



## Alerts

### Mediation Confidentiality Precludes Inferences of Malpractice

April 1, 2015

*Lawyers for the Profession® Alert*

*Amis v. Greenberg Traurig LLP*, \_\_\_ Cal.Rptr.3d \_\_\_, 2015 WL 1245902 (Cal. App.2 Dist. 2015)

#### Brief Summary

Plaintiffs in a legal malpractice action cannot circumvent mediation confidentiality provided by Evidence Code Section 1115 *et. seq.* by asking the trier of fact to draw inferences of malpractice from the defendant lawyer's alleged acts or omissions during mediation. To permit such inferences would be to allow indirectly what *Section 1119* prohibits directly.

#### Complete Summary

Plaintiff was an officer and shareholder of Pacific Marketing Works, Inc. (Pacific), a clothing company. Pacific sued Path Productions, LLC (Path) for breach of contract. Path filed a counterclaim against Pacific, the plaintiff and other Pacific shareholders for breach of contract, fraud and alter ego liability.

Defendant law firm was engaged to represent Pacific and the other Pacific parties in the action, including plaintiff. The action eventually settled at a mediation, and plaintiff and the other Pacific defendants agreed, jointly and severally, to pay Path \$2.4 million based on an agreed schedule. Unfortunately, the Pacific defendants were unable to make the scheduled payments and Path successfully moved for entry of the stipulated judgment pursuant to the settlement agreement. Plaintiff and the other Pacific parties then declared bankruptcy.

Thereafter, plaintiff filed his legal malpractice action against defendant, claiming that defendant failed to alert him to the "risks involved for his personal liability under the proposed settlement agreement," and instead caused him to execute a settlement agreement, which converted Pacific's corporate obligations into his personal obligations.

At plaintiff's deposition, he admitted his claimed damages stemmed entirely from the mediated settlement agreement and that all of defendant's alleged advice and recommendations occurred at the mediation. This proved fatal to his cause. Defendant moved for summary judgment, contending that plaintiff could not prove his claims, nor could defendant defend itself without testifying to communications protected by mediation confidentiality. Plaintiff argued that even outside of the protected communications, he could prove negligence

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because all the evidence, taken together, permitted a reasonable inference that defendant's misconduct caused him to execute the settlement agreement and incur personal liability. The trial court granted defendant's summary judgment motion, and the appellate court affirmed.

Under Section 1119 (a) and (b) of the Evidence Code, neither "evidence of anything said," nor any "writing," is discoverable or admissible "in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which ... testimony can be compelled to be given," if the statement was made, or the writing was prepared, "for the purpose of, in the course of, or pursuant to, a mediation."

The court noted that mediation confidentiality has been broadly applied in California, and courts have demonstrated hostility to any attempt to judicially craft exceptions to the general rule of confidentiality, even in situations where justice seemed to call for a different result. Indeed, the California Supreme Court in *Cassel v. Superior Court*, 51 Cal.4<sup>th</sup> 113, 117, 119 (2011), stated:

"Judicial construction, and judicially crafted exceptions, are permitted only where due process is implicated, or where literal construction would produce absurd results, thus clearly violating the Legislature's presumed intent. Otherwise, the mediation confidentiality statutes must be applied in strict accordance with their plain terms. Where competing policy concerns are present, it is for the Legislature to resolve them."

*See also Wimsatt v. Superior Court*, 152 Cal.App.4<sup>th</sup> 137 (2007) (mediation confidentiality protected mediation briefs and correspondence). The *Cassel* court fully acknowledged that the ruling could adversely impact a wronged client's ability to prove a justified legal malpractice claim against his or her lawyers but observed that "if an exception is to be made for legal misconduct, it is for the Legislature to do, and not the courts..." *Cassel*, at 133.

Here, the court concluded the trial court correctly granted summary judgment because plaintiff was barred from presenting the critical proof needed to establish breach and causation by mediation confidentiality. Significantly, the court also rejected plaintiff's contention that mediation confidentiality was not implicated because the trier of fact could infer from "direct, admissible, and undisputed evidence" that plaintiff was advised by defendant during mediation before signing the agreement." The appellate court stated: "[plaintiff's proposed inference is fundamentally at odds with the mediation confidentiality statutes' directive. To permit such an inference would allow [plaintiff] to attempt to accomplish indirectly what the statutes prohibit him from doing directly."

### **Significance of Opinion**

The case reaffirms California's broad treatment and strict adherence to mediation confidentiality. Mediation confidentiality also prohibits the drawing of any inferences from communications made during mediation.

For more information, please contact [Terrence P. McAvoy](#) or [Filomena E. Meyer](#).

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