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Watch What You Say (and Do): The Use of Settlement Negotiations and Mediation Conduct to Prove Bad Faith Under California's Uniform Trade Secrets Act

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**WATCH WHAT YOU SAY (AND DO):
THE USE OF SETTLEMENT NEGOTIATIONS AND MEDIATION
CONDUCT TO PROVE BAD FAITH UNDER CALIFORNIA’S
UNIFORM TRADE SECRETS ACT**

ROBERT G. KNAIER*

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ABSTRACT

This article explores the intersection of two policy considerations that shape, in part, California’s law of trade secrets: (1) the power of courts to impose attorney-fee sanctions on parties that bring or maintain trade secret claims in bad faith; and (2) the confidentiality of

settlement negotiations and mediation. Both policies serve the purpose of efficiency in litigation. To deter trade secret plaintiffs from litigating baseless claims, courts have broad power to sanction such conduct. And to encourage early and informal dispute resolution, the law provides for robust confidentiality of settlement negotiations and mediation. These consonant policies, however, can come into conflict. When what is said and done during settlement negotiations or mediation indicate that a party is acting in bad faith, a question arises whether that party's words or conduct may be used as evidence in support of a request for sanctions.

Is discouraging bad-faith litigation so important that a defendant may introduce evidence of what otherwise might be considered confidential? This article concludes that (1) although the confidentiality of settlement negotiations is strong, it is narrow—it will readily yield to the policy of deterring bad-faith litigation; and (2) although the confidentiality of mediation is substantially broader—its protection of communications is nearly absolute—it may not shield certain forms of conduct from being used as evidence of bad faith. In conclusion, this article offers practical advice to trade secret litigants, given the danger that what they say (and do) during settlement negotiations and mediation may return to haunt them.

INTRODUCTION

Legal rules often reflect a balancing of social policy considerations. In California, the law governing trade secrets is strongly shaped by such balancing.¹ Indeed, California's Uniform Trade Secrets Act ("CUTSA") formally codifies the importance of intellectual property to our modern economy.² A firm's trade secrets can be central to its ability to develop and maintain a competitive advantage in the marketplace. The law thus protects this information, setting forth, in detail, what constitutes a trade secret, and what one party must prove to establish that another party misappropriated its

1. Trade secrets consist of information that "[d]erives independent economic value . . . from not being generally known to the public," and that is the "subject of [reasonable] efforts . . . to maintain its secrecy." CAL. CIV. CODE § 3426.1(d) (West 1997).

2. *Id.* §§ 3426.1-3426.11.

trade secrets. Moreover, the law recognizes that trade secret *litigation*, itself, can stifle competition. Legislatures and courts have taken steps to discourage such anti-competitive conduct, penalizing those who bring or maintain trade secret litigation in *bad faith*. Specifically, in California, a party that brings or maintains a trade secret claim in bad faith may suffer the potentially crushing sanction of having to pay its adversary's attorneys' fees.³

But the policy of discouraging bad-faith trade secret litigation conflicts, at times, with other important policy considerations. For example, few principles are as central to the efficient operation of the legal system as the confidentiality of attempts to settle or mediate disputes short of costly and protracted litigation. Thus, in California, settlement negotiations and mediation generally enjoy robust confidentiality.⁴ If it were otherwise, parties might hesitate to be frank and forthcoming in their attempts to resolve disputes out of court, and they might hesitate to mediate their differences. Parties may fear that what they say or do could be used against them in later proceedings. Removing that fear encourages candid, early, and informal dispute resolution—and reduces the time and cost that litigation might otherwise impose on the parties and the courts.

What happens, however, when CUTSA's fee-shifting rule collides with confidentiality? What happens, for example, when a party's settlement communications or mediation conduct clearly demonstrates that it pursued a trade secret claim in bad faith? Is encouraging early dispute resolution so strong a principle that even such damning evidence must remain confidential? Or is the need to discourage bad-faith trade secret litigation—and thus safeguard appropriate economic activity—so powerful that it can allow the disclosure of otherwise protected communications?

This article addresses those questions by exploring the impact of conflicting policies of discouraging bad-faith trade secret litigation and encouraging settlement of trade secret claims (meritorious and meritless). In Part I, it explains the substantial power of California courts to grant a request for attorneys' fees under CUTSA. In Part II,

3. *Id.* § 3426.4; *see also* FLIR Sys., Inc. v. Parrish, 95 Cal. Rptr. 3d 307, 312 (Ct. App. 2009) (finding that trade secret misappropriation claims were brought in bad faith, and awarding \$1.6 million in attorneys' fees).

4. *See* CAL. EVID. CODE §§ 1119, 1152, 1154 (West 2009) (protecting mediation communications, settlement offers, and settlement demands).

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it discusses the purpose and breadth of California's protections for settlement negotiations, and how those protections can yield to the policy of deterring bad-faith trade secret litigation—permitting the admission of settlement negotiations to prove *bad faith*. In Part III, this article describes the strong confidentiality afforded to mediation communications and how it likely withstands CUTSA's fee-shifting provisions—but also suggests that mediation *conduct* may nevertheless constitute admissible evidence of bad faith. In conclusion, this article provides practical advice to those involved in trade secret disputes, given that a subsequent request for attorneys' fees under CUTSA may place settlement and mediation communications and conduct at risk of disclosure.

I. CUTSA PROVIDES FOR FEE-SHIFTING SANCTIONS TO PUNISH AND DETER BAD-FAITH TRADE SECRET LITIGATION

In the area of trade secret litigation, legislatures and courts pay special attention to claims brought with no objective basis and, moreover, in subjective bad faith. Such claims can be used by unscrupulous litigants to strike at the heart of competition in a world increasingly driven by intellectual property. Simply being forced to defend a trade secret claim can drain a firm's resources and distract it from pursuing its main economic goals. And of course, suffering an adverse judgment on such a claim—whether that judgment imposes injunctive relief, damages, or both—can compound these effects enormously.

To protect against this harm, the law permits the target of a baseless, bad-faith trade secret claim to seek recovery of attorneys' fees it incurred in defending that claim. CUTSA, for example, provides that where “a claim of [trade secret] misappropriation is made in bad faith . . . the court may award reasonable attorney's fees and costs to the prevailing party.”⁵ This is a sharp break from the normal rule that parties to a litigation generally bear their own attorneys' fees—but California courts have explained that it is justified by the importance of discouraging improper interference with healthy competition.

5. CAL. CIV. CODE § 3426.4 (West 1997).

A. *Fee Shifting Is an Exceptional Sanction in American Jurisprudence*

Having to pay an adversary's attorneys' fees is, in the context of American jurisprudence, a significant sanction. A core aspect of litigation in the United States—one so important it is simply known as the "American Rule"—is that "each party to a lawsuit must ordinarily pay his own attorney fees."⁶ This principle has been part of California's legal landscape since the 19th century, with its 1872 inclusion in the Code of Civil Procedure.⁷

Nonetheless, this hallmark of American litigation has exceptions. For example, private parties may agree that a "prevailing party" in a contractual dispute be awarded attorneys' fees it "incurred to enforce [the] contract."⁸ Similarly, under the private attorney general doctrine, a "court may award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest."⁹ In addition, and directly relevant here, a court may order that one party pay another party's attorneys' fees as a *sanction* to punish and deter frivolous, vexatious, or bad-faith conduct during litigation.¹⁰

B. *Under CUTSA, Courts Have Broad Power to Award Attorneys' Fees*

The statutory power to award attorneys' fees as a sanction for bad-faith trade secret litigation has been extensively litigated. Courts have thus defined the sort of "bad faith" that will warrant sanctions

6. *Trope v. Katz*, 902 P.2d 259, 262 (Cal. 1995) (*en banc*).

7. *Id.*; see also CAL. CIV. PROC. CODE § 1021 (West 2007) ("Except as attorney's fees are specifically provided for by statute, the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties . . .").

8. CAL. CIV. CODE § 1717(a) (West 1997).

9. CAL. CIV. PROC. CODE § 1021.5 (West 2007).

10. See CAL. CIV. CODE § 3426.4 (West 1997); CAL. CIV. PROC. CODE § 128.5 (West 2007) ("Every trial court may order a party, the party's attorney, or both to pay any reasonable expenses, including attorney's fees, incurred by another party as a result of bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay.").

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under CUTSA, made it clear that their power in this regard is broad, and discussed the kinds of evidence that will support a finding of bad faith.

*1. An Award of Attorneys' Fees, as a Sanction, Is Warranted
When a Party Brings or Maintains Objectively Specious
Claims in Subjective Bad Faith*

Just over ten years ago, in *Gemini Aluminum Corp. v. California Custom Shapes, Inc.*, a California Court of Appeal set the basic parameters of an award of attorneys' fees under CUTSA.¹¹ In that case, Taskmaster Industries Corporation ("Taskmaster") hired Gemini Aluminum Corporation ("Gemini") to provide aluminum parts for the "Taskmaster workbench."¹² The workbenches were manufactured by Taskmaster and marketed to the public by Makita.¹³ Gemini subcontracted with California Custom Shapes, Inc. ("CCS") to "powder coat" the aluminum parts.¹⁴

After Taskmaster began experiencing financial problems, Gemini stopped supplying it with parts and CSS began providing parts directly to Taskmaster.¹⁵ Gemini sued CSS, alleging, among other things, that CCS misappropriated its trade secrets.¹⁶ Gemini lost, and, under CUTSA, the trial court found that Gemini brought its misappropriation claim in bad faith—and awarded CCS over \$160,000 in attorneys' fees.¹⁷

The Court of Appeal affirmed. It first noted that neither CUTSA nor the California state courts had yet defined "bad faith" for the purpose of awarding attorneys' fees.¹⁸ The court nevertheless held that a finding of "bad faith" under CUTSA "requires objective speciousness of the plaintiff's claim . . . and its subjective bad faith in

11. *Gemini Aluminum Corp. v. California Custom Shapes, Inc.*, 116 Cal. Rptr. 2d 358 (Ct. App. 2002).

12. *Id.* at 361.

13. *Id.*

14. *Id.*

15. *Id.* at 362.

16. *Gemini*, 116 Cal. Rptr. 2d at 362.

17. *Id.* at 363.

18. *Id.* at 367.

bringing or maintaining the claim.”¹⁹ In doing so, the court noted that CUTSA’s fee-shifting rule is meant to be a “*deterrent*” to such specious claims.²⁰ The court further stressed that because an “award of attorney fees for bad faith constitutes a sanction, and the trial court has broad discretion in ruling on sanctions motions,” trial courts have broad discretion in awarding attorneys’ fees under CUTSA.²¹

Applying these standards, the court upheld the sanction of attorneys’ fees assessed against Gemini.²² The court noted the complete “lack of any proof” that the trade secrets at issue had “economic value,” given that Taskmaster, the recipient of parts to which the trade secrets related, was essentially insolvent at the relevant time.²³ Further, reflecting one of the core purposes of CUTSA—discouraging bad-faith, anti-competitive conduct—the court also noted that Gemini’s principal had repeatedly testified that CCS’s principal was a “snake.”²⁴ The court thus found that a deterrent fee award was in order, because the evidence strongly indicated that Gemini brought suit, at least in part, to send a message to a competitor it did not like.

2. *Anti-Competitive Behavior Can Be Evidence of Objective Speciousness*

More recently, in *FLIR Systems, Inc. v. Parrish*, a California Court of Appeal indicated that an anti-competitive motive is at least one basis for finding that a party’s claims are objectively specious.²⁵ In that case, two shareholders and officers of FLIR Systems, Inc. (“FLIR”)—a manufacturer of infrared cameras, night-vision devices, and other “thermal imaging systems that use microbolometers”—left FLIR to start a new company to mass-produce microbolometers.²⁶ The former officers began negotiating with Raytheon Company to

19. *Id.* at 367-68 (emphasis added) (citing and discussing *Stilwell Dev., Inc. v. Chen*, No. CV86-4487-GHK, 1989 WL 418783 (C.D. Cal. Apr. 25, 1989)).

20. *Id.* at 367 (internal quotation marks omitted).

21. *Gemini*, 116 Cal. Rptr. 2d at 367 (citation omitted).

22. *Id.* at 370.

23. *Id.* at 369.

24. *Id.*

25. *FLIR Sys., Inc. v. Parrish*, 95 Cal. Rptr. 3d 307, 314-15 (Ct. App. 2009).

26. *Id.* at 312.

“acquire licensing, technology, and manufacturing facilities” for their new venture, and announced a timeline during which that company would begin mass-producing microbolometers.²⁷ FLIR sued the officers to enjoin any misappropriation or threatened misappropriation of its trade secrets.²⁸ At trial, the court found no such actual or threatened misappropriation—and further found that FLIR brought its case in bad faith, ordering it to pay over \$1.6 million in attorneys’ fees and costs.²⁹

As in *Gemini*, the Court of Appeal affirmed. In addition to finding that FLIR lacked any actual “evidence of misappropriation” or “harm,”³⁰ the court concluded that “[o]bjective speciousness was established by evidence that [FLIR] had an anticompetitive motive in filing the lawsuit” and thus “filed a specious action as a preemptive strike” against its former officers.³¹ Indeed, FLIR’s CEO had testified that the company simply could not “tolerate a direct competitive threat” from its former officers.³² The court further found that FLIR’s subjective bad faith was evidenced, in part, by its unwarranted reliance on merely *fearing* a misuse of trade secrets.³³

3. *Mere Speculation of Misappropriation Will Not Support an Argument that Claims Were Pursued in Good Faith*

In *SASCO v. Rosendin Electric, Inc.*, a California Court of Appeal recently reaffirmed its broad powers to award attorneys’ fees as a sanction for bad-faith trade secret litigation—stressing that mere speculation that an adversary misappropriated trade secrets will not support a conclusion that a claim was brought in good faith.³⁴ There, several management-level employees of SASCO, an electrical contractor, left the company and joined Rosendin Electric, Inc. (“Rosendin”), another electrical contractor.³⁵ SASCO sued its former

27. *Id.*

28. *Id.*

29. *Id.* at 313.

