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Malpractice

Lawyer-Client Talks Relating to Mediation Cannot Be Used to Prove Malpractice Claim

Private discussions that attorneys have with their client during or relating to mediation of the client's case may not be used against the lawyers if the client subsequently sues them for malpractice, the California Supreme Court declared Jan. 13 (*Cassel v. Superior Court (Wasserman, Comden, Casselman & Pearson LLP)*, Cal., No. S178914, 1/13/11, rev'g 25 Law. Man. Prof. Conduct 640).

The court grounded its holding on California's broad mediation confidentiality statutes, which provide that any statements made for the purpose of mediation are not discoverable or admissible in subsequent noncriminal cases. The statutes plainly cover private attorney-client communications relating to mediation, and applying these laws in a malpractice lawsuit does not violate due process or produce absurd results, Justice Marvin R. Baxter said for the court.

In a concurring opinion, Justice Ming W. Chin said he ''reluctantly'' agreed that the statute makes private lawyer-client discussions inadmissible. But he urged the legislature to rethink this issue.

Right or Wrong? Ronald W. Makarem, who represented plaintiff Michael Cassel in the present action, told BNA that ''the ruling allows attorneys to breach their fiduciary duties to their clients within the context of discussing mediation.'' The decision is unfair to clients and will discourage use of mediation, he said. Makarem is with Makarem & Associates in Los Angeles.

''Unfortunately for consumers, clients with compelling legal malpractice cases against corrupt or incompetent lawyers may find it too difficult to prosecute their cases if the claims are in any way connected to mediation,'' he asserted. ''Clients may not want to participate in mediation for fear of being taken advantage of by their attorney without the ability for recourse in a subsequent legal malpractice case,'' Makarem said.

But according to Kyle Kveton of Robie & Matthai, Los Angeles, ''the decision is right based on the broad language of the confidentiality statute,'' which shields ''anything'' said by ''participants'' in mediation. The supreme court has repeatedly said that it must enforce the statute according to its plain language, he said in comments to BNA.

Kveton also said he believes the court's ruling will actually promote mediation as a dispute resolution tool. Participants will know that ''what happens in Vegas stays in Vegas,'' he said, adding that predictability aids the mediation process. It would be unfair to lawyers, he said, if clients could bring in evidence of lawyer-client discussions, yet lawyers could not put those talks in context by introducing evidence of other confidential communications in the mediation.

Kveton was the principal author of an amicus brief in *Cassel* submitted on behalf of the Association of Southern California Defense Counsel. He also represents lawyer-defendants in a similar malpractice action involving use of statements allegedly made during the mediation process, *Porter v. Wyner*, No. B211398 (Cal. Ct. App. 2d Dist. 4/8/10), which has been on hold pending resolution of the *Cassel* appeal.

In e-mailed comments, conflict resolution professor A. Marco Turk stated: ''Like Justice Chin in his concurring opinion, I agree that the Court's hands were tied by the statutory provisions, and that removal of this loophole that protects lawyers potentially guilty of malpractice must be dealt with by the Legislature.''

Turk said the ruling puts the burden on lawyers who represent clients in mediation to inform them in writing, before agreeing to mediation, about the impact of *Cassel* on possible malpractice claims. He also said he believes that lawyers who serve as mediators will need to make the parties aware of the effect of the case in writing, preferably as part of the confidentiality agreement. Turk is a professor at California State University Dominguez Hills in Carson, Cal., and frequently serves as a mediator and arbitrator.

So long as the statutory ''loophole'' recognized in *Cassel* exists, Turk stated, it will undermine the primary and most important foundation of the mediation process: client self-determination. Turk believes it would be absurd to think that parties will proceed to mediate once they are apprised of and fully understand the effect of *Cassel*. ''So an unintended result of *Cassel* will be contrary to what the Legislature and the courts have sought to accomplish, the promotion of mediation as the ADR process of choice,'' he said.

H. Jay Folberg, a longtime professor and author on alternative dispute resolution, emphasized that the California Evidence Code—unlike most other states and unlike the Uniform Mediation Act—does not create a me-

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diation privilege that can be waived. ''It's not a privilege and can't be analyzed in those terms,'' he said in an interview with BNA. Instead, Folberg explained, ''the legislature has created a tent, woven of public policy, that shields anything that occurs within that tent in mediation and in preparation for it.''

Readers therefore can think of the attorney-client discussions alleged in this case not as ''privileged'' communications but instead as a sideshow within the statutory confidentiality tent, he suggested. In effect, he said, the court is swatting the camel's nose back from under the edge of the tent.

A former dean of the University of San Francisco law school, Folberg is a mediator and arbitrator with ADR provider JAMS.

