a basis for the arbitration decision being vacated or for new or further hearings. Thus, the consequences of violating a mediation provision cannot be ignored.

III. Court Decisions

California courts have recognized, and enforced the Evidence Code’s mediation provisions. Since the California legislature enacted the mediation provisions in 1997, those provisions have been considered in eight published California decisions and one published federal decision.

A. **Rinaker**

In *Rinaker v. Superior Court*, 62 Cal. App. 4th 155 [Shepardize](#), 74 Cal. Rptr. 2d 464 (1998), a juvenile court had ordered a mediator to appear and testify at a juvenile delinquency proceeding. The court of appeal held that a juvenile delinquency proceeding is a “civil action” that comes “within the plain language of section 1119.” [Id. at 164 Shepardize](#). However, the court held that

the confidentiality provision of section 1119 must yield if it conflicts with the minors’ constitutional right to effective impeachment of an adverse witness in [a] juvenile delinquency proceeding.

[Id. at 165 Shepardize](#). The court recognized that while section 1119 “serves an important public purpose in promoting the settlement of legal disputes through confidential mediation rather than litigation,” it “does not justify the preclusion of effective impeachment of a prosecution witness in a juvenile delinquency proceeding with statements the witness made during mediation.” [Id. at 167 Shepardize](#). The court determined that the proper approach would be for the juvenile court to conduct an *in camera* hearing to weigh the constitutionally-based claim of need against section 1119’s restrictions. [Id. at 169 Shepardize](#).

B. **Folb**

In *Folb v. Motion Picture Industry Pension & Health Plans*, 16 F. Supp. 2d 1164 [Shepardize](#) (C.D. Cal. 1998), the federal court addressed whether California’s rules regarding the confidentiality of mediation-related communications applied in a federal action involving a federal question. The court held that state privileges do not govern in cases presenting federal questions and that federal courts should not look at the law of the forum state as a matter of comity in “determining the contours of federal privilege law . . .” [Id. at 1170 Shepardize](#). However, it adopted a federal mediation privilege, stating:

[C]ommunications 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. To protect additional communications, the parties are required to return to mediation. A contrary rule would permit a party to claim the privilege with respect to any settlement negotiations so long as the communications took place following an attempt to mediate the dispute.

Id. at 1180 *Shepardize*. It noted that it was not attempting “to fully elucidate the appropriate scope of a mediation privilege under the federal common law. *Id.* at 1180 n.10 *Shepardize*.

C. **Colbert**

In *Gilbert v. National Corp. for Housing Partnerships*, 71 Cal. App. 4th 1240 *Shepardize*, 84 Cal. Rptr. 2d 204 (1999), the court addressed section 1119 in the context of a dispute over disqualification of counsel. The court noted that an attorney was “probably barred from introducing *any* of the information he gained in connection with the mediation and negotiation of the Settlement Agreement” because of section 1119’s predecessor, Evidence Code section 1152.5. *Id.* at 1254 n.9 *Shepardize*.

D. **Olam**

In *Olam v. Congress*, 68 F. Supp. 2d 1110 *Shepardize* (N.D. Cal. 1999), the court addressed a situation in which the competency of a party was at issue and a mediation arguably provided evidence regarding competency. The court applied the California provisions regarding the confidentiality of mediation communications. *Id.* at 128 *Shepardize*. See also Fed. R. Evid. 501 *Shepardize*, Advisory Committee Notes (state law regarding privilege applies in diversity cases). The court noted that Evidence Code section 1122

suggests that waivers by the parties would not be sufficient to make disclosure of mediation communications lawful if the mediator (and any other participants in the mediation, like non-party witnesses) did not also waive the protections of section 1119.

68 F. Supp. 2d at 1129 n.23 *Shepardize*. The court concluded that the waivers were sufficient to remove section 1119 “as a barrier to admission of the evidence” *Id.* at 1130 *Shepardize*. It observed that

Rinaker’s finding that the confidentiality provisions of § 1119 must give way to the minor’s right to effective cross-examination and impeachment of an adverse witness demonstrates that the confidentiality provisions of § 1119 are not absolute.

