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Mediation confidentiality

Where we stand on mediation confidentiality, both in California since the *Cassel* decision and in the Ninth Circuit

During the past year, there have been two interesting developments regarding mediation confidentiality. The first occurred within the California Law Revision Commission ("CLRC"). The second occurred within the Ninth Circuit Court of Appeals.

The consequences of *Cassel v. Superior Court*

In 2011, the California Supreme Court decided *Cassel v. Superior Court* (2011) 51 Cal.4th 113, in which it held that the policy underlying mediation confidentiality trumps the ability of a party to a mediation to sue his attorney for alleged professional negligence occurring at the mediation. Mediation confidentiality covers all conversations that relate to the mediation – both pre-mediation and during the mediation – even if outside the presence of the mediator.

Specifically, the Court stated:

> *We must 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. No situation that extreme arises here. Hence, the statutes' terms must govern, even though they may compromise petitioner's ability to prove his claim of legal malpractice.*

(*Id.* at 51 Cal.4th at 119.)

Although this case was framed in the context of whether a client could sue his attorney for what occurred during the mediation, a careful reading of the decision reveals that the Supreme Court was addressing the issue much more broadly in terms of the absolute nature of mediation confidentiality barring admission in any subsequent proceeding of any discussion between any of the mediation participants. Any mediation-related discussions occurring "… for the purpose of, in the course of or pursuant to a mediation or mediation consultation…" are confidential. (Evid. Code, § 1119.) This means that two participants on the same side cannot later seek the assistance of a court to enforce their agreement to adjust their attorney-client fee agreement, or to adjust the proportionate share of liability among them as defendants, et cetera unless their agreement complies with the strict requirements for disclosure under California Evidence Code sections 1123 and/or 1118.

Assembly Bill 2025

In response to the *Cassel* decision, in early 2012, AB 2025 was introduced into the California Legislature to amend California Evidence Code Section 1120 by adding subsection (4) to subpart (b). As originally drafted and introduced into the California State Assembly, this new subpart provided that mediation confidentiality would not preclude the admissibility in an action for legal malpractice, an action for breach of fiduciary duty or both, or in a State Bar proceeding of:

> *… communications directly between the client and his or her attorney during mediation if professional negligence or misconduct forms the basis of the client's allegations against the attorney.*

(AB 2025, February 23, 2012.)

In short, mediation confidentiality would not provide a shield to an attorney in a legal malpractice action, State Bar proceeding or disciplinary action where his/her alleged misfeasance or malfeasance arose during the mediation.

Referral to the California Law Revision Commission

There was so much opposition to this bill that it was amended on May 10, 2012, to provide that the whole matter be referred to the California Law Revision Commission for study, review, and recommendations. Specifically, the Legislature requested that the Commission:

> *…(a) … shall study and report to the Legislature regarding the relationship under current law between mediation confidentiality and attorney malpractice and other misconduct, and the purposes for, and impact of, those laws on public protection, professional ethics, attorney discipline, client rights, the willingness of parties to participate in voluntary and mandatory mediation and the effectiveness of mediation, as well as any other issues that the commission deems relevant. Among other matters, the commission shall consider Sections 703.5, 958, and 1119 of the Evidence Code and predecessor provisions, as well as California court rulings, including, but not limited to, Cassel v. Superior Court* (2011) 51 Cal.4th 113*; Porter v. Wyner* (2010) 183 Cal.App.4th 949*, and Wimsatt v. Superior Court* (2007) 152 Cal.App.4th 137.
>
> *(b) The commission shall also consider and report on the availability and propriety of contractual waivers. In conducting its analysis, the commission shall consider the law in other jurisdictions, including the Uniform Mediation Act as it has been adopted in other states, other statutory acts, scholarly commentary, judicial decisions, and any data regarding the impact of differing confidentiality rules on the use of mediation.*
>
> *(c) The commission shall request input from experts and interested parties including, but not limited to, representatives from the California Supreme Court, the State Bar of California, legal malpractice defense counsel, other attorney groups and individuals, mediators, and mediation trade associations. The commission shall make any recommendations that it deems appropriate for*

