Mediation confidentiality: A malpractice exception or not?

An ethical issue either way

By Nancy Neal Yeend and Stephen Gizzi

Recent articles in Plaintiff and other legal publications have addressed the succession of cases that comprise our present common law interpretation of mediation confidentiality.[1] This article departs from that analysis, and addresses the current "tug-of-war" that is presently pulling at the very fabric of the mediation process. That debate is the direct result of legislative efforts to address what some see as too much, and others as just the right amount of, confidentiality in mediation. Here, we discuss some of the collateral ethical issues raised by this debate.

Background

In 2011, the California Supreme Court decided the *Cassel*[2] case, which soon prompted a call by some for a legislative response. The case involved evidence of alleged attorney malpractice committed "during"[3] mediation, which the Court determined was inadmissible due to mediation confidentiality rules. Following the decision, two sides emerged: one desiring to maintain the status quo, where legal malpractice is sheltered and deemed inadmissible under the present rules governing mediation confidentiality; and another group supporting the creation of a confidentiality exception under Evidence Code section 1120 for evidence of attorney malpractice.

The *Cassel* decision essentially concluded that everything done, said in, or in the course of mediation is confidential.[4] This left evidence of fraudulent and/or criminal acts, and abuse, as the few exceptions to mediation confidentiality statutes.[5] Simply put, this majority opinion leaves evidence of attorney malpractice and, by inference, mediator malpractice, protected from disclosure.

Notably, although Justice Chin concurred with the Court's decision, he did so "reluctantly," and pointedly emphasized that by holding as it did, the Court was shielding the acts of an attorney from a malpractice action during a mediation, *including* when advising clients, even if the advice given was "…incompetent or deceptive." He further stated, "Attorneys participating in mediation will not be held accountable for any incompetent or fraudulent actions during that mediation unless the actions are so extreme as to engender a *criminal* prosecution against the attorney."[6]

Justice Chin was likely inferring that under criminal circumstances, such actions would be admissible through the existing exceptions allowed by Evidence Code section1115, et seq.

Initially, *Cassel* prompted a movement by some demanding a total overhaul of the confidentiality provisions, with such proposals as multiple exceptions for attorney and mediator malpractice, as well as standards for all participants. At some point, many feared mediation confidentiality would have been rendered wholly ineffective with so many exceptions. Eventually, the focus was narrowed to a discussion more directly responsive to *Cassel* by linking the sweeping mediation confidentiality statutes and attorney malpractice.

The State Legislature began to wrestle with the issue in 2012 when Assemblyman Donald Wagner[7] introduced AB2025, which added a fourth exception to section 1120 of the Evidence Code. That amendment states: "*The admissibility in an action for legal malpractice, and action for breach of fiduciary duty, or both, or in a State Bar disciplinary action, of communications directly between the client and his or her attorney during mediation if professional negligence or misconduct forms the basis of the client's allegations against the attorney.*"

Later in 2012, the Legislature directed the California Law Review Commis-sion ("CLRC"), to "*analyze the relationship under current law between mediation confidentiality and attorney malpractice and other misconduct, and the purpose for, and impact of, those laws on public protection, professional ethics, attorney discipline, client rights, the willingness of parties to participate in voluntary and mandatory mediation, and the effectiveness of mediation...*"

Potential implications of the status quo

When considering mediation confidentiality, as it relates to attorney malpractice, there are presently two options: 1) Create an exception to confidentiality for attorney malpractice, or 2) Leave the statute as it is. If the statute remains intact, with all of the associated implications that have now been confirmed by the Court, does this create any additional disclosure duty for practitioners? It may, if you consider the following...

Based upon the holding in *Cassel*, the Court has once and for all cleared up any residual doubt, by unequivocally establishing that evidence of malpractice committed by an attorney is protected by the mediation confidentiality statutes, and is therefore inadmissible in a subsequent civil action. Since a bright line has now been drawn on this issue by the Court, arguably it begs the question from an

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ethical perspective: Do attorneys now have an obligation to specifically inform clients in advance that the confidentiality provisions of mediation extend to attorney and mediator malpractice? If such a disclosure is not provided in sufficient time prior to attending a mediation session, has the client truly given "informed consent" to attending the proceeding?

State Bar Rules require that an attorney, without professional liability coverage, must disclose that fact in writing to a client, if it is "reasonably foreseeable that the total amount of the member's legal representation of the client in the matter will exceed four hours."[8] Rule 3-400 proscribes an attorney from preemptively limiting her professional liability exposure to a client by contract,[9] and further requires an attorney settling an actual or prospective malpractice action, to first inform the client in writing of his or her right to seek independent counsel before settling the matter.[10] These rules evidence the Bar's priority in ensuring that clients are properly informed in matters involving professional liability, and their rights and remedies related thereto. On this basis, one could argue that absent a confidentiality exception, the state law sheltering evidence of attorney malpractice must be disclosed to clients sufficiently in advance of the mediation session, in order to enable clients to provide valid "informed consent" to the process.