Id. at 1130 n.26 *Shepardize*. The court found that “a waiver of the mediation privilege by the parties is not a sufficient basis for a court to permit or order a mediator to testify.” *Id.* at 1130 *Shepardize*. However, the court also concluded that Federal Rule of Evidence 703 *Shepardize* imposes “an independent duty” on

courts to determine whether testimony from a mediator can be justified “by the prospect that her testimony might well make a singular and substantial contribution to protecting or advancing competing interests of comparable or greater magnitude.” *Id.* at 1132 *Shepardize*. The court noted that courts should weigh and assess the interests that would be harmed if the mediator were compelled to testify with the rights or interests that would be jeopardized if the testimony were not available, and assess how much the testimony would contribute towards protecting those rights. *Id.* *Shepardize* The court concluded that the “most consequential” testimony from the mediator would focus not primarily on what an individual said during the mediation, but on how she acted and “the mediator’s perceptions of her physical, emotional, and mental condition.” *Id.* at 1136 *Shepardize*. As the court reasoned, the purpose would be “to assess at a more general and impressionistic level her condition and capacities. That purpose might be achieved with relatively little disclosure of the content of her confidential communications.” *Id.* *Shepardize*

The court concluded that

refusing to compel the mediator to testify might well deprive the court of the evidence it needs to rule reliably on the plaintiff’s contentions — and thus might either cause the court to impose an unjust outcome on the plaintiff or disable the court from enforcing the settlement. In this setting, refusing to compel testimony from the mediator might end up being tantamount to denying the motion to enforce the agreement — because a crucial source of evidence about the plaintiff’s condition and capacities would be missing. . . . If parties believed that courts routinely would refuse to compel mediators to testify, and that the absence of evidence from mediators would enhance the viability of a contention that apparent consent to a settlement contract was not legally viable, cynical parties would be encouraged either to try to escape commitments they made during mediations or to use threats of such escapes to try to re-negotiate, after the mediation, more favorable terms — terms that they never would have been able to secure without this artificial and unfair leverage.

Id. at 1137 *Shepardize*. Therefore, the court held an evidentiary hearing in which all participants in the mediation testified.

E. Foxgate

In *Foxgate Homeowners’ Ass’n v. Bramalea California, Inc.*, 26 Cal. 4th 1 *Shepardize*, 25 P.3d 1117, 108 Cal. Rptr. 2d 642 (2001), the California Supreme Court considered the appropriateness of a sanctions order based on allegedly dilatory and obstructive conduct during a mediation. The superior court had granted sanctions against a party and its counsel, based in part upon a mediator’s declaration that counsel had aborted the mediation session by refusing to participate in good faith. The California Supreme Court ruled that the order for sanctions was inappropriate and constituted an irregularity in the proceedings. *Id.* at 1128-29 *Shepardize*. Therefore, it ruled that if sanction motions were pursued on remand,

the trial court may consider only plaintiff’s assertion and evidence offered in

support of the assertion No evidence of communications made during the mediation may be admitted or considered.

Id. at 1129 *Shepardize*. The court premised its decision on the notion that

the purpose of confidentiality is to promote “a candid and informal exchange regarding events in the past This frank exchange is achieved only if the participants know that what is said in the mediation will not be used to their detriment through later court proceedings and other adjudicatory processes.”

Id. at 1126 *Shepardize*.

The court also stated:

[W]e do not agree . . . that the court may fashion an exception for bad faith in mediation because failure to authorize reporting of such conduct during mediation may lead to “an absurd result” or fail to carry out the legislative policy of encouraging mediation. The Legislature has decided that the policy of encouraging mediation by ensuring confidentiality is promoted by avoiding the threat that frank expression of viewpoints by the parties during mediation may subject a participant to a motion for imposition of sanctions by another party or the mediator who might assert that those views constitute a bad faith failure to participate in mediation. Therefore, even were the court free to ignore the plain language of confidentiality statutes, there is no justification for doing so here.

Id. at 1128 *Shepardize*.