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the revision of California law to balance the competing public interests between confidentiality and accountability.
(*AB 2025, Amended in Assembly May 10, 2012.*)

Consequently, in early 2013, the CLRC began its study on the "Relationship between Mediation Confidentiality and Attorney Malpractice and Other Misconduct — Study K-402" (http://www.clrc.ca.gov/K402.html). For the next two years, its Staff Counsel issued numerous memoranda addressing the California statutes on mediation confidentiality, federal law, the Uniform Mediation Act, the laws of the other states on this topic, pilot projects and other studies, law review articles, various policy considerations and public comments on this issue. Drawing on this wealth of information, in its July 2015 Memorandum (Staff Memorandum 2015-33), Staff Counsel listed possible options for the Commission to study and possibly adopt. (http://www.clrc.ca.gov/pub/2015/MM15-33.pdf)

August 2015 recommendations of the CLRC

At its August 7, 2015 meeting, the Commission directed Staff Counsel to begin drafting a tentative recommendation proposing an exception to mediation confidentiality.

The proposed new exception would apply to alleged misconduct of an attorney or an attorney mediator, to alleged misconduct in a professional capacity, and regardless of whether the alleged misconduct occurred during a mediation.

The proposed new exception would apply in both a disciplinary proceeding and malpractice action against an attorney acting as an attorney and against an attorney mediator acting as a mediator.

The proposed new exception would apply to permit the use of such evidence both to prove or disprove a claim and permit disclosure of all relevant evidence in the proceeding at issue.

The Commission decided that the new exception should use an in camera screening process but left open for future vote whether such an in camera proceeding would be mandatory in any proceeding alleging misconduct or any other details of this screening process.

The Commission discussed but did not decide whether the proposed new exception should apply while the underlying mediated dispute is still pending. It also did not really address the issue of mediator testimony. (*Approved* Minutes of Meeting – California Law Revision Commission – August 7, 2015, Los Angeles at 5-6.)

October 2015 recommendations

Subsequent to this vote, the CLRC received a barrage of comments about its recommendations, most of them opposing the creation of any exception. As a result, at its October 2015 meeting, the CLRC back tracked a little bit by voting to exclude attorney mediators from its recommendations such that any exception to mediation confidentiality would apply to attorneys representing clients only and not to attorneys who are the mediators. The Commission recognized mediators have long had quasi-judicial immunity and further that under Evidence Code section 703.5 mediators are incompetent to testify.

The Commission also back tracked by voting that the proposed new exception would apply only to evidence of alleged misconduct occurring in the context of a mediation, and *not* to alleged misconduct occurring otherwise or outside of a mediation context. Thus, the exception would apply to any stage of the mediation process including a mediation consultation, the actual mediation, mediation-related telephone calls and mediation briefs.

The Commission also voted that any exception to mediation confidentiality should not apply to any proceeding to enforce the settlement agreement. Thus, a litigant who attempts to argue that she was coerced into settling, was under duress, et cetera would not be able to raise this argument in response to a motion to enforce the settlement agreement.

The Commission voted that additional sanctions should not be imposed on any party who seeks admission or disclosure of mediation evidence, fails in that endeavor but causes the other party to incur attorneys' fees and expenses. The Commissioners believed that the existing sanction statutes are sufficient.

The Commission also voted to include a provision similar to Section 6(d) of the Uniform Mediation Act which limits the extent of disclosure of mediation communications.

The Commission also voted that the exceptions would apply only to mediations occurring after the effective date of the legislation which is to be placed in the Evidence Code.

At this meeting, the Commission directed Staff Counsel to research the area of in camera review. (*Approved* Minutes of Meeting − California Law Revision Commission − October 8, 2015 − Davis at 4-7.)

In Camera Review

At its December 2015 meeting, the Chief Deputy Counsel for the Commission discussed her latest memorandum on in camera review, noting that one large issue (requiring further research) is the public's right of access to judicial records and proceedings. Staff Counsel was very concerned that using an in camera approach denies access to the public to judicial review and proceedings. As a result, the Commission put this topic over for further study. (*Approved* Minutes of Meeting – California Law Revision Commission − December 10, 2015 − Los Angeles at 5.)

