

Confidentiality Case Summaries

Joseph Macaluso, Inc., the District Court for D.C. quashed a subpoena for private labor mediators holding that public policy and the parties' reliance on confidentiality of the process required a protective order.

Olam v. Congress Mortgage Co., 1999 WL 909731, 68 F. Supp. 2d 1110, (N.D. Cal. 1999). *Olam* disavowed the agreement reached in mediation session, which extended into the late night. She claimed that she was physically, intellectually and emotionally incapable of giving consent and noted a prior illness. Magistrate Judge Wayne Brazil held that the best evidence of her capacity was from the mediator, so when both parties waived their confidentiality rights, Judge Brazil ordered the mediator to testify in a sealed proceeding.

Eisenrath v. Superior Court, 109 Cal. App. 4th 351, 134 Cal. Rptr.2d 716 (2d Dist. 2003). The Court interpreted Section 910 of the California Evidence Code. One party wanted to show the settlement document was inaccurate while the other wanted to not only admit mediation communications but to depose the mediator. The Court applied the Evidence Code and did not permit a waiver of the parties to confidentiality.

Riner v. Newbraugh, 563 S.E. 2d 802 (W. Va. 2002) a mediator was subpoenaed and questioned by the trial judge beyond the key issue of whether there was a settlement but the mediator did not reveal any confidential information.

Howard v. Ramsey, 2001 WL 228015 (Ohio Ct. App. 1st Dist. Hamilton Cty. 2001). The case interpreted Ohio law to hold that the parties may consent to disclosure of mediation.

R.R. Donnelley & Sons Co. v. North Texas Steel Co., Inc., 752 N.E.2d 112 (Ind. Ct. App. 2001) interpreted the Indiana A.D.R. Rule 2.12, which incorporates Indiana Rules of Evidence 408, to preclude admission at trial of a videotape prepared for mediation. The Indiana Rule tracks the federal rule.

Rojas v. Superior Court, 93 P.3d 260 (Cal. 2004)(raw evidence compiled for mediation is protected even if it is not later available to non-parties in other litigation involving one of the parties on the same subject matter).

In re Learjet, Inc., 59 S.W.3d 842 (Texarkana 2001). The Texas Court held that videotapes prepared solely for mediation were not communications entitled to protection under Texas Civ. Prac. & Rem. Code Sec. 154.073(c)(Vernon Supp. 2001).

In re Daley, 29 W.W3d 915 (Tex. App. Beaumont, 2000) held that the confidentiality of the process does not extend to attendance and whether a participant had permission to leave the mediation session.

National Union Fire Ins. Co. of Pittsburgh, Pa. v. Price, 78 P.3d 1138 (Colo. App. 2003) stated that confidentiality of Colorado Dispute Resolution Act precludes evidence of oral agreement allegedly reached at mediation since it mandates all settlements must be reduced to writing under the statute.

Frank v. L.L. Bean Inc., 377 F.Supp.2d 233 (D. Me. 2005) a \$ 1, 000 fine was imposed to sanction a plaintiff's attorney in a sexual harassment claim for breaching confidentiality of the mediation.

Johnson v. America Online, Inc., 280 F.Supp. 2d 1018 (N.D. Cal. 2003) the court struck portion of defendant brief which quoted language in a narrative submitted to mediator by the plaintiff. The California court relied upon the mediation contract and the California confidentiality statute to exclude the language.

VJL v. RED, 2002 WY 25, 39 P.3d 1110 (Wyo. 2002), the court reprimanded a mediator for reporting to the court observations of one of the parties. The Wyoming Supreme Court held that for the mediators to place themselves "into court proceedings after the fact of the mediation as basically a witness to discredit the truthfulness and character of a party to the mediation would not seem to comport with the functions of a mediator."

In re Waller, 573 A.2d 780 (D.C. App. 1990) upheld suspension of an attorney based upon allegations that an attorney-mediator disclosed to the trial judge an admission of a conflict of interest. The Court held that the public significance of the issue and the fact that it was unrelated to the negotiation of the claim itself permitted disclosure despite express confidentiality language in the mediation referral order.

In re Marriage of Malcolm, 2004 Cal. App. Unpub. LEXIS 10675, 2004 WL 2669309 (Cal. App., 2004) upheld the confidentiality protections against disclosure of mediation communications in subsequent action by participant for malpractice against own lawyer holding that the state statute does not provide an express exception under these circumstances.