



by Tracy Luu-Varnes

Excepting Misconduct

Many jurisdictions outside California provide for an exception to privileged mediation communication when the communication can prove or disprove misconduct that occurred during mediation

UNDER California's existing laws, a person who files a malpractice action against his or her attorney is prohibited from using evidence of conduct or communications that occurred during a mediation against the attorney to prove the case. Unlike California, other jurisdictions provide for an exception to the mediation-confidentiality doctrine with attorney malpractice claims. There may be changes in the near future that will make California laws in this regard more like those of other jurisdictions. In response to a call from the California legislature, the California Law Revision Commission is analyzing the relationship between the state's statutes regarding the mediation confidentiality privilege and attorney malpractice.¹ This year—nearly five years after the initial request from the legislature—the commis-

sion issued a preliminary recommendation on this topic. On the horizon is the possibility of a new statute that would provide for an exception to the mediation confidentiality privilege in situations involving attorney misconduct during mediation.

Mediation is an interactive form of dispute resolution in which a neutral facilitates communications between disputants to assist them in reaching a mutually acceptable agreement.² Although voluntary, mediation continues to be a popular avenue for those interested in resolving a dispute, both during and before litigation. There is a broad consensus that one of the appeals to mediation is the guarantee of confidentiality during the mediation process.³

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Currently, California's mediation statutes make any statements and writings that occur during the mediation confidential and protected from disclosure. Statutes governing mediation confidentiality are found in the California Evidence Code.⁴ Section 1119—perhaps the crux of the mediation confidentiality privilege—provides that:

[N]o evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery, and disclosure of the evidence shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.⁵

There are limited exceptions to the mediation confidentiality privilege. Outside of the family law and criminal context, these exceptions include contempt proceedings, criminal conduct, and conduct being investigated by the State Bar or Commission on Judicial Performance disqualification proceedings.⁶ Notably absent are exceptions based on attorney malpractice, misconduct, or abuse during mediation.

The mediation confidentiality privilege encourages participants (including attorneys) to speak openly and freely and to engage in robust discussions with the assurance that if a settlement is not achieved, their words and any discussion that took place during the mediation would not be used against them at a later time. However, suppose a dispute settles at mediation, but one of the participants alleges that his attorney committed malpractice or engaged in misconduct during the mediation. In addition, suppose that this participant alleges that he would never have settled at mediation “but for” the attorney's misconduct. Under California's existing mediation confidentiality privilege laws, since the evidence to support the malpractice action derives solely from the conduct of the aggrieved party and communications during mediation, the aggrieved party will find that he has no recourse against the attorney as that evidence is subject to the mediation confidentiality privilege and thus inadmissible.

Current California laws shield attorneys from malpractice actions if the alleged misconduct occurred during a mediation. This is a harsh line in the sand for a mediation participant who is seeking recourse for an attorney's malpractice at mediation. Interestingly, this protection for attorneys does not exist in other jurisdictions. For

example, states have adopted the Uniform Mediation Act (UMA), which has carved out an exception to the mediation confidentiality privilege for attorney malpractice and misconduct.

Malpractice Context

Several California courts have examined the intersection between the protections afforded by the mediation confidentiality privilege and attorney malpractice arising from conduct during mediation. In every California case thus far, the courts have broadly construed and applied the mediation confidentiality privilege to exclude the admission of evidence of communications or conduct that occurred during mediation, despite the knowing inequity that results from such a decision.

In 2004, the California Supreme Court broadly interpreted the mediation confidentiality privilege to preclude exceptions other than those expressly contained in the statutes. In *Rojas v. Superior Court*,⁷ contractors and subcontractors settled a construction defect case brought by the owner of an apartment complex at mediation. Thereafter, hundreds of tenants of the apartment complex sued several of the entities who had been involved in the development and construction of the complex for numerous health problems associated with the construction defects.⁸ The tenants demanded production of several items prepared in the prior litigation including the files relating to the construction defect case.⁹ The supreme court concluded that the requested items were not discoverable because they were “prepared for the purpose of, in the course of, or pursuant to, [the] mediation” in the underlying action.¹⁰ Even acknowledging that without the requested discovery the tenants might not have been able to obtain much of the necessary evidence, the supreme court held that the mediation confidentiality privilege is not subject to a “‘good cause’ exception.”¹¹ In reaching this conclusion, the supreme court focused on the strong public policy favoring mediation and the need for confidentiality in the mediation process.¹²

