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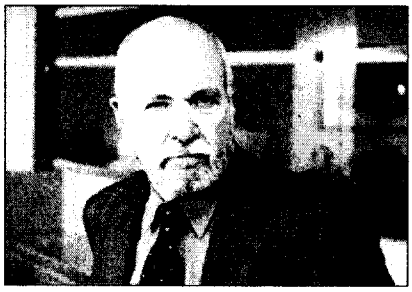
Case Pits Mediation Confidentiality Against Client Secrecy

State Supreme Court Will Decide Which Tenet of Practice Takes Precedence

By Laura Ernde



The California Supreme Court is set to decide whether attorneys can use the cloak of mediation confidentiality to prevent discussions with their clients from later being used against them in a legal malpractice case.

The justices will hear oral argument Tuesday in San Francisco in a case that pits mediation confidentiality against the long-standing concept of attorney-client privilege. The privilege gives clients the right to reveal confidential discussions if they later sour on their attorneys and decide to sue.

Defense lawyers say mediation privacy trumps. The Legislature passed strong laws protecting settlement talks from being used in litigation in order to encourage out-of-court dispute resolution, and it didn't approve an exception for attorney-client privilege, they say.

But lawyers who bring legal malpractice cases argue that those protections shouldn't be used to shield attorneys from wrongdoing.

"All of a sudden, lawyers have free rein to do what they want inside of that," said Gerald Sauer of Sauer & Wagner. He is participating in the case as a friend of the court because he represents a client facing a similar conundrum.

'It's unfair that lawyers are trying to graft on mediation confidentiality as a way of undermining attorney-client privilege.'

Gerald Sauer
Sauer & Wagner

Leading the plaintiffs' argument will be Ronald Makarem of Makarem & Associates. Makarem represents Michael Cassel, who claims his former attorneys at Wasserman, Comden, Casselman & Pearson threatened to abandon him two weeks before trial in a trademark dispute that had gone to mediation, unless he agreed to settle for $1.25 million.

Los Angeles County Superior Court Judge James MacLaughlin ruled that conversations Cassel had with his lawyers about the settlement were protected by mediation confidentiality, and couldn't be used against the firm in a legal malpractice trial.

But when Cassel challenged MacLaughlin's decision in a writ petition, a 2-1 panel of the 2nd District Court of Appeal found discussions that took place outside of the mediation session could come into evidence.

"There is no indication of any legislative intent that the mediation confidentiality statutes were to protect a lawyer from his client where only the client was a disputant in a mediation," Justice Frank Y. Jackson wrote for the majority.

Peter Q. Ezzell of Haight Brown & Bonesteel is asking the Supreme Court to overturn the ruling.

"The case is very important, because if everything a lawyer says to his client in mediation - much of which undoubtedly comes from the mediator - comes in ... now he gets in the back door what he couldn't get in the front," Ezzell said. "It will have a very chilling effect on mediation."

It would also encourage so-called buyer's remorse lawsuits, in which a client decides he isn't happy with the outcome of a mediation, and sues his lawyer, Ezzell said.

But Makarem and Sauer argue that it wouldn't harm mediation to allow only attorney -client privileged conversations to come in as evidence, excluding other conversations that took place as part of the mediation.

"It's unfair that lawyers are trying to graft on mediation confidentiality as a way of undermining attorney-client privilege," Sauer said. "That couldn't have been the intent of the Legislature."

Ezzell argues that it's up to the Legislature and not the courts to create such an exception to the confidentiality rules, and it would be difficult to parse out which conversations were part of the mediation and which ones were not.

"If it would not have existed but for the mediation, then it's out," Ezzell said.

The Association of Southern California Defense Counsel wrote a friend-of-the-court brief supporting Ezzell's position.

Attorney-client conversations taken out of context might give a misleading picture of what happened, said Kyle Kveton of Robie & Matthai. He worked on the amicus brief, and is also Sauer's opposing counsel in the similar case, *Porter v. Wyner*, 2010 DJDAR 6816.

The outcome of *Porter v. Wyner* rests largely on what the Supreme Court does in *Cassel v. Superior Court*, S178914. A decision is due within 90 days of the argument.