30. *Flir*, 95 Cal. Rptr. 3d at 315.

31. *Id.* at 314.

32. *Id.* (internal quotation marks omitted).

33. *Id.* at 317.

34. *SASCO v. Rosendin Elec., Inc.*, 143 Cal. Rptr. 3d 828 (Ct. App. 2012).

35. *Id.* at 830.

employees and Rosendin, claiming, among other things, misappropriation of trade secrets.³⁶ The defendants moved for summary judgment, and after the parties engaged in “fierce discovery battles,” SASCO voluntarily dismissed its claims without opposing the motion.³⁷ The trial court subsequently granted the defendants’ request for sanctions under CUTSA, ordering SASCO to pay approximately \$485,000 in attorneys’ fees.³⁸

In affirming the fee award, the Court of Appeal followed *Gemini* and *FLIR*, explaining that: (1) “bad faith” under CUTSA includes both objective speciousness and subjective bad faith; (2) fee awards under CUTSA are a “sanction” meant to be a “deterrent to specious trade secret claims”; and (3) courts have “broad discretion” in imposing such sanctions.³⁹ Finding no “evidence in the record supporting the claim that defendant[s] misappropriated SASCO’s trade secrets,” the court explained that it “was perfectly legitimate for Rosendin to hire the individual defendants and for the individual defendants to leave the employ of SASCO in favor of a competitor.”⁴⁰ Mere “[s]peculation that the individual employees must have taken trade secrets . . . [did] not constitute evidence of misappropriation.”⁴¹

4. *Evidence of Subjective Bad Faith Comes in Many Forms*

It is thus clear that trial courts have broad discretion under CUTSA to sanction parties for bringing and maintaining objectively specious misappropriation claims—and doing so with *subjective* bad faith. But this raises difficult questions of *proof*. Although objective speciousness of a claim seems relatively straightforward as an evidentiary matter—does a party have *evidence* to support its misappropriation claims?—subjective bad faith is less concrete, and thus potentially more difficult to prove. How does the target of

36. *Id.* at 831.

37. *Id.*

38. *Id.* at 832-33.

39. *SASCO*, 143 Cal. Rptr. 3d at 834 (internal quotation marks and citation omitted).

40. *Id.* at 837.

41. *Id.*; see also *FLIR Sys., Inc. v. Parrish*, 95 Cal. Rptr. 3d 307, 317 (Ct. App. 2009) (finding that FLIR’s subjective bad faith was evidenced, in part, by its unwarranted reliance on merely *fearing* a misuse of trade secrets).

objectively specious claims demonstrate *subjective* bad faith? Necessarily, such proof is likely to be a matter of reasonable *inference*. As the *Gemini* court explained, a “subjective state of mind will rarely be susceptible of direct proof; usually the trial court will be required to infer it from circumstantial evidence.”⁴²

Circumstantial evidence of subjective bad faith can take many forms. A court might, for example, infer from a “complete failure of proof” that a party “must have knowingly and intentionally prosecuted a specious claim.”⁴³ In this way, objective speciousness may be so clear that it, alone, can support a finding of “bad faith” under CUTSA. Proving subjective bad faith thus can be similar to the manner of proving subjective malice in a malicious prosecution case, where such malice may be inferred, *at least in part*, from a lack of probable cause, an objective determination based on the lack of evidence supporting the unsuccessful underlying claim.⁴⁴

Sometimes, however, there is evidence from which a subjective state of mind can be more strongly inferred, such as when “the specific shortcomings of the case are identified by opposing counsel, and the decision is made to go forward despite the inability to respond to the arguments raised.”⁴⁵ Evidence of this sort begins to shed more

42. *Gemini Aluminum Corp. v. California Custom Shapes, Inc.*, 116 Cal. Rptr. 2d 358, 369 (Ct. App. 2002) (internal quotation marks omitted).

43. *Id.* at 368.

44. *See Mattel, Inc. v. Luce, Forward, Hamilton & Scripps*, 121 Cal. Rptr. 2d 794, 802 (Ct. App. 2002) (“Malice may be inferred from the lack of probable cause.”). Courts have since clarified that subjective malice may not “be inferred *solely* from an objective lack of probable cause.” *Franklin Mint Co. v. Manatt, Phelps & Phillips, LLP*, 109 Cal. Rptr. 3d 143, 191 n.10 (Ct. App. 2010) (Mosk, J., dissenting); *see also Jarrow Formulas, Inc. v. LaMarche*, 74 P.3d 737, 747 (Cal. 2003) (“Merely because the prior action lacked legal tenability, as measured objectively . . . without more, would not logically or reasonably permit the inference that such lack of probable cause was accompanied by the actor’s subjective malicious state of mind.”) (alteration in original) (internal quotation marks and emphasis omitted). An absence of objective evidence, however, remains relevant. *See, e.g., Soukup v. Law Offices of Herbert Hafif*, 139 P.3d 30, 52 (Cal. 2006) (explaining that although a “plaintiff must plead and prove actual ill will or some improper ulterior motive . . . [m]alice may also be inferred from the facts establishing lack of probable cause”) (internal quotation marks, emphasis, and citations omitted).

45. *Gemini*, 116 Cal. Rptr. 2d at 369 (internal quotation marks omitted); *see also FLIR*, 95 Cal. Rptr. 3d at 319 (“A trade secrets claim could be brought in good

light on a party's *intent*. In addition, more direct evidence of subjective bad faith sometimes arises. In *Gemini*, for example, the plaintiff's principal "revealed his hostility toward [the defendant] and its principal," testifying in open court that the defendant was "snaky," that the defendant's principal was a "snake," and that he and the principal of a third company were "two snakes in a paper sack."⁴⁶ Such personal animosity may, indeed, suggest an "improper motive," and thus subjective bad faith.⁴⁷

But what about the statements or conduct of a party that does not occur in open court or otherwise—at least in the mind of the party—"on the record"? Is there a risk that statements made or conduct occurring in the context of settlement negotiations, or even mediation, may constitute evidence of subjective bad faith, to be later used in support of a request for attorneys' fees under CUTSA? As discussed below, the confidentiality of both settlement negotiations and mediation, to differing degrees, may indeed yield to the important public policy of deterring bad-faith trade secret litigation.

