



Mediation in the woodshed

Navigating the jurisdictional dilemma

This story is for you if:

- You have agreed to mediate a state court case before a damage analysis has been exchanged
- Before or during the mediation you exchange confidential damage estimates with the other side
- The mediation results in impasse and you receive a motion to remove to federal court with your damage calculations attached as an exhibit



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Over the years, I have learned that the selection of guitar strings for my Martin acoustic tends to make little or no difference in how good or bad I sound in my venue of choice – the proverbial woodshed. There are many different manufacturers that put out similar products. Ultimately, my decision is based on the attractiveness of the string packaging. A good trial lawyer will probably be a bit more judicious in making these types of choices than a guitar hobbyist. After all, the amount at stake and the influence on an outcome can change dramatically depending on what evidence is developed and where the case is venued.

Yet even the most discriminating trial lawyer will eventually be faced with performing in front of a higher authority, namely, the United States District Court (federal court). This performance may not be based on the preferred selection of venue because, after all, we know that most trial lawyers who prosecute cases to juries file in state court. The fact that rules of evidence tend to be more liberal and there is no requirement that the jury return a unanimous verdict are but two of a slew of reasons federal courts are generally not the first choice of trial lawyers. Since federal judges receive lifetime presidential appointments, it's fairly easy to get a sense of their political leanings when tough decisions have to be made.

So how in the world does a case that resembles a classic state court action get stuck in a federal venue when the navigation settings were all set in a different direction? Welcome to an area of complexity in the confidentiality laws that have left litigators who mediate cases scratching their heads.

Here is an abbreviated version of the considerations faced by our federal courts when deciding jurisdictional dilemmas. In particular, the issue is whether and to what extent a federal judge



can consider settlement information that has been disclosed either in a confidential mediation setting or exchanged informally between counsel.

The complexity begins with an informal discussion between counsel about considering settlement. Customarily, plaintiff's counsel quantifies by way of estimating the value of the case. That value might be confirmed in an e-mail or other written document such as a letter. This is what happened in a putative class action entitled *Babasa v. LensCrafters, Inc.* (9th Cir. 2007) 498 F. 3d 972. Since the written correspondence constituted notice of damages, it demonstrated that the amount in controversy might be sufficient to satisfy federal jurisdictional requirements. The letter was deemed *admissible* in federal court despite the fact that it was prepared in preparation for mediation and protected from disclosure under California Evidence Code sections 1115-1123 aka the Mediation Confidentiality statutes. In other words, the federal court specifically rejected the applicability of the mediation confidentiality statutes since "state law does not supply the rule of decision here." (*Ibid.*)

Yet the federal government has adopted statutes that do consider a mediation privilege that contemplates protection of what some might consider confidential settlement communications. The federal Alternative Dispute Resolution Act of 1998, 28 U.S.C. section 652, delegates to each district court the ability to adopt local rules that deal with confidentiality of civil disputes. This is a problem because the federal statute does not specify what should be included in the local rules. Needless to say, this has created an environment where federal judges have immense discretion in determining whether to grant a motion for removal based on information gleaned in what some consider confidential proceedings.

In another twist on the issue, Judge Margaret Morrow in *Molina v. Lexmark International, Inc.*, 2008 U.S. Dist. Lexis 83014, 77 Fed. R. Evid. Serv. (Callaghan) 905 (C.D. CA. Sept. 30, 2008) ("*Molina*"), was



presented with a remand motion in the context of a wage and hour class action. The issue was whether information learned during settlement negotiations (both during and after mediation) commenced the running of the 30-day removal window. Though the court held that the removal was not timely, Judge Morrow confronted the question of confidentiality and observed in no uncertain terms:

“Confidentiality” refers to a duty to keep information secret while “privilege” refers to protection of information from compelled disclosure”... Communications are confidential when the freedom of the parties to disclose them voluntarily is limited; they are privileged when the ability of third parties to compel

disclosure of them, or testimony regarding them, is limited.
(*Id.* at 35.)

The Court observed that “. . . Rule 408 does not make settlement offers inadmissible in the removal context as evidence of the amount in controversy.” (*Id.* at 42-43.) The Court rejected the argument that either mediation confidentiality or rule 408 of the Federal Rules of Evidence, precluded the use of information exchanged during mediated settlement discussion for purposes of removal, holding that even though parties to a mediation “generally have a duty to keep their discussions confidential, this duty does not prevent the use of mediation discussions for the limited purpose of establishing the amount in controversy.”

Since the federal court has carved exceptions to the privacy of communications that occur before, after and during mediation, particularly in determining the amount in controversy for jurisdictional purposes, don't be surprised if you're taken out to the federal woodshed from time to time. Just make sure you buy the right guitar strings!

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