Viewpoint: The Clock is Ticking on Mediation Confidentiality

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When a California lawyer is accused of wrongdoing arising from mediation, confidentiality is the first evidentiary consideration for both sides. Can the client use mediation communications to support malpractice? If not, how does the client prove the lawyer erred?

Mediation confidentiality statutes vary from state to state. Nineteen states and Washington, D.C., have mediation confidentiality statutes with one or more exceptions expressly addressing professional misdeeds, generally (including mediators), or attorney misdeeds specifically. See, e.g., the Uniform Mediation Act ("UMA"), used by eleven states, including Hawaii, Idaho, Illinois, Iowa, Nebraska, New Jersey, Ohio, South Dakota, Utah, Vermont and Washington, as well as D.C. Other states, like Virginia, Florida, Michigan, New Mexico, Maine, Maryland and Minnesota, have independent state statutes, which also contain varied exceptions for professional misconduct, including malpractice claims. North Carolina's exception only covers attorney and mediator disciplinary proceedings.

On the other hand, statutes in Alaska, Arizona, Colorado, Delaware, Georgia, Kansas, Montana, North Dakota, Oklahoma, Oregon and Tennessee except only mediator misdeeds from protection, but not conduct by other professionals. Conversely, New York and Kentucky offer little to no protection of mediation confidentiality. See California Law Revision Commission's ("CLRC") First Supplement to Memorandum 2014-35 and Memorandum 2014-59.

California ranks among the remaining eighteen states with mediation confidentiality statutes which do not include any exceptions expressly addressing professional bad behavior of any type. In fact, California's mediation confidentiality statute, Evidence Code §1119, which was enacted by the Legislature in 1997, is currently the most protective in the country, but it may not hold that title for long.

Our state's statute provides without exception: "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, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given." Many appellate courts have tried to craft judicial exceptions, but these attempts have been rebuffed by the California Supreme Court, which has made clear that such exceptions may not be created because the statutory language and legislative intent are unambiguous.

In 2011, the California Supreme Court held in Cassel v. Superior Court, 51 Cal. 4th 113, that mediation confidentially barred the client from introducing mediation-related attorney-client communications in the client's malpractice lawsuit. Supporters of an exception were fueled by the ruling, claiming it effectively "legalized malpractice." However, they have not seen much traction in the courts.

Most recently, in Amis v. Greenberg Traurig LLP (2015) 235 Cal.App.4th 331, the court, citing Cassel, rejected an effort to circumvent mediation confidentiality by the use of inferences about
the former attorney's alleged conduct during mediation. Other states have followed California's lead. See Arizona Court of Appeals case *Grubaugh v. Blomo ex. rel. Cnty. of Maricopa*, No. 1 CA-SA 15-0012, 2015 WL 5562347.

In response to the high court's unwavering position, the Conference of California Bar Associations adopted resolution 10-06-2011, which was introduced to the Legislature as Assembly Bill 2025 on Feb. 23, 2012. As originally drafted, the bill attempted to provide an exception to the mediation confidentiality statutes for "… communications between a client and his or her attorney during mediation … in an action for legal malpractice or breach of fiduciary duty or both, and in State Bar disciplinary action, if the attorneys' professional negligence or misconduct forms the basis of the client's allegations against the attorney." Opposition was immediate and fierce. As a consequence, the judiciary committee's hearing was postponed and eventually the bill was completely withdrawn. However, it has not ended there.

Instead, in July 2013, the Legislature directed the CLRC to study "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, as well as any other issues the commission deems relevant." (Study K-402) 2012 Cal. Stat res. ch. 108(acr 98 (Wagner & Gorell).

In August 2015, the Legislature then asked the CLRA "to begin the process of preparing a draft of a tentative recommendation that would propose an exception to the mediation confidentiality statutes to address 'attorney malpractice and other misconduct." On Aug. 7, the commission decided the proposed, new exception "should apply to alleged misconduct of an attorney or an attorney-mediator." See CLRA Aug. 7, 2015 Minutes at 5.

On Sept. 9, 2015, the CLRA published the numerous comments it has since received. Although no draft of a proposed exception has yet been published, public comment on both sides of the dispute is extensive. See CLRA Sept. 9, 2015 Memorandum 2015-46.

Those opposed to the exception believe mediation is effective because participants know they can speak freely and frankly with an assurance of privacy. Retractors also note that people should not be able to breach the mediation confidentiality merely by asserting an allegation. The brashest opposition voice came from the neutral community concerned with the disparate treatment of mediators who happen to be attorneys and those who are not.

Supporters, on the other hand, emphasized that the mediation confidentiality statute is so broad that it shields attorneys, creating a serious injustice for clients. They complain that it turns mediation into an "ethics-free zone."

The overwhelming dissent of the neutral community rang loud and clear. At the most recent commission meeting on Oct. 8, the commission reconsidered its decision to include alleged misconduct against attorney-mediators. Recognizing that mediators have long had quasi-judicial immunity and that they are incompetent to testify under Evidence Code § 703.5, the CLRA concluded that the exception should only apply to alleged misconduct of an attorney acting as an advocate.

The debate over whether an exception is warranted has merit on both sides. In most attorney wrongdoing actions involving mediation, the issue ultimately comes down to the adequacy or validity of the settlement. Under California law, the client must prove that "but for" the attorney's negligence, a better result would have been obtained. Proving this requires a case-within-a-case analysis or, in other words, re-litigating the entire underlying settlement, including the good, the bad and the ugly. The details of the settlement, which all parties, attorneys and the mediator originally planned and agreed would be confidential, could end up being public record as a result
of the unilateral decision by one party to cast an allegation. In consideration of this issue, some states, like Arizona, require "[a]ll of the parties to the mediation agree to the disclosure" before mediation confidentiality is waived. Arizona Revised Statutes section 12–2238(B)(1).

No matter where you stand, change is upon us. Although this process still has a long way to go, likely one to two years, now is the time to voice your opinion. The next public commission meeting is set for Dec. 10 in Los Angeles. Information about the upcoming meeting and CLRA's efforts can be found at www.clrc.ca.gov/K402.html

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