

# BEHIND CLOSED DOORS: The Supreme Court Protects Mediation Confidentiality in *Foxgate*.

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Should the veil of mediation confidentiality which is mandated by statute be subject to a judicially created exception when bad faith tactics are allegedly employed in mediation? Does a trial judge have the inherent power to determine when mediation confidentiality applies and when it does not? On July 9, 2001, the California Supreme Court issued an opinion which answered these important questions, preserving the confidentiality of the mediation process. *Foxgate Homeowners Association, Inc., v. Bramalea California, Inc.* (July 9, 2001) 26 Cal.4<sup>th</sup> 1.

## **The Facts of Foxgate:**

*Foxgate* arose from a court-ordered construction defect mediation, in which the judge appointed the same person to serve as mediator and special master (discovery referee). A case management order (CMO) permitted the neutral to report to the court as a special master, but confirmed the confidentiality protections of the California Mediation Act (*Evidence Code* " 1115 - 1128) for the mediation. The CMO also empowered the neutral to schedule mediation sessions, including expert meetings. When the neutral perceived that defense counsel was subverting the mediation process by not producing experts when directed to do so and by other conduct, he wrote a report to the trial judge which was highly critical of defense counsel, and which contained references to mediation communications and conduct. That report, and a motion for sanctions by plaintiff=s counsel which also disclosed confidential mediation communication, were considered by the judge in ordering sanctions against the defense of over \$30,000.

The actions of the trial judge were troubling for several reasons. Confidentiality is the cornerstone of mediation. It allows for candor and creativity, which maximizes the potential for settlement. Without a firm assurance of confidentiality, the process is undermined. This principle is recognized in the statute. *Evidence Code* '1121 prohibits a mediator from reporting to the court about mediation, or the court from considering such a report. *Evidence Code* ' 1119 precludes disclosure of any mediation communication. *Evidence Code* ' 703.5 declares that a mediator is incompetent to testify about a mediation. The CMO in *Foxgate* confirmed that the *Evidence Code* confidentiality protections would apply. The facts of *Foxgate* did not fit within any previously recognized exception to mediation confidentiality. See, *Olam v. Congress Mortgage Company* (October 1999) 68 F. Supp. 2d 1110 (mediator compelled to testify regarding consent to a mediated settlement agreement); and, *Rinaker v. Superior Court* (1998) 62 Cal. App. 4<sup>th</sup> 155 (right to confront and cross-examine witnesses in juvenile hearing takes precedence over confidentiality).

The Court of Appeal acknowledged all of these points, but fashioned a new exception to statutory mediation confidentiality, which we will call “The Sanctions Exception”. It reasoned that the legislature could not have intended that confidentiality shield parties from the consequences of violating a court order, and ruled that the judge was correct to consider those portions of the mediator’s report which constituted a “purely neutral account” of mediation conduct and communication, and references in the plaintiff’s motion to mediation communication. To rule otherwise, the Court reasoned, would frustrate the legislative purpose and lead to an absurd result.

The Court of Appeal opened a Pandora’s box. The problem was this: To consider the merits of such a motion, a judge must breach confidentiality and hear about what occurred behind the closed doors of a mediation. To file or oppose such a motion, counsel must breach confidentiality. Even if the motion is denied, the damage is done. Confidentiality is reduced to a hollow ideal. Counsel would have to approach every mediation with the knowledge that the judge might hear about what was said or done. This Sanctions Exception would have had a very chilling impact on mediation in California.

### **The Supreme Court Analysis:**

The California Supreme Court in *Foxgate* took a surprisingly strong stand on behalf of mediation confidentiality. In a 6-0 decision, it concluded that there were “no exceptions” to the confidentiality of mediation communications under *Evidence Code* · 1119, or to the statutory limits on reporting by a mediator under *Evidence Code* · 1121. The Court rejected the argument that judicial construction of the statute was needed to avoid frustrating the legislative intent, or to avoid an absurd result. The clear language of the statute precludes mediator reporting, and requires strict confidentiality for all mediation communication.

The principle concern of the Court of Appeal, that litigants might be able to ignore court orders and subvert the mediation process, was deftly handled by the Supreme Court. An important distinction was made between disclosing mediation “conduct” and “mediation communication.” The court noted that the statute does not preclude a *party* from reporting to the trial court about *conduct* at a mediation (the mediator may not do so). Footnote 14 specifically states that the mediation statute is not violated by counsel’s declaration revealing that opposing experts were not produced, as required by court order. In fact, the opinion concludes with an invitation to the trial court in *Foxgate* to consider plaintiff’s evidence of conduct (not communication), if the sanctions motion is pursued.

The “conduct” distinction should effectively address the most common complaint about mediation: that the opposition has not brought the real decision-maker to the table. Many local rules require that decision-makers be personally present for mediation. Counsel who appear without the plaintiff, or a real defense decision-maker, will risk sanctions based on a report of this “conduct” to the court.

Notwithstanding the “no exception” language of the opinion, the Supreme Court distinguished the rulings in *Olam* and *Rinacker*, *supra*, and allowed their exceptions to stand. In *Olam*, the parties partially or completely waived confidentiality to allow inquiry into

a party's voluntary consent in signing a settlement agreement. In *Rinaker*, the constitutional due process right to cross-examine witnesses at a juvenile hearing was deemed more worthy of protection than the policy favoring confidentiality in mediation. In each case, the trial court conducted an *in camera* review of the evidence, and then engaged in a weighing of the competing arguments and policies.

### **The Lessons of Foxgate:**

After *Foxgate*, California courts will give much greater weight to arguments in favor of mediation confidentiality, and will resist the temptation to fashion new judicial exceptions. However, under *Olam* and *Rinaker*, trial courts may still engage in a balancing analysis that could overcome mediation confidentiality.

What practical issues should counsel be aware of after *Foxgate*?

- ⇒ *Mediation conduct may be reported by counsel, but communication may not. Make sure your opponent agrees in advance to the absence of clients or insurance representatives. Confirm in writing.*
- ⇒ *Do not bring a sanction motion without strong conduct evidence, which requires no communication evidence to understand the context.*
- ⇒ *Draft Case Management Orders carefully. Old form CMOs may contain language which waives confidentiality protections.*
- ⇒ *Never hire the same neutral to be Special Master and Mediator. The role of mediator is inconsistent with a decision-making role.*

Finally, remember that the Mediation Act does not preclude disclosure of mediation communication in a subsequent criminal proceeding. If a criminal investigation is underway, you may be wise to limit client communication in any related civil mediation.

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