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Informed consent in mediations taking place in California

By Phyllis G. Pollack

Sometimes parties attend mediation without the proper preparation. If the matter is in litigation, their attorney may not have met with them beforehand to explain the process of mediation and more importantly, the consequences of mediation confidentiality: That one's statements and conduct occurring in mediation ordinarily are not admissible in a later court proceeding. Should one side be unhappy with the settlement, the party cannot use what occurred during mediation in a legal malpractice action.

This almost absolute protection for mediation confidentiality stems from California's Evidence Code Sections 1115-1128 enacted in 1997. At its essence is Evidence Code Section 1119, which provides that "no evidence of anything said, or any admission made, [or any writing prepared] for the purpose of, in the course of or pursuant to a mediation or mediation consultation is admissible or subject to discovery" in a non-criminal proceeding. In effect, all communications, settlement discussions or negotiations held during a mediation or mediation consultation are confidential.

Over the years, disgruntled plaintiffs, unhappy with settlements reached at mediation, have sued their counsel. Each time the California Supreme Court has held that these statutes must be applied unless to do so would violate due process or would lead to an absurd result never intended by the Legislature.

The latest case is *Cassel v Superior Court* (2011), in which the California Supreme Court declared that the policy underlying mediation confidentiality overrides the ability of a party to a mediation to sue his attorney for alleged professional negligence occurring at the mediation. Michael Cassel attended mediation in a trademark infringement/counterfeiting dispute. Prior to the mediation, he had certain strategy discussions with his counsel. During the mediation, Cassel also had private conversations with his attorneys outside the presence of the mediator. The matter settled.

Cassel sued his attorney claiming that during the mediation, his counsel (1) harassed and coerced him to settle for an amount less than he wanted to take; (2) threatened to abandon him at the upcoming trial; (3) misrepresented important terms of the proposed settlement; (4) falsely assured him that they would negotiate a side deal to make up the loss he suffered in the settlement; (5) would discount the bill; and (6) failed to disclose a conflict of interest. In light of this conduct, Cassel sued his attorneys for professional negligence. The attorneys moved to exclude all their discussions both prior to and during the mediation claiming they occurred in the context of the mediation and so were inadmissible by mediation confidentiality.

New York Times News Service

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The California Supreme Court agreed with the attorneys: All conversations both in the strategy sessions leading up to the mediation and in the actual mediation would be excluded. In his reluctant concurring opinion, Justice Ming Chin noted that while he agreed with the majority that the court must give full effect to the statutory language, perhaps the Legislature did not fully consider the law's effect of fully shielding attorneys from accountability in this way and that there is a better way to counter-balance the competing interests of confidentiality and accountability.

This concurring opinion led to the introduction of Assembly Bill 2025 in February 2012 to create an exception to mediation confidentiality for legal malpractice. The bill faced extreme opposition and was amended in May 2012 to refer the matter to the California Law Revision Commission to study the proposal and make a recommendation. After five years and more than 3,000 pages of memoranda later, in June 2017, the commission issued recommendations for public comment. It met with overwhelming opposition and the proposed new bill was not introduced in the fall of 2017.

However, most parties involved in the process agreed that parties to mediation should be made aware of the confidentiality restrictions and their consequences ahead of time. Most importantly, parties should know and understand that whatever occurs during a mediation or in a strategy session leading up to the mediation will not be admissible in a subsequent malpractice action. That is, counsel should obtain a client's "informed consent" or "prior disclosure."

This led to Senate Bill 954 being introduced earlier this year. The bill provides for transparency so that parties attending mediation go in with "eyes wide open," aware that if the mediation does not go the way they want, they cannot later exercise "buyer's remorse" and sue their attorney for legal malpractice.

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While this requirement does not apply to class or representative actions, it does apply "as soon as reasonably possible before the client agrees to participate in the mediation or mediation consultation." Section 1129(a). At that time, the attorney shall "provide that client with a printed disclosure containing the confidentiality restrictions described in Section 1119 and obtain a printed acknowledgment signed by that client stating that he or she has read and understands the confidentiality restrictions." *Id.*

The new statute contains a sample disclosure form that if used, will provide lawyers a "safe harbor" such that the disclosure requirements are deemed met.

Significantly, the failure of an attorney to comply with this new law will NOT provide a basis to set aside an agreement prepared for, in the course of, or pursuant to a mediation. Section 1129(e). But, as long as the disclosure form "does not disclose anything said or done or any admission made in the course of the mediation," it will not be deemed confidential and thus "may be used in an attorney disciplinary proceeding to determine whether the attorney has complied with Section 1129." Section 1122(a)(3).

Hopefully, this proactive measure will help increase a party's satisfaction with the mediation process and its outcome.

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