In *Wimsatt v. Superior Court*, Corey Kausch, a mediation participant, filed a legal malpractice case against his former attorneys regarding their representation of him during a mediation in a personal injury lawsuit.¹³ Among other allegations, Kausch alleged that his attorneys breached their fiduciary duty by submitting an unauthorized settlement demand to the opposing party, which Kausch allegedly learned from the confidential mediation brief during mediation.¹⁴ The law firm sought a writ

of mandate to compel the trial court to vacate its order denying the firm's application for a protective order and instead to enter an order that would protect all mediation-related communications, including the brief, which was the critical evidence for Kausch's malpractice action.¹⁵

The court of appeal acknowledged that the California Supreme Court has consistently held that “the mediation statutes are to be broadly construed to effectuate the legislative intent, even if there are conflicting public policies and even if the equities in a particular case suggest a contrary result.”¹⁶ Therefore, in light of dicta and the supreme court's analysis of the scope of mediation confidentiality privilege, and despite the fact that the ruling would likely deprive Kausch of his ability to prove the purported legal malpractice action, the court of appeal found that the mediation brief and e-mail referring to sections of the mediation brief were absolutely and completely protected from disclosure by the mediation privilege.¹⁷

Similarly, in *Amis v. Greenberg Traurig LLP*, a mediation participant brought a legal malpractice action against his former attorneys. Amis alleged that at mediation his attorneys failed to advise him of the potential for personal liability under the proposed settlement agreement.¹⁸ Specifically, Amis alleged that the settlement included a stipulated judgment that converted the corporate obligations to Amis's personal obligations.¹⁹ During the trial, Amis admitted that his damages stemmed entirely from the settlement agreement and that any communication he had with his former attorneys regarding the settlement agreement occurred in the course of mediation.²⁰ Based on those facts, the trial court concluded, and the court of appeal affirmed, that the mediation confidentiality privilege precluded Amis from presenting evidence of communications during the mediation, including the settlement agreement, thus preventing Amis from being able to prove his malpractice action.²¹

Perhaps the most recognized California case on this issue was one that reached the California Supreme Court in 2011, *Cassel v. Superior Court*.²² Petitioner Cassel brought a malpractice action against his former attorneys because “by bad advice, deception, and coercion, [by his] attorneys,” Cassel alleges he was induced to settle the case “for less than the case was worth.”²³ Specifically, during the 14-hour mediation, Cassel alleged that despite feeling increasingly tired, hungry, and ill, his attorneys insisted that he remain until the mediation concluded and that he was pressed by his attorneys to accept an offer

MCLE Test No. 273

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1. Mediation involves a neutral who facilitates a discussion between disputants.
True.
False.
2. California's mediation statutes make statements and writings that occur during the mediation confidential and protected from disclosure.
True.
False.
3. California's mediation statutes do not include protection for conduct that occurs during a mediation.
True.
False.
4. California laws provide an exception to the mediation confidentiality statutes for attorney malpractice actions.
True.
False.
5. California laws currently do not provide exceptions to the mediation confidentiality privilege.
True.
False.
6. In California, an attorney's conduct during mediation may be used as evidence in a subsequent malpractice lawsuit by the attorney's former client.
True.
False.
7. In California, communications between an attorney and client may be used as evidence in a subsequent malpractice lawsuit because not allowing them would be against public policy.
True.
False.
8. California courts have broadly construed the mediation confidentiality privilege to exclude evidence of communications that occurred during mediation.
True.
False.
9. In deciding whether evidence of misconduct during mediation should be allowed in a subsequent malpractice lawsuit, the California Supreme Court only considers public policy.
True.
False.
10. In *Cassel v. Superior Court* (51 Cal. 4th 113 (2011)), the Supreme Court permitted evidence of the communications between Cassel and his attorneys during mediation.
True.
False.
11. California is considering a change to the state's current mediation confidentiality statutes to allow for an exception for attorney malpractice.
True.
False.

