CASE STUDY PREPARED FROM ORIGINAL PUBLISHED OPINION

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Cassel v Superior Court (1/13/11)

Legal Malpractice; Mediation Confidentiality

In this legal malpractice action, Plaintiff alleges he held a license to market clothing. Plaintiff hired defendant law firm to represent him in a claim against a competitor concerning the rights he held under the license. The competitor sued him for trademark infringement, and obtained an injunction against him for use of the label. Defendant law firm advised plaintiff he could continue to market his products in Asia, but the competitor asserted this violated the injunction and sought a finding of contempt against plaintiff.

A pretrial mediation of the suit took place, attended by plaintiff and defendant law firm. Plaintiff client and defendant lawyers had previously agreed he would take no less than $2 million for the assignment of his rights under the license to his competitor. After hours of mediation, however, plaintiff alleges he was finally told that the competitor would pay no more than $1.25 million. Though he felt increasingly tired, hungry and ill, his attorneys insisted he remain until the mediation was concluded, and they pressed him to accept the offer, telling him he was "greedy" to insist on more. Plaintiff alleged his lawyers continued to harass and coerce him to accept the $1.25 million offer, threatening to abandon him at trial and misrepresenting certain terms of the proposed deal.

Finally at midnight, after 14 hours of mediation, plaintiff believed he had no alternatives and signed the settlement agreement. In his deposition, plaintiff testified at length regarding pre-mediation meetings with his lawyers, at which mediation strategy was discussed. He also testified to private conversations held with his attorneys during the mediation. Thereafter, defendant law firm moved *in limine* under the mediation confidentiality statutes to exclude all evidence of

communications between plaintiff and his attorneys that were related to the mediation, including matters discussed before the mediation, and private communications between plaintiff and his lawyers during the mediation.

The trial court ruled that all pre-mediation communications and all discussions during the mediation were inadmissible at trial. Plaintiff sought a writ of mandate from the Court of Appeal. The Appellate Court granted mandamus relief, finding the mediation confidentiality statutes do not extend to communications between a mediation participant and his or her own attorneys, outside the presence of other participants in the mediation.

The Appellate Justices held the purpose of the mediation confidentiality statutes is to allow the disputing parties in a mediation to engage in candid discussions with each other about their respective positions, and the strength and weaknesses of their respective cases, without fear that the matters thereby disclosed will later be used against them. This protection was not intended to prevent a client from proving, through private communications outside the presence of all other mediation participants, a case of legal malpractice against the client's own lawyer. If this was not true, the mediation confidentiality statutes would unfairly hamper a malpractice action by overriding the waiver of the attorney-client privilege that occurs by operation of law when a client sues lawyers for malpractice. (Evidence code section 958)

The Supreme Court granted review, and Justice Baxter wrote the opinion. He began by noting that the statutes encourage the use of mediation by promoting a "candid and informal exchange regarding events in the past. This exchange 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." (*Simmons v Ghaderi* (2008) 44 Cal.4th 570) Section 1119 of the Evidence code provides that no evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to a mediation is admissible or subject to discovery, and disclosure of the evidence shall not be compelled, in any civil action. It further provides that all communications or settlement discussions by and between participants in the course of a mediation shall remain confidential. Exceptions are made for settlement agreements when statutory requirements are met.

The purpose of the provision is to encourage the mediation of disputes by eliminating a concern that things said or written will be used later against a participant. The statute unqualifiedly bars disclosure of communications made during mediation absent an express statutory exception. (*Fair v Bakhtiari* (2006) 40 Cal.4th 189) The Legislature has decided that the candor necessary to successful mediation is promoted by shielding mediation participants from the threat that their frank expression of views during a mediation might subject them to sanctions based on the claims of another party that they were acting in bad faith. (*Foxgate Homeowners' Assn. v Bramalea California, Inc.* (2001) 26 Cal.4th 1)

The Supreme Court has previously construed section 1123(b) which permits disclosure of a written settlement agreement reached in mediation if the agreement provides that it is enforceable or binding or words to that effect. The written agreement must directly express the parties' agreement to be bound by the document they sign. (*Fair*, at p. 197) A writing must include on its face a statement that it is "enforceable" or "binding" or a declaration in other terms with the same meaning. Extrinsic proof of a party's intent to be bound is not enough. Durable settlements are more likely to result if section 1123(b) is applied to require language directly reflecting the parties' awareness that they are executing an "enforceable or binding" agreement.

