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Samuel D. Almon
MAKAREM & ASSOCIATES

Ron W. Makarem
MAKAREM & ASSOCIATES

Mediation confidentiality and legal malpractice matters

THE STATE OF THE LAW SINCE *CASSEL* AND A PROPOSAL FOR CHANGE

California's Evidence Code, as interpreted by the state's Supreme Court, imposes sweeping protections on communications related to mediation. Its reach purportedly extends to communications that occur in the days before mediation, and conversations that are solely between attorney and client. These protections are meant to encourage candor in mediation, but come at a high cost: many plaintiffs in legal-malpractice actions, as well as attorneys named in such actions, find that important evidence to support or defend against a claim is excluded by California's mediation confidentiality rules.

A better approach is possible, in which conversations solely between attorney and client are governed by the Evidence Code's sections addressing attorney-client privilege rather than mediation confidentiality. This would still protect such conversations in most circumstances, while allowing plaintiffs to hold accountable unscrupulous attorneys who could otherwise take advantage of mediation confidentiality's protections. In turn, these changes would enhance public confidence in the legal profession and address the problems of access to evidence sometimes posed by mediation confidentiality. This proposal would also benefit attorneys faced with legal malpractice claims by allowing access to potentially beneficial evidence and enabling them to fully present their side of the case. Although efforts to reform the state's mediation confidentiality statues have faced opposition, reform offers many benefits and is worth pursuing.

The current state of the law

Mediation confidentiality is codified in the California Evidence Code, sections 1115 through 1128. Subject to limited exceptions, the Evidence Code provides that "evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation" is neither admissible nor discoverable. (Evid. Code, § 1119, subd. (a).) Writings "prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation" and "communications, negotiations, or settlement discussions" among "participants in the course of a mediation or mediation consultation" are likewise inadmissible and not subject to discovery. (Evid. Code, § 1119, subds. (b), (c).)

Thus, under California's statutory scheme, as interpreted by the California Supreme Court, communications related to mediation are broadly excluded. Unlike attorney-client privilege and other protections, mediation confidentiality is not subject to estoppel or implicit waiver. (*Cassel v. Superior Ct.* (2011) 51 Cal.4th 113, 126.) Similarly, while Evidence Code section 958 provides an exception to attorney-client privilege for communications relevant to an issue of breach of the attorney-client relationship, it does *not* waive mediation confidentiality, even as to mediation communications between the attorney and client only.

Mediation confidentiality often arises in the context of legal malpractice matters. Though it is possible to prevail in a legal malpractice action even without introducing mediation communications, mediation confidentiality can pose evidentiary challenges to both plaintiffs and defendants in such cases.

The *Cassel* litigation

In February 2005, Michael Cassel filed a legal malpractice action against his former counsel, Wasserman, Comden, Casselman & Pearson, LLP. The Wasserman firm had represented Cassel in underlying litigation over the rights to market clothing under the Von Dutch label. Cassel alleged that at a pretrial mediation, the Wasserman firm coerced him to accept an inadequate settlement by threatening him and making a variety of false statements regarding the settlement. Among other things, Cassel sought to introduce evidence of private meetings with his attorneys in the days preceding the mediation, at which they discussed mediation strategy, as well as conversations with his lawyers outside the presence of others during mediation.

The trial court granted a defense motion in limine, broadly prohibiting Cassel from introducing evidence "about the conduct of the mediation itself." The trial court also excluded evidence of discussions between Cassel and his attorneys regarding mediation strategy in the days before the mediation and private communications between Cassel and his attorneys that occurred during the mediation. (*Ibid.*)

Cassel: The Court of Appeal

On writ review, the Court of Appeal reversed, allowing Cassel to introduce evidence of his communications and conduct with his own attorneys which occurred outside the presence of any opposing party or mediator. (*Cassel v. Superior Ct.* (2009) 101 Cal.Rptr.3d 501, 511, *rev'd*, 51 Cal.4th 113.)

The Court of Appeal based its decision on several considerations. It found it significant that the communications were between a client and his attorney, "outside the presence of, and not otherwise communicated to, any opposing party (or its attorney) or the mediator, and reveal[ed] nothing said or done in the mediation discussion." The court observed that the legislative intent and policy behind mediation confidentiality are to facilitate frank discussion among the parties, "not to facilitate communication between a party and his own attorney." It held that an attorney and client "are not within the class of persons which mediation confidentiality was intended to protect from each other." Rather, the court held that a party's lawyer "is a component of, 'the party' to the mediation, rather than a free-standing, independent entity."