12. The California Law Revision Commission is studying the relationship that exists under current law between mediation confidentiality and attorney malpractice, as well as other misconduct, to determine if an amendment to the mediation confidentiality statutes should be recommended.
True.
False.
13. There is unanimous support to amend California's current mediation confidentiality statute and add an exception for attorney malpractice.
True.
False.
14. The Uniform Mediation Act provides for an attorney malpractice exception to the mediation privilege.
True.
False.
15. The Uniform Mediation Act has been adopted in California.
True.
False.
16. The Uniform Mediation Act has been enacted by all 50 states.
True.
False.
17. In an attorney malpractice action brought against an attorney in a state that has adopted the Uniform Mediation Act, the former client will be allowed to introduce evidence of communications that occurred during mediation to prove its claim.
True.
False.
18. In an attorney malpractice action brought against an attorney in New York, the former client will be allowed to introduce evidence of communications that occurred during mediation to prove its claim.
True.
False.
19. In an attorney malpractice action brought against an attorney in California, the former client will be allowed to introduce evidence of communications that occurred during mediation to prove its claim.
True.
False.
20. If Evidence Code Section 1120.5 were adopted by the California Legislature, in an attorney malpractice action brought against an attorney in California after the enactment of Section 1120.5, the former client would be allowed to introduce evidence of communications that occurred during mediation to prove its claim.
True.
False.

MCLE Answer Sheet #273



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11. True False
12. True False
13. True False
14. True False
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16. True False
17. True False
18. True False
19. True False
20. True False

by allegedly calling him greedy if he insisted on more.²⁴ In addition, Cassel alleged that during mediation, his attorneys harassed him, threatened to abandon him at the imminently pending trial if he did not accept the settlement, misrepresented certain significant terms of the proposed settlement, and falsely assured him that they could and would negotiate a side deal to recoup the deficits in the settlement while waiving or discounting a large portion of the legal bill if he accepted the offer. At midnight, Cassel's attorneys presented him with a written settlement agreement, and evaded his questions about the terms of the agreement. Feeling cornered with no time to find new counsel before trial, Cassel said he felt that he had no choice but to sign the agreement, which he did.²⁵

Following the settlement, Cassel initiated a malpractice action against his attorneys. During deposition, Cassel testified about the conversations he had with his attorney before and during the mediation.²⁶ Thereafter, the attorneys moved in limine pursuant to the mediation confidentiality privilege to exclude all evidence of communications between Cassel and his attorneys. The trial court granted the motions and determined that all conversations were inadmissible pursuant to the mediation confidentiality privilege.²⁷

The court of appeal reversed, finding that the mediation confidentiality privilege statutes were "not intended to prevent a client from proving, through private communications outside the presence of all other mediation participants, a case of legal malpractice against the client's own lawyers."²⁸ The attorneys petitioned review in the California Supreme Court, arguing that the mediation-related discussions with the client were inadmissible in the malpractice action even if the discussions were private and away from any other mediation participants.²⁹

The supreme court granted review, and consistent with its prior decisions, characterized the mediation confidentiality privilege statutes as "clear and absolute" and thus must be strictly construed.³⁰ The supreme court further held that the mediation confidentiality privilege statutes are not subject to a judicially created exception when a client sues for legal malpractice and seeks disclosure of private attorney-client discussions relating to a mediation.³¹ The supreme court stated that the statutes "must govern, even though they may compromise" the ability of a person to prove a legal malpractice action against a former attorney.³² Recognizing the inequitable results of the case, the California Supreme

Court indicated that it was up to the legislature to consider reform.³³

Allowing Exception

Most privileges, like the attorney-client privilege or spousal privilege, are treated consistently by courts throughout the country. That is not the case for the mediation confidentiality privilege. In California, and as exemplified in the cases above, the mediation confidentiality privilege has been broadly applied as courts have categorically prohibited judicially crafted exceptions, even in situations when justice seems to call for a different result.³⁴ In taking this position, California courts have echoed that a hard line is necessary "[t]o carry out the purpose of encouraging mediation by ensuring confidentiality."³⁵

At the opposite spectrum of California's treatment of the mediation confidentiality privilege—which provides for nearly absolute confidentiality to mediation communications—are the mediation confidentiality privilege statutes of New York, which provide minimal confidentiality to mediation communications. The governing statute, New York Civil Practice Law and Rules 4547, provides that settlement offers and demands as well as evidence of conduct or statements made during a mediation "shall be inadmissible as proof of liability for or invalidity of the claim or the amount of damages." The statute continues by stating that "the exclusion established by this section shall not limit the admissibility of such evidence when it is offered for another purpose," which will include purposes to show attorney malpractice or misconduct during mediation.

