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Divorce Mediation Participants: Family Code Disclosure Formalities Apply to You, Too!

by Michael T. Bonetto

For divorcing parties desiring to participate in mediation to resolve property division issues, recent case law has made it clear that the formalities of the Family Code don't just apply to litigants in court. If you want to attempt to mediate your divorce, don't eschew your disclosure requirements or you may find yourself with a voidable agreement.

As access to courts has been made difficult by the costs of litigation and court delays resulting from an underfunded public court system, divorce mediation has become a popular means of quickly and cost-effectively resolving property division. Integral to the mediation process is the **mediation confidentiality privilege** which precludes disclosure or use of documents in litigation which were "prepared for the purpose of, in the course of, or pursuant to, a mediation." Confidentiality is considered essential to effective mediation because it allows for frank and candid discussions by the parties without fear that adverse information presented during a mediation will be used against them later. Therefore, one of the Legislature's fundamental means of encouraging mediation has been the enactment of mediation confidentiality provisions. To ensure confidentiality, the statutory scheme unqualifiedly bars disclosure of specified communications and writings associated with a mediation absent an express statutory exception. (See *Rojas v. Superior Court (2004) 33 Cal.4th 407.*)

If you think that everything you exchange during mediation is protected by the mediation privilege, think again. In the more recent case *Lappe v. Superior Court* (2014) 232 Cal.App.4th 774, the court determined that the mediation privilege cannot be used as a shield against production of financial disclosure in a family law proceeding following participation in mediation. In *Lappe*, divorcing spouses elected to participate in mediation to resolve their family law dispute. The parties purportedly exchanged Preliminary Declarations of Disclosure in mediation detailing the community assets and their estimated values. After reaching an agreement on the division of property, the wife later learned that the community business -- which she relinquished to her husband at a value of $10 million -- was sold for $75m shortly after entry of judgment. She moved to set aside the judgment and attempted to compel husband to produce his disclosures. Citing the mediation confidentiality privilege husband refused to turn over the document. The Superior Court denied the motion to compel and, consequently, wife's motion to set aside the judgment. On appeal the Second District Court of Appeal overturned the lower court, holding that mediation confidentiality statutes do not apply to statutorily mandated financial disclosures in a family law proceeding. **Public policy in favor of complete and accurate disclosure of assets and debts supersedes the policy in favor of mediation privilege.**

The *Lappe* decision presents an interesting twist on the application of the mediation privilege as it applies within a divorce mediation. As recently as 2013, the appellate court held in *Marriage of Woosley* (2013) 220 Cal. App. 4th 881 that formal disclosures are not required in mediation as a prerequisite to enforceability of a judgment resulting from that mediation. While these two decisions are not directly in conflict, they do highlight the dilemma that most mediators and parties face when attempting to resolve their divorce through the mediation process. Often, parties participate in mediation to avoid the court

process in its entirety (along with its attendant cost). The goal in many such cases is to get a quick and fair broad brush resolution to the case and reduce the fees incurred by both parties. Parties in mediation often do away with formalities like conducting discovery, appraising property and valuing community businesses. If they do complete their financial disclosures, often they are prepared without the same level of detail and scrutiny as they would otherwise if prepared outside the mediation process. While *Woosley* recognizes this as an acceptable approach, *Lappe* makes it clear that these documents are still subject to judicial scrutiny, and confidentiality must yield to the underlying policy requiring a complete and accurate disclosure.

Why does an accurate disclosure matter? Family Code §2107(d) provides: "If a court enters a judgment when the parties have failed to comply with all disclosure requirements of this chapter, the court shall set aside the judgment. The failure to comply with the disclosure requirements does not constitute harmless error." In *Marriage of Fell* (1997) 55 Cal.App.4th 1058, the parties entered into a written marital settlement agreement without exchanging preliminary or final declarations of disclosure. The judgment was subsequently set aside for failure to comply with the statutory disclosure requirements. A fraudulent or misleading disclosure can likewise undermine a final resolution. Even if a misrepresentation in a disclosure is inadvertent, it can have the effect of voiding your judgment.

If you are considering participating in divorce mediation, consider meeting with one of our State Bar Certified Family Law Specialists to learn how to protect yourself in this process, and ensure that the agreements you reach are going to stand up to scrutiny should they be challenged. ■

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