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Additionally, the court held that the meetings at issue were for trial strategy preparation as well as mediation discussions. "The proximity in time of the meetings and communications to any part of the mediation process is not determinative." Also important to the Court of Appeal decision was that the communications at issue did not contain information obtained from the mediator or other parties. Accordingly, the court held that the communications Cassel sought to introduce were not mediation communications within the meaning of Evidence Code section 1119. The Court of Appeal also noted that attorney-client privilege would not preclude admission of the evidence Cassel sought to introduce, as Evidence Code section 958 provides an exception to the privilege in an action alleging breach of duties arising out of the lawyer-client relationship.

Cassel: The California Supreme Court

The California Supreme Court reversed, holding that the evidence must be excluded. While acknowledging the policy considerations undergirding the decision of the Court of Appeal, the Supreme Court held that the statutory language did not limit mediation confidentiality to communications between mediation disputants, but rather extended it to all "things said or written 'for the purpose of' and 'pursuant to' a mediation," even communications between an attorney and client. (*Cassel*, 51 Cal.4th at 118-19.) Analyzing the provisions of Evidence Code sections 1119 and 1122, the court held that the statutory language manifested an intent to extend confidentiality to mediation-related communications "between a mediation disputant and the disputant's counsel, even though these occur away from other mediation participants and reveal nothing about the mediation proceedings themselves." (*Id.* at 129.)

The Supreme Court also held that, unlike the Evidence Code sections governing attorney-client privilege, the mediation confidentiality statutes contain no exception for legal malpractice actions by mediation disputants against their own counsel. (*Id.* at 131-32.) The court further held that the exclusion of mediation communications in legal malpractice actions "does not implicate due process concerns so fundamental that they might warrant an exception on constitutional grounds." (*Id.* at 135.) The court opined that the legislature had reasonably decided to promote the goal of encouraging mediation, even at the cost of potentially excluding "valuable civil evidence." (*Id.* at 136.)

The Supreme Court's decision in *Cassel* is still the law. Accordingly, evidence of communications between attorney and client, occurring outside the presence of any other mediation participant, are subject to mediation confidentiality if they are "for the purpose of, in the course of, or pursuant to, a mediation[.]" (*Id.* at 138.)

Legislative proposals to address mediation confidentiality

The Supreme Court in *Cassel* noted that "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." (*Id.* at 136.) Several proposals to amend the Evidence Code to allow the use of mediation-related communications between attorney and client in legal malpractice actions have failed. A more modest proposal to require that attorneys disclose mediation confidentiality to clients in advance of mediation was recently introduced in the California Senate as S.B. 954.

Beverly Hills Bar Association proposal

In 2011, citing *Cassel*, the Beverly Hills Bar Association proposed legislation creating an exception to mediation confidentiality for "communications directly between the client and his or her attorney, only, where professional negligence or misconduct form the basis of the client's allegations against the client's attorney." (See http://calconference.org/html/wp-content/Resolutions/2011/A/Series%2010%20-%20Miscellaneous.pdf) The authors of the proposal expressed concern that extending mediation confidentiality to the attorney-client relationship "would seriously impair and undermine not only the attorney-client relationship but would likewise create a chilling effect on the use of mediations." The proposal was never adopted.

California Law Revision Commission proposal

In 2012, the Legislature directed the California Law Revision Commission ("CLRC") to study the relationship between mediation confidentiality and attorney malpractice and misconduct. (2012 Cal. Stat. res. ch. 108 (ACR 98 (Wagner & Gorrell).) In December 2017, the CLRC issued a final recommendation in which it laid out its extensive research findings. (CLRC Pre-Print Recommendation at 3-131 (Dec. 1, 2017) (available at: http://www.clrc.ca.gov/pub/Printed-Reports/RECpp-K402.pdf).) The report explained the CLRC's conclusion that "existing California law does not place enough weight on the interest in holding an attorney accountable for malpractice or other professional misconduct in a mediation context" (*Id.* at 135) and proposed new legislation creating an exception to mediation confidentiality. (*Ibid.*)

