CLM National Conference
March 13-15, 2019
Orlando, Florida

LIFTING THE VEIL: THE FUTURE OF CONFIDENTIALITY IN MEDIATION AND SETTLEMENT

I. Confidentiality in Mediation and Settlement

A. Confidentiality Today

Requiring confidentiality is understandable for prized trade secrets-after all, the formula for Coca Cola is one of a kind. In recent times, however, confidentiality in case resolution has spread far beyond the imaginable to the unimaginable. Instead of protecting the essential it has, in some circumstances, cloaked evil that can only be ended by bringing darkness into light.

B. Stakeholders and What is At Stake

Claims professionals, third party administrators, in-house and outside counsel need to ensure compliance with the most recent legal changes. In the field of confidentiality, the landscape has changed dramatically in the last 18 months. As a result of changes on the federal and state level, new laws require greater scrutiny of the need for confidentiality in both mediation and settlement.

C. Mediation Confidentiality: A Lawyer's View

The most stringent law protecting mediation confidentiality resides in California. California Evidence Code Section 1119 has broad protection for mediators, parties and their counsel. The communications leading up to, at and shortly following mediation are protected from future use. In recent years, the California Supreme Court has determined that the confidentiality at mediation has a greater interest than admissibility of its communications in an action between lawyer and client. Thus, in Cassel v. Superior Court (2011) 51 Cal. 4th 113, the California Supreme Court determined that such communications between attorney and client are inadmissible in a subsequent legal malpractice action-even when the alleged malpractice occurred at mediation.

The shock wave was felt. The legislature empowered the revision of law through a law review commission. The result was a compromise. If an attorney wants to have the protections of California Evidence Code Section 1119, he or she must first do a disclosure to the client and have it signed off prior to the mediation. California Evidence Code Section 1129. Thus, starting January 1, 2019, statutory forms will become more commonplace. Further, clients may elect to forego mediation because of it which may result in fewer settlements or more court ordered conferences.

As other states' laws are not as stringent as California, the ripple effect cannot be more clear. Setting expectations for, communication on and consent for mediation will become more an important element for all stakeholders who must remain vigilant and careful with all their communications and dealings.

D. Traditional Confidential Settlements

In Florida, for example, a party can enter into a confidential agreement regarding trade secrets provided, it is not a result of fraud or concealment. Florida Statutes Section 90.506 (4). The Florida Uniform Trade Secrets Act defines a trade secret as one in which information, data, or documents have an independent value by not being known by others who can gain economic benefit from it. Florida Statutes Section 688.002(4).

Thus, litigation based on concealment and fraud in connection with trade secrets creates hurdles for settlement in general, and confidentiality in particular. Practitioners need to focus on the gravamen of the litigation, why settlement is reached, and the element of non-monetary terms which support the need for confidentiality.

Florida goes further in the Sunshine in Litigation Act to protect public hazards. Florida Statutes Section 69.08 (4). Under the Act, a confidential settlement involving a public hazard is void. Public hazards are defined as an instrumentality, including, but not limited to, any device, instrument, person, procedure, product, or a condition of a device, that causes injury. Florida Statutes Section 69.08 (2). Thus, it extends to products. Jones v. Goodyear Tire & Rubber, 871 So. 2nd 899 (2003). Courts have applied this to tangible things rather than pure economic losses under Florida law. Stivers v. Ford Motor Credit, 777 So. 2nd 1023 (2000). Thus, the nature of the case will affect the application of the Sunshine in Litigation Act.

II. Age of Accountability

A. Weighing Accountability with Case Resolution

We have learned recently of cruelty bathed in silence. The stories of Hollywood actresses and the casting couch shed light through the brightness of celebrity. The revelations have raised awareness and emboldened those who previously lived in fear to come forward and tell their stories. The revelations have brought down storied empires. It has been a clear, solemn reminder

that as individuals, we each deserve dignity and respect. The unthinkable in business, religious, and interpersonal relationships have caused a re-examination not simply of values, but of the law. Each of these has an impact on case resolution today, tomorrow and for many years to come.

In this context, attorneys, mediators, claims professionals, underwriters, brokers and stakeholders of all trades and sizes need to transform the fixed notions of the past to a new future. This future will recognize that transparency is a value to be factored into settlement. The world has changed. Those who participate in conflict resolution need to innovate to account for this change and implement time honored skills to do so.

B. Changes in the Law on Confidentiality

Some states have chosen to restrict the availability of confidentiality in settlements. For example, in his final year in office, California Governor Edmund G. "Jerry "Brown signed into law S.B. 820. This law amends California Code of Civil Procedure Section 1002. It reflects the recognition that it is the identities of the victims of sexual harassment, rather than of the perpetrators, that need to be protected. This legislation followed the revelations of sexual harassment and assault in the entertainment industry. This new law, which goes into effect January 1, 2019, prevents non-disclosure agreements in settlements involving: (1) acts of sexual assault; (2) acts of sexual harassment; (3) work place sexual assault; (4) work place sexual harassment; and (5) failure to prevent work place sexual assault or sexual harassment; and, (6) retaliation for reporting work place sexual assault and sexual harassment. A settlement non-disclosure agreement which violates these provisions will be void.

