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PERSPECTIVE

Piercing the veil of mediation

By Rebecca Callahan

The unreported decision of the 2nd District Court of Appeal in *Amis v. Greenberg Traurig LLP*, 2015 WL 1245092 (Mar. 18, 2015), illustrates just how broad and ironclad the confidentiality protection is under California Evidence Code Section 1119, causing some to say that mediated settlement agreements are "super contracts" because they are effectively immune from attack on the grounds that they were induced by fraud, duress, coercion or other bad conduct.

In *Amis*, plaintiff John Amis was the former client of defendant Greenberg Taurig LLP. After agreeing to the settlement of a litigation matter in which Greenberg Taurig represented Amis, Amis sued the firm alleging it had committed attorney malpractice by causing him to execute a settlement agreement that converted his company's corporate obligations into Amis' personal obligations without advising him that he had little to no risk of personal liability in the underlying lawsuit.

Greenberg Taurig moved for summary judgment citing Amis' undisputed admission that all advice he received from the firm regarding the settlement was given during mediation. Based on this undisputed fact, Greenberg Taurig argued Amis could not maintain the lawsuit because he had no admissible evidence to support and prove his claims and Greenberg Taurig, on the other hand, could not produce evidence to defend itself, because the disclosure of what happened in the mediation was barred by the mediation confidentiality statutes.

The trial court agreed with Greenberg Taurig and entered summary judgment for the firm. Amis appealed. To the surprise of no one, given the California Supreme Court's near categorical prohibition against judicially crafted exceptions to the mediation confidentiality statutes "even in situations where justice seems to call for a different result," the 2nd District affirmed the trial court (citing *Cassel v. Superior Court*, 51 Cal. 4th 113, 118 (2011); *Foxgate Homeowners' Ass'n v. Bramalea California, Inc.*, 26 Cal. 4th 1, 15 (2001); *Rojas v. Superior Court*, 33 Cal. 4th 407, 416 (2004); *Fair v. Bakhtiari*, 40 Cal. 4th 189, 194 (2006); *Simmons v. Ghaderi*, 44 Cal. 4th 570, 582-583 (2008).) "The Supreme Court's holding in Cassel dictates the result we reach in this case."

Assembly Bill 2025 was introduced by Assemblyman Jeff Gorell in 2012 to create a statutory exception to mediation confidentiality for attorney malpractice and misconduct occurring during a mediation. That proposed legislation passed the Assembly and then stalled in the Senate. Objections were raised because, although the bill was designed to eliminate the unfairness of preventing clients from suing their attorneys for malpractice committed during mediation, it shifted the unfairness to the attorney defendant. As proposed, the mediation confidentiality provisions of the Evidence Code still barred the attorney from introducing testimony by other participants in the mediation (such as the adverse party and the mediator). As such, the attorney could not show that the ultimate settlement was the result of information obtained from the mediator or the adverse party because these communications remained inadmissible.

Ultimately, Gorell was unable to come up with a bill that satisfied everybody. Consequently, his solution was to refer the problem to the California Law Revision Committee (CLRC).

The CLRC is studying whether to weaken the legislative promise of mediation confidentiality and, if so, in what way. The general thought in the ADR community is that the CLRC will not recommend to leave the current mediation confidentiality statutes intact, but no one knows whether it will recommend minor tweaking, a major change or something in between.

The following are some of the questions that ADR authority Paul J. Dubow believes "could very well be on the minds of the CLRC members."

1. Should confidentiality be eliminated completely, leaving only actual settlement offers to be inadmissible? (Note: Without the blanket confidentiality that presently exists, the Superior Court would have been aware of the alleged lack of good faith by one of the *Foxgate* attorneys; the crucial photographs in *Rojas* would have been subject to discovery by the building occupants in their lawsuit; the Simmons family might have been able to enforce the settlement agreement entered into by Dr. Ghaderi; the dispute over the mediated settlement agreement in *Fair v. Bakhtiari* might have been arbitrated; and Mr. Cassel might have been able to introduce evidence that would have demonstrated his attorneys' alleged malpractice.)

2. Should a statutory exception be enacted for attorney malpractice? If so, should other participants in the mediation be allowed to testify? Should the mediator be allowed to be called as a witness?

3. Should an exception for attorney malpractice be limited to those that ring the bell with the State Bar?

4. Should there be an exception for insurance bad faith lawsuits so that the insurer could show that it made a reasonable settlement offer during the mediation? (Note: This is consistent with what at least one federal district court has ruled. See, *Milhouse v. Travelers Commercial Ins. Co.*, 982 F.Supp. 2d 1088 (C.D. Cal. 2013).)

5. Should there be an exception that would allow a party to introduce documents produced during a mediation that were developed for the purpose of justifying a party's position concerning its claims or defense, such as was the case in *Rojas*?

6. What other exceptions are necessary to eliminated perceived unfairness caused by mediation confidentiality? Is there any amendment that will be perceived as "fair" by everyone?

7. If no exception of attorney malpractice is enacted, should there be a provision for a cooling off period during which mediation parties can withdraw from their agreement to settle? If so, how long should that period be?

8. If no exception to attorney malpractice is enacted, should attorneys be required to inform clients in advance of mediation that any communications between them that occur during or in connection with the mediation will not be admissible in any malpractice lawsuit that the client might later bring against the attorney?

9. Should mediators be required to advise mediation participants that the confidentiality rules extend to communications between attorney and client that are had during the mediation — even if no others are present — and hence they would not be admissible in a malpractice lawsuit that the clients might later bring against their respective attorneys?

10. Should mediation participants be allowed to sue the mediator for engaging in coercive tactics in order to get the party to agree to accept a settlement?

11. Should Evidence Code Section 703.5 be amended to allow mediators to be competent to testify? If so, should such an amendment be limited to cases where "good cause" is shown? And what qualifies as "good cause" — the need for a tie-breaker between contesting parties?

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