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Time to roll back the mediation privilege

By Allen B. Grodsky

Over the years, the Legislature and the California Supreme Court have expanded the mediation privilege far beyond what it needs to be to serve its purpose — that is, to encourage the candor necessary for a successful mediation. The last straw was *Cassel v. Superior Court*, 51 Cal. 4th 113 (2011), in which the state Supreme Court interpreted the mediation privilege to cover confidential communications between a lawyer and client at the mediation, and prevented a client from using those communications to prove clear malpractice by the lawyer.

In *Cassel*, the Supreme Court affirmed a trial court's decision in a legal malpractice case that evidence of confidential discussions between a lawyer and client at the mediation of the underlying matter was nondiscoverable and inadmissible, thereby preventing the client from proving that his lawyer had committed malpractice. The Supreme Court reached this conclusion through a simple analysis: that's the plain meaning of the statute, and it is not our job to rewrite it.

So the ball is now in the Legislature's court, and it is time for the Legislature to take action. The absurdity of the holding of *Cassel* can be demonstrated in just a few examples.

For example, imagine two parties and their counsel are at a mediation and the mediation goes into the wee hours of the morning, because the mediator insists that "this is our only chance to settle and we're going to stay here — no matter how tired or hungry anybody is — until we get it done." At 2:00 a.m., the exhausted and hungry participants reach an agreement: defendant will pay plaintiff $2,000,000 in 30 days. Naturally the mediator insists that they need a written agreement right then and there; it can't wait until everybody gets a good night's sleep because somebody may change their mind. So the bleary-eyed lawyers draft a settlement agreement. Unfortunately, none of the tired participants notices a critical mistake in the settlement agreement. The agreement reads that the money must be paid by April 1, 2015 — not April 1, 2013. The next day, defendant wakes up and has second thoughts about the deal. Then he reads the agreement and is thrilled when he realizes that, under the express terms of the written agreement which everybody signed, he can wait *two years* to pay the money. The other party, the other lawyer, and the mediator are all furious. The mediator even calls and reads the riot act to the defendant's lawyer. But nothing will change the defendant's mind. He makes clear that he is going to hold on to the $2,000,000 for two years.

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Most lawyers might say: What's the problem? Plaintiff can file an action for reformation of the contract, put on pretty much uniform evidence about the parties' intent and negotiations and fix this problem. Not so fast. Under Cassel, no testimony about anything that was said or written at the mediation can come into evidence. There is absolutely no way plaintiff can prove that the written agreement does not reflect the parties' actual intent.

Let's make things worse. Let's say that defendant and his lawyer decide at the mediation to try to "slip in" the April 2015 date, figuring that nobody will notice. Their scheme works. Now we are not talking about malpractice; we have an intentional tort. Too bad! Unless the district attorney decides to bring a criminal proceeding (the mediation privilege does not protect disclosure in criminal proceedings), the plaintiff cannot do anything about it. He cannot bring any civil action based on what was said during the mediation. He cannot sue plaintiff and his lawyer, nor can he sue his own lawyer for malpractice in failing to notice the incorrect date in the settlement agreement.

Here is another example: In another mediation, after many hours of discussion, the mediator proposes a very complex financial transaction that could resolve both side's concerns. But plaintiff is concerned about the tax consequences. Her lawyer — not a tax lawyer, but desperate to get the case over with because he's not getting paid — tells his client that he's sure the transaction will get favorable tax treatment. Plaintiff goes along with it, signs a settlement agreement, and learns to her dismay some months later that the transaction does not get favorable tax treatment and that she's worse off than before the settlement. Most lawyers would think she could sue her lawyer for malpractice. Wrong again. Under the express holding of Cassel, none of what was discussed during the mediation (including her lawyer's insistence that there would be no tax problems) is discoverable or admissible.

Finally, in yet another mediation, the parties come to a settlement which provides that defendant has a one-year period to sell off certain goods in certain territories, but otherwise may not sell any of plaintiff's goods. But the written agreement (signed at the mediation) is vague about which particular goods can be sold off. Plaintiff sues defendant for breach of the agreement. But when defendant tries to put on evidence of what the parties specifically discussed during the mediation with respect to the goods that could be sold off, the court finds that evidence inadmissible. With *any other contract* it would be fair game to use negotiation discussions to help interpret the contract; but with a mediation settlement, it's off limits, and that's simply not fair to the parties.

Obviously, then, we have a big problem. And it's a problem that the Legislature could easily fix. We need to go back to the purpose of the mediation privilege — to foster candor in mediation discussions that will help lead to settlement. Why does confidentiality help foster openness? Because parties are legitimately concerned that if the case does not settle, what they say or admit will be used against them somehow. So when a case does not settle, it makes perfect sense that anything anybody says at a mediation should remain privileged.

But when a mediation results in a full and complete settlement, there is no longer any fear that what was said at the mediation could prove harmful to the case because the case is over. There is no conceivable reason that negotiations at the mediation should not be admissible in cases involving *interpretation* of the settlement agreement, just like evidence of negotiations is used to interpret any other contract. It should be in the interest of all parties to have the settlement agreement interpreted in such a way as to reflect the parties' intent. Cutting off this critical evidence, which can demonstrate the parties' intent, makes no sense.

Similarly, there is no reason that mediation should provide a "get out of jail free" card for lawyers who commit malpractice in a mediation, in particular during confidential communications with the client. None of the purposes of the mediation privilege are served by letting lawyers escape from the consequences of malpractice.

I am not proposing that mediators can be compelled to testify in these situations. Carving exceptions out of the mediation privilege will not change a mediator's immunity from having to testify. Under Evidence Code Section 703.5, mediators are, as a matter of law, *not competent* to testify about any statement or conduct that occurred during a mediation (except criminal acts).

Bottom line, the mediation privilege has gone too far. It is time to reel it in and return to a sensible privilege that does not infringe on parties' rights.

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