II. THE ROBUST, BUT NARROW, CONFIDENTIALITY OF SETTLEMENT NEGOTIATIONS MAY YIELD TO THE POLICY OF DETERRING BAD-FAITH TRADE SECRET LITIGATION

As the cases above demonstrate, trade secret litigation—and attorney-fee sanctions sought thereunder—can turn on the quantity and quality of evidence presented. The touchstone for the admissibility of evidence, of course, is relevance. Evidence is relevant if it has "*any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.*"⁴⁸ And, "[e]xcept as otherwise provided by statute, all relevant evidence is admissible."⁴⁹ But some considerations are so

faith but warrant attorney fees were the claim pursued beyond a point where the plaintiff no longer believes the case has merit.").

46. *Gemini*, 116 Cal. Rptr. 2d at 369 (internal quotation marks omitted).

47. *Id.* (internal quotation marks omitted); *see also FLIR*, 95 Cal. Rptr. 3d at 315 ("Subjective bad faith may be inferred by evidence that appellants intended to cause unnecessary delay, filed the action to harass respondents, or harbored an improper motive.").

48. CAL. EVID. CODE § 210 (West 2009) (emphasis added).

49. *Id.* § 351.

important that even relevant, material evidence is deemed inadmissible. For example, to encourage free and open discussions, much of what is said between an attorney and client, or a physician and patient, while perhaps highly relevant, is nevertheless inadmissible.⁵⁰

Similarly, although often clearly “of consequence to the determination of the action,”⁵¹ evidence of settlement offers or demands, or communications relating to such offers or demands, generally are confidential—and thus inadmissible.⁵² Strictly speaking, these communications are not “privileged” as that term is defined in the Evidence Code.⁵³ They are thus potentially discoverable.⁵⁴ They nevertheless are “confidential” insofar as—within limits—they may not be admitted into evidence at trial.

A. *Settlement Negotiations Enjoy Robust, but Narrow, Confidentiality*

The confidentiality, and thus inadmissibility, of settlement communications is “based on the public policy in favor of the settlement of disputes without litigation and [is] intended to promote candor.”⁵⁵ In other words, the hope is that people will be encouraged to freely discuss the possibility of settlement without the fear of their words being used against them should such settlement not materialize. Indeed, the policy concerns at play are important enough that protection is afforded not only to settlement offers and demands, but

50. *See id.* §§ 954, 994 (regarding attorney-client and physician-patient privilege).

51. *Id.* § 210.

52. *Id.* §§ 1152, 1154.

53. *See Covell v. Superior Court*, 205 Cal. Rptr 371, 373 (Ct. App. 1984) (“Communications made in the course of settlement discussions are not ‘privileged.’ Privileged matters are defined in Division 8 of the Evidence Code, comprising sections 900 to 1070. Section 1152 of the Evidence Code is contained in Division 9. The statutory protection afforded to offers of settlement does not elevate them to the status of privileged material. Our inquiry therefore must focus on whether discovery of settlement negotiations is ‘relevant to the subject matter involved in the pending action,’ or ‘appears reasonably calculated to lead to discovery of admissible evidence.’”).

54. *Id.*

55. *Zhou v. Unisource Worldwide, Inc.*, 69 Cal. Rptr. 3d 273, 276 (Ct. App. 2007).

also, more generally, to “statements made in the context of settlement negotiations.”⁵⁶

Nevertheless, the confidentiality of settlement communications is limited in scope. It is narrowly tailored to preclude the admission of such communications as proof either of *liability* or of the *meritlessness* of a claim. Specifically, evidence that someone has made an offer to settle a claim, “as well as any conduct or statements made in negotiation thereof, is inadmissible to prove his or her liability for the loss or damage or any part of it.”⁵⁷ Similarly, “[e]vidence that a person has accepted or offered or promised to accept” a settlement offer “as well as any conduct or statements made in negotiation thereof, is inadmissible to prove the invalidity of the claim or any part of it.”⁵⁸

This is not an unusual limitation on the admissibility of evidence. In general, the law attempts to avoid having socially desirable behavior affect the risk of legal liability. One well-known example is the law of “subsequent remedial conduct.” After harm has occurred, taking socially beneficial steps toward reducing the risk of future harm should be encouraged—and thus evidence of such steps should not place a party at increased risk of *liability* for the past harm. Indeed, this is the law in California.⁵⁹

The policy of decoupling socially desirable conduct from increased risk of liability, however, does not preclude evidence of such conduct for purposes *other than* proving the merits of a claim. Thus, for example, although subsequent remedial conduct is not admissible to prove negligence,⁶⁰ nothing in the Evidence Code precludes its admission to show that a party “exercised control” over

56. *Id.* at 277 (internal quotation marks omitted).

57. CAL. EVID. CODE § 1152(a) (West 2009) (emphasis added); *see also* CAL. LAW REVISION COMM’N, RECOMMENDATION PROPOSING AN EVIDENCE CODE, 7 CAL. LAW REVISION COMM’N REP. 217 (1965) (explaining that this section “declares that compromise offers are inadmissible to prove liability”) (emphasis added).

58. CAL. EVID. CODE § 1154 (West 2009) (emphasis added).

59. *See id.* § 1151 (“When, after the occurrence of an event, remedial or precautionary measures are taken, which, if taken previously, would have tended to make the event less likely to occur, evidence of such subsequent measures is inadmissible to prove negligence or culpable conduct in connection with the event.”).

60. *Id.*

property on which harm occurred.⁶¹ Similarly, “Evidence Code sections 1152 and 1154 are not absolute bars to admissibility, since a settlement document may be admissible for a purpose other than proving liability.”⁶² Thus, for example, evidence of settlement negotiations is admissible “to show bias or prejudice of an adverse party.”⁶³ As discussed further below, evidence of the bad faith of a trade secret litigant may similarly fall outside the confidentiality protections of the Evidence Code.⁶⁴

B. Settlement Negotiations Can Constitute Evidence of Bad Faith

In *FLIR*, the Court of Appeal addressed the impact of what one might otherwise consider confidential communications—those made in the context of settlement negotiations—on a finding of bad faith. There, during settlement discussions with its former employees, FLIR demanded “\$75,000, a non-competition agreement, an agreement that respondents would not hire [FLIR’s] employees,” and an assurance that the former employees would not challenge certain patent applications.⁶⁵ The Court of Appeal explained that, in awarding sanctions, a trial court “may consider . . . bad faith settlement demands”—and found that FLIR’s “settlement terms were inflammatory, violated public policy, and were made in bad faith.”⁶⁶

But on what basis did the Court of Appeal in *FLIR* conclude that settlement communications—which parties generally consider confidential—are admissible evidence of subjective bad faith? In other contexts, it seems clear that certain kinds of settlement communications cross ethical boundaries—and may be used to support an award of sanctions. In the recently decided *Mendoza v. Hamzeh*, for example, Hamzeh, an attorney, sent a letter to Mendoza, an adverse party, demanding at least \$75,000 in settlement of an

61. *Alcaraz v. Vece*, 929 P.2d 1239, 1252 (Cal. 1997).