In preparation for the April 2016 meeting, the Chief Deputy Counsel prepared an extensive memorandum – Memorandum 2016-18 (April 4, 2016) − outlining the constitutional concerns (both under the First Amendment to the U. S. Constitution and the California Constitution) and proposals for in camera review. The proposals were complex. In response, the Commissioners inquired if it was possible to fashion a simple preliminary screening process. After extensive discussion, the Commission requested (i.e., voted) that the Chief Deputy Counsel:

• Investigate reasonably and succinctly whether it is possible to use a preliminary

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screening method *before* the complaint is filed much like a preliminary hearing in camera used in criminal matters pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 or a motion to strike under the anti-SLAPP statutes (CCP 426.16-425.18 (Strategic Lawsuits Against Public Participation)) to determine whether the potential malpractice action arising out of what occurred in mediation has a probability of prevailing on the merits or similar standard, but all the while complying with the Constitutional limitations that the public has a right of access to hearings in the Court under the First Amendment (Right to Access) to the U. S. Constitution and Article I, Section 2, Subdivision (a) and Article I, Section 3, Subdivision (b) of the California Constitution) (Memorandum 2016-18 at 7-8, 31-32);

• Investigate what types of screening device or method to use once a complaint gets past the threshold screening above, in terms of deciding the admissibility and discoverability of documents or other evidence perhaps in conjunction with the current California Rules of Court on sealing of documents (Rules 2.550-2.551 for trial courts; Rules 8.45-8.47 for appellate courts); and

• Review prior memoranda for cases cited from other states in which in camera proceedings were used in actions involving malpractice occurring during mediation; how did those courts decide about the mediation confidential evidence?

Although it is moving at a snail's pace, it appears that the Commission is going to recommend to the Legislature that an exception to mediation confidentiality be created to address the issue of attorney malpractice and other misconduct. This process still has a *long* way to go. The Staff Counsel must draft the legislation, the Commission must draft a comment on each section, a narrative explanation to the proposal must be also drafted, the entire package must then be made public for comment for 2-3 months, then changes may be made based on the those comments…. And then it is sent to the California Legislature where it goes through that process. Without doubt, any change to California's mediation confidentiality statutes is at least a few months (if not a year) away.

For complete information on this topic, visit the California Law Revision Commission webpage and look for Study K-402 — "Mediation Confidentiality and Attorney Malpractice and Other Misconduct" (http://www.clrc.ca.gov/K402.html).

Mediation confidentiality in the Ninth Circuit

The contours of mediation confidentiality have always been mercurial in federal court. One might argue that whether a federal court applies a state's mediation- confidentiality rules, federal common law, or none depends on the jurisdictional basis of the case. If the case falls within the diversity jurisdiction of the court, a federal court may well apply Federal Rule of Evidence 501 which, in part, provides that the state's law on privilege shall apply "in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision." (*Id.* and see, *Benesch v. Green*, 2009 WL 4885215, Case No. C-07-3874 EDL (N.D. Cal. Dec. 17, 2009).)

In those cases in which there is federal question jurisdiction (28 U. S. C. § 1331) or where the issue is one of procedure, the court may or may not apply a common law mediation privilege. For example, where the issue is whether removal jurisdiction was properly invoked, the court may apply federal law since the issue falls under the Federal Rules of Civil Procedure, and not state law. (*Babasa v. LensCrafters, Inc*. (9th Cir. 2007) 498 F.2d at 972.)

In the U. S. District Court for the Central District of California a federal mediation privilege has both been recognized (*Folb v. Motion Picture Industry Pension and Health Plans, Inc.* (9th Cir. 2000) 16 F. Supp. 2d 1164 (C.D. Cal. 1998) *aff'd*, 216 F. 3d 1082 and rejected (*Molina v. Lexmark International, Inc*. No. 08-4796, 2008 WL 4447678 at *9, 77 Fed. R. Evid. Serv. (Callaghan) 905 (C.D. Cal. Sept 30, 2008).) The other Districts in California have recognized a federal mediation privilege. (*United States v. Union Pac. R.R. Co.,* No. 06-1740, 2007 WL 1500551, at *5 (E.D. Cal. May 23, 2007); *Microsoft Corp. v. Suncrest Enter*., No. 03-5424, 2006 WL 929257, at *2 (Order, Docket No. 58 (N.D. Cal. Jan. 6, 2006); and *Dibel v. Jenny Craig, Inc*., No. 06-2533 (Docket Nos. 64 and 73) (S. D. Cal. August 1, 2007).)

