WILL PORTER v WYNER AND CASSEL CHANGE MEDIATION FOREVER?

Lucy and her attorney, Alfred, walk the short block to the offices where the mediation is to take place. After several hours of intense negotiations at mediation including Alfred's direct threat, privately made, to withdraw as legal counsel unless Lucy agrees to a settlement of $6.7 million, Lucy agrees to and executes a $6.7 million settlement agreement, of which $1.6 million is for attorneys fees and costs.

After receipt of the settlement proceeds in full and dismissal with prejudice of the lawsuit, Lucy sues Alfred for failure to pay her $200,000 from the attorneys' fees portion of the settlement proceeds. Lucy contends that at the closing stages of the mediation just after Alfred threatened to withdraw as legal counsel, Alfred promised his firm would pay Lucy $200,000 as part of the attorneys' fees portion of any settlement. Lucy says her oral agreement at the entirely private attorney-client meeting is not covered by mediation confidentiality and its evidentiary exclusion of mediation related communications.

Alfred Attorney responds that: (a) the total attorneys' fees received were far less than the original contingency fee agreement Lucy had with Alfred's firm and (b) it is manifestly unfair for Lucy to present her claims while Alfred is barred from introducing the unquestionably confidential negotiations at the joint session at which Lucy expressly dropped her demand for $200,000.

Should a jury be permitted to hear Lucy's claim of how Alfred broke his promise to her that he would pay Lucy $200,000 more from the mediated allocation of $1.6 million in attorneys' fees and costs?

Although the facts are somewhat modified, two recent cases answer the question of the admissibility with a resounding "Yes." *Porter v Wyner*, 2010 Cal.App.LEXIS 487 (decided April 8, 2010) and *Cassel v Superior Court* (2009) 179 Cal App 4th 152 (review granted by California Supreme Court, Case No. S178914). "Yes," these recent cases carve a judicially created exception to mediation confidentiality for private attorney-client communications at mediation.

The California Supreme Court strongly discouraged the courts from crafting new exceptions to mediation confidentiality in *Foxgate v Bramalea* (2001) 26 Ca. 4th 1, 14 and its progeny. "[F]rank exchange is achieved only if **participants** know what is said in mediation will not be used to their detriment through later court proceedings and other adjudicatory process." *Rojas v Superior Court* (2004) 33 Cal. 4th 407, 415-416, citing *Foxgate* (emphasis added).

More recently, the California Supreme Court in *Simmons v. Ghaderi* (2008) 44 Cal.4th 570 at 588 held: "Allowing courts to craft judicial exceptions to the statutory rules would run counter to [the Legislature's] intent. Both the clear language of the mediation statutes and our prior rulings support the preclusion of an implied waiver exception. The Legislature chose to promote mediation by ensuring mediation confidentiality rather than to adopt a scheme to ensure good behavior in the mediation and the litigation process."

Only two judicially carved exceptions to the evidentiary exclusions for mediation confidentiality are cited with approval in California Supreme Court opinions: *Olam v Congress Mortgage Co.* (N.D. Cal.

1999) 68 F. Supp. 2nd 1110 (mental competency); and *Rinaker v Superior Court* (1998) 62 Cal. App. 4th 155] (right to put on a defense in a quasi-criminal case). See *Simmons, supra*.

Further, the Supreme Court has upheld cases which because of mediation confidentiality have shielded improper and even illegal conduct. *Wimsatt v Superior Court (Kausch*) (2007) 152 Cal.App.4th 137 (preventing a client from adducing mediation related communications may have the harsh result that the client must forego his legal malpractice lawsuit against his own attorneys); *Doe 1 v Superior Court* (2005) 132 Cal. App. 4th 1160 (shielding the summaries of personnel records of priests accused of 500 cases of child molestation which were prepared for mediation); *Eisendrath v Superior Court* (2003) 109 Cal. App. 4th 351 (excluding from evidence prior inconsistent statements necessary to demonstrate the intended meaning of a settlement agreement).

As to whether the Legislature intended to shield legal malpractice through mediation confidentiality, *Foxgate* , supra at 17 fn 13, notes that the Legislature recognized that the effects of broad mediation confidentiality provisions would be adverse to protecting the public against incompetent and/or unscrupulous attorneys.

"[W]hen clients…participate in mediation they are, in effect, relinquishing all claims for new and independent torts arising from mediation, including legal malpractice causes of action against their own counsel." *Wimsatt v Superior Court, supra,* at 163.

Nevertheless, the majority opinions in *Porter* and *Cassel* each creatively invoke legislative history and dicta from *Foxgate* and *Rojas* to distinguish away the seemingly unambiguous statutory language of evidentiary exclusion in Evidence Code sections 1119(a) and (c), in order to permit an aggrieved client to have a trial on the issue of whether counsel committed legal malpractice or breached its contractual obligations to a client.

Peter Robinson, Managing Director of the Straus Institute for Dispute Resolution, coined the term "Super Contract" to refer to a mediation settlement agreement in California because it must be enforced without resort to extrinsic evidence (mediation related communications) even in the face of allegations of fraudulent inducement occurring at the mediation, mutual mistake of a material fact, a scrivener's error or simply the clarification of ambiguous language that could be resolved by introducing mediation communications and evaluating their credibility, as fact finders routinely do in civil cases. Robinson, Centