

PRACTICAL CONSIDERATIONS FOR EMPLOYMENT CASES IN THE COVID-19 ERA

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MEDIATION IN THE AGE OF COVID: STRATEGIC AND TACTICAL CONSIDERATIONS

► PRESENTED BY: DAVID PHILLIPS, ESQ.

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HOW ZOOM MEDIATIONS DIFFER FROM IN PERSON MEDIATIONS AND HOW THEY'RE THE SAME: NEW CHALLENGES AND NEW OPPORTUNITIES IN THE AGE OF VIRTUAL MEDIATIONS

- ▶ 1) Are the right parties present?
- ▶ 2) Are the wrong parties absent?
- ▶ 3) Virtual rooms, physical rooms, and texting.
- ▶ 4) Mediation tempo - Zoom Zoom Zoom!

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HOW DO PANDEMIC AND ECONOMIC CRISIS IMPACT MEDIATION TACTICS?

- ▶ 1) Timing of trial versus arbitration.
- ▶ 2) Financial pressures on plaintiffs and defendants.
- ▶ 3) Reductions in force and protected characteristics.
- ▶ 4) COVID and the interactive process.

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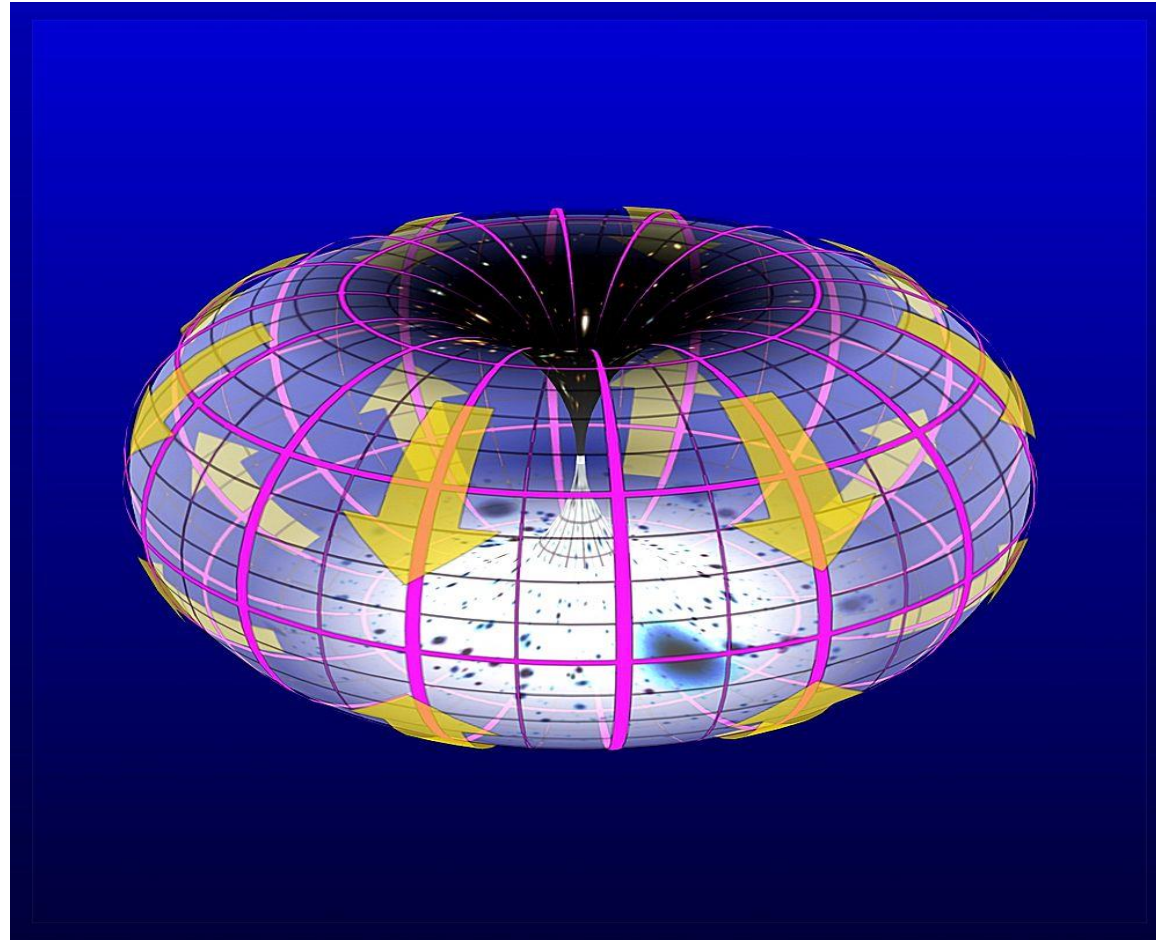
MEDIATION CONFIDENTIALITY: ISSUES IN THE ERA OF VIRTUAL MEDIATION

► PRESENTED BY: HON. SUZANNE H. SEGAL (RET).

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CALIFORNIA MEDIATION PRIVILEGE



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CALIFORNIA EVIDENCE CODE SECTION 1119 - BROAD CONFIDENTIALITY PROTECTION

- ▶ “With specific statutory exceptions, neither evidence of anything said nor any writing is discoverable or admissible in . . . [any] noncriminal proceeding in which . . . testimony can be compelled to be given, if the statement was made, or the writing was prepared, ‘for the purpose of, or in the course of, or pursuant to a mediation. . .’
Cassel v. Superior Court (2011) 51 Cal.4th 113, 117.

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SECTION 1126 PREVENTS ADMISSION OF MEDIATION COMMUNICATIONS AFTER THE MEDIATION ENDS

- ▶ “[A]nything said, any admission made, or any writing that is inadmissible, protected from disclosure, and confidential under this chapter before a mediation ends, shall remain inadmissible, protected from disclosure, and confidential to the same extent after the mediation ends.” Section 1126; *Simmons v. Ghaderi* (2008) 44 Cal. 4th 570, 579-588 (rejecting judicially created exceptions to mediation confidentiality).

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CONFIDENTIALITY CONCERNS RAISED BY VIRTUAL MEDIATION

- ▶ 1) Will someone record mediation communications?
- ▶ 2) If other individuals are off-screen but in the room, can they reveal mediation communications?
- ▶ 3) What mediation privilege law applies to participants in other states or countries?
- ▶ 4) If security is compromised, will confidentiality be maintained?

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SHOULD I BE CONCERNED ABOUT RECORDING OF THE MEDIATION?

- ▶ 1) Owner of Zoom account can disable recording for entire account.
- ▶ 2) Individual host can disable recording.
- ▶ 3) Even if recorded, California law is so broad it would be excluded.
- ▶ 4) Pre-mediation agreement can include provision barring recording of mediation and include penalties.

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IF PARTICIPANTS ARE IN MULTIPLE STATES OR COUNTRIES, WHOSE PRIVILEGE LAW APPLIES?

- ▶ 1) Determination of applicable privilege law for a mediation, when parties are in different states, is a complex question. In general, the state which has the most “significant relationship” with the mediation controls the privilege law. Typically, that is the state where the mediation occurs.
- ▶ 2) Resolve through pre-mediation agreement that expressly sets forth which state’s mediation privilege law applies.

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IF OTHER INDIVIDUALS ARE IN THE ROOM BUT OFF SCREEN, ARE THEY BOUND BY THE MEDIATION PRIVILEGE?

- ▶ 1) In California, yes. Broad evidentiary privilege would exclude any statements made or heard by anyone during a mediation - *Eisendrath v. Superior Court (Rogers)* (2003) 109 Cal. App. 4th 351, 358 (Rule includes communications outside presence of mediator).
- ▶ 2) Address this concern in pre-mediation agreement - parties may agree that no individuals are allowed where mediation participant is located.

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MEDIATION CONFIDENTIALITY AND SECURITY CONCERNS

- ▶ 1) Can my zoom mediation be “Zoom bombed”?
 - ▶ Not if there is a password, waiting room and host procedure used.
 - ▶ Use most recent version of Zoom software to avoid security breaches.
- ▶ 2) How can I protect highly sensitive information?
 - ▶ Multi-factor Authentication - available from Zoom.
 - ▶ Pre-mediation agreement.
 - ▶ Share only with mediator for verbal summary to other party.