F. **Paul**

In *Paul v. Friedman*, 95 Cal. App. 4th 853 *Shepardize*, 117 Cal. Rptr. 2d 82 (2002), a securities broker had sued former brokerage clients and their lawyer for various claims arising out of their earlier pursuit of an arbitration in which the broker was vindicated. After a mediation, the lawyer filed written declarations in a civil proceedings attempting to vacate the arbitration award in which he described statements and evaluations made by the mediator during the mediation. The broker also sought recovery on a theory that the attorney had breached the confidentiality agreement. The court ruled that the lawyer’s motion to strike that cause of action properly was denied by the trial court. According to the court of appeal, statements that the lawyer made in his declarations regarding the mediation were not covered by the litigation privilege. *Id.* at 869 *Shepardize*. As the court further explained:

Nor are there any exceptions to the confidentiality of mediation communications or to the statutory limits on the content of mediator’s reports.

Id. *Shepardize*

G. **Greene**

In *Greene v. Dillingham Construction N.A.*, 101 Cal. App. 4th 418 *Shepardize*, 124 Cal. Rptr. 2d 250 (2002), the defendant argued that the trial court abused its discretion in awarding attorneys' fees for the period of time after the plaintiff rejected a settlement offer. The court noted that under California Code of Civil Procedure section 998, "a plaintiff who refuses a reasonable settlement offer and then fails to obtain a more favorable judgment is penalized by the loss of post-offer costs and an award of costs in the defendant's favor." *Id.* at 425 *Shepardize*.

However, the court noted that section 998's punitive provisions "have no application to an informal settlement offer made during the course of a confidential mediation session." *Id.* *Shepardize* It reasoned as follows:

Not only would disclosure of the settlement offer violate Evidence Code section 1119, the penalties would frustrate the public policy favoring settlement that is served by mediation. In addition, where, as here, the settlement offer includes a confidentiality condition, it would be difficult for a judge to calculate the value to the litigants of vindication in a public forum, even if the judgment is ultimately less favorable monetarily than the settlement offer.

Id. (note omitted) *Shepardize*.

H. **Eisendrath**

In *Eisendrath v. Superior Court*, 109 Cal. App. 4th 351 *Shepardize*, 134 Cal. Rptr. 2d 716 (2003), a husband filed a petition for dissolution of marriage. The husband and wife participated in a mediation subject to a mediation agreement that provided that communications during the mediation would be treated as confidential information and not admissible or subject to discovery. The parties ultimately agreed to a stipulated judgment of dissolution. Subsequently, they remarried. The husband then sought to correct the judgment, stating that it did not accurately reflect the parties' agreement. He filed a declaration referencing negotiations and conversations when the mediation was proceeding. The wife responded by stating that she was willing to waive her confidentiality rights regarding the mediation and contended that the husband had waived his confidentiality rights.

The court noted that section 1119 "states the fundamental rule regarding confidentiality of mediation communications." *Id.* at 358 *Shepardize*. The court ruled that Evidence Code section 912, which permits waiver of specified privileges, did not apply to the mediation provisions and that the so-called "in issue doctrine" (which creates an implied waiver when a privilege-holder tenders an issue involving the substance or content of a privileged communication) also did not apply. *Id.* at 363 *Shepardize*. As the court explained, section 910 *et seq.* do not "refer to mediation confidentiality rights or the statutory scheme governing these rights." *Id.* *Shepardize* The court then noted that

the confidentiality rule in section 1119 sweeps broadly: it bars discovery and evidence of "anything said" not merely "in the course of" mediation, but "for

the purpose of . . . , or pursuant to" mediation. Only certain communications made after the end of the mediation, or falling under other enumerated exceptions, escape its reach. Thus, the confidentiality rule in section 1119 encompasses communications by participants before the end of mediation that are materially related to the purpose of the mediation, regardless of whether these communications are made in the mediator's presence.

Id. at 364 Shepardize.

