California Supreme Court Refuses to Create Exception to Mediation Privilege, Prohibiting Disclosure of Attorney Communications in Legal Malpractice Suits

The California Supreme Court recently held in *Cassel v. Superior Court*, 51 Cal. 4th 113 (2011), that California's statutory mediation privilege prevents the disclosure of private communications between an attorney and client made before or during a mediation, even in the context of a malpractice suit arising out of the attorney's alleged conduct in connection with the mediation.

In *Cassel*, a client sued his former attorneys for malpractice, breach of fiduciary duty, fraud and breach of contract, alleging that they coerced him into settling during a mediation. *Id.* at 118. The trial court excluded all evidence of discussions between Cassel and his attorneys that took place before or during the mediation. *Id.* The court of appeal reversed, holding that the mediation privilege did not shield attorney-client communications from disclosure in a malpractice suit. It reasoned that, "the mediation confidentiality statutes are intended to prevent the damaging use *against a mediation disputant* of tactics employed, positions taken, or confidences exchanged in the mediation, not to protect attorneys from the malpractice claims of their own clients." *Id.* (emphasis in original). The dissent objected that, "the majority had crafted an unwarranted judicial exception to the clear and absolute provisions of the mediation confidentiality statutes." *Id.*

Although the Supreme Court acknowledged the policy concerns advanced by the court of appeal majority, it concluded that making an exception for attorney-client communications in malpractice actions would contravene the plain wording of the mediation privilege statutes. *Id.* at 118-19.

In particular, California Evidence Code section 1119 provides that:

a. 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.

b. No writing, as defined in Section 250, that is prepared 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 writing 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.

c. All communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential.

Although *Cassel* attracted much interest from the press, it was in line with prior Supreme Court decisions interpreting California's mediation privilege statutes. The Supreme Court has consistently adhered to a literal reading of California's broad mediation privilege, observing that, "We have repeatedly said that these confidentiality provisions are clear and absolute. Except in rare circumstances, they must be strictly applied and do not permit judicially crafted exceptions or limitations, even where competing public policies may be affected." *Cassel*, 51 Cal. 4th at 118-19, citing *Simmons v. Ghaderi*, 44 Cal. 4th 570, 580 (2008) *Fair v. Bakhtiari* 40 Cal. 4th 189, 194 (2006); *Rojas v. Superior Court* 33 Cal. 4th 407, 415-16 (2004); *Foxgate Homeowners' Ass'n v. Bramalea California Inc.*, 26 Cal. 4th 1, 13-14 (2001).

In *Foxgate*, the Supreme Court held that the mediation privilege prevents a mediator from disclosing communications or conduct by any of the parties, even if that party thereby escapes sanctions for failing to participate in good faith. See 26 Cal. 4th at 17. In *Rojas*, the Supreme Court confirmed that the language of section 1119 forbids the disclosure of all writings "for the purpose of, in the course of, or pursuant to, a mediation," excluding, only direct physical evidence introduced at or used during a mediation that is not a "writing." *See* 33 Cal. 4th at 416. In *Fair*, the Supreme Court narrowly construed one of the enumerated exceptions to the mediation privilege concluding that the disclosure of a written settlement agreement reached during a mediation is permissible only if the agreement expressly states the parties intended to be bound by the document. *See* 40 Cal. 4th at 197. And, in *Simmons*, the Supreme Court rejected the argument that the judicial doctrines of equitable estoppel and implied waiver could provide an exception to the mediation privilege, thus allowing the disclosure of oral settlement agreements reached in mediation. *See* 44 Cal. 4th at 580.

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Cassel is nonetheless noteworthy because, as one justice noted, "[t]his 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. Attorneys participating in mediation will not be held accountable for any incompetent or fraudulent actions during that mediation unless the actions are so extreme as to engender a criminal prosecution against the attorney. This is a high price to pay to preserve total confidentiality in the mediation process." *Cassel*, 51 Cal. 4th at 138 (J. Chin, concurring in the result). The interpretation of the mediation privilege reached in *Cassel* is so broad that it might prompt the legislature to carve out another exception to the California mediation privilege.

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