In addition, the tax treatment of payments made and received for confidential settlements promotes greater transparency of the resolution of litigation. Specifically, the Tax Cuts and Jobs Act of 2017, Section 13307, addresses the deductibility of settlement payments. The law disallows the tax deductibility of a payment of a settlement for sexual harassment or sexual assault if the settlement agreement contains a confidentiality requirement. Further, there is an

open tax question on the deductibility of the victim's attorney's fees as well. Thus, confidentiality can be prohibited by law and/or punished by the Internal Revenue Code.

Changes in the law both increase expectations of a more vigilant public and call into question why confidentiality requirements in settlement agreements are so common. Confidentiality is no longer under a magnifying-glass, it is der a microscope as the pendulum swings past center. All stakeholders must be both vigilant in knowing the applicable law, procedure, and practice

involved, and candid in considering whether a settlement really needs to be confidential to begin with. Some members of the Bar, empowered by current trends, may choose to refuse to make a settlement confidential. Balancing the interests will become more delicate as the scrutiny of confidentiality provisions increases.

III. Confidentiality: A Mediator's Point of View

Over recent years, mediation has become a preferred method of claim and case resolution. Ensuring mediation confidentiality is important for a Mediator to build confidence in the process. Quite often, parties will have little or no sophistication in legal matters and will heavily rely on their counsel and, where appropriate, claims professionals, to guide them through the process. Regardless of the mediator's style, development of trust is the key medium to get a matter resolved. Some general concepts that set the table are good starting points.

A. Building Trust

First, mediation does not begin on the date selected, it begins, at the latest, when the date is selected. Quite often, many successful mediators initiate communication with the parties and/or their counsel in advance. Timing, discovery and potential determination of key issues before mediation will enable the parties to best approach to resolve their dispute. Ensuring that a discussion starts before the parties arrive is one way to set the table for an effective mediation

B. Interest Identification

Second, understanding the interests of the parties is essential. The gist of a dispute may well be monetary, but in some instances it is not. Surprisingly, the number of successful resolutions which include an apology of some sort are on the rise. Parties need closure, but in some cases, money alone will not buy it.

C. Appropriateness of Confidentiality

Third, in this context, confidentiality needs to be assessed. Is the case one where confidentiality is appropriate? For example, cases involving public entities and certain non-profits may not be subject to confidentiality. Does the case fall into a protected category of actions, such as sexual
harassment, where there is a growing trend for transparency? Examining whether a settlement can be confidential is a prerequisite for the process.

D. Impediment or Stepping Stone

Fourth, is confidentiality an impediment or a stepping stone? If confidentiality is to be a condition, it has a value. That may be reflected in money or other terms. Is it really worth it? Quite often the need for subsequent disclosure for other lawful reasons may take that term out of reach. Mediation should not fail because there was no understanding of whether or not confidentiality was understood as an important element.

E. Enforcement

Fifth, how is confidentiality to be enforced? With many jurisdictions with various rules on how a case concludes, judicial review and approval, claim professionals, third party administrators, in-house and outside counsel need to ensure what the cost is for non-disclosure. In this regard, how it can be enforced (e.g. liquidated damages or injunctive relief) create an atmosphere that while the case is settled, it's not over.

IV. Claim Professional's Challenge

A. Creating Confidence

Among the considerable talents of claim professionals is taking the unmanageable dispute into mediation. Mediation is not a destination, but a forum where a resolution can be reached. The claim professional's role may vary from matter to matter; however, must be built on trust. Empathetic listening to a client or an insured's cause is an essential element to build that trust. Often, client consultation and, perhaps, consent, is needed to effectuate any resolution. In that context, the claim professional's working knowledge of whether and how a confidential settlement can be reached is the difference between a closed file and trial.

B. Can It Be Done

Perhaps even before a Mediator or a date is selected, a frank conversation is needed between the client or insured, the claim professional, third party administrator, in-house counsel and outside counsel. In some instances, the subject matter of the case cannot be concluded by confidentiality as a matter of law. This may be due to subject matter. It may also be due to the need for an approval of the settlement by a Court or other tribunal.

C. Good Faith Settlement

For example, in the landmark decision of the Illinois Supreme Court in Skinner v. Reed-Prentice Division Package Machinery, 70 Ill. 2nd 1 (1977), led to the adoption of the Joint Tortfeasor Contribution Act ,740 Illinois Compiled Statutes (ILCS) 100/0.01 et seq. This created a right of contribution among joint tortfeasors under Illinois law. BHI Corp. v. Litgen Concrete Cutting & Coring, 214 Ill 2nd 356, 365 (2005). Upon motion, a party may seek a determination of good faith, discharging it from remaining claims for contribution by other tortfeasors. Johnson v. United Airlines, 203 Ill. 2nd 121, 135.