The CLRC's proposal would create an exception to confidentiality for a mediation-related communication if (1) "[T]he evidence is relevant to prove or disprove an allegation that a lawyer breached a professional obligation when representing a client in the context of a mediation or a mediation consultation," (2) it is offered in connection with an attorney disciplinary proceeding, legal malpractice action, or fee disputes, and (3) the evidence does not disclose a communication of the mediator. (*Id.* at 145-48.) The CLRC's proposal did not limit the exception to communications solely between an attorney and his or her client, and instead focused on the relevance of a communication rather than the parties to the communication. (*Ibid.*) The only mediation participant expressly protected under the CLRC's proposed exception was the mediator, meaning

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that other parties' communications could potentially be disclosed under the proposed exception. (*Ibid.*) The public comment to the CLRC's proposal was overwhelmingly negative, and the proposal was not able to find a legislative sponsor.

S.B. 954 disclosure proposal

Most recently, on January 30, 2018, Senator Robert Wieckowski introduced S.B. 954, which would require an attorney to provide his or her client with a written disclosure of mediation confidentiality prior to participating in mediation. S.B. 954 would also create a narrow exception to mediation confidentiality where a "communication, document, or writing is to be used in an attorney disciplinary proceeding to establish that an attorney did not comply with the [disclosure requirements], and does not disclose anything said or done or any admission made in the course of the mediation."

A possible way forward

Problems with the status quo

California's mediation confidentiality statutory regime, as interpreted by the California Supreme Court, can lead to confusion and pose traps for those unfamiliar with it. For instance, some attorneys understandably assume that mediation confidentiality applies only to communications that occur at mediation. Yet under *Cassel*, the confidentiality strictures of Evidence Code section 1119 purportedly extend even to communications made in the days before mediation, where "[t]hey were closely related to the mediation in time, context, and subject matter . . . ." (51 Cal.4th at 137.) The mediation in *Cassel* occurred August 4, 2004, yet the court held that mediation confidentiality applied to conversations that occurred on August 2, 3, and 4, 2004. (*Id.* at 123 n.3.)

On the other hand, legal malpractice defense attorneys sometimes seek to stretch mediation confidentiality to exclude discussions that occurred *weeks* before mediation, a result not supported by *Cassel*, which excluded discussion that occurred in the two days prior to mediation. (*Ibid.)* Both errors – reading *Cassel* too narrowly and attempting to apply it too broadly – point to a line-drawing problem that the *Cassel* court itself acknowledged. (*Id.* at 137.) Unfortunately, though *Cassel* nodded to the problem, it provided little guidance on where to locate the line between those communications that are mediation-related and those that are not.

Even putting aside the line-drawing problem, California's mediation confidentiality regime poses another problem recognized by the *Cassel* court and many commentators: the exclusion of valuable evidence in legal malpractice actions. There are many ways attorneys can commit legal malpractice in mediation, whether by deliberately making false representations to their clients about the terms of a proposed settlement, as alleged in *Cassel*, or by negligently failing to properly advise a client about the consequences of a settlement. When a client brings a legal malpractice action based on events that occurred in connection with a mediation, California's mediation confidentiality statutes can pose evidentiary challenges to the plaintiff. Moreover, mediation confidentiality may also frustrate the defendant in a legal malpractice action, who may wish to introduce mediation-related communications to defend against the plaintiff's claims.

It is true that the challenges posed by mediation confidentiality are not always fatal to a legal malpractice claim or defense. After the California Supreme Court's decision in *Cassel*, for instance, the plaintiff's claims were set for a bifurcated trial on liability and damages, and his legal malpractice attorneys tried the case using emails and written communications arising outside the mediation context.

Though neither party was permitted to present direct evidence of mediation-related communications, the jury extrapolated what occurred at mediation based on admissible evidence. Using this strategy, Cassel won the liability phase and the parties settled shortly thereafter. Some judges, however, will not allow a jury to extrapolate the events of mediation due to the inadmissibility of direct evidence. Moreover, where such an approach is permitted, the defendants may be hamstrung by their inability to introduce mediation communications that may bolster their defense.