As the court emphasized, "Statutory exceptions aside, sections 1119 and 1121, by their plain language, render confidential any communications between mediation participants before the end of mediation that occur *outside* the mediator's presence, provided that these communications are materially related to the mediation." *Id. Shepardize*

Therefore, the court concluded that the evidence that the husband used in support of his motion to correct the judgment rested on evidence that "is inadmissible absent suitable express waivers" from both husband and wife. *Id. at 365 Shepardize.* The court noted that "this conclusion gives [wife] a substantial measure of control over [husband's] ability to present evidence in support of his motion to correct the spousal support agreement." *Id. Shepardize*

The court also ruled that the mediator cannot be ordered to testify on the terms of the spousal support agreement reached through mediation. It explained that authorizing such testimony "would authorize mediator testimony in virtually every dispute over a mediated agreement, and thus gut [Evidence Code] section 703.5" (which states that no mediator "shall be competent to testify in any subsequent civil proceeding, as to any statement, conduct, decision, or ruling occurring at or in conjunction with the prior proceeding." *Id. at 359 Shepardize.*

I. Rojas

In *Rojas v. Superior Court*, **33 Cal. 4th 407 Shepardize**, 93 P.3d 260, 15 Cal. Rptr. 3d 643 (2004), tenants of an apartment complex sued entities involved in the development or construction of the complex. This lawsuit followed an earlier suit brought by the owner of the complex against contractors and subcontractors, which had been settled as a result of a mediation in which consultants had provided construction defect reports, photographs, and witness interview statements. The court of appeal ruled that section 1119 does not "protect pure evidence," and that photographs and witness statements are discoverable.

The California Supreme Court disagreed, finding that the court of appeal's holding "directly conflicts with the plain language" of the Evidence Code provisions. It concluding that the Evidence Code provisions' language was

expressly designed to give a mediation participant who takes a photograph for purposes of the mediation "control over whether it is used" in subsequent litigation, even where "another photo" cannot be taken because, for example "a building has been razed or an injury has healed."

Id. at 420 *Shepardize*. The court stated:

For all of the above reasons, we conclude that the Court of Appeal erred in holding that photographs, videotapes, witness statements, and “raw test data” from physical samples collected at the complex — such as reports describing the existence or amount of mold spores in a sample — that were “prepared for the purpose of, in the course of, or pursuant to, [the] mediation” in the underlying action are not protected under section 1119.

Id. at 422-23 *Shepardize*.

The court also ruled that the court of appeal erred in holding that there is no “good cause” exception to Evidence Code 1119. However, the court recognized that the fact that witness statements and other documents prepared for, or during, mediation are protected from discovery “does not mean that *the facts* set forth in those statements are so protected.” *Id.* at 423 n.8 *Shepardize*. As the court explained, “facts known to a percipient witness constitute ‘[e]vidence otherwise admissible or subject to discovery outside of a mediation,’ those facts do not ‘become inadmissible or protected from disclosure solely by reason of [their] introduction or use in a mediation’ through witness statements prepared for the purpose of, in the course of, or pursuant to, the mediation. Otherwise, contrary to the Legislature’s intent, parties could use mediation “as a pretext to shield materials from disclosure.” *Id.* *Shepardize*

J. Stewart

In *Stewart v. Preston Pipeline Inc.*, 134 Cal. App. 4th 1565, 36 *Shepardize* Cal. Rptr. 3d 901 (2005), at the conclusion of a mediation, the plaintiff, plaintiff’s attorney, and defendants’ attorney presented a document that purported to memorialize a settlement reached at the mediation. However, thereafter, the plaintiff refused to accept the settlement check. The plaintiff contended that the settlement agreement was inadmissible under section 1119. The court started its discussion by observing that “the Evidence Code does not use the term ‘privilege,’ and, therefore, we will use the term ‘mediation confidentiality’ in [its] discussion of the statutory provisions rendering communications made in connection with mediation confidential.” *Id.* at 1572 n.5 *Shepardize*. The court then pointed out:

Mediation confidentiality encourages the frank exchange of information in order to encourage settlement. Section 1119 is a rule of mediation confidentiality that “sweeps broadly.” And as our high court recently reiterated, there are no exceptions to mediation confidentiality under section 1115 *et seq.*, except those expressed by statute.

