

# Beware The 'Standard' Mediation Confidentiality Agreement

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The purpose of this article is to give you a healthy fear of your mediator's "standard" mediation confidentiality agreement (MCA). When you sign the "standard" MCA:

- You lose the power to protect your client against fraud;
- You lose the power to protect your client against malpractice; and
- You lose the power to protect your client against inappropriate mediation conduct.



Jeff Kichaven

Do you recognize the risks to your clients — and the malpractice and disciplinary risks to yourself? Once you do, you will never sign the "standard" MCA again, at least not without a lot of thought, and a lot of disclosures to your client. Here's why.

## What Rights Do You Have?

To understand what you lose when you sign the "standard" MCA, you must first understand what rights you have under the statutes governing mediation confidentiality. While your rights differ from jurisdiction to jurisdiction, there are three general approaches, those of New York, Illinois and California.



## ***New York***

New York law affords minimal confidentiality to mediation. The governing statute, CPLR 4547, provides only that settlement offers and demands “shall be inadmissible as proof of liability for or invalidity of the claim or the amount of damages.” The statute continues, “the exclusion established by this section shall not limit the admissibility of such evidence when it is offered for another purpose.”

This is analogous to the standard of Federal Rule of Evidence 408. So, evidence of what was said in a mediation is ordinarily admissible to prove fraudulent inducement of a mediated settlement; to prove mediator malpractice; and to prove inappropriate mediation conduct by one’s adversary.

## ***Illinois***

Illinois is governed by the Uniform Mediation Act (UMA), 710 ILCS 35/1 et seq. The UMA provides that mediation communications are privileged against admissibility and discovery. UMA Section 4. The privilege gives way, based upon proof of need, in “a proceeding to prove a claim to rescind or reform or a defense to avoid liability on a contract arising out of the mediation.” UMA Section 6(b)(2). The privilege gives way automatically in a malpractice action against the mediator or any other professional based upon conduct occurring during a mediation. UMA Section 6(a)(5) and (6).

The UMA is the law in other commercial states, including New Jersey, Ohio and Washington, and Washington, D.C. In mediations governed by this law, evidence of what was said in a mediation may be admissible to prove fraudulent inducement of a mediated settlement, is ordinarily admissible to prove mediator malpractice, and is not ordinarily admissible to prove inappropriate mediation conduct by one’s adversary.

## ***California***

California provides “absolute confidentiality” to mediation communications. Cal Ev. C. Section 1119. In mediations governed by California law, evidence of what was said in a mediation is ordinarily not admissible to prove fraudulent inducement of a mediated



settlement, mediator malpractice or inappropriate mediation conduct by one's adversary.



### **What Law Applies?**



Choice of law questions regarding mediation confidentiality can be complex, and deserve more thought than counsel customarily give them.

One recent mediation which I conducted involved a lawsuit pending in the federal district court in Minnesota. Federal jurisdiction was based on diversity of citizenship and amount in controversy. Over a dozen top-flight lawyers from excellent firms were involved. The mediation took place in Chicago, which was an easier travel destination for many of the lawyers than Minneapolis.

During the mediation day, I asked these lawyers which mediation confidentiality law they thought applied. All agreed that, even though I live in California, California law did not apply. Beyond that, there was no agreement. About a third thought that the UMA applied, because we were physically present in Illinois, a UMA state. Another third thought that Federal Rule of Evidence 408 applied, because the case was pending in federal court. The final third thought that Minnesota state law applied, because Minnesota state law governed the contract which was the subject of the lawsuit. But when I asked this final third — none of whom were a Minnesotan — what Minnesota mediation confidentiality law provided, none of them knew.

Clearly, in order to advise clients properly regarding their rights and obligations regarding mediations and mediated settlements, counsel should analyze choice of law questions and determine which law applies. Depending on the result of that analysis, the signing of a “standard” MCA can work a substantial waiver of your clients' rights, and possible malpractice and disciplinary risks to yourself.

### **Fraud**

The paradigm case is [Facebook v. ConnectU](#), [640 F.3d 1034, 9th Cir., April 11, 2011](#). This case involved the effort of the Winklevoss twins to rescind a mediated settlement agreement reached with Facebook and Mark Zuckerberg. The twins asserted that



Zuckerberg had misled them, at the mediation, about the value of their Facebook shares, and opposed enforcement of the mediated settlement agreement on grounds of fraudulent inducement. The district court enforced the settlement agreement, and the Ninth Circuit affirmed, holding that evidence of the alleged fraud was inadmissible because it came from a mediation:

Nevertheless, the district court was right to exclude the proffered evidence. The confidentiality agreement, which everyone signed before commencing the mediation, provides that:

“All statements made during the course of the mediation or in mediator follow-up thereafter at any time prior to complete settlement of this matter are privileged settlement discussions ... and are nondiscoverable and inadmissible for any purpose including in any legal proceeding ... *No aspect of the mediation shall be relied upon or introduced as evidence in any arbitral, judicial or other proceeding.*” (emphasis added).