But if the settlement is confidential, how can the non-settling parties respond, in opposition, without the details of the agreement itself? This was answered, at least in part, in Zielke v. Wagner, 291 Ill. App. 3rd 1037, 1039. In that case, the Court entered a protective order allowing opposing parties' counsel to learn of the material, monetary terms; accepted the confidential agreement under sea; and then had the ability to determine that the settlement was in good faith. In such cases, courts engage in a balancing act: encourage settlement while also ensuring the appropriate apportionment of damages.

D. Go Global

Other considerations include not seeking a good faith determination, positioning the settlement as part of a global resolution, having an in-camera review of confidential terms, or simply
recognizing that a good faith determination invokes public review. Different states employ a variety of procedures; however, weighing the interest for genuine confidentiality on a trade secret differs from an amount paid where foreclosing contribution rights are concerned.

V. Keeping Confidential Settlements Confidential: A Mediator's View

A. A Deal is a Deal

Confidentiality also overlays the past and present employment of individuals entrusted with trade secrets. For example, in Texas, where confidentiality agreements between the parties enjoy greater contractual protection, the Texas Tenth Court of Appeals refused to allow a deposition and production of documents under Texas Rule of Civil Procedure Section 202. In re Jeremy Pickrell and ERBE USA, Inc. (2017) No. 10-17-00091-CV. The Court reasoned, in an appeal from the 413th District Court of Johnson County, that the intent of confidentiality overrode the need for information in litigation.

B. Court Filings and Termination

In some states, some disclosure requirements have been routinely ignored. For example, in New York, when a case is dismissed based on a settlement, the stipulation for or settlement agreement is supposed to be filed publicly where it is available for public view. New York Civil Practice and Law Rules (CPLR) Section 2104. The failure to file a stipulation under seal as an alternative, but cumbersome, procedure has resulted in challenges to confidentiality. In Mahoney v. Turner Construction, 872 N.Y. 2nd 433 (2009), the Court reversed a trial court decision enforcing a confidentiality provision of a settlement. While it remanded for an in camera review, it was a reminder that prescribing confidentiality and maintaining it are two different things.

Moreover, in New York, CPLR 3101 has historically required disclosure of all documents in the prosecution and defense of an action. This has been given broad interpretation under New York law. Allen v. Crowell-Collier Publishing, 21 N.Y. 2nd 403 (1968). Therefore, in drafting a confidentiality provision in a settlement agreement, counsel need to consider whether and how this agreement may be viewed after the fact.

C. Confidential Settlements Revisited

We live in a more turbulent time. The white water that all stakeholders will navigate requires the ability to adapt, perpetually learn new laws and techniques, and apply reason where it has been missing-perhaps for some time.

The #MeToo movement has raised consciousness of unspeakable conduct that has gone on too long in the theatre of silence. It is an important development in the evolution of what it means to respect others and advance liberty. It is a lens on the events of the past calls into question behavior that did not satisfy the highest and best standards of professionalism and decency. Knowing this, a review of confidentiality in settlements may have begun in cases involving sexual assault and harassment, but it will not end there. It is, in fact, only beginning.

Greater means and speed of communication combined with a vigilant public whose awareness is heightened requires a new skill set for dealing with confidentiality in settlement. It follows that if procedural safeguards need to be followed before mediation, the potential result, a confidential settlement, requires much more preparation for clients, attorneys, claims professionals, and third-party administrators alike.

In this regard, it is truly indispensable to all stakeholders: clients or insureds, claim professionals, third party administrators, in house counsel and outside counsel to know, in their jurisdiction, whether or not the case is an appropriate subject for confidentiality to begin with. As states respond to recent developments in employment, public safety, product liability, trade and commercial relations, what will not be transparent? Further, with the change in tax laws, both at the federal and state level, will the payment be tax deductible? Finally, in this instant information age, what are the enforcement guidelines when an inadvertent email goes viral on the internet?

D. A Check List

The following questions may be helpful in determining whether to include a confidentiality provision in a settlement:

1. Is this subject matter really confidential?
2. Why is confidentiality requested?
3. Have the parties exchanged non-monetary terms in advance of mediation?
4. Has the mediator explored confidentiality with the parties before mediation?
5. Is confidentiality lawful for the subject of the case?
6. What steps are necessary to reach a complete or partial confidential settlement?
7. What is the risk/cost in having confidentiality? In not having it?
8. How will confidentiality be enforced?
9. Are there third parties with interests that need to be considered?
10. What happens in the event of later, lawful requests for examination of the settlement?
11. Is there the risk for regulatory or administrative review of the settlement?
12. Are there adverse tax consequences from confidentiality? If so, what are they?

Given the difficulty in keeping the curtain over the deal, a close and thoughtful evaluation of whether there should be one to begin with is essential for all stakeholders.

VIII. Conclusion

This panel has discussed the appropriateness of confidentiality in a new era. As time goes on, preparation and vigilance of all stakeholders can shed light where there is darkness and include confidentiality requirements in settlements only when they are genuinely necessary.