Id. at 1574 (citations omitted) *Shepardize*. The court ruled that the settlement agreement was admissible. It noted that the agreement provided that the parties thereto agreed that it would be “exempt from the confidentiality provisions of Evidence Code Section 1152, *et seq.*,” finding that the references to section 1152 were not “words of limitation, such that the agreement should be construed as

confidential in one context but nonconfidential in others.” *Id.* at 1578 *Shepardize*. It also noted that the agreement stated that it was a full and final settlement of all claims and would be enforceable, concluding that this satisfied the requirement in section 1123 that “[t]he agreement provide[] that it is enforceable or binding or words to that effect.” *Id.* *Shepardize* Finally, the court concluded that although section 1123 specifies that a waiver be “signed by the settling parties,” “a stipulation waiving mediation confidentiality is not one that impacts the substantial rights of the party litigant,” thus meaning that the waiver was a procedural matter where the attorney’s signature would bind the client. *Id.* 1581-83 *Shepardize*.

K. In re Marriage of Kieturakis

In *In re Marriage of Kieturakis*, 138 Cal. App. 4th 56, 41 *Shepardize* Cal. Rptr. 3d 1119 (2006), a wife challenged a marital settlement agreement that she and her husband had reached during mediation, contending that it was a result of fraud, duress, and lack of disclosure. The court denied the motion to set aside the agreement. It concluded that the trial court’s error in admitting evidence from the mediation was harmless under the circumstances before it. It explained that because the wife bore the burden of proof on her challenges to the judgment,

she would be compelled to fully waive the mediation privilege if the matter were retried. Without that waiver, [given the evidence that otherwise would be available], [she] could not prevail with the case in that posture. Even if she was forced into the mediation as she claimed, she would have no meritorious ground for setting aside the judgment if the mediation itself was entirely fair . . . [t]o prove otherwise, she would need to show what transpired in the mediation.

Id. at 92 *Shepardize*.

L. Doe I

In *Doe 1 v. Superior Court*, 132 Cal. App. 4th 1160, 34 *Shepardize* Cal. Rptr. 3d 248 (2005), the Roman Catholic Archbishop of Los Angeles had sought a protective order to block the disclosure of written proffers of the personnel records of numerous priests accused of sexually molesting minors. The proffers would allow the disclosure for mediation and settlement purposes of the contents of the files to the extent that they reflected notice to the Archdiocese of an accused priest’s propensities toward child molestation before the alleged misconduct took place. The court noted that California’s statutory scheme regarding mediation confidentiality “unqualifiedly bars disclosure of specified communications and writings associated with the mediation absent an express statutory exception.” *Id.* at 1165 *Shepardize*. The court rejected the argument that the process that was taking place was a mandatory settlement conference, rather than a mediation, and therefore was exempt from the mediation confidentiality rules. It stated:

If counsel wish to avoid the effect of the mediation confidentiality rules, they should make clear at the outset that something other than a mediation is intended. 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.

Id. at 1166-67 *Shepardize*. The court then ruled that the proffers could not be disclosed because they “reveal something about the mediation discussion — the position the Church has staked out for mediation purposes regarding priests as to whom it supposedly had no notice of their sexual interests in minors.” *Id.* at 1169 *Shepardize*.

M. Fair

In *Fair v. Bakhtiari*, 40 Cal. 4th 189 *Shepardize*, 147 P.3d 653, 51 Cal. Rptr. 3d 871 (2006), the parties to a lawsuit engaged in a private mediation, signed a settlement terms document, and subsequently disagreed as to whether arbitration was required under the terms of that document. The trial court refused to consider the settlement terms document, citing section 1119 and finding that the exceptions to confidentiality do not apply and that there has been no waiver. The California Supreme Court considered the facts that the agreement mentioned arbitration and that the defendants told the trial court that the case had settled and circulated a formal agreement declaring the settlement terms effective as of the date of the memorandum. The defendants argued that this was sufficient under section 1123, which specified that an agreement could be used if it provides that “it is enforceable or binding or words to that effect.” The court held that the agreement was not admissible. It reasoned that

[a] tentative working document may include an arbitration provision, without reflecting an actual agreement to be bound. If such a typical settlement provision were to trigger admissibility, parties might inadvertently give up the protection of mediation confidentiality during their negotiations over the terms of settlement. Disputes over those terms would then erupt in litigation, escaping the process of resolution through mediation. Durable settlements are more likely to resolve if the statute is applied to require language directly reflecting the parties’ awareness that they are executing an “enforceable or binding” agreement.