62. *Volkswagen of Am., Inc. v. Superior Court*, 43 Cal. Rptr. 3d 723, 728 (Ct. App. 2006) (holding that a plaintiff asserting an asbestos-based personal-injury claim could not withhold from discovery—or perhaps even preclude from admission into evidence—similar claims made against other entities).

63. *Moreno v. Sayre*, 208 Cal. Rptr. 444, 450 (Ct. App. 1984).

64. *See infra* Parts II.B, III.

65. *FLIR Sys., Inc. v. Parrish*, 95 Cal. Rptr. 3d 307, 318 (Ct. App. 2009).

66. *Id.*

underlying claim.⁶⁷ Hamzeh also threatened to report Mendoza “to the California Attorney General, the Los Angeles District Attorney, the Internal Revenue Service . . . the Better Business Bureau, as well as to [Mendoza’s] customers and vendors” for various purported “transgressions.”⁶⁸ Mendoza sued for, among other things, civil extortion.⁶⁹ Hamzeh brought an “anti-SLAPP” motion, seeking to strike Mendoza’s complaint and requesting an award of attorneys’ fees.⁷⁰ The trial court denied the motion—and granted an award of attorneys’ fees to Mendoza instead.⁷¹

The Court of Appeal affirmed. It first noted that under California’s anti-SLAPP statute, “a party may move to dismiss certain unmeritorious claims that are brought to thwart constitutionally protected speech or petitioning activity.”⁷² The court then explained, however, that “Hamzeh’s threat to report criminal conduct to enforcement agencies and to Mendoza’s customers and vendors, *coupled with a demand for money*, constitute[d] ‘criminal extortion as a matter of law,’” and thus was not the sort of speech protected by the anti-SLAPP statute.⁷³ The trial court had properly denied Hamzeh’s anti-SLAPP motion and awarded attorneys’ fees to Mendoza in connection with opposing that motion.⁷⁴ Although the Court of Appeal did not publish its analysis of the award of attorneys’ fees, the anti-SLAPP statute provides that “[i]f the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney’s fees to a

67. *Mendoza v. Hamzeh*, 155 Cal. Rptr. 3d 832, 833 (Ct. App. 2013).

68. *Id.* (internal quotation marks omitted).

69. *Id.*

70. *Id.*

71. *Id.* at 834.

72. *Mendoza*, 155 Cal. Rptr. 3d at 834 (internal quotation marks omitted); *see also* CAL. CIV. PROC. CODE § 425.16(b)(1) (West 2007) (“A cause of action against a person arising from any act of that person in furtherance of the person’s right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.”).

73. *Mendoza*, 155 Cal. Rptr. 3d at 836 (quoting *Flatley v. Mauro*, 139 P.3d 2, 22 (Cal. 2006)).

74. *Id.* at 837.

plaintiff prevailing on the motion.”⁷⁵ Perhaps unsurprisingly, making extortionate threats in the context of settlement “negotiations”—and then defending those threats as “protected speech”—can subject a party to an attorney-fee sanction.

Still, it is not clear to what extent settlement communications falling short of *extortionate* demands may be admitted as evidence in support of such a sanction. The *FLIR* court purported to rely on three bases in permitting the use of settlement communications for this purpose:⁷⁶ *CUTSA*; *Gemini*; and *In re Marriage of Norton*.⁷⁷ None of these authorities, however, states that settlement demands may form the basis of a finding of subjective bad faith. *CUTSA* does not mention it. Although *Gemini* notes in passing that the parties briefly discussed settlement,⁷⁸ the court in no way relied on those settlement discussions—or even suggested that they were relevant—in concluding that *Gemini* acted in bad faith. And while *Norton*—a case involving a contentious custody proceeding—suggests that conduct frustrating the important policy of encouraging settlement may weigh in favor of imposing an attorney-fee sanction,⁷⁹ the court nowhere discusses whether the parties had attempted to settle their dispute—much less whether a trial court may consider the content of settlement communications in imposing such a sanction. Moreover, the *FLIR* court nowhere addressed the question whether the *confidentiality* of settlement negotiations impacted their admissibility.

Nevertheless, that *FLIR* failed to provide authority for its consideration of settlement discussions does not mean that the court got it wrong. Indeed, to see that the court got it right requires little more than a literal reading of the Evidence Code. As discussed above, statements made in furtherance of a settlement are inadmissible only to the extent that they are offered to prove that the party offering to settle was *liable for an underlying wrong*,⁸⁰ or that the claim of a party agreeing to accept a settlement *had no merit*.⁸¹ Nothing in the

75. CAL. CIV. PROC. CODE § 425.16(c)(1) (West 2007).

76. *FLIR Sys., Inc. v. Parrish*, 95 Cal. Rptr. 3d 307, 318 (Ct. App. 2009).

77. 253 Cal. Rptr. 354 (Ct. App. 1988).

78. *Gemini Aluminum Corp. v. California Custom Shapes, Inc.*, 116 Cal. Rptr. 2d 358, 366 (Ct. App. 2002).

79. *Norton*, 253 Cal. Rptr. at 356.

80. See CAL. EVID. CODE § 1152(a) (West 2009).

81. *Id.* § 1154.

Evidence Code precludes the admission of settlement negotiations for *other purposes*.

For example, in the context of insurance claims, the law “does not preclude the introduction of settlement negotiations if offered not to prove liability for the original loss but to prove failure to process the claim fairly and in *good faith*.”⁸² And in malicious prosecution cases, such communications are admissible “to show that a case was litigated for an *improper purpose*.”⁸³ It is no stretch of logic or language to conclude, then, that settlement negotiations also are likely admissible to prove that a trade secret litigant acted with subjective *bad faith*.

III. THE BROAD CONFIDENTIALITY AFFORDED TO MEDIATION LIKELY PRECLUDES *COMMUNICATIONS*—BUT MAY PERMIT *CONDUCT*—AS EVIDENCE OF BAD FAITH

Unlike the somewhat limited scope of confidentiality afforded to settlement communications, the confidentiality of *mediation* communications is quite broad. In *Cassel v. Superior Court*, the California Supreme Court recently explained that “to encourage the candor necessary to a successful mediation, the Legislature has broadly provided for the confidentiality of things spoken or written in connection with a mediation proceeding.”⁸⁴ Specifically, under the Evidence Code, “[n]o evidence” of statements made or writings prepared “for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery.”⁸⁵

Thus, mediation communications enjoy broad confidentiality. Indeed, the Evidence Code explicitly states that “[a]ll communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential.”⁸⁶ This language strongly suggests that the confidentiality of mediation may not yield to the

82. *Shade Foods, Inc. v. Innovative Prods. Sales & Mktg., Inc.*, 93 Cal. Rptr. 2d 364, 411 (Ct. App. 2000) (emphasis added) (internal quotation marks omitted).

