BUSINESS LAW NEWS

The State Bar of California • Issue 1 2011

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MCLE Self-Study Article
Mediation Confidentiality and Legal Malpractice: *Cassel v. Superior Court*

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Suppose that during mediation a defendant offers plaintiff a million dollar settlement. The plaintiff's lawyer, who thinks the money is a fraction of the case's value, advises the client not to accept the million, and instead to go to trial. Then suppose that the case goes to trial and the plaintiff loses. The plaintiff decides to sue his lawyer for malpractice for advising him to turn down the million dollar settlement. The lawyer argues that the case cannot go forward because any statement made at a mediation—such as "don't take the million, we'll do better at trial," is inadmissible in court. Without this evidence the malpractice case cannot go forward. Does the law of mediation confidentially immunize the lawyer from malpractice?

The law of mediation confidentiality, as codified in the California Evidence Code[1], allows participants in a mediation to freely discuss and exchange settlement proposals, orally or in writing, without fear that any of these conversations or writings could be used in a later court hearing. In statutory language, all "statements" made during mediation, or pursuant to mediation, are inadmissible in a later proceeding. But do the rules that apply to opposing parties also apply to a conversation between a lawyer and his client such as the one described above. Two court of appeal decisions, *Cassel v. Superior Court*[2] and *Porter v. Wyner,*[3] held that they do not; however, the California Supreme Court recently reversed the *Cassel* court of appeal decision and held that all statements or writings which occur during or pursuant to a mediation are confidential, and are inadmissible in any future court action, including a malpractice action.[4] The Court has thus decided the thorny issue of whether the rules of mediation confidentiality also apply to conversations between a party and his/her own counsel, holding that a statement made by counsel to a client during the course of mediation—which could otherwise form the basis of a claim for legal malpractice—is protected by mediation confidentiality and is inadmissible.

Each of the two court of appeal cases was decided by a two to one majority, and in each case the majority held that the Evidence Code's mediation confidentiality rules were intended to keep communications *between the parties*, not communications between a lawyer and client, confidential and inadmissible. Each court of appeal therefore held that the legal malpractice cases could proceed, and the alleged statements made by counsel to client were admissible. In each case the dissenting justice stated that the clear language of the statute did not allow for such interpretation, especially in light of the fact that the Supreme Court has stated that judicially created exceptions to the rules of mediation confidentiality are to be discouraged.[5] In overturning the court of appeals' holding in *Cassel* (and implicitly overturning *Porter*) the Supreme Court has made clear that the dissenting justices got it right: the language of the statute allows no exceptions except

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for the most extreme circumstances, which it determined did not exist in *Cassel.*

In so ruling, the Supreme Court reviewed the law of mediation confidentiality, and specifically looked at the court of appeal decision in *Wimsatt v. Superior Court.*[6] There a client sued his counsel for legal malpractice based on an allegedly unauthorized offer to settle. The client had authorized his attorney to settle his personal injury case for $3.5 million. The plaintiff alleged that in a mediation brief the defense represented to the mediator that the plaintiff's counsel had communicated to defense counsel a settlement demand of $1.5 million. This greatly-reduced settlement proposal—which the plaintiff claimed was unauthorized—was the subject of the malpractice case. In furtherance of his malpractice case, the client sought to introduce the defense mediation brief into evidence. In addition to the brief itself, the client sought to introduce (a) several emails which expressly referenced the contents of the mediation brief; and (b) evidence of a conversation between his attorney and defense counsel during which his counsel allegedly lowered the settlement demand without authorization. The *Wimsatt* court concluded that the content of the mediation brief and the emails was inadmissible pursuant to mediation confidentiality, but the content of the conversation was not. The mediation brief, in the Court's words "epitomizes the types of writings which the mediation confidentiality statutes have been designed to protect from disclosure."[7] Thus the emails, which referenced and quoted from the brief, were also barred from evidence. As for the conversation, the Court held that it was unclear whether the conversation took place in the context of the mediation, and for this reason it was deemed admissible until proven otherwise.

Under the Evidence Code, any statement made at a mediation is not admissible in a subsequent court, administrative or arbitral forum. In the words of the Code:

> No evidence of anything said or any admission made for *the purpose of, in the course of, or pursuant to* a mediation or a mediation consultation is admissible or subject to discovery, and disclosure of the evidence shall not be compelled, in any arbitration, administrative adjudication, [or] civil action…[8]

There are other provisions not directly germane to this discussion which are not discussed here. The key provision is admissibility—any "statement" made at a mediation, or made for the purpose of mediation or pursuant to a mediation is not admissible in any subsequent action—not just the action which gave rise to the mediation, but *any* action. On its face, as the Supreme Court held, the statute applies to a statement by a lawyer to his/her client so long as it was made for the purpose of, in the course of, or pursuant to a mediation.

