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California Supreme Court Issues Yet Another Decision Demonstrating
The Broad Scope Of The Confidentiality Provisions In California's
Mediation Statute As It Rules That Communications Between A Client
And His Attorney In A Mediation Setting Are Inadmissible In A
Subsequent Legal Malpractice Action By The Client Against The
Attorney.....

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As we reported in the January 2010 Edition of The Morrison Law Journal, the California Court of Appeal, Second District ruled in the now depublished opinion in Cassel v. Superior Court (2009) 101 Cal.Rptr. 501 ("Cassel") that discussions between a party and his counsel in a mediation setting were not within the ambit of California's Mediation Statute because they only involved a "single participant" or party and were admissible in a subsequent legal malpractice case. That opinion was seen by many in the legal community as a departure from the California Supreme Court's decisions which have held that the courts should refrain from crafting judicially created exceptions to the Mediation Statute which mandates confidentiality for mediation protected activities as prescribed under Evidence Code § 1119. See, Foxgate Homeowners Association v. Bramalea California, Inc. (2001) 26 Cal.4th 1, Rojas v. Superior Court (2004) 33 Cal.4th 407, Fair v. Bakhtiari (2006) 40 Cal.4th 189 and Simmons v. Ghaderi (2008) 44 Cal.4th 570.

The facts of the Cassel are straightforward enough. In that case, an individual, Michael Cassel, agreed in a mediation to the settlement of business litigation to which he was a party. He later sued his attorneys who represented him at the mediation for legal malpractice, breach of fiduciary duty, fraud and breach of contract. His complaint alleged that, by bad advice, deception, and coercion, his attorneys, who had an alleged conflict of interest, induced him to settle for a lower amount than he had told them he would accept, and for less than the case was worth. Prior to the trial of the legal malpractice case, the lawyers who had previously represented Mr. Cassel, and who were now defendants to Mr. Cassel's legal malpractice complaint, moved, under the statutes governing mediation confidentiality to exclude all evidence of private attorney-client discussions concerning mediation settlement strategies and the attorney's efforts to persuade Mr. Cassel to reach a settlement in the mediation.

The trial court granted the attorneys' motion, but the Court of Appeal, in a split decision, vacated the trial court's order.

In the Court of Appeal's decision in Cassel, that Court ruled that the former client, Mr. Cassel, and the law firm which previously represented Mr. Cassel acted as a "single participant" (i.e. a single "party") and that their discussions during the mediation in the underlying action were admissible in the subsequent legal malpractice action. It is noted that the Court of Appeal's decision in Cassel was a split decision and was the subject of a stinging dissent by Justice Perluss who commented that the majority's conclusion was "not only at odds with the clear language of [Evidence Code] § 1119, subdivision (a), but [was] also inconsistent with the Supreme Court's repeated disapproval of 'judicially created exception[s]' to the mediation and confidentiality statutes".

The California Supreme Court, upon the publication of the Court of Appeal's decision in Cassel, acted quickly. First, on February 3, 2010, it granted review. Thereafter, on January 13, 2011, that Court issued its own opinion in Cassel v. Superior Court (2011) Westlaw 102710 wherein the California Supreme Court reversed the judgment of the Court of Appeal. In the unanimous opinion of the California Supreme Court (Justice Chin concurred but filed a separate opinion), the Court ruled that an attorney's mediation related discussions with a former client, absent an applicable waiver, came within the confidentiality provisions of the Mediation Statute and were not admissible for purposes of proving any claim of legal malpractice in a subsequent action.

With respect to the facts of the Cassel case, the California Supreme Court stated, given the broad breadth of the Mediation Statute, that there could be no judicially created exception for that case and, in general, there could be no exception absent a violation of due process or an absurd result that "clearly undermined" the purpose of the Mediation Statute.¹ The Court went on to indicate that it passed no judgment on the "wisdom of the mediation confidentiality statutes" and commented that the legislature had simply decided that the encouragement of mediation to resolve disputes requires broad protection for the confidentiality of communications exchanged in relation to

¹ Quoting the California Supreme Court in Cassel:

"[w]e must apply the plain terms of the mediation confidentiality statutes to the facts of this case unless such a result would violate due process, or would lead to absurd results that clearly undermine the statutory purpose. No situation that extreme arises here. Hence, the statutes' terms must govern, even though they may compromise petitioner's ability to prove his claim of legal malpractice."

that process and required exclusion of evidence of the communications between attorney and client in that case.

The California Supreme Court's decision in Cassel is significant in that it holds that communications in a mediation setting between a client and a law firm are not admissible in a subsequent legal malpractice case. However, and even more importantly, the California Supreme Court's decision in Cassel sets forth, again, the very broad breadth of the confidentiality provisions in the Mediation Statute in California and essentially limits any judicial exception to circumstances involving a violation of due process or an "absurd" result - a high bar indeed.

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