Id. at 197-98 *Shepardize*. The court also noted that while the plaintiff’s characterization of defendants’ post-mediation conduct was “one reasonable interpretation of the facts,” the legislature did not contemplate that a court “would examine extrinsic evidence to resolve competing claims over the parties’ intent.” *Id.* at 198 *Shepardize*. As it explained, “the statute is designed to produce documents that clearly reflect the parties’ agreement that the settlement terms are ‘enforceable or binding.’” *Id.* *Shepardize* It then stated:

[T]o satisfy section 1123(b), a settlement agreement must include a statement that it is “enforceable” or “binding,” or a declaration in other terms with the same meaning. The statute leaves room for various formulations. However, arbitration clauses, forum selections clauses, choice of law provisions, terms contemplating remedies for breach, and similar commonly employed enforcement provisions typically negotiated in settlement

discussions do not qualify an agreement for admission under section 1123(b).

Id. at 199-200 *Shepardize*.

N. Wimsatt

In *Wimsatt v. Superior Court*, 2007 Cal. App. LEXIS 996 *Shepardize* (June 18, 2007), an attorney's client alleged that the attorney submitted an unauthorized settlement demand to the opposing party, which the client had learned of from a confidential mediation brief. The attorney sought to invoke the mediation confidentiality protections as to all mediation brief, some e-mails sent the day before the mediation that quoted from a mediation brief, and a communication made by the attorney to the defendants that purportedly lowered the client's settlement demand. The court directed that a protective order be entered as to the mediation briefs and e-mails, but not as to a conversation concerning the settlement demand. The court noted that the confidentiality provisions are "not limited to those communications made 'in the course of mediation.'" *Id.* at *18 *Shepardize*. It explained that the mediation briefs were protected because they "epitomize the types of writings which the mediation confidentiality statutes have been designed to protect from disclosure. Mediation briefs are part and parcel of the mediation negotiation process." *Id.* at *37 *Shepardize*. The court reached the same conclusion as to the e-mails, stating

The purpose of the e-mails was to clarify statements made in the mediation briefs as such statements would significantly affect the mediation negotiation to be held the next day. The e-mails would not have existed had the mediation briefs not been written. They were materially related to the mediation that was to be held the next day and are to remain confidential. To conclude otherwise would permit mediation participants to extract excerpts from the mediation brief and avoid confidentiality by publishing the contents of the briefs in another medium. Thus, the e-mails are protected and not subject to discovery.

The fact that the e-mail communications were transmitted by electronic means does not alter our conclusion. An e-mail is considered a writing for purposes of mediation confidentiality.

Id. at *38-39 (citation omitted) *Shepardize*. However, the court held that the mediation confidentiality would not apply to communications between the attorney and opposing counsel, even if those communications occurred at the time of the mediation.

The moving party[] has the burden to show that the conversation is protected by mediation confidentiality. To do so, the timing, context, and content of the communication all must be considered. Mediation confidentiality protects communications and writings if they are materially related to, and foster the mediation. Mediation confidentiality is to be employed where the writing, or statement would not have existed but for a mediation communication, negotiation, or settlement discussion.

[The firm] has not brought forth any evidence to demonstrate that the

conversation is linked to the second mediation or that it is anything other than expected negotiation posturing that occurs in most civil litigation. Throughout litigation, parties discuss discovery, settlement ranges, and developing evidence, including witnesses and documents. It is not unusual for parties to change positions as new information is developed. Parties revalue liability and damages. They alter their negotiation strategy. All conversations between the parties are not protected by mediation confidentiality simply because the conversations might have occurred temporarily before a scheduled mediation.

. . . The fact that the conversation in which [the attorney] allegedly lowered [the client's] settlement demand occurred outside the presence of a mediation does not automatically foreclose a conclusion that it was protected by mediation confidentiality. However, it is [the firm's] burden to link the conversation to a mediation session. It has not done so. . . . [T]he conversation may have occurred, and the statement could have been made, even if there was to be no mediation. If so, the statements were communications, negotiations, and settlements made in the regular course of the litigation, not for the purpose of, in the course of, or pursuant to a mediation.

Id. at *41-44 (citations omitted) *Shepardize*.