The problems with California's mediation confidentiality rules stem in part from the fact that they were crafted for mediation as it once was, not as it is now practiced. It was once the case that mediation began and ended in a joint session, with all parties present in a single room. In that setting, it is understandable that the legislature viewed broad confidentiality rules as necessary to encourage litigants to engage in frank discussions in the presence of their adversaries. Today, however, many mediations do not include a joint session; rather, each party spends the entire mediation sequestered in a caucus room, alone with his or her own attorney, with occasional visits by the mediator. In mediation as it is practiced today, much of the discussion that occurs is in the context of private conversations with only attorney and client present.

Proposal for a balanced approach

An approach balancing the interest in promoting candor at mediation with the interest in accessing relevant evidence in legal malpractice actions is possible. Under such an approach, communications solely between attorney and client, even at mediation, would not be protected by mediation confidentiality. Such conversations, however, would still be protected by attorney-client privilege and governed by the Evidence Code's treatment of such conversations. Communications involving the mediator, opposing parties, or other mediation participants would continue to be covered by mediation confidentiality.

This scheme would offer several benefits. As the legislature recognized, it is appropriate for the protections attending attorney-client communications to give way when a communication is "relevant to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship." (Evid. Code, § 958.) In a setting where attorney and client are alone together for most of the mediation, the tradeoffs reflected in

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Evidence Code section 958 make sense. In contrast, Evidence Code section 1119, as construed by *Cassel*, offers no exception to mediation confidentiality, even for conversations only between lawyer and client, and even when the communications are relevant to an issue of breach of a duty arising out of the lawyer-client relationship.

California's application of mediation confidentiality to communications solely between attorney and client often works to frustrate important public policies. Unscrupulous attorneys are aware that a client will be hard-pressed to hold them accountable for conduct at mediation. Any benefit of such a broad confidentiality scheme seems speculative in light of current mediation practices, where a litigant may never be in the presence of the opposing party during the course of the mediation. As the Court of Appeal recognized in *Cassel*, a client and her attorney "are not within the class of persons which mediation confidentiality was intended to protect from each other." Barring evidence of conversations between attorney and client does little to further the legislative interest in facilitating communication between the parties.

Our proposed limited exception to mediation confidentiality would benefit attorneys as well as clients. When faced with claims of legal malpractice related to a mediation, access to mediation-related communications may be beneficial to the attorney's defense. Arguably, a rule that permits both client and attorney to introduce evidence of mediation-related attorney-client communications may be of greater benefit to the attorney than to the client. An attorney is better-positioned to explain and properly contextualize a communication than a lay-person, and will likely desire the opportunity to do so when faced with a claim of legal malpractice.

Additionally, an exception to mediation confidentiality for communications between attorney and client would promote greater transparency and integrity in the legal profession. In turn, this is likely to foster greater public confidence in the profession. As attorneys, we should welcome that transparency, both in the interest of the profession, and in recognition of the opportunity it would afford an attorney facing a legal malpractice claim to present his or her side of the case.

To the extent mediation communications occur in the presence of persons not within the attorney-client privilege, of course, confidentiality can serve an important role in promoting candor and facilitating settlement. An amendment to the Evidence Code to enact the limited exception we propose could offer the best of both worlds: promoting accountability and access to evidence, while also protecting mediation communications that are not solely between attorney and client.

Conclusion

In light of the likely failure of the California Law Revision Commission's December 2017 recommendation to revise California's mediation confidentiality statues, it appears unlikely that California will adopt the balanced proposal we describe in the near term. Nonetheless, in light of the outdated basis of the current statutory scheme and the burdens it can place on access to evidence, we believe reform of the mediation confidentiality statutes would offer significant benefits and is a goal that should not be abandoned.

Samuel D. Almon is an attorney at Makarem & Associates *in Los Angeles. A graduate of the University of Chicago Law School, Mr. Almon's practice focuses on complex civil litigation, including representing victims of legal malpractice and advocating for employees in individual and class actions. Mr. Almon is also an experienced appellate litigator and maintains an active appellate practice.*

Ron W. Makarem is the founder of Makarem & Associates, *where he represents consumers with a focus on legal malpractice and employment actions. Mr. Makarem is a graduate of the University of Southern California and Pepperdine University, School of Law and is certified by the State Bar of California as a legal malpractice specialist. Mr. Makarem represented Michael Cassel in the* Cassel *litigation and argued the case before the California Supreme Court in 2010.*