Avoiding Legal Malpractice Claims Arising From Mediation

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In today’s legal landscape, the settlement of litigation is often reached outside of the courtroom, as parties resort to mediation either by their own volition or due to court mandate. To encourage the use of mediation, states have legislated mediation-confidentiality statutes that aim to insulate statements made during mediation from their use in subsequent proceedings. The increase in settlement of cases through mediation, however, raises additional legal malpractice concerns as to how courts enforce mediation-confidentiality statutes not only in the case being mediated, but also in the use of such communications in a subsequent legal malpractice suit.

This issue recently arose in Cassel v. Superior Court, 51 Cal.4th 113, 136, 244 P.3d 1080 (2011). In Cassel, the Supreme Court of California squarely addressed “the effect of the mediation confidentiality statutes on private discussions between a mediating client and attorneys who represented him in the mediation.” Id. at 118.

Michael Cassel agreed to a mediated settlement of commercial litigation and subsequently sued his attorney for malpractice, breach of fiduciary duty, fraud, and breach of contract. Id. Prior to trial, the defendant attorneys moved to exclude all evidence of private attorney-client discussions “immediately preceding, and during, the mediation concerning mediation-settlement strategies and defendants’ efforts to persuade petitioner to reach a settlement in the mediation.” Id. The trial court granted the motion, but the California Court of Appeal vacated the lower court’s order. The California Supreme Court reversed the appellate court’s decision due to a strict construction of the language of California’s mediation-confidentiality statutes.

Citing the statutory language, the California Supreme Court held that all things said or written by participants in a mediation are inadmissible in any civil action. Id. In its analysis, the court noted the purpose of the mediation-confidentiality statutes, which is “to encourage the mediation of disputes by eliminating a concern that things said or written in connection with such a proceeding will later be used against a participant.” Id. at 124. In adhering to this statutory purpose, the court found that the statutory language extended to
attorneys participating in a mediation unless “such a result would violate due process, or would lead to absurd results that clearly undermine the statutory purpose,” even if such an application may “compromise [a] petitioner's ability to prove his claim of legal malpractice.” *Id.* at 119; Thus, attorneys are participants whose statements at mediation cannot and will not be used against them in a court of law.

The primary concern raised by *Cassel* is to what extent do mediation-confidentiality statutes shield attorneys from malpractice and associated malpractice claims? Moreover, applying confidential-mediation statutes to bar evidence in a subsequent legal-malpractice action may also undermine the strength of a prospective plaintiff’s legal-malpractice claim for the attorney's failure to properly investigate and advise as to the settlement. Variations of the issues raised in *Cassel* are currently unfolding in other jurisdictions examining similar mediation-confidentiality statutes.

The Uniform Mediation Act, which has been adopted in eleven states and in the District of Columbia, provides language that would expand the exceptions to the mediation privilege differently than in *Cassel*. It specifically exempts communications sought to prove or disprove a claim of professional misconduct or malpractice by the mediator or a party, nonparty participant or representative of a party, based on conduct occurring during the mediation.

The statute in pertinent part states:

> (6) Except as otherwise provided in division (C) of this section, the mediation communication is sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediation party, nonparty participant, or representative of a party based on conduct occurring during a mediation.


Thus, in those states which have adopted this provision of the Uniform Mediation Act, including Ohio, statements made during mediation are confidential and cannot be used in court proceedings between the parties. Nonetheless, statements made during mediation appear to be available for use to assert or defend against malpractice and misconduct claims that are based on actions or conduct that take place during the mediation.

Conversely, Indiana's mediation-confidentiality rule, ADR Rule 2.11, is not as broad as the California's statute and merely declares mediation to be settlement negotiations and therefore governed by Indiana Evidence Rule 408, which provides as follows:

**Rule 408. Compromise Offers and Negotiations**

(a) Prohibited Uses. Evidence of the following is not admissible on behalf of any party either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:

(1) furnishing, promising, or offering, or accepting, promising to accept, or offering to accept a valuable consideration in order to compromise the claim; and
(2) conduct or a statement made during compromise negotiations about the claim. Compromise negotiations include alternative dispute resolution.

(b) Exceptions. The court may admit this evidence for another purpose, such as proving a witness’s bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Based upon this Rule, should the issue of mediation communications arise in an Indiana action, the analysis will likely turn on the “offered for another purpose” exception. This exception was cited by the Indiana Supreme Court in *Horner v. Carter*, 981 N.E.2d 1210 (Ind. 2013). In that case, Justice Brent Dickson stated that “[t]he admissibility provided for mediation evidence ‘offered for another purpose’ pertains to the use of such evidence only in collateral matters unrelated to the dispute that is the subject of the mediation.” *Id.* at 1212. The result in Indiana, therefore, could be that the mediation evidence would only be admissible in a separate or “collateral” bad-faith case.

In Kentucky, mediations abide by the Kentucky Model Court Mediation Rules. Rule 12 of the Ky. Model Court states:

“Mediators shall not be subject to process requiring the disclosure of any matter discussed during the mediation, but rather, such matters shall be considered confidential and privileged in nature *except on order of the Court for good cause shown*. This privilege and immunity reside in the mediator and may not be waived by the parties.” (Emphasis added.)

In other words, there is no exception to the confidentiality privilege in a subsequent legal-malpractice suit in Kentucky. What exactly “for good cause” entails has yet to be determined.

While the application of an individual state's mediation rules may vary, the fact remains that attorney misconduct at mediation is both an ethical violation and viable legal-malpractice claim. Often, claims raised against an attorney in this regard center on allegations that the attorney failed to properly prepare for mediation, coerced the client into accepting an inadequate settlement or, based upon the attorney's malpractice, the client was forced to settle a case for less than full value. Other common claims center on an attorney’s alleged failure to ensure that certain critical settlement terms are incorporated into the memorandum of understanding executed at the conclusion of the mediation or that various terms or tax consequences of the settlement were not properly explained to the client during the mediation.

Regardless of the nature of the claims raised against an attorney, and the application of the jurisdiction's mediation-confidence provisions, the best defense to defending against such legal-malpractice claims is for the attorney to properly prepare both herself and her client for mediation. In this regard, managing client expectations is critical. Avoid overly-confident or defeatist predictions, share your thoughts on the realistic value of a claim with the client, in writing, both at the inception of the lawsuit as well as after any significant case developments and in anticipation of mediation. Meet with your client well in advance of mediation to address not only the mediation process, but also why mediation is being pursued and what you have done to prepare for mediation. If a written mediation statement is submitted to the mediator prior to the mediation, then this should be shared with the client. Further, make an effort to understand your client's goals and expectation in advance of the mediation. If these expectations are not realistic, then address the misconceptions before
Avoiding wrongful settlement legal malpractice is often a matter of fully and completely communicating with the client prior to the mediation and documenting all such communications in writing. Thus, even in the event that your jurisdiction's mediation-privacy rules do not preclude a legal-malpractice claim arising from conduct occurring during the mediation process, sufficient evidence should exist to defeat the disappointed client's claims.