“This agreement precludes the Winklevosses from introducing in support of their securities claims any evidence of what Facebook said, or did not say, during the mediation. See *Johnson v. America Online Inc.*, 280 F. Supp. 2d 1018, 1027 (N.D. Cal. 2003) (enforcing a similar agreement). The Winklevosses can’t show that Facebook misled them about the value of its shares or that disclosure of the tax valuation would have significantly altered the mix of information available to them during settlement negotiations. Without such evidence, their securities claims must fail. See *In re Daou Systems Inc.*, 411 F.3d 1006, 1014 (9th Cir. 2005); see also *McCormick v. Fund Am. Cos.*, 26 F.3d 869, 876 (9th Cir. 1994).”

640 F.3d at 1041.

Importantly, the Ninth Circuit devotes not one word to choice of law issues. One might question whether California’s “absolute confidentiality” standard, or the minimal confidentiality standard of Federal Rule of Evidence 408, applied to the mediation, which physically took place in California, but involved federal securities claims. So, presumably,



choice of law did not matter. If the minimal confidentiality standard of Rule 408 applied, not augmented by the “standard” MCA, the twins probably would have been able to present what they contended was the critical evidence in opposition to the enforcement of the mediated settlement. But the broad language of their mediator’s “standard” MCA would trump even that.

If Rule 408 did apply, query whether the twins would have had a malpractice claim against their lawyers if those lawyers thoughtlessly advised the twins to sign a “standard” MCA waiving their contract defenses. Query, too, whether the MCA itself would have prevented the twins from presenting evidence necessary to prove that malpractice claim. If the MCA prevented the introduction of evidence necessary to prove the malpractice claim, query whether those lawyers, in procuring client signatures on the MCA, would have run afoul of Rule 1.8(h)(1), ABA Model Rules of Professional Conduct, or, in California, Rule 3-400(A), Rules of Professional Responsibility, for improperly obtaining the equivalent of a “Prospective Waiver of Liability” from a client.

While dictum in *Facebook v. ConnectU*, 640 F.3d at 1041, suggests not, it hardly controls. Query further whether those lawyers violated ABA Model Rule 1.4(a)(1) (“A lawyer shall ... promptly inform the client of any decision or circumstance with respect to which the client’s informed consent ... is required by these rules”), or 1.4(b) (“A lawyer shall explain a matter to a client to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”) The same analysis would apply if Illinois law (Uniform Mediation Act) governed.

If California law governed, though, the twins’ lawyers would likely not face these risks. By operation of law, California Evidence Code Section 1119 would prohibit the introduction of Zuckerberg’s mediation statements to prove the alleged fraud, and so the signing of the MCA would not waive any rights the twins otherwise would have had.

### **Mediator Malpractice**

Suppose that, at a mediation, a defendant tells the mediator, unwisely, that the limit of its settlement authority is \$1 million, and asks the mediator to keep that confidential. The mediator then strolls down the hall to chat with the plaintiff, and is asked, “Do you think the



defendant will accept our demand of \$850,000? That is really our bottom line.” The mediator, foolishly, says, “Yes, that is well below the defendant’s authority.” The questioner pauses, and then asks, “Oh, really? How much below?” The case then settles for the full \$1 million. The mediator apologizes to the defendant, who nonetheless sues the mediator for malpractice. Can the defendant introduce evidence of the mediator’s gaffe in the subsequent malpractice case?

Under the New York/Federal and Illinois/UMA regimes, the answer, under operation of law, would be, yes. In California, no. The “absolute confidentiality” of California’s Evidence Code protects tortfeasors from justice once again.

But wait. Even under New York or Illinois law, the wronged defendant would be deprived of justice if she had signed the mediator’s “standard” MCA. Remember what it says?

“All statements made during the course of the mediation or in mediator follow-up thereafter at any time prior to complete settlement of this matter are privileged settlement discussions ... and are nondiscoverable and inadmissible for any purpose including in any legal proceeding ... *No aspect of the mediation shall be relied upon or introduced as evidence in any arbitral, judicial or other proceeding.*” (emphasis added).