83. *HMS Capital, Inc. v. Lawyers Title Co.*, 12 Cal. Rptr. 3d 786, 797 (Ct. App. 2004) (emphasis added).

84. *Cassel v. Superior Court*, 244 P.3d 1080, 1083 (Cal. 2011).

85. CAL. EVID. CODE § 1119(a)-(b) (West 2009).

86. *Id.* § 1119(c).

policy of deterring bad-faith trade secret litigation. As discussed below, this appears to be true with regard to *communications*. But with regard to *conduct*, the strength of mediation confidentiality is not entirely clear.

A. *Mediation Communications Are Given “Maximum Protection,” and Thus Are Likely Inadmissible as Evidence of Bad Faith*

In *Cassel*, the Court explained that although the provisions described above “govern only the narrow category of mediation-related communications . . . they apply broadly within that category, and are designed to provide *maximum protection* for the privacy of communications in the mediation context.”⁸⁷ The Court has “repeatedly said that these confidentiality provisions are clear and absolute,” and that “[e]xcept in rare circumstances, they must be strictly applied.”⁸⁸ Indeed, even in the face of important conflicting policy considerations—and even in the face of sanctionable conduct—mediation communications remain confidential.

1. *Mediation Communications Are Confidential Even in the Face of Important Countervailing Public Policy*

The California Supreme Court has been explicit that the “maximum protection” afforded to mediation communications holds true “even where competing public policies may be affected.”⁸⁹ In general, “[t]he Legislature decided that the encouragement of mediation to resolve disputes requires broad protection for the confidentiality of communications exchanged in relation to that process, even where this protection may sometimes result in the unavailability of valuable civil evidence.”⁹⁰ Thus, the confidentiality of mediation communications trumps even the laudable public policy of deterring *bad behavior* among litigants. As the Court has explained: “The Legislature chose to promote mediation by ensuring confidentiality *rather than adopt a scheme to ensure good behavior* in

87. *Cassel*, 244 P.3d at 1094 (emphasis added).

88. *Id.* at 1083.

89. *Id.*

90. *Id.* at 1096.

the mediation and litigation process. The mediation statutes provide clear and comprehensive rules reflecting that policy choice.”⁹¹

In *Cassel*, the Court held that the mediation privilege shielded from disclosure communications between an attorney and his own client, where the client intended to introduce those communications in support of a claim of *legal malpractice*.⁹² The holding in *Cassel* is worth pausing over. Deterring legal malpractice is an obviously important goal. Moreover, outside the context of mediation, the client in *Cassel* surely could have waived the attorney-client privilege to reveal the offending communications.⁹³ The attorney-client privilege, after all, belongs to the client.⁹⁴

Nevertheless, *Cassel* instructs that *inside* the context of mediation, the client has no such power. He or she may not unilaterally “waive” confidentiality—even to prove legal malpractice. This is perhaps explained, at least in part, by the fact that mediation confidentiality, as with settlement confidentiality, is not a “privilege” belonging to any one party.⁹⁵ Rather, it is a broad institutional policy meant to give “maximum protection” to *information*, not particular *individuals*.⁹⁶ And this maximum protection generally will not yield, even to the policy goal of safeguarding clients from legal malpractice.

The Court has not directly addressed the question of whether the same is true with regard to the strong public policy meant to deter bad-faith trade secret litigation. The logic of *Cassel*, however, strongly implies that as in the context of legal-malpractice claims, mediation communications are likely inadmissible to prove the improper motives of trade secret litigants.

91. *Simmons v. Ghaderi*, 187 P.3d 934, 946 (Cal. 2008) (emphasis added).

92. *Cassel*, 244 P.3d at 1087.

93. See CAL. EVID. CODE § 958 (West 2009) (“There is no privilege . . . as to a communication relevant to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship.”).

94. See *id.* § 953(a) (“‘[H]older of the privilege’ means . . . [t]he client, if the client has no guardian or conservator.”).

95. See *Wimsatt v. Superior Court*, 61 Cal. Rptr. 3d 200, 208 n.4 (Ct. App. 2007) (“[B]ecause the mediation confidentiality rules are not ‘privileges’ in the traditional sense, and because the Evidence Code does not use the phrase ‘privilege,’ we will use the term ‘mediation confidentiality.’”) (citations omitted).

96. *Cassel*, 244 P.3d at 1094.

2. *Mediation Communications Are Confidential Even When They Otherwise Would Support Sanctions*

Indeed, although California courts have not directly addressed whether mediation-related communications may be disclosed in support of a claim that a party brought or maintained a trade secret case in bad faith, the California Supreme Court, ten years prior to deciding *Cassel*, addressed an arguably more general—and thus inclusive—issue. In *Foxgate Homeowners' Ass'n, Inc. v. Bramalea California, Inc.*, the Court faced the “intersection” between the confidentiality of mediation-related communications and the question of whether a court may exercise its “power . . . to control proceedings before it . . . by imposing sanctions on a party or the party’s attorney for statements or conduct during mediation.”⁹⁷ In that case and those that followed, it appears that the confidentiality of mediation *communications* is not likely to yield to the policy of deterring bad-faith litigation.

In *Foxgate*, a homeowners’ association brought a construction-defect case against certain developers and subcontractors.⁹⁸ The trial court ordered mediation, to which the parties were required to bring their experts.⁹⁹ The defendants, however, not only were late to the first day of mediation, but also failed to bring any of their experts.¹⁰⁰ The mediator thus cancelled the mediation.¹⁰¹ The homeowners’ association moved for sanctions, ultimately seeking over \$30,000 in attorneys’ fees and costs, relying on a declaration provided by the mediator in support of an argument that the defendants’ failure to properly participate in mediation was in bad faith.¹⁰² Over the objection of the defendants, who claimed that the mediator’s declaration was inadmissible under statutes governing the confidentiality of mediation, the trial court granted the motion.¹⁰³ The

97. *Foxgate Homeowners' Ass'n, Inc. v. Bramalea Cal., Inc.*, 25 P.3d 1117, 1119 (Cal. 2001).

98. *Id.*

99. *Id.* at 1120.

100. *Id.*

101. *Id.*

102. *Foxgate*, 25 P.3d at 1120-22.

103. *Id.* at 1122.