Gary Weiner, the mediation program administrator for the California Court of Appeal, First District, said that in his view the outcome in *Cassel* was predictable in light of the supreme court's precedents that construe the mediation confidentiality statutes broadly and refuse to carve out exceptions to the statute. But he told BNA ''there is a widespread expectation among many in the mediation community that the legislature will take a second look at the mediation confidentiality statutes,'' to consider whether California should move closer to the Uniform Mediation Act's view of confidentiality.

Settle and Sue. Wasserman, Comden, Casselman & Pearson represented Michael Cassel in a dispute over rights to a clothing label. After the dispute was settled in mediation, Cassel sued the law firm, alleging that the Wasserman lawyers who represented him in the mediation pressured him into accepting an inadequate settlement.

Cassel asserted that during the mediation, the lawyers leaned on him, told him he was greedy, threatened not to take his case to trial, misrepresented the proposed settlement, made him keep mediating even though he was exhausted, promised to negotiate a side deal, and falsely promised to discount his legal fees. They even accompanied him to the bathroom and continued to pressure him there, he claimed.

In his deposition in the malpractice case, Cassel testified about strategy meetings with his attorneys in the run-up to mediation, and he described private conversations with them during the mediation process.

The defendants moved to exclude any evidence of lawyer-client communications related to the mediation, including discussions at the strategy meetings before the impending mediation and the private talks during the mediation. The trial court held that the communications between Cassel and his lawyers came within the shield of California's mediation confidentiality statutes.

The court of appeal vacated, concluding that the mediation confidentiality laws do not protect private attorney-client communications, even if they occurred in connection with mediation, against the client's claims that the attorneys committed malpractice.

Plain Language Controls. The supreme court reversed, holding that under the plain language of the statutes, the lawyers' mediation-related discussions with their client were not discoverable or admissible in his malpractice action against them.

In so holding, the court relied on Section 1119 of the California Evidence Code, which provides that, with specified exceptions, nothing said or written ''for the purpose of, in the course of, or pursuant to, a mediation'' is discoverable or admissible in any noncriminal proceeding. The statute also states that all communications ''by and between participants'' in the course of a mediation shall remain confidential.

This expansive language aims to ensure, Baxter said, that the statutory shield extends beyond discussions carried out directly between the opposing parties to the dispute, or with the mediator, during the mediation proceedings themselves. ''[A]ll 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,'' the court ruled. Accordingly, Baxter said, these protected communications include those between a mediating party and his own counsel, even if not made in the presence of the mediator or the opposing party.

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H. JAY FOLBERG
JAMS MEDIATOR

The court rejected the court of appeal's theory that a party to mediation and the party's attorney are a single ''participant'' for purposes of mediation confidentiality. The statutory scheme makes clear that the term ''participants'' extends beyond the mediating parties and that the protection granted by the statutes is not tied to the identity or status of the communicating party, the court found.

Confidentiality, Not Privilege. The court also disagreed with the court of appeal's reliance on Evidence Code Section 958, which eliminates attorney-client privilege in suits between clients and their own lawyers. The mediation confidentiality statutes include no such exception, do not create a ''privilege'' in favor of anyone, and have a different purpose from the statute on attorney-client privilege, the court reasoned.

''Neither the language nor the purpose of the mediation confidentiality statutes supports a conclusion that they are subject to an exception, similar to that provided for the attorney-client privilege, for lawsuits between attorney and client,'' the court wrote.

In his remarks to BNA, Jay Folberg pointed out the distinction between California law on this point and the Uniform Mediation Act, which puts the protection for mediation communications in terms of privilege. The UMA's approach allows the law of privilege—including a rich body of law on waiver—to tag along, he said. When the UMA was being developed, he said, California participants did not want the protection to be cast in terms of a privilege, and there was a real battle on this issue that delayed the drafting process. Ultimately a strong privilege was included in the uniform act, he explained.

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No Attorney-Client Exception. The supreme court agreed with *Wimsatt v. Superior Court*, 61 Cal. Rptr.3d 200, 23 Law. Man. Prof. Conduct 314 (Cal. Ct. App. 2007), that the judiciary may not create an ''attorney-client'' exception to mediation confidentiality.

The plain terms of the mediation confidentiality statutes must be applied unless that would violate due process or lead to absurd results that undermine the statutory purpose, Baxter said. The court found no such extreme situation presented here. Mere loss of evidence needed for a civil damages lawsuit does not implicate due process, and applying the statute here would not produce a result that is either absurd or clearly contrary to legislative intent, the court found.

The legislature could rationally conclude, the court said, that protecting attorney-client communications facilitates the use of mediation as a means of dispute resolution.

Fairness to Lawyers. The court also said the legislature could rationally conclude 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 those discussions in context by citing communications within the mediation proceedings themselves.