Under the reasoning of *Facebook v. ConnectU*, the wronged defendant will be held to her contract and not able to introduce evidence critical to her claim.

Now wait some more. Chances are that your mediator’s “standard” MCA also has a “prospective waiver of liability” that reads something like this:

“Neither (mediation company) nor its employees or agents, including the mediator, shall be liable to any party for any act or omission in connection with any mediation conducted under this agreement.”



If this provision were enforced, it would further bar the wronged defendant in our hypothetical from justice. It would easily be unethical if a lawyer tried to put this into an engagement letter. Rule 1.8(h)(1), ABA Model Rules; Rule 3-400(A), California Rules of Professional Conduct. It is a cowardly act by mediators who use it, and advocates should just cross it out. Mediators should be proud to stand behind the quality of their work, and carry malpractice insurance so that, in the unlikely event that they do commit malpractice and cause someone economic damage, those people can be compensated without causing the mediator financial ruin. Why subject your clients to the risk of waiving this important right to hold your mediator accountable?

So, at least in mediations governed by the New York/Federal rules, or the Illinois/UMA rules, the malpractice and disciplinary risks of uncritically signing the "standard" MCA remain.

### **Inappropriate Mediation Conduct**

On July 7, 2016, Law360 published "[Jones Day Says Gordon Rees Breached Confidentiality Pact](#)," The article describes an effort by [Gordon & Rees](#) to bring to a judge's attention alleged bad faith conduct by opposing counsel Jones Day and its clients in the mediation of a case pending before that judge. Jones Day used language in their mediator's "standard" MCA to object to the judge being informed of its conduct.

Should judges be informed of "bad faith" conduct in the mediations of cases pending before them? The point is debatable. On the one hand, particularly where mediation is court-ordered, some say that the court should have a reasonable opportunity to determine whether the parties have complied with its order. Others say that because parties have a constitutional right to a jury trial, there should be no jeopardy to parties who refuse to make offers or demands during a mediation; all those parties are doing is insisting on their constitutional rights.

But if operative law permits parties to bring an opponent's inappropriate mediation conduct to a judge's attention, should counsel waive that ability thoughtlessly, by reflexively signing a "standard" MCA? What are the consequences for Gordon & Rees, and its clients, if they are unable to bring to a judge's attention information which they believe it is important for



that judge to consider? Will Gordon & Rees ever reflexively sign a “standard” MCA again? Should anyone?



### **How Can You Protect Yourself?**



In mediations governed by the New York/Federal rules, you should strike the offensive language highlighted by the Ninth Circuit in *Facebook v. ConnectU*. Of course, the mediator’s prospective waiver of liability also has to go.

In cases governed by the Illinois/UMA rules, it is a little more challenging. First, you should strike the offensive language highlighted in *Facebook v. ConnectU*, and the mediator’s prospective waiver of liability. Then, you should decide whether you want your confidentiality agreement to include a waiver of privilege, pursuant to Section 5 of the UMA, to the extent necessary to bring inappropriate mediation conduct to the attention of the court, or for any other reason not addressed in the UMA.

Those other reasons might include, among others, the need for primary and excess insurance carriers to prosecute or defend equitable subrogation claims between them arising out of the mediated settlement. See generally, [Ace American Insurance Co. v. Fireman’s Fund Insurance Co.](#), Aug. 5, 2016. If you do, you should recite that, to those extents, you are intentionally waiving privilege pursuant to Section 5.

In cases governed by the California rules, you have to do even more. You still have to strike the offensive language highlighted in *Facebook v. ConnectU*, and the mediator’s prospective waiver of liability. Then, instead of calling your settlement process a “mediation,” governed by the uber-confidential California Evidence Code Sections 1115 et. seq., call it a “settlement conference” governed by California Evidence Code Sections 1152 and 1154, California’s analog of Federal Rule of Evidence Rule 408 and New York CPLR 4547.

To effect this switch, the court must enter an order, upon stipulation of the parties, under California Rules of Court 3.1380. Anyone who is not concurrently serving as “mediator” in a case can be appointed to conduct a settlement conference under this rule. So, the same dispute resolution professional who you would otherwise hire can still serve. California



courts ought to be willing to appoint your dispute resolution professional as a “settlement conference officer” based on a routine stipulation. In practice, the processes will likely be indistinguishable.

—By Jeff Kichaven, Jeff Kichaven Commercial Mediation

*[Jeff Kichaven](#) is an independent commercial mediator with a nationwide practice. He focuses on insurance, intellectual property and professional liability matters.*

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