Does it make a difference that in *Wimsatt* the statements at issue were between opposing parties while in *Cassel* they were between a lawyer and client on the same side?

The Supreme Court's answer is no. In *Cassel,* the lawyer and client met prior to the mediation to discuss, among other things, mediation strategy and trial strategy, should the case not settle. No mediator or opposing party was present during the conversations at issue.[9] The client insisted that he would never settle for less than $2 million. At the mediation, according to the client's malpractice complaint, his lawyers badgered him, threatened him, and ultimately forced him to agree to settle the case for $1.25 million.[10] Among other things, even though the mediation was held shortly before trial, the lawyers allegedly threatened to withdraw as counsel unless the client agreed to the lower number. Cassel further alleged that after a fourteen-hour mediation; when he was hungry, ill, and exhausted, and concerned that he would be unable to find new counsel in the short time before trial, he gave in to his counsel's demands and settled for the lower amount. He later brought a legal malpractice action against his counsel, Wasserman, Comden, Casselman & Pearson, LLP (hereafter "WCCP") alleging that WCCP had forced him to sign the settlement agreement for the $1.25 million, rather than the higher amount he'd told WCCP was acceptable.[11] The trial court granted WCCP's motion in limine to exclude any reference to the pre-mediation conversations, and the court of appeal granted Cassel's petition for writ of mandate. The court of appeal, by a 2-1 majority, reversed the trial court's ruling and held that the legal malpractice case can go forward and the attorney-client communications at issue would be admissible.

In support of its ruling, the court of appeal noted that the legislative intent and policy behind the rules of mediation confidentiality is to: "facilitate communication by a party that otherwise the party would not provide, given the potential for another party to the mediation to use the information against the revealing party; they are not to facilitate communication between a party and its own counsel."[12] The court later explained that the client and WCCP: "are not within the class of persons which mediation confidentiality was intended to protect from each other—the 'disputants,' i.e. the litigants—in order to encourage candor in the mediation process."[13] In other words, the court of

appeal's ruling was based on its understanding of why the Legislature enacted mediation confidentiality in the first place—to encourage disputants to be open and candid with each other without fear that a statement or offer might come back to haunt them at trial. Because, in the court of appeal's view, the policy reasons behind mediation confidentiality did not apply to a conversation between attorney and client, the provisions do not apply, even if the literal language of the statute does.

As noted earlier, both *Cassel* and *Porter* were decided by 2-1 majorities. In each of the dissents, the dissenting justice focused (1) on the actual language of the Evidence Code, which refers to statements made in the course of, or pursuant to a mediation, without regard to who made the statements; and (2) on prior Supreme Court cases which frown on exceptions to the rules of mediation confidentiality. In Justice Perluss' dissent in *Cassel* he stated that the majority's holding "is not only at odds with the clear language of section 1119, subdivision (a), but also inconsistent with the Supreme Court's repeated disapproval of 'judicially crafted exception[s]' to the mediation confidentiality statutes."[14] Similarly, in dissenting to the majority opinion in *Porter*, Justice Flier noted that: "the court's majority opinion sweepingly exempts all client-lawyer communications from mediation confidentiality. In my opinion, such a drastic exception must be made by the Legislature under carefully crafted statutory standards."[15]

The Supreme Court wholeheartedly agreed with Justice Perluss' (and implicitly with Justice Flier's) dissent. As the Court stated: "Though we understand the policy concerns advanced by the Court of Appeal majority, the plain language of the statutes compels us to agree with the dissent. …Confidentiality …is not confined to communications that occur *between mediation disputants* during the mediation itself."[16] The Court noted that it was obligated to apply "the plain terms of the mediation confidentiality statutes to the facts of this case unless such a result would violate due process, or would lead to absurd results that clearly undermine the statutory purpose."[17] Because the Court held that no such denial of due process or absurd result existed, it was required to apply the plain meaning of the statute.

In further rejecting the two courts of appeals' arguments on legislative intent (in which each court of appeal majority opinion argued that the legislature clearly enacted mediation confidentiality to encourage candid talk between disputants) the Supreme Court explained that it was entirely possible that the Legislature fully understood that the laws of mediation confidentiality would apply to attorney-client discussions, and fully intended that result. In this context the Court proposed two hypothetical examples of what the Legislature might have been thinking when it enacted the statutes. First, the Court stated: "the Legislature might reasonably believe that protecting attorney-client conversations in this context facilitates the use of mediation as a means of dispute resolution by allowing frank discussions between a mediation disputant and the disputant's counsel about the strengths and weaknesses of the case, the progress of negotiations, and the terms of a fair settlement, without concern that the things said by either the client or the lawyers will become the subjects of later litigation against each other."[18] In other words, the Court suggested that just as the Legislature enacted mediation confidentiality to encourage frank discussions between disputants, without their having to worry about statements being used against them in court, so too the Legislature may have wished to encourage frank discussions between a lawyer and client about the issues raised in mediation, without worrying about subsequent lawsuits.

