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Mediation Confidentiality Statutes Include All Evidence of Discussions Immediately Preceding, During and After Mediation

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Cassel v. Superior Court of Los Angeles County, 51 Cal. 4th 113, 244 P.3d 1080 (Jan. 13, 2011)

Brief Summary

The California Supreme Court held that the mediation confidentiality statutes cover all communications before, during and shortly after a mediation, and that all such communications are not discoverable or admissible by reason of the statutes.

Complete Summary

Petitioner client brought a claim against his former attorneys for legal malpractice, breach of fiduciary duty, fraud and breach of contract arising out of business litigation to which he was a party. The client's alleged claim involved his attorneys' conduct at a pretrial mediation in the underlying litigation. The client alleged that before the mediation, he agreed with his attorneys that he would accept no less than $2 million to resolve the suit. The mediation lasted more than 14 hours, during which time the client alleged that his attorneys harassed and coerced him into accepting a $1.25 million settlement. The client alleged that he agreed to the written draft settlement believing that he had no other choice.

The trial court ruled that in addition to information about the conduct of the mediation itself, the following evidence was protected by mediation confidentiality statutes:

(1) discussions between the client and his attorneys concerning plans and preparations for the mediation, mediation strategy and amounts that the client might be offered, and would accept, in settlement at the mediation;
(2) similar discussions between the client and the lawyers the next day;
(3) all private communications among the client, his assistant and his attorneys on the date of the mediation concerning the progress of the session, settlement offers made, the client's departure from the mediation over the objection of his lawyers and their efforts to secure his return;
(4) the attorneys' recommendations that the client accept the $1.25 million offer;

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(5) accusations that the client was greedy for considering $5 million as an appropriate amount;
(6) who would try the case if the client did not settle;
(7) a possible deal if the client settled; and
(8) the attorneys' willingness to reduce their fees if the client settled the suit.

The trial court determined that these items were inadmissible as communicative conduct, along with the act of one of the lawyers accompanying the client to the bathroom during the mediation.

On appeal, the appellate court held that the mediation confidentiality statutes do not extend to communications between a mediation participant and his or her own attorneys outside the presence of other participants in the mediation. To support its holding, the appellate court relied on the definition of the term "participant" and the term "disputing parties" in a mediation. The court found that mediation confidentiality statutes would unfairly hamper malpractice actions by overriding a waiver of attorney-client privilege which occurs by operation of law when a client sues a lawyer for malpractice. Cal. Evid. Code § 958.

The California Supreme Court agreed with the reasoning of the dissent in the appellate decision. The Court thoroughly discussed whether mediation confidentiality statutes protect private attorney/client communications even if they occur in connection with the mediation of the client's claims that the attorneys committed legal malpractice. The Court also discussed similar cases dealing with the mediation confidentiality statutes and considered the legislators' intent in drafting the mediation confidentiality statutes.

The Court noted that the statutes are clear and unambiguous and concluded that judicially-crafted exceptions should not be made. The plain language of the statutes covers all oral or written communications if they are made "for the purpose of" or "pursuant to" a mediation. Cal. Evid. Code § 1119(a), (b). Absent express statutory exception, all discussions conducted in preparation for a mediation, as well as mediation-related communications that take place during the mediation itself, are protected from disclosure. These communications include those between a disputant and his or her own counsel, even if they do not occur in the presence of other disputants or the mediator. The Court concluded that applying the plain language of the statutes to the circumstances of this case "[did] not produce absurd results that are clearly contrary to the Legislature's intent."

Petitioner could thus not rely on communications covered by the mediation confidentiality statutes as admissible evidence in his legal malpractice case.

Significance of Opinion

The California Supreme Court noted that in order to encourage the candor necessary to a successful mediation, the legislature has broadly provided for the confidentiality of things spoken or written in connection with a mediation proceeding. Except in rare circumstances, the mediation confidentiality statutes must be strictly applied and do not permit judicially crafted exceptions or limitations, even where competing public policies may be affected.

For more information, please contact Terrence P. McAvoy or your regular Hinshaw attorney.

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