The court recognized the impact of its decision. It observed:

The stringent result we reach here means that when clients . . . participate in mediation they are, in effect, relinquishing all claims for new and independent torts arising from mediation, including legal malpractice causes of action against their own counsel. . . . We believe that the purpose of mediation is not enhanced by such a result because wrongs will go unpunished and the administration of justice is not served.

The inequities of California's mediation statutes have not gone unnoticed. . . .

. . . The California cases . . . have allowed to go unpunished sanctionable conduct that frustrated the purpose of mediation, foreclosed litigants from gathering evidence that might prove toxic molds and other microbes created health hazards, precluded a *propria persona* litigant from proving the terms of a mediated agreement, and shielded from view evidence of criminal conduct.

Given the number of cases in which the fair and equitable administration of justice has been thwarted, perhaps it is time for the Legislature to reconsider California's broad and expansive mediation confidentiality statutes and to craft ones that will permit countervailing public policies to be considered.

In light of the harsh and inequitable results of the mediation confidentiality statutes, such as those set out above, the parties and their attorneys should be warned of the unintended consequences of agreeing to mediate a dispute. If they do not intend to be bound by the mediation confidentiality statutes,

then they should “make [it] clear at the outset that something other than a mediation is intended.”

Id. at *48-52 *Shepardize*.

IV. Practical Issues And Approaches To California’s Mediation Provisions

As the above demonstrates, courts thus far have found few exceptions to the mediation confidentiality provisions established by the California Evidence Code. However, the courts have recognized that, in appropriate circumstances and with appropriate balancing, exceptions may be found. The commonly recognized exceptions include materials provided by a party (who can use the materials outside of the mediation), materials or communications presented by more than one party (when all presenting parties consent), other exceptions recognized by the statutory provisions, and certain exceptions when other rights (such as constitutional rights) are more important.

The mediation confidentiality provisions have practical implications for parties in several contexts, particularly when an insured is seeking coverage from an insurance carrier. If the carrier is not a participant in the mediation, then under section 1119, it should have no right to compel disclosure or offer into evidence any of the mediation communications. Furthermore, a carrier may not even be able to force the insured to tell the insurer what happened in the mediation, what positions were taken, or the bases for any settlement achieved at the mediation. Indeed, in at least one lawsuit in California, a carrier’s request for settlement information has been rejected by a discovery referee. In *American International Specialty Lines Insurance Co. v. Coca-Cola Enterprises Inc.*, Case No. 320748 (Cal. San Francisco Super. Ct. Oct 14, 2003), a carrier sought information regarding an underlying settlement that was negotiated at a mediation. The referee rejected the carrier’s request, stating:

The Referee recognizes that access to settlement information is crucial for [the carrier], and one might conclude that it appears inherently unfair that [the insured] can request reimbursement, yet not provide the details by shielding them within the mediation privilege. But the California Supreme Court has made it clear that this is the way the statutory scheme operates, and with very limited statutory exceptions, all communications, negotiations, discussions or findings resulting from a mediation are confidential.

Slip op. at 14. Thus, the referee enforced section 1119’s confidentiality requirements, even when the insured had sought coverage for the settlement negotiated at the mediation and even though the carrier’s coverage counsel had attended at least parts of the mediation. Therefore, a carrier may find itself barred from obtaining information it believes necessary to its coverage defenses.

A similar problem is presented for insureds if they would like to use communications or materials from a mediation to establish that there was an opportunity to settle a claim against them. In that situation, the materials arguably would not be admissible in evidence against the carrier in subsequent litigation without the participation of all involved in the mediation, unless the materials were generated by

the insured. Thus, if the underlying plaintiff objected to the insured's disclosure of information, the insured could find itself handicapped in the presentation of evidence against the carrier. Therefore, it is important for an insured to address this situation by obtaining, as part of a settlement, authorization to use the communicated settlement amounts in a dispute with its carrier. Alternatively, the insured could insist that the underlying plaintiff separately communicate settlement demands outside the context of the mediation so that it could offer evidence of those demands.