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PRE-MEDIATION AGREEMENTS - BALANCE NEED FOR CONFIDENTIALITY VS. POSSIBILITY OF INCREASING DISAGREEMENT BETWEEN PARTIES

- ▶ Mediation agreement provides extra layer of protection for mediation communications.
- ▶ *Facebook, Inc. v. Pacific Northwest Software, Inc.* (9th Cir. 2011) 640 F.3D 1034, 1040-41 (Confidentiality agreement precluded admission of Facebook representative's statements from mediation).

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MEDIATION CONFIDENTIALITY SURVIVES THE VIRTUAL FORMAT



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FEDERAL ANTI-DISCRIMINATION LAWS AND COVID-19 & STRUCTURING SETTLEMENT PAYMENTS IN THE COVID-19 ERA

► PRESENTED BY: MARK LOETERMAN, ESQ.

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THE AMERICANS WITH DISABILITIES ACT (ADA) AND COVID-19

The ADA protects a “qualified individual” with disabilities from employment discrimination.

- ▶ A disability is a physical or mental impairment that substantially limits a major life activity.
- ▶ Determining whether an individual is “qualified” requires an assessment of both the individual *and* the position.

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ADA CONCEPTS

- ▶ Triggering the **Interactive Process**.
- ▶ Reasonable accommodations for known limitations.
- ▶ No “undue hardship” to the employer.

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CASES ON THE HORIZON

- ▶ 1. Can a previously furloughed employee who is afraid of catching COVID refuse to return to work?
- ▶ 2. Is an employee entitled to a reasonable accommodation to avoid exposing a “high risk” family member to COVID?
- ▶ 3. May an employer postpone the start date or withdraw a job offer because an individual is 65 years old or pregnant, placing them at higher risk from COVID?
- ▶ 4. As government restrictions are lifted, what steps can employers take consistent with the ADA to screen employees for COVID?

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THE AGE DISCRIMINATION IN EMPLOYMENT ACT (ADEA) AND COVID-19

- ▶ Bars discrimination against employees age 40 and older.
- ▶ An employer may not “involuntarily” exclude an employee from the workplace simply because the employee is over the age of 65, even for benevolent reasons.
- ▶ Unlike the ADA, an employer is not required to provide an accommodation to a person based on age, even though that person may be at a higher risk of COVID.
- ▶ Employers are free to provide flexibility to workers age 65 and older, even if it results in younger workers ages 40-64 being treated less favorably.

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STRUCTURING SETTLEMENT PAYMENTS IN THE COVID ERA

The challenge: how to draft a stipulated judgment so that the financial terms do not include an unenforceable penalty? (See *Civil Code* section 1671(b), governing liquidated damages.

- ▶ The amount of the judgment must be reasonably related to the damages likely to arise from a breach of the stipulation, *not* a breach of the underlying contract.

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APPLICABLE CASES

Graylee v. Castro (2020) 52 Cal.App.5th 1107

Greentree Financial Group, Inc. v. Execute Sports, Inc. (2008)

163 Cal.App.4th 495

Vitatech Internat., Inc. v. Sporn (2017) 16 Cal.App.5th 796

Jade Fashion & Co., Inc. v. Harkham Industries, Inc. (2014)

229 Cal.App.4th 635

Mitsuwa Corp. v. Wehba, 2019 WL 3561928

Red & White Distribution, LLC. v. Osteroid Enterprises, LLC (2019)

38 Cal.App.5th 582

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INCENTIVIZING PROMPT PAYMENT

- ▶ A discount for early payment is preferable to a surcharge for late payment.
- ▶ The restrictions on liquidated damages clauses can be avoided where a defendant acknowledges that the amount to be paid reflects an actual debt, as distinct from a compromise of disputed claims.
- ▶ If there is a surcharge, make sure it is proportional to the damages resulting from the payment default.

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