From an attorney's perspective, the question of whether to make such a disclosure – and when to do so – may be a legal or ethical one, or just good business practice. Like many practitioners, you may subscribe to the theory that when in doubt, err on the side of caution and disclose. Except under extraordinary circumstances, every good attorney almost always conducts a pre-mediation strategy and preparation meeting with her client prior to a mediation session. That may present a perfect opportunity to disclose the extent of the confidentiality provisions, since it is usually a time to review that subject with your client. Or perhaps this may be a material fact you choose to raise when you first approach the idea of mediation with your client.

When speculating, one can carry it even a step further. If you believe such a disclosure is a condition precedent to free, voluntary and informed participation in mediation, what effect does that have for those who previously signed contractual agreements to mediate? Could one argue that the provision is now voidable, because confirmation by the Court that malpractice is protected, constitutes a material change in terms? Just a thought to ponder on a slow day!

At the heart of this discussion is "informed consent." Many will argue that the protection of legal malpractice is consistent with the Court's prior decisions, and the Court simply clarified this point, and the extent to which it holds mediation confidentiality to be sacrosanct. Others argue the Court has taken things too far beyond the reasonable expectation of mediating parties and, absent legislative intervention, full disclosure must be provided to clients upfront. For now, the choice is yours.

Analysis

There are three primary concerns expressed by those who oppose a confidentiality exception for attorney malpractice. First, some suggest that *any* exception to confidentiality will doom the process by making participants fear that *anything* that is said will not remain confidential. Second, others claim that there is so little malpractice that the exception is not warranted. Third, it is speculated that if an exception is allowed, there will be an onslaught of attorney malpractice complaints.

• ***Any exception dooms the process***

Few would argue that the ability to communicate confidentially is one of the hallmarks that makes mediation so successful. However, as the plaintiff in *Cassel* discovered, as well as others similarly situated, such confidentiality can come at too great a cost, when you are dealing with an incompetent, unethical or ill-intentioned attorney. The proposed exception does not contemplate admitting into evidence anything other than that which is necessary to prove the alleged malpractice. If anything, the knowledge of this exception would more likely provide mediating parties with reassurance, rather than act as a chilling effect. It can be argued that if the client had actual knowledge that any bad actions, on the part of the mediator or legal counsel during a mediation could not be disclosed, that alone could serve as a disincentive for the use of the process.

It is also important to remember that this is not strictly a pro-client exception. Under the present rule, attorneys *accused* of malpractice or bad acts, cannot defend themselves with evidence of *proper* conduct or actions during mediation, because that too would be disallowed absent the proposed exception. One could easily imagine a circumstance where a client accused an attorney of malpractice based upon the totality of the representation – the culmination of which took place during a mediation proceeding. This final meeting with the client could hold the key to the attorney's defense, yet evidence of that last session would not be admissible.

Anecdotally, it is notable that to date, the District of Columbia and the 10 states[11] that have adopted the Uniform Mediation Act ("UMA"), which incorporates an attorney malpractice exception, have all experienced an *increase* in the use of mediation. Even states that have not adopted the UMA but have enacted statutes that provide for an attorney malpractice exception, have experienced continued and/or increased use of mediation.[12] None of these states has experienced a decline in mediation usage or popularity with the public or the courts.

• ***The problem is too small to warrant an exception***

Those citing the lack of complaints as justification for not requiring an exception, fail to provide any supportive data. The likely reasons for no data are twofold: 1) Since mediation is confidential, no such data is available, and 2) Those processing malpractice complaints, including bar associations,

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insurance companies, etc., track when a claim is filed – not where it occurs.

Supporters of the exception argue that, for one who has been the victim of legal malpractice, incompetence or bad acts, once is too many times to have the problem occur if it could have been remedied with a simple exception to the confidentiality rule. Further, as cited *supra* the State Bar would be uncharacteristically passive if it did not take *every* opportunity available to avoid a single instance of attorney malpractice or misconduct, when given the opportunity to do so.

• *An exception will lead to increased malpractice claims*

There is simply no supporting evidence that indicates allowing the proposed exception will foster an increase in legal malpractice claims. In fact, as cited above, just the inverse is true. States that presently have an attorney malpractice exception within their mediation confidentiality statutes, do not display a statistically significant increase in attorney malpractice claims.[13]

Additional ethical considerations

Mediation confidentiality was designed to encourage frank and open discussions in a safe and secure environment, in order to foster settlement amongst the participants. It therefore does not follow that mediation confidentiality was intended to facilitate malpractice or other bad acts. In his concurring opinion, Justice Chin expressed his doubts that "*…the Legislature's purpose in mandating confidentiality was to permit attorneys to commit malpractice without accountability.*"[14]

Lawyers have a fiduciary duty to clients, and aggressive advocacy does not void an attorney's obligation to be both competent and truthful. Historically, the majority of bar members have worked hard to ensure that their activities and the overall image of the legal profession in general, meet the highest standards. The fact that much of the attorney discipline process relies on a "self-policing" mechanism has not altered this goal. It is therefore counterintuitive, for those who advocate in the best interests of the profession, to work against an exception that would bring to light those practitioners, who are not performing at an acceptable standard, regardless of whether the reason for the problem is negligence, as in the case of malpractice, or the result of bad or fraudulent acts.