But, the Ninth Circuit has been more circumspect. While it has recognized that federal privileges apply to the admissibility of evidence stemming from mediations, at the same time it has refused to determine whether a mediation privilege should be recognized under federal common law and if so, the scope of that privilege. (*Wilcox et al v. Arpaio et al*, (9th Cir. 2014) 753 F.3d 872.)

For example, in an earlier decision, *Facebook v Pacific Northwest Software, Inc*. (9th Cir. 2011) 640 F.3d 1034, the issue was whether there was an enforceable term sheet and settlement agreement between Mark Zuckerberg and the Winklevoss twins over the latters' allegation that Zuckerberg had stolen the idea for Facebook from their competing website, Connect U. The agreement was never finalized and so Zuckerberg sued to enforce it. The twins objected on the grounds that it was procured by fraud and lacked material terms. At the mediation, the parties signed a confidentiality agreement essentially providing that all statements made during the mediation would be confidential and not admissible and that no aspect of the mediation could be relied upon or introduced as evidence in any later proceeding. Based on this contract provision, the trial court granted the motion to enforce which the Ninth Circuit affirmed.

According to the Ninth Circuit in its *Arpaio* decision, in *Facebook*, it applied state contract law to determine whether in mediation the parties reached an enforceable settlement of plaintiffs' federal and state law claims, but applied federal privilege law to determine what evidence from mediation was admissible in support of that determination. (*Arpaio, supra,* at 876-877.)

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Milhouse v. Travelers Commercial Insurance Company

In February 2016, the Ninth Circuit once again sidestepped discussing the contours of mediation confidentiality in federal lawsuits based on diversity jurisdiction. In an unpublished (and thus not having precedential value) Memorandum affirming the trial court judgment, the appellate court held that Dr. and Mrs. Milhouse waived their claim of mediation confidentiality by not raising it as an objection at trial:

> By failing to object on the basis of the mediation privilege at trial, the Milhouses did not preserve for appeal whether the district court erred when it admitted mediation statements. We therefore consider the issue waived and decline to address the merits of their tardy objection to the admission of the evidence.

(*Craig Milhouse v. Travelers Commercial Insurance*, Case Nos. 13-56959 and 13-57029, Memorandum at 5-6 (February 23, 2016).) ("Memorandum")

The whole matter started when Dr. and Mrs. Milhouse suffered the total loss of their home during a fire in November 2008. They filed a claim with their insurer, Travelers Commercial Insurance Company ("Travelers"), but reached no resolution. They decided to mediate the dispute but did not reach a settlement. They then filed suit in state court. Travelers removed the matter to federal court based on diversity jurisdiction.

In August 2013, the case was tried before a jury. The issues were whether Travelers had breached its contract with the plaintiffs and breached the implied covenant of good faith and fair dealing (or, in essence, acted in bad faith) in not settling their claim.

As the trial court requested that they limit their motions in limine, counsel allegedly agreed informally not to introduce into evidence any communications that occurred during the mediation.

However, at trial, counsel for Travelers elicited testimony about what had occurred during the mediation to show that the reason the case had not settled was because of the extreme demands made by Dr. and Mrs. Milhouse and their counsel and not because of Travelers' recalcitrance. Counsel for the Millhouses objected to the testimony on grounds of hearsay and lack of foundation but not on grounds of mediation confidentiality. The court allowed the testimony determining that the parties had waived mediation confidentiality.

Although the jury found for the plaintiffs, it also concluded that Travelers had not acted in bad faith.

Plaintiffs filed a post-trial motion urging, among other things, that admitting the mediation communications into evidence was prejudicial. The trial court disagreed, stating that counsel had waived it by failing to object. Both parties appealed to the Ninth Circuit.