The UMA has been enacted in the District of Columbia and 11 states.³⁶ Section 4 of the UMA provides that unless otherwise specified "a mediation communication is privileged...and is not subject to discovery or admissible in evidence in a proceeding unless waived."³⁷ The UMA allows several exceptions to the mediation confidentiality privilege, including when the communication can prove or disprove a claim or complaint of professional misconduct or malpractice that occurred during mediation.³⁸ The UMA's exception is restricted only to evidence of misconduct that allegedly occurred "during a mediation" and does not apply to evidence of misconduct in a nonmediation setting.

Proposed Revisions

At the direction of the legislature, the California Law Revision Commission has been conducting a study, Study K-402, to analyze "the relationship under current law between mediation confidentiality and

attorney malpractice and other misconduct."³⁹ The commission has acknowledged several tentative proposals to revise the Evidence Code, with the objective of allowing parties to discover and offer into evidence mediation communications that are relevant to proving or disproving claims that attorneys committed malpractice in connection with a mediation.

On April 13, 2017, the following proposed statute was presented to the commission for consideration:

Evidence Code § 1120.5 (added).
Alleged misconduct of lawyer when representing client in mediation context

(a) A communication or a writing that is made or prepared for the purpose of, or in the course of, or pursuant to, a mediation or a mediation consultation, is not made inadmissible, or protected from disclosure, by provisions of this chapter if both of the following requirements are satisfied:

(1) The evidence is relevant to prove or disprove an allegation that a lawyer breached a professional requirement when representing a client in the context of a mediation or a mediation consultation.

(2) The evidence is sought or proffered in connection with, and is used solely in resolving, one of the following:

(A) A complaint against the lawyer under the State Bar Act, Chapter 4 (commencing with Section 6000) of the Business and Professions Code, or a rule or regulation promulgated pursuant to the State Bar Act.

(B) A cause of action for damages against the lawyer based upon alleged malpractice.

(C) A dispute between a lawyer and client concerning fees, costs, or both including a proceeding under the State Bar Act, Chapter 4, Article 13-Arbitration of Attorneys' Fees, Business & Professions Code Sections 6200-6206.⁴⁰

This proposal has not been unanimously supported. There are concerns that allowing for a malpractice exception to the mediation confidentiality privilege would change the effectiveness of mediation as it makes participants less willing to be open and honest since the reassurance of confidentiality will no longer be absolute. This concern, while legitimate, was not persuasive in other jurisdictions. Mediation is still popular and widely used, even in states that have adopted the UMA.⁴¹ With the exception of the potential change in con-

Confidentiality, the other acknowledged benefits of mediation will not change. Compared with going to trial, mediation is a quicker and more cost-effective way to resolve a dispute. Mediation also provides the participants more control of the outcome of the case and allows participants to craft creative resolutions.

In addition, the availability of an attorney malpractice exception to the mediation confidentiality privilege should not change the way attorneys conduct themselves during mediation. Attorneys have a fiduciary duty to competently and diligently advocate for their clients. An attorney's standard of care to a client should not be different in a mediation. In fact, the addition of an attorney malpractice exception to the mediation confidentiality privilege should provide more confidence for clients as well as attorneys, for both will be able to present evidence from the mediation should a situation like a malpractice claim arise. The evidence will be treated like any other malpractice action and left for the trier of fact to make a determination if there was malpractice.

California is a leader in the alternative dispute resolution domain but may have fallen behind with respect to carve-outs to protect mediation participants from attorney misconduct. At this point, it is unclear what the commission will recommend to the legislature: new Evidence Code Section 1120.5, a different statute, or no change at all. For the time being, participants in mediation can still expect that all communications and writings that occurred during the mediation (with few exceptions) will be absolutely privileged. ■

¹ Memorandum 2017-30 from the California Law Revision Comm'n on the Relationship Between Mediation Confidentiality and Attorney Malpractice and Other Misconduct (Draft Tentative Recommendation) (May 30, 2017), available at <http://www.clrc.ca.gov/pub/2017/MM17-30.pdf> [hereinafter Cal. L. Revision Comm'n].

² Section 1115(a) defines mediation as "a process in which a neutral person or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement."

³ *Blackmon-Malloy v. United States Capitol Police Bd.*, 575 F. 3d 699, 711 (D.C. Cir. 2009) ("Congress understood what courts and commentators acknowledge, namely, that confidentiality play a key role in the informal resolution of disputes.")

⁴ See EVID. CODE §§115-1118. Sections 1152 and 1154 are based on the public policy favoring settlement of disputes by encouraging candid discussions while restricting the admissibility of evidence of settlement negotiations and providing some assurance that statements made by a party during negotiations will be inadmissible to prove (or disprove) liability.