As with any profession, everyone benefits when there is an improved public perception of the industry. If an exception is not allowed, and it becomes more universally known that legal malpractice is "protected" in mediation, it can actually become a *deterrent* to the process. Often, litigants are very distrustful and wary, simply by virtue of the complexities of the unfamiliar legal environment they have found themselves in. When considering mediation, knowing there is no protection from mistakes made by their legal counsel or the mediator, may be enough to deter them from trying the mediation alternative.

Conclusion

The solution seems rather simple. A narrow exception to the mediation confidentiality statute for attorney malpractice should be created, which only applies to the admissibility of relevant evidence during a subsequent civil or administrative malpractice proceeding – and in no other forum. This is a proven solution with effectively no downside, which benefits both the public *and* the legal profession.

Regardless of whether you believe the question of mediation confidentiality protecting attorney malpractice is a legal or ethical question, it is a question that needs to be answered. Presently, the CLRC is holding a series of meetings and gathering public input on the proposed exception.[15] No matter your position on the topic, let your voice count. Get involved and let the CLRC know where you stand on the issue.

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Endnotes

[1] *Mediation: Three Ways of Getting to " Yes"* by Doug deVries, and *What's said in Mediation Stays in Mediation, Right?* by Fred Carr. Both articles appeared in the September 2013 issue of Plaintiff Magazine.

[2] *Cassel v. Superior Court* (2011) 51 Cal.4th 113, 244 P.3d 1080.

[3] In fact, some of the conduct alleged by the plaintiff to have constituted malpractice had taken place days prior to the actual mediation proceeding. However, the Court deemed that conduct to also be protected by the mediation confidentiality provisions, because it was "in preparation" for the mediation session.

[2] Nothing herein is intended to question the merits of the Supreme Court's holding that an exception would lead to "absurd results" undermining "... the statutory purpose of California Evidence Code 1115, et seq ..." or related mediation confidentiality statutes.

[5] These few exceptions are found in California Evidence Code section1115, et seq. Other mediation-related and specialized confidentiality provisions may also be found in the Bus. & Prof. Code, §§ 467.4-467.5 (community dispute resolution programs), 6200 (attorney-client fee disputes); Code Civ. Proc., §§ 1297.371 (international commercial disputes), 1775.10 (civil action mediation in participating courts); Fam. Code, §§ 1818 (family conciliation court), 3177 (child custody); Food & Agri. Code, § 54453 (agricultural cooperative bargaining associations); Gov. Code, §§ 11420.20-11420.30 (administrative adjudication), 12984-12985 (housing discrimination), 66032-66033 (land use); Ins. Code § 10089.80 (earthquake insurance); Lab. Code, § 65 (labor disputes); Welf. & Inst. Code, § 350 (dependency mediation). See also Cal. Const. art. I, § 1 (right to privacy).

[6] *Cassel v. Superior Court*, 51 Cal.4th 113,138 (2011).

[7] Later Assemblyman Jeff Gorell became the bill's sponsor.

[8] Rules of Professional Conduct, rule 3-410(A)

[9] *Ibid.*

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[10] Rules of Professional Conduct, rule 3-410(B)
[11] The ten states that have adopted the Uniform Mediation Act include Nebraska, Illinois, New Jersey, Ohio, Iowa, Idaho, South Dakota, Washington, Utah and Vermont.
[12] Florida, Georgia, Virginia, Tennessee and others have exceptions to their mediation confidentiality statutes that address attorney malpractice. Florida has over 25 years experience with malpractice exceptions to its confidentiality rules.
[13] Florida Chapter 44, Mediation of Judicial Action, Section 44.405, (Confidentiality; privilege; exceptions): (4) Offered to report, prove, or disprove professional malpractice occurring during the mediation, solely for the purpose of the professional malpractice proceeding and (6) goes on to state, " ...solely for the internal use of the body conducting the investigation of the conduct. As an aside, Florida's confidentiality exceptions address not only attorney malpractice, but also mediator malpractice.
[14] *Id.* @ p. 139
[15] The first public hearing was held in Los Angeles in August, the second will be in Davis in October, and the third is scheduled for San Diego in December. For additional information go to the California Law Review Commission's Web site: www.circ.ca.gov.

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