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Cassel v. Superior Court: Supreme Court Rules that Mediation Confidentiality Shields Attorneys From Claims Based on Mediation Communications

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Reversing a decision of the Court of Appeal, the California Supreme Court has held that under Evidence Code section 1119, "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 decision is *Cassel v. Superior Court*, (2011) 51 Cal.4th 113.

The effect of this decision is reflected in the following language from *Wimsatt v. Superior Court,*(2007) 152 Cal.App.4th 137 1t 150, which was cited with approval by the Supreme Court: "when clients, such as [the malpractice plaintiff in that case], 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."

A decision cited at length by the Supreme Court was *Benesch v. Green*. This blog author's firm, Sedgwick, Detert, Moran & Arnold LLP, was counsel for the defendant attorney in that action and procured the ruling. The Supreme Court had the following to say regarding the *Benesch* decision:

A United States District Court case, *Benesch v. Green* (N.D.Cal.2009) 2009 WL 4885215 (Benesch), more recent than the Court of Appeal decision in this case, supports our analysis even more closely than does *Wimsatt*. In *Benesch*, a mediation disputant sued her attorney, claiming counsel committed malpractice by inducing her, in the mediation, to sign an enforceable "Term Sheet" that failed to meet her aim of ensuring her daughter's inheritance rights. Defendant attorney sought summary judgment, asserting that the client had no case without introducing evidence protected by the mediation confidentiality statutes, including "the legal advice that [counsel] gave to [the client], and the circumstances in which the Term Sheet was executed." (Id., at p. *5.)

The district court denied summary judgment, ruling that it was not absolutely clear the mediation confidentiality statutes left the client without evidence sufficient to prove her case. Nonetheless, the court agreed that the multiple California cases construing the mediation confidentiality statutes, including *Wimsatt*, "generally support Defendant's position" that mediation-related communications, including those only between client and counsel, are not subject to disclosure, even when this may inhibit a client's claim that her lawyer committed malpractice. (*Benesch*, supra, 2009 WL 4885215, *5.)

In particular, *Benesch* criticized the instant Court of Appeal majority's decision as at odds with section 1119, subdivision (a), contrary to the rule against implied exceptions to mediation confidentiality, and "in significant tension with the large majority of California appellate decisions" construing the mediation confidentiality

statutes. (*Benesch*, supra, 2009 WL 4885215, *7.) As the district court observed, even if a private attorney-client conversation did not occur "in the course of" a mediation, this circumstance is not enough to exempt the communication from confidentiality, because the statutory "protections also encompass communications made 'for the purpose of' or 'pursuant to' mediation." (Ibid.) The latter phrases, the court explained, "must necessarily include statements that were not made in the course of the mediation itself, or those additional provisions would be superfluous." (Ibid.)

As pertinent here, the *Benesch* court declared, "Communications between counsel and client that are materially related to the mediation, even if they are not made to another party or the mediator, are 'for the purpose of' or 'pursuant to' mediation." (*Benesch*, supra, 2009 WL 4885215, *7.) Indeed, the court noted, if protected communications did not include those outside the mediation proceedings, it would be unnecessary and useless for section 1122, subdivision (a)(2) to provide that communications by and between fewer than all participants in a mediation may be disclosed if all such participants agree and " 'the communication does not disclose anything said or done in the course of mediation.' " (*Benesch*, supra, at p. *7.)

We agree with this analysis.

The Supreme Court stressed that it was interpreting the language of Evidence Code section 1119 and that the statute was subject to amendment by the legislature: "Of course, the Legislature is free to reconsider whether the mediation confidentiality statutes should preclude the use of mediation-related attorney-client discussions to support a client's civil claims of malpractice against his or her attorneys."

Finally, the Court also recognized that future judicial attention may be given to defining what communications fall within the scope of Section 1119. Here, there was no dispute about whether the communications were closely related to the mediation:

Moreover, we need not decide in this case the precise parameters of the phrase "for the purpose of, in the course of, or pursuant to, a mediation." The communications the trial court excluded from discovery and evidence concerned the settlement strategy to be pursued at an immediately pending mediation. They were closely related to the mediation in time, context, and subject matter, and a number of them occurred during, and in direct pursuit of, the mediation proceeding itself. Petitioner raises no factual dispute about the relationship between the excluded communications, or any of them, and the mediation in which he was involved. There appears no basis to dispute that they were "for the purpose of, in the course of, or pursuant to, a mediation ." (§ 1119, subd. (a).)