⁵ This includes writing, communications, negotiations, or settlement discussions. See EVID. CODE §1119.

⁶ See EVID. CODE §§1117, 1120, 1122.

⁷ *Rojas v. Superior Ct.*, 33 Cal. 4th 407 (2004).



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⁸ *Id.*

⁹ *Id.* at 411-13.

¹⁰ *Id.* at 416-17, 423.

¹¹ *Id.* at 414, 423.

¹² *Id.* at 415-16.

¹³ *Wimsatt v. Superior Ct.*, 152 Cal. App. 4th 137 (2007).

¹⁴ *Id.* at 141.

¹⁵ *Id.*

¹⁶ *Id.*; *Rojas*, 33 Cal. 4th at 415-16; *see also* *Foxgate Homeowners' Assn. v. Bramalea California, Inc.*, 26 Cal. 4th 1 (2001). In *Foxgate*, a mediator's report that indicated the attorney for one party had engaged in a pattern of tactics that were in bad faith was submitted in support of a motion for sanctions. By crafting a nonstatutory exception to the mediation confidentiality privilege, the court of appeal held that the report was admissible. The California Supreme Court disagreed, holding that the motion and the trial court's consideration of the motion and attached documents violated the mediation confidentiality privilege as Evid. Code §1119 expressly prohibits any person, mediator, and participants from revealing any written or oral communication made during mediation.

¹⁷ *Wimsatt*, 152 Cal. App. 4th at 155.

¹⁸ *John Amis v. Greenberg Traurig LLP*, 235 Cal. App. 4th 331 (2015).

¹⁹ *Id.* at 335.

²⁰ *Id.* at 336.

²¹ *Id.* at 343-44.

²² *Cassel v. Superior Ct.*, 51 Cal. 4th 113 (2011).

²³ *Id.* at 118.

²⁴ *See id.* at 120.

²⁵ *Id.*

²⁶ *Id.* at 121.

²⁷ *Id.*

²⁸ *Id.* at 122.

²⁹ *Id.* at 119.

³⁰ *Id.* at 117.

³¹ *Id.* at 123-33

³² *See id.* at 119.

³³ *See id.* at 136.

³⁴ *Glenn Provost v. Regents of Univ. of Cal.*, 201 Cal. App. 4th 1289, 1303 (2011); *John Eisendrath v. Superior Ct.*, 109 Cal. App. 4th 351, 362-363 (2003) (holding that no exception to the privilege can be implied).

³⁵ *Foxgate Homeowners' Ass'n. v. Bramalea Cal., Inc.* 26 Cal. 4th 1, 15 (2001); *Rojas v. Superior Ct.*, 33 Cal. 4th 407, 416 (2004); *R. Thomas Fair v. Karl E. Bakhtiari*, 40 Cal. 4th 189, 194 (2006).

³⁶ D.C. CODE §§16-4201 to 16-4213; HAW. REV. STAT. §§658H-1 to 658H-13; IDAHO R. EVID. 507; 710 ILL. COMP. STAT. 35/1-35/99; IOWA CODE §§679C.101-679C.115; NEB. REV. STAT. §§25-2930 to 25-2542; N.J. REV. STAT. §§2A:23C-1 to 2A:23C-13; N.J. R. CT. 1:40-4; OHIO REV. CODE ANN. §§2710.01-2710.10; S.D. CODIFIED LAWS §§19-13A-1 to 19-13A-15; UTAH CODE ANN. §§2710.01-2710.10; VT. STAT. ANN. tit. 12, §§5711-5723; WASH. REV. CODE §§7.07.010-7.07.904.

³⁷ Uniform Mediation Act §4 (2001).

³⁸ *Id.* §6(a).

³⁹ Cal. L. Revision Comm'n, *supra* note 1.

⁴⁰ Minutes from the California Law Revision Commission on the Relationship Between Mediation Confidentiality and Attorney Malpractice and Other Misconduct (Draft Tentative Recommendation) 5 (April 2017).

⁴¹ There is no evidence that enactment of the UMA, for example, has led to a decline in the use of effective mediation in jurisdictions that have adopted UMA. *See, e.g.*, James R. Coben, *My Change of Mind on the Uniform Mediation Act*, DISP. RESOL. MAG., Winter 2017, at 8 ("[T]o my knowledge not a single empirical study suggests that the UMA has triggered a decline in the use of mediation.")



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