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Can Mediation Discussions Between Counsel And Client Be Admitted In A Later Legal Malpractice Action? A California Court Of Appeal Rules The Answer May Be Yes In Certain Contexts

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Since 2001, the California Courts of Appeal have consistently ruled that communications, reports and briefs prepared in preparation for or in mediation will be inadmissible in a later action unless the parties specifically agree otherwise in writing. See, Evidence Code section 1115, et seq., see also, Foxgate Homeowners' Association v. Bramalea California, Inc. (2001) 26 Cal.4th 1, 14; Rojas v. Superior Court (2004) 33 Cal.4th 407, 415-416, In re Marriage of Kieturakis (2006) 138 Cal.App.4th 56, 61-62, Fair v. Bakhtiari (2006) 40 Cal.4th 189, 194 and Wimsatt v. Superior Court (2007) 152 Cal.App.4th 137.

In a rare departure from that trend, a divided Court of Appeal recently ruled that evidence of discussions between a client and counsel in preparation for mediation will not necessarily be barred in a later legal malpractice action. That decision was arrived at in Cassel v. Superior Court (2009) 179 Cal.App.4th 152 ("Cassel case").

The Cassel case arose from an underlying action by Michael Cassel against Von Dutch Originals LLC wherein Cassel claimed an ownership interest in the Von Dutch Jeans entity and a license to use the Von Dutch Jeans name. Cassel was represented by the law firm of Wasserman, Comden & Casselman. Shortly before the trial of that action, Cassel met with his counsel on August 2, 2004, August 3, 2004 and August 4, 2004 in preparation for, among other things, a mediation which took place on August 4, 2004. The matter was resolved at the mediation for $1,250,000.

After that litigation was resolved, Cassel sued his attorneys for legal malpractice claiming that he had not authorized a settlement at the $1,250,000 level. In preparation for the trial of Cassel's legal malpractice action, Wasserman Comden & Casselman filed a Motion in Limine seeking to bar evidence of the discussions between Cassel and his attorneys which took place during the August 2, 2004 to August 4, 2004 time period. The Trial Court granted the Motion in Limine on the basis that the discussions dealing with settlement authority were part and parcel of the mediation process and should be barred.

Cassel then filed a Petition for Writ of Mandate arguing that the discussions between Cassel and his attorneys were not within the ambit of the mediation statute because they only involved counsel and the client, among other reasons.

In a divided opinion, the Court of Appeal granted the Writ of Mandate and directed the Trial Court to vacate its order. The Court of Appeal ruled that, as a matter of law, California's mediation confidentiality statutes did not require exclusion of conversations and conduct solely between a client and his attorneys during meetings in which they were the sole participants and which were held outside the presence of any opposing party or mediator. The Court of Appeal reasoned that, in mediation, "a client and his attorney operate as a single participant" and that the client and counsel in that case were not within the class of persons to be protected by the statutes since they were not "disputants." The Court of Appeal further reasoned that the mediation statute was meant to encourage candor in the mediation, which is not implicated when counsel is speaking only to his client. Finally, the Court of Appeal found that the communications were for trial preparation (trial was only two weeks away), not just for mediation or creation of any documents such as mediation briefs or witness statements to be used in the mediation, and that the proximity in time to the mediation did not automatically make the communications protected.

In a stinging dissent, Justice Perluss stated that the majority's conclusion was "not only at odds with the clear language of [Evidence Code] section 1119, subdivision (a), but [was] also inconsistent with the Supreme Court's repeated disapproval of 'judicially created exception[s]' to the mediation confidentiality statutes." In particular, the dissent noted that the majority's conclusion ignored the "for the purpose of" provision in Evidence Code section 1119, stating: "[f]or that additional statutory language to have meaning, mediation confidentiality must cover statements that were not made 'in the course of' the mediation proceeding itself." Further, the dissent pointed out that the majority's interpretation of the scope of Evidence Code section 1119 would render superfluous section Evidence Code section 1122(a)(2), which "plainly ... contemplates the application of mediation confidentiality (absent express agreement to the contrary) to private statements made for the purpose of mediation that are not communicated to the opposing party or the mediator."

The Cassel case is certainly at odds with a nearly decade long line of California decisions on point and does appear to be inconsistent with Evidence Code sections 1119 and 1122. It is also noted that the only published decision to discuss the Cassel case, Benesch v. Green (N.D. Cal. 2009) Westlaw 4885215, questioned the validity of the majority's ruling. For these reasons, it is likely that

the Cassel case will be narrowly construed as a fact specific decision. However, attorney practitioners, when meeting with clients in preparation for mediation, may well be advised to identify such discussions as being for mediation if that is indeed the intent of counsel.

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