Court of Appeal reversed and remanded, instructing the trial court to provide a more detailed explanation of the basis for sanctions.¹⁰⁴ In doing so, however, it rejected the defendants' "confidentiality" argument, reasoning that the statutes governing the confidentiality of mediation were "not intended to shield sanctionable conduct."¹⁰⁵

The Supreme Court disagreed. It acknowledged the concern, in the face of California's strong public policy favoring alternative dispute resolution, that the defendants may not have "participate[d] in good faith in the mediation process."¹⁰⁶ But the Court also recognized that "the Legislature has weighed and balanced the policy that promotes effective mediation by requiring confidentiality against a policy that might better encourage good faith participation in the process."¹⁰⁷ It thus held that "none of the confidentiality statutes currently makes an exception for reporting bad faith conduct or for imposition of sanctions . . . when doing so would require disclosure of communications."¹⁰⁸

As the *Cassel* court explained, the "frank exchange" meant to be encouraged by confidentiality "is achieved only if the participants know that what is said in the mediation will not be used to their detriment through later court proceedings and other adjudicatory processes."¹⁰⁹ And according to the *Foxgate* court, this protected "frank exchange" reaches even to communications that might otherwise be *sanctionable*. The protection of mediation communications could scarcely be broader.

B. Mediation Conduct, However, May in Principle Provide a Basis for a Finding of Bad Faith

Nevertheless, despite the broad nature of the statutes establishing the confidentiality of mediation proceedings, and the Supreme Court's consistent interpretations of those statutes as "unambiguous" in doing

104. *Id.*

105. *Id.* at 1123.

106. *Id.* at 1127-28.

107. *Foxgate*, 25 P.3d at 1128.

108. *Id.*

109. *Cassel v. Superior Court*, 244 P.3d 1080, 1087 (Cal. 2011) (internal quotation marks omitted).

so,¹¹⁰ mediation confidentiality may not *entirely* shield a party from sanctions. In analyzing the confidentiality of mediation, the *Foxgate* court noted: “The statutes are clear. [They] prohibit[] any person, mediator and participants alike, from revealing any written or oral communication made during mediation . . . [and] prohibit[] the mediator, but not a party, from advising the court about *conduct* during mediation that might warrant sanctions.”¹¹¹ Thus, while the *Foxgate* court meant to stress that the mediation-confidentiality statutes unequivocally prohibit any participant from revealing communications made during mediation, and also prohibit a mediator from revealing conduct during a mediation, it also noted that the language of the statutes does *not* prohibit a “party” from advising the court about *conduct* occurring during mediation. Could this provide a narrow basis for supporting an award of sanctions based on a party’s bad faith?

At least one court has answered that question in the affirmative. In *Campagnone v. Enjoyable Pools & Spas Service & Repairs, Inc.*, the plaintiffs brought claims of negligence and products liability against the manufacturer, seller, and installer of a swimming pool filter that exploded, causing severe injuries.¹¹² The plaintiffs prevailed at trial, and the defendants appealed.¹¹³ The Court of Appeal ordered mediation, under what the court described as the “relatively recent advent of court-ordered mediation of certain cases on appeal,” which, according to the court, “has been a resounding success.”¹¹⁴ After the defendants’ excess insurer, however, failed to appear at mediation—thus defeating the requirement that all parties have full settlement authority—the plaintiffs sought sanctions in the form of attorneys’ fees and costs, in excess of \$19,000.¹¹⁵

The Court of Appeal denied the request—but only because the excess insurer had not been notified of the mediation, and there had not yet been a published appellate decision holding that parties have

110. *Id.* at 1094.

111. *Foxgate*, 25 P.3d at 1125.

112. *Campagnone v. Enjoyable Pools & Spas Serv. & Repairs, Inc.*, 77 Cal. Rptr. 3d 551, 555 (Ct. App. 2008).

113. *Id.*

114. *Id.* at 553.

115. *Id.* at 555-56.

an obligation to provide such notice.¹¹⁶ The court made it clear, however, that “[h]enceforth,” sanctions would follow a failure to notify insurance carriers of court-ordered mediation.¹¹⁷ Moreover, the “unauthorized failure of a party, the party’s attorney, or a representative of a party’s insurance carrier, to attend a court-ordered appellate mediation” would “warrant[] imposition of sanctions” in future cases.¹¹⁸

In reaching this result, the *Campagnone* court found a basis for distinguishing *Foxgate* and the broad confidentiality afforded mediation proceedings. The court first noted its authority to “impose sanctions” for violations of the rules of court, and that “monetary sanctions . . . may include payment of the aggrieved party’s attorney fees and costs.”¹¹⁹ But the court also recognized that, because the plaintiffs sought sanctions based on mediation-related conduct, the “issue is complicated . . . by the confidentiality that is afforded to the mediation process.”¹²⁰ Indeed, the court noted the broad language of the statutes providing for such confidentiality and, quoting *Foxgate*, recognized that “communications made during mediation or for the purpose of a mediation consultation” are unquestionably confidential.¹²¹

Seizing on the *Foxgate* court’s further proposition, however, the *Campagnone* court explained: “On the other hand, the confidentiality rules do not prohibit ‘a party’ from ‘advising the court about *conduct* during mediation that might warrant sanctions.’”¹²² Thus, the court reasoned, the “failure to have all persons or representatives attend court-ordered appellate mediation . . . is *conduct* that a party . . . may report to the court as a basis for monetary sanctions.”¹²³

Accordingly, not *all* matters related to mediation are confidential—and *some* matters related to mediation may be used to support an award of attorneys’ fees as a monetary sanction. Under

116. *Id.* at 556.

117. *Campagnone*, 77 Cal. Rptr. 3d at 556.

118. *Id.* at 555.

119. *Id.* at 553-54.

120. *Id.* at 554.

121. *Id.* (internal quotation marks omitted).

122. *Campagnone*, 77 Cal. Rptr. 3d at 554.

123. *Id.* at 555 (emphasis added).

Campagnone, and under a straightforward reading of the statutes providing for mediation confidentiality, there is no obligation to keep certain forms of *conduct* confidential. Thus, by extension, one might plausibly argue that the *conduct* of a party asserting trade secret claims under CUTSA, even where that conduct occurs in the context of mediation, might constitute admissible evidence of that party's *bad faith* in connection with a request for attorneys' fees. Even the mediation privilege, it seems, might bend in the face of bad-faith trade secret litigation.

But how far does this exception reach? The *Campagnone* court indicated that "reporting anything more" than the sort of conduct at issue there—a failure to *appear* at mediation—"may violate the confidentiality rules."¹²⁴ In other words, if a party asserting a trade secret claim unreasonably fails to appear at mediation, perhaps that fact—and only that fact—is admissible to show bad faith. This seems a slim reed on which to support a case for bad-faith litigation. Could other forms of mediation-related "conduct" be admissible to show bad faith? Plausible examples are difficult to conceive of. Suppose a party makes disparaging comments, or even threats amounting to coercive conduct, at mediation. Despite the important goal of preventing such coercion, it is not difficult to imagine a court considering those to be protected "communications."¹²⁵

Suppose, however, that a party's *actions* at mediation—perhaps via body language, tone of voice, or gesture—amount to non-verbal strong-arm tactics, or, alternatively, imply the absence of a good-faith belief in the claims asserted. Would such conduct be admissible to show bad faith? The answer might turn on the extent to which such non-verbal conduct is more or less plausibly described as "communication." Certainly some gestures meet that plausibility test. But perhaps other conduct does not. In the right circumstances, it seems at least possible that litigation might be needed to decide whether *conduct* falls under what one might call the "*Campagnone* Rule"—and thus is available for use in a CUTSA fee request.