(See, generally, Docket and documents filed therein in *Milhouse v. Travelers Commercial Insurance Company*, Case. No. SACV-10-01730-CJC (ANx) (C. D. Cal.).)

Although noting that it reviews the trial court's decision de novo whether to apply state or federal law in a diversity action, the appellate court avoided the issue altogether by holding that mediation confidentiality was waived by the failure of plaintiffs' counsel to object during trial. (Memorandum, *supra,* at 4-6.) Thus, the appellate court avoided a discussion of which applies: California's Evidence Code section 1119 on mediation confidentiality or Federal Rule of Evidence 408 allowing for the admission of evidence of settlement discussions when introduced to rebut a contention of undue delay.

Further, even though plaintiff's counsel objected to the introduction of these mediation communications on the grounds of hearsay, the appellate court agreed with the district court that such statements did not constitute "hearsay" as they were "statements by a person authorized by the party to make a statement concerning the subject." (Fed. R. Evid. 801(d)(2)(C).) That is, as plaintiffs were delivering their demands to Travelers through the mediator, the mediator was their authorized "agent" and spokesman. As such, the mediator's statements did not constitute hearsay! (*Id*. at 6.)

Accordingly, the Ninth Circuit affirmed the rulings of the trial court. What is disconcerting, is whether this affirmance impliedly provides credence to the trial court's creation of a "bad faith" or "due process" exception to mediation confidentiality.

In its Order Granting Defendant's Motion for Remittitur Or In The Alternative A New Trial etc. filed November 13, 2013 ((Document No. 413) ("Order") *Milhouse v. Travelers Commercial Insurance Company*, Case. No. SACV-10-01730-CJC (ANx) (C. D. Cal.)) rejecting plaintiff's argument that the admission of statements concerning the demands and offers made during the mediation was extremely prejudicial requiring a retrial on this issue, the district court rejected the notion that mediation confidentiality was even an issue. First, it believed that the parties had waived it by not timely objecting (with which the Ninth Circuit subsequently agreed) and more importantly, the trial court stated that even *if* the plaintiffs had timely objected, it would have overruled the objections based on due process:

> Due process demanded that the Court allow the jury to hear the testimony regarding the parties' mediation statements.

The Milhouses argued extensively at trial that Travelers, "unreasonably or without proper cause, failed to pay or delayed payment of policy benefits." (Citation omitted) More specifically, the Milhouses contended that Travelers acted in bad faith by refusing to settle their claims. …

> For the Milhouses, the case was one about a despicable insurance company that had a policy of not fairly and reasonably cooperating with its insureds to settle their claims after a tragic loss. They now argue the Court erred by allowing the jury to hear the parties' mediation statements. The Milhouses are wrong. Travelers needed to present the parties' mediation statements to provide a complete defense of its actions and to avoid paying millions of dollars in bad faith and punitive damages for wrongfully refusing to settle the Milhouses' claim.

(Order at 27-29.)

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After tersely noting the factual history of Travelers' efforts to settle this case, commenting that the matter did not settle due to the actions of the plaintiffs, rather than Travelers, the court concluded:

> It was entirely proper for Travelers to present the parties' mediation statements to the jury. The evidence presented at trial clearly demonstrated that Travelers did not settle the Milhouses' claim because of the positions that were taken during and after the mediation by the Milhouses and their attorney. The jury therefore needed to hear all about what happened during and after the mediation so it could determine whether Travelers did in fact act unreasonably, maliciously, fraudulently, or oppressively by refusing to settle the Milhouses' claim. To exclude this crucial evidence would have been to deny Travelers' of its due process right to present a defense. (See *Cassel v. Superior Court*, (2011) 51 Cal.4th. 113,119 ("We must 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.") (Emphasis added.)…." (Order at 31.))

Once again, the Ninth Circuit missed another opportunity to clarify the contours of mediation confidentiality in federal court. By avoiding the issue and affirming the trial court, has the Ninth Circuit unwittingly allowed this language to remain viable and quotable by some future party attempting to create an exception to mediation confidentiality? Only time will tell.

Until we know for sure, my advice is when in federal court, be careful… the law remains unsettled! It will all depend on the particular district court in which the matter is filed if not the particular U. S. District Court judge presiding over the case.

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