Kyle Kveton made this fairness argument in the amicus brief he submitted in support of the Wasserman firm. Discussing the point with BNA, he explained that it would be unfair to lawyers if, for example, clients could concoct a story about a supposed side deal made in private with their lawyer while the lawyer could not introduce contradictory evidence from the mediation proceeding to show that the client's version was a fabrication. Chin acknowledged this concern in his concurring opinion, he noted.

Confidentiality for attorney-client communications ''is the only way to be fair to all parties,'' Kveton asserted.

Kveton said he disagrees with the view that the ruling in *Cassel* will foster lawyer misconduct in the mediation process. While acknowledging that sometimes ''there's a lot of yelling and screaming behind closed doors in mediation'' as lawyers struggle to convince clients that their position will not succeed, Kveton said it is ''unfair to the legal profession'' to predict that lawyers will now beat up on their clients in mediation. Lawyers who treat their clients badly tend to do so throughout the attorney-client relationship, he said, so that clients who are mistreated will generally have proof of their counsel's misdeeds outside the context of mediation. In addition, he noted that the statutory confidentiality does not apply when lawyers' conduct results in criminal charges against them—a point the court itself made in a footnote.

Mediation-Related Communications. The supreme court cautioned that it was not necessary in this case to determine the precise parameters of the statutory phrase ''for the purpose of, in the course of, or pursuant to, a mediation.'' The communications that the trial court excluded from discovery and evidence concerned the settlement strategy to be pursued at an immediately pending mediation, it said.

Marco Turk emphasized to BNA the court's statement that the justices ''need not, and do not, review the trial court's factual determinations that the communications it excluded from discovery and evidence were *mediation related*, and thus within the purview of the mediation confidentiality statutes.''

He also noted that the court ''dipped its toes into the water'' regarding the exception for due process, or cases that would lead to absurd results. But it then ''abruptly withdrew the foot by stating that '[n]o situation that extreme arises here,' '' he stated. The inference, he suggested, is that ''had the majority delved into those murky waters, perhaps on a detailed evidentiary examination there might have been some wiggle room.''

In his comments to BNA, Ronald Makarem stated that *Cassel* excludes from evidence in a malpractice suit those communications evidencing an attorneys' incompetence and fraud on a client not only ''in the course of'' a mediation but even if determined to be ''made for the purposes'' of a mediation. This latter phrase ''will no doubt be abused and expanded'' by lawyers fighting malpractice cases, he predicted.

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RONALD W. MAKAREM
ATTORNEY FOR PLAINTIFF MICHAEL CASSEL

Makarem noted that the statements at issue in this case were allegedly made to his client one to two days before the mediation, as well as on the day of mediation. Defense lawyers in malpractice cases may try to argue, he said, that statements one week or even one month before mediation are ''made for the purposes'' of mediation. He also said that in *Cassel*, the statements involved legal bills, witnesses at trial, experts, and abandoning the case, yet communications on those topics were deemed ''made for the purposes'' of mediation.

Reconsider Breadth of Statute? The supreme court made clear in its opinion that it was expressing no view on whether the statutory language ideally balances the competing concerns or represents the soundest public policy. The legislature is free to reconsider whether the mediation confidentiality statutes should preclude the use of mediation-related attorney-client discussions to support clients' civil claims of malpractice against their attorneys, it said.

In his concurring opinion, Chin expressed concern that the court's holding ''will effectively shield an attorney's actions during mediation, including advising the client, from a malpractice action even if those actions are incompetent or even deceptive.'' The legislature should reconsider protecting attorneys in this broad way, he stated.

In speaking with BNA about the possibility of legislative change, Gary Weiner noted the view expressed by many mediators and scholars that mediation confidentiality should not be allowed to insulate lawyers from liability in connection with mediation, as California's mediation confidentiality statutes do. Proponents of change may argue, he noted, that clients need to be protected from the bad acts of their lawyers, and that the Uniform Mediation Act's approach, which is a privilege-

based statutory construct as opposed to what is essentially an exclusionary rule, is better public policy.

On the other hand, Weiner continued, others will urge that the confidentiality statutes stay untouched now that the issue of lawyer-client confidentiality is settled. There are concerns about the unintended consequences of changing the statute—what the changes will be, and their effect, he said.

Arguing for the plaintiff were Cassel's attorney Ronald Makarem as well as Gerald L. Sauer of Sauer & Wagner, Los Angeles, who appeared on behalf of amici curiae.

Peter Q. Ezzell of Haight Brown & Bonesteel, Los Angeles, argued for the defendants.

BY JOAN C. ROGERS

Full text at http://op.bna.com/mopc.nsf/r?Open=jros-8d3pnz.

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