Exceptions to the unambiguous provisions of the mediation confidentiality statutes are limited to narrowly proscribed statutory exemptions, and except in cases of express waiver or where due process is implicated, mediation confidentiality must be strictly enforced, even where policy considerations are present. (*Rinaker v Superior Court* (1998) 62 Cal.App.4th 155) Section 1119, adopted in 1997, is more expansive than its predecessor, former section 1152.5. It extends to oral communications made for the purpose of or pursuant to a mediation, not just to oral communications made in the course of the mediation. (*Simmons*, at p. 581) It follows that absent an express statutory exception, all discussions conducted in preparation for a mediation, as well as all mediation-related communications that take place during the mediation itself, are protected from disclosure. Plainly, such communications include those between a mediation disputant and his or her own counsel, even if these do not occur in the presence of the mediator or other disputants.

The Court of Appeal found that under the mediation statutes, a party and a party's attorney are a single mediation "participant" whose communications are not within the scope of the confidentiality statutes. Justice Baxter concluded there is no persuasive basis to equate mediation "parties" or "disputants" with mediation "participants," and thus to restrict confidentiality to exchanges between disputing parties. Section 1119 broadly provides that no evidence of anything said and no writing is discoverable if for the purpose of or in the course of a mediation. The protection afforded by these statutes is not limited by the identity of the communicator, or by his or her status as a "party," "disputant," or "participant" in the mediation itself.

The Court of Appeal also implied that the mediation confidentiality statutes were not intended to trump section 958, which eliminates the confidentiality protections otherwise afforded by the attorney-client privilege in suits between clients and their own lawyers. Justice Baxter pointed out that the mediation confidentiality statutes include no exception for legal malpractice actions by mediation disputants against their own counsel, and the two statutes serve separate and unrelated purposes. The client's statutory privilege of confidentiality is applicable to all communications between client and counsel (sections 952-954), to allow frank consultation. The exception under 958 acknowledges that in litigation between the lawyer and client, the privilege cannot be used to bar evidence that supports the lawyer's claim or undermines the client's.

By contrast, the mediation confidentiality statutes do not create a privilege in favor of any particular person. Instead, they serve the public policy of encouraging the resolution of disputes by means short of litigation. A principal purpose is to assure prospective participants that their interests will not be damaged, by attempting this alternative means of resolution and by making and communicating candid disclosures and assessments that are likely to produce a fair and reasonable mediation settlement. The Court of Appeal has essentially carved out an exception to the unambiguous language of the mediation confidentiality statutes in order to accommodate a competing policy concern, the protection of the client's right to sue his or her attorney.

In *Wimsatt v Superior Court* (2007) 152 Cal.App.4th 137, mediation briefs and attorney emails were protected from disclosure even when one of the mediation disputants sought these materials in support of his legal malpractice action against his own attorneys. The Justices in that case noted the California Supreme Court has clearly stated it may not craft any exceptions to mediation confidentiality. An exception, even for legal misconduct, is for the Legislature to enact. As such, **when clients participate in mediation, they are, in effect, relinquishing all claims for new and independent torts arising from mediation, including legal malpractice causes of action against their own counsel.** Justice Baxter concluded the mediation confidentiality statutes extend beyond the narrow issues of *Wimsatt*, and plainly include every oral or written communication by any person that occurs for the purpose of, in the course of, or pursuant to, a mediation (section 1119(a) & (b)).

Due process concerns are not implicated. Implicit in *Foxgate*, *Fair* and *Simmons* is the premise that the mere loss of evidence pertinent to the prosecution of a lawsuit for civil damages does not implicate such a fundamental interest.

The 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. It could reasonably conclude that confidentiality should extend to anything said or written for the purpose of, in the course of, or pursuant to a mediation, including mediation related discussions between a mediation disputant and his own counsel. The exclusion of all attorney client communications from that proviso would simply engraft an exception that does not appear in the mediation confidentiality statutes themselves.

The Court of Appeal erred, and its judgment is reversed.

In his concurring opinion, Justice Chin notes the following:
"*This holding will effectively shield an attorney's action even if those actions are incompetent or even deceptive. Attorneys participating in mediation will not be held accountable for any incompetent or fraudulent actions during that mediation unless the*

actions are so extreme as to engender a criminal prosecution against the attorney. This is a high price to pay to preserve total confidentiality in the mediation process.
I greatly sympathize with the Court of Appeal majority's attempt to interpret the statutory language as not mandating confidentiality in this situation. But, for the reasons the present majority gives, I do not believe the attempt quite succeeds."
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