A different situation is presented when a carrier participates in a mediation. In that circumstance, the carrier presumably can block disclosure of its statements and communications. This could, in essence, potentially shield a carrier from liability for bad faith conduct in a mediation and even prevent an insured from showing that a carrier authorized a settlement, if the authorization was communicated during the course of the mediation. However, both *Rinaker* and *Olam* suggest that there may be exceptions that will permit an insured to offer evidence of mediation statements. One obvious exception should be if the carrier denied, in a subsequent coverage case, that it ever authorized a settlement or agreed to waive certain defenses. In that circumstance, the mediation communications could establish that the carrier or its representatives engaged in criminal conduct, such as perjury.

However, an insured's right to point to events related to a mediation might not be as limited as the Evidence Code provisions arguably suggest. Indeed, the California Supreme Court has interpreted the confidentiality provisions as not having the admissibility of evidence of bad faith. For example, the California Supreme Court has held that the litigation privilege ([California Civil Code section 47](#)) [Shepardize](#) does not bar the evidentiary use of statements made in negotiations incident to litigation to establish a defendant's motive in an abuse of process action. In *Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma*, [42 Cal. 3d 1157 Shepardize](#), 728 P. 2d 1202, 232 Cal. Rptr. 567 (1986), the court stated:

[W]hile section 47(2) bars certain tort causes of action which are predicated on a judicial statement or publication itself, the section does not create an evidentiary privilege for such statements. Accordingly, when allegations of misconduct properly put an individual's intent at issue in a civil action, statements made during the course of a judicial proceeding may be used for evidentiary purposes in determining whether the individual acted with the requisite intent.

Id. at 1168 [Shepardize](#).

California law certainly does not endorse an insurance carrier's bad faith conduct. There also is nothing in the Evidence Code sections that suggests that the Legislature meant to create a shield that would allow carriers to engage in gross bad faith, but then hide behind a confidentiality provision. Indeed, the California Supreme Court has recognized that other protections, such as the litigation privilege, will not shield an insurance carriers from liability for bad faith. For example, in *White v. Western Title Insurance Co.*, [40 Cal. 3d 870 Shepardize](#), 710 P.2d 309, 221 Cal. Rptr. 509 (1985), the court stated:

It is clear that the contractual relationship between insurer and the insured does not terminate with commencement of litigation. . . . [I]t is not unusual for an insurance company to provide policy benefits, such as the defense of litigation, while itself instituting suit to determine whether and to what extent it must provide those benefits. It could not reasonably be argued under such circumstances either that the insurer no longer owes any contractual duties to the insured, or that it need not perform those duties fairly and in good faith.

Id. at 885-86 *Shepardize*. The carrier next argued that [California Evidence Code section 1152](#) *Shepardize* would preclude the admission of prior settlement offers. The California Supreme Court disagreed with this contention, too. It held:

The language of this section does not preclude the introduction of settlement negotiations if offered not to prove liability for the original loss but to prove failure to process the claim fairly and in good faith.

Id. at 887 *Shepardize*. The court also rejected the carrier's contention that the litigation privilege would prevent the use of settlement offers made after the commencement of coverage litigation. It held:

It is obvious, however, that even if liability cannot be founded upon a judicial communication, it can be proved by such a communication — otherwise Evidence Code section 1152 would be unnecessary, and much of modern discovery valueless. [The insurer's] argument, consequently, forces us to draw a careful distinction between a cause of action based squarely on a privileged communication, such as an action for defamation, and one based upon an underlying course of conduct evidenced by the communication. In the present case plaintiffs do not assert that defendant's communications were defamatory, or done with the intent of causing emotional distress, but instead that they show that defendant was not evaluating and seeking to resolve their claim fairly and in good faith. In our opinion, [the litigation privilege] does not bar admission of the offers for that purpose.

Id. at 888 *Shepardize*.

V. Conclusion

The California Evidence Code provisions regarding mediation clearly place restrictions on the ability to use mediation documents and communications outside the context of the mediation. Those restrictions must be considered. Parties should take practical approaches to ensure that if they need to use any mediation communications and documents, they can do so. Otherwise, parties should engage in a settlement approach that all participants agree or acknowledge is not a mediation or is not subject to Evidence Code section 1119 *et seq.* However, even in the absence of statutory exceptions or the required waivers, there is a possibility that an insured may be able to use mediation communications and records as evidence of a carrier's bad faith.