124. *Id.*

125. *See, e.g.,* *Provost v. Regents of Univ. of Cal.*, 135 Cal. Rptr. 3d 591, 604-05 (Ct. App. 2011) (rejecting plaintiff's argument, in support of an attempt to invalidate a settlement agreement, that he should be permitted to introduce evidence that he was "coerced" into signing it).

CONCLUSION

Arguably, both CUTSA's fee-shifting rule and the confidentiality of settlement negotiations and mediation serve the same goal: efficient dispute resolution. The former policy—the “stick”—serves as a reminder that unjustifiably bringing or prolonging meritless litigation will be punished; the latter policy—the “carrot”—permits frank, open evaluation and discussion of settlement and mediation opportunities. These consistent legal rules nevertheless can come into conflict. When they do, there is a significant risk that the confidentiality of settlement communications may yield to the policy of deterring bad-faith trade secret litigation; and that although mediation *communications* are likely to remain confidential in the face of this important public policy, mediation *conduct*, at least in principle, may be vulnerable to being used as evidence of bad faith.

Parties to trade secret litigation should therefore be wary of what they say, and how they act, while attempting to negotiate a settlement or mediate a dispute. While it should perhaps be unnecessary to say, being frank and forthright is not a license to act in bad faith. In settlement negotiations, trade secret plaintiffs should thus avoid proposing settlement terms that are “inflammatory,” illegal, or that otherwise “violate[] public policy.”¹²⁶ Avoiding extortionate threats needs little explanation.¹²⁷ But even somewhat more reasonable parties may overreach. In California, agreements under which a party is “restrained from engaging in a lawful profession, trade, or business” generally are “void.”¹²⁸ Thus, even if the results of doing so might at first blush seem desirable from a business perspective, a plaintiff should not demand non-competition agreements;¹²⁹ concessions that a defendant will not hire the plaintiff's employees;¹³⁰ financial terms disconnected from the evidence;¹³¹ or agreements that a defendant will “assign” to the plaintiff intellectual property subsequently

126. *FLIR Sys., Inc. v. Parrish*, 95 Cal. Rptr. 3d 307, 318 (Ct. App. 2009).

127. *See, e.g., Mendoza v. Hamzeh*, 155 Cal. Rptr. 3d 832, 835-36 (Ct. App. 2013).

128. CAL. BUS. & PROF. CODE § 16600 (West 2008).

129. *See, e.g., FLIR*, 95 Cal. Rptr. 3d at 318.

130. *See id.*

131. *See id.*

conceived.¹³² Furthermore, plaintiffs should not demand “market allocation” schemes, under which competitors *carve up* a market, effectively restraining one another from competing.¹³³ And of course, personal attacks on an adversary, its employees, or its principal, should be avoided—even if you are convinced that you are dealing with “two snakes in a paper sack.”¹³⁴

Given the extraordinary strength of confidentiality attached to mediation, many of these concerns might be less pressing. The “maximum protection” afforded to communications in the context of mediation likely shields even the sort of demands—and insults—described above.¹³⁵ Indeed, California’s Legislature did not “adopt a scheme to ensure good behavior in the mediation . . . process.”¹³⁶ Nevertheless, some *conduct* may cross the line. Under the *Campagnone* Rule, a *party* may disclose an outright failure to appear at mediation as evidence of bad faith.¹³⁷ It seems plausible to wonder whether functionally similar conduct—say, appearing at mediation but refusing to participate—might also constitute admissible evidence of bad faith. Whether other forms of non-communicative conduct at mediation may support a request for sanctions is unknown, but it would be logically consistent with *Campagnone* for such conduct to

132. *Applied Materials, Inc. v. Advanced Micro-Fabrication Equip. (Shanghai) Co.*, 630 F. Supp. 2d 1084, 1090 (N.D. Cal. 2009) (“Assignment clauses function as unlawful non-compete provisions where they require an employee to assign an invention conceived after departing from an employer’s service.”).

133. *Compare Guild Wineries & Distilleries v. J. Sosnick & Son*, 162 Cal. Rptr. 87, 91 (Ct. App. 1980) (“It is settled that distributors cannot lawfully agree to divide territories or customers. Such conduct is sometimes called a ‘horizontal restraint,’ and is a per se violation of the Sherman Act.”), *with Dimidowich v. Bell & Howell*, 803 F.2d 1473, 1482-83 (9th Cir. 1986) (“*Guild Wineries* . . . ignores the possible benefits to interbrand competition that can result from allowing restrictions in the intrabrand market.”).

134. *Gemini Aluminum Corp. v. California Custom Shapes, Inc.*, 116 Cal. Rptr. 2d 358, 369 (Ct. App. 2002).

135. *Cassel v. Superior Court*, 244 P.3d 1080, 1094 (Cal. 2011).

136. *Simmons v. Ghaderi*, 187 P.3d 934, 946 (Cal. 2008).

137. *See Campagnone v. Enjoyable Pools & Spas Serv. & Repairs, Inc.*, 77 Cal. Rptr. 3d 551, 555 (Ct. App. 2008); *cf. Foxgate Homeowners’ Ass’n, Inc. v. Bramalea Cal., Inc.*, 25 P.3d 1117, 1125 (Cal. 2001) (holding that mediation confidentiality precludes “the mediator, but not a party, from advising the court about *conduct* during mediation that might warrant sanctions”).

be admissible. Thus, as in settlement negotiations, good behavior is good advice.

Nevertheless, as is often the case in litigation and elsewhere, although behaving well may be necessary to avoid trouble, it may not be sufficient. Even if a party brings and maintains an objectively meritorious trade secret claim in good faith, and is on its best behavior during settlement negotiations or mediation, a risk remains. If the target of the claim prevails on the merits, there is little to prevent it from then *alleging* bad faith—thus opening the possibility that otherwise confidential communications might be revealed. In other words, a successful *defendant* could seek to capitalize on its success, and, perhaps in a *bad faith* attempt to punish an unsuccessful-but-sincere plaintiff, introduce evidence of settlement negotiations or mediation conduct in support of a sanctions motion.¹³⁸ To prevent this, parties should always consider entering into express, written agreements that anything said—or done—during settlement negotiations and mediation will remain strictly confidential. “Behave yourself” may be good advice, but “get it in writing” is even better.

138. Of course, doing so could backfire if the court is convinced that the defendant did so in bad faith. See CAL. CIV. PROC. CODE § 128.5(a) (West 1997) (“Every trial court may order a party, the party’s attorney, or both to pay any reasonable expenses, including attorney’s fees, incurred by another party as a result of bad-faith actions or tactics[.]”).