Conversations Between Attorney and Client During Mediation Are Privileged, And Are Inadmissible in a Subsequent Action Between Them.

Did your client make a settlement decision after you advised the client of the potential risks and rewards of the offer made at mediation? Do you think you will be able to testify to protect yourself, if a subsequent claim is made against you, about the good advice you gave and the informed business decision the client made during the course of the mediation? Not so fast. In *Cassell v. Superior Court of Los Angeles County*, 2011 Cal. LEXIS 2 (Cal. Jan. 13, 2011) the California Supreme Court reaffirmed the bright line rule holding mediation communications privileged, even where the privilege results in a client being unable to prove attorney malpractice. In *Cassell*, a former client sought to introduce evidence that he had been coerced by his attorneys into accepting a lower settlement offer that was below the previously agreed settlement "floor." The client asserted that he had been hounded and threatened by the lawyers into taking less than his case was worth.[1]

The trial court held all of these mediation communications privileged, but the Court of Appeals reversed, reasoning that the purpose of mediation confidentiality was to protect communications between the two disputing sides, and the mediator, not communications between attorney and client. The Court of Appeals also reasoned that a mediation party and its counsel constituted a single participant and the privilege did not apply to conversations within a single participant.

The Supreme Court rejected this analysis. The court distinguished the mediation confidentiality statute from the attorney client privilege statute (Evidence Code §§ 950, 958) which expressly makes the client the holder of the attorney client privilege, and permits waiver of the privilege in suits between attorney and client. In contrast, the mediation privilege is not held by any one participant, but applies to all participants jointly, with no one party in a position to waive the privilege.

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[1] The plaintiff's allegations were summarized as follows: "Though he felt increasingly tired, hungry, and ill, his attorneys insisted he remain until the mediation was concluded, and they pressed him to accept the offer, telling him he was "greedy" to insist on more. At one point, petitioner left to eat, rest, and consult with his family, but Speiss called and told petitioner he had to come back. Upon his return, his lawyers continued to harass and coerce him to accept a $ 1.25 million settlement. They threatened to abandon him at the imminently pending trial, misrepresented certain significant terms of the proposed settlement, and falsely assured him they could and would negotiate a side deal that would recoup deficits in the VDO settlement itself. They also falsely said they would waive or discount a large portion of his $ 188,000 legal bill if he accepted VDO's offer. They even insisted on accompanying him to the bathroom, where they continued **[*9]** to "hammer" him to settle. Finally, at midnight, after 14 hours of mediation, when he was exhausted and unable to think clearly, the attorneys presented a written draft settlement agreement and evaded his questions about its complicated terms. Seeing no way to find new counsel before trial, and believing he had no other choice, he signed the agreement."

> By contrast, the mediation confidentiality statutes do not create a "privilege" in favor of any particular person. (See, e.g., *Wimsatt, supra*, 152 Cal.App.4th 137, 150, fn. 4; *Eisendrath, supra*, 109 Cal.App.4th 351, 362–363; but see, e.g., *Stewart v. Preston Pipeline Inc.* (2005) 134 Cal.App.4th 1565, 1572, fn. 5 [36 Cal. Rptr. 3d 901] [referring to a "mediation privilege"].) Instead, they serve the public policy of encouraging the resolution of disputes by means short of litigation. The mediation confidentiality statutes govern only the narrow category of mediation-related communications, but they apply broadly within that category, and are designed to provide maximum protection for the privacy of communications in the mediation context. A principal purpose is to assure prospective participants that their interests will not be damaged, first, by attempting this alternative means of resolution, and then, once mediation is chosen, by making and communicating the candid disclosures and assessments that are most likely to produce a fair and reasonable mediation settlement. To assure this maximum privacy protection, the Legislature has specified that all mediation participants involved in a mediation-related communication must agree to its disclosure.

The court also rejected the single participant analysis, noting that the Law Revision Commission Comments to Evidence Code § 1122 (a) requires a waiver of the mediation privilege for any communication by all participants, including all non-party attendees (e.g. a spouse, insurance representative, or an employee) not just a side.

In general, the Supreme Court rejected the Court of Appeals' attempt to create a judicially-crafted exception to mediation confidentiality, citing *Wimsatt v. Superior Court* (2007) 152 Cal.App.4th 137, and the cases cited in *Wimsatt*, *Simmons v. Ghaderi* (2008) 44 Cal.4th 570, 580 [80 Cal. Rptr. 3d 83, 187 P.3d 934], *Fair v. Bakhtiari* (2006) 40 Cal.4th 189, 194 [51 Cal. Rptr. 3d 871, 147 P.3d 653]. The court reasoned that these cases held that the mere loss of evidence pertinent to the prosecution of a lawsuit for civil damages does not implicate such a fundamental interest that outweighs the benefits of mediation confidentiality. The Supreme Court invited the legislature to explore exceptions to the mediation privilege, "Of course, the Legislature is free to reconsider whether the mediation confidentiality statutes should preclude the use of mediation-related attorney-client discussions to support a client's civil claims of malpractice against his or her attorneys."

Although *Cassell* involved communications that the client sought to introduce, the bright line rule is as easily used to bar communications the lawyer would like to offer. The "take away" from this case is that any cautionary advice that a client is given, and the business decisions the client makes, should be confirmed in writing either long before the mediation session, or in separate advice given before the final settlement agreement is executed (but outside of the scope of the mediation) in order to fall outside of the mediation privilege, and should be, if possible acknowledged by the client. Absent such a record, the lawyer will be barred from protecting him or herself by offering testimony of mediation communications.