Frankly, this hardly seems logical. It is one thing for the Legislature to encourage candid exchanges of views between disputants, who are essentially equals, and quite another to imagine that the Legislature wished to encourage frank discussions between lawyers and clients when a lawyer has a fiduciary duty to his client. Moreover, while disputants are not under a legal duty to tell the truth to each other, a lawyer is at all times duty-bound to tell the candid truth to his client.

Perhaps recognizing the flaws in this hypothetical legislative intent, the Court presented a second possible legislative purpose: "The Legislature also could rationally decide that it would not be fair to allow a client to support a malpractice claim with excerpts from private discussions with counsel concerning the mediation, while barring the attorneys from placing such discussions in context by citing communications within the mediation proceedings themselves."[19] This makes a lot more sense than the prior hypothetical legislative intent. After all, in a subsequent malpractice case the lawyer would be unable to cite statements by the other party, or by the mediator, which might have bolstered the attorney's recommendation, and shown that he was giving advice which did not fall below the standard of care.

At the end of the day, however, the Court's best argument is that the mediation confidentiality statutes bar the admission of "statements" made at a mediation, or pursuant to a mediation, and the statutes say nothing at all about who is making those statements. In the absence of any suggestion in the statutes that statements by some persons to some other persons—such as

by plaintiff's counsel to defense counsel—are confidential, but statements made by a lawyer to his client are not, the Court concluded that it had no basis to create such an exception.

While the Court's statutory interpretation argument makes good sense, it leads to the somewhat troubling conclusion that lawyers are immune from suit when their advice at mediations falls below professional standards. After all, the same lawyer giving the same bad advice outside the context of any mediation is certainly subject to a malpractice lawsuit. Perhaps this is what bothered Justice Chin, who said in a concurring opinion, that he "reluctantly" concurred in the majority's decision. He agreed with the rest of the Court that the statute must be interpreted according to its plain meaning unless it creates an absurd result, but also qualified his agreement, noting that in his view the result in this case "just barely" does not qualify as an absurd result. Justice Chin concludes by saying that he greatly doubts that: "the Legislature's purposes in mandating confidentiality was to permit attorneys to commit malpractice without accountability."[20] Presumably, the Legislature can act to amend the mediation confidentiality statutes if, like Justice Chin, it is uncomfortable with the result in *Cassel*. Unless and until it does, attorneys who give bad advice, or coerce their clients into accepting settlements by threats and intimidation, may use mediation confidentiality as a "get out of jail free card" to avoid the consequences of their actions. ■

Endnotes

1 Evidence Code §§ 1115 *et. seq.*

2 179 Cal. App. 4TH 152 (2009) review granted Feb. 2, 2010. Citations below are to the Court of Appeal decision, and are for information only as the decision is no longer citable.

3 183 Cal.App. 4TH 949 (2010) review granted July 14, 2010. Citations below are to the Court of Appeal decision and are for information only as the decision is no longer citable.

4 *Cassel v. Superior Court*, __Cal 4TH ___, 2011 Cal. LEXIS 2 (Jan. 13, 2011).

5 *See, Wimsatt v. Superior Court* 152 Cal.App. 4TH 137, 152 (2007).

6 *Ibid.*

7 *Id.* at 158.

8 Evidence Code §1119 (emphasis added).

9 *Cassel, surpa,* at 659.

10 Of course, the allegations in the complaint were not proven, as the matter did not proceed to trial.

11 *Cassel, supra,* 2011 Cal. LEXIS 2, *8-*9..

12 179 Cal. App. 4TH at 159.

13 *Id.*.at 163.

14 179 Cal. App. 4TH at 166, citing *Foxgate Homeowners' Assn v. Bramalea California, Inc.*26 Cal. 4TH 1,14 (2001) and *Rojas v. Superior Court* 33 Cal. 4TH 407, 424 (2004).

15 183 Cal. App. 4TH at 968.

16 *Cassel, supra*, 2011 Cal. LEXIS 2, *5 (emphasis in original).

17 *Id*. at *5, *18.

18 *Ibid*.

19 *Id*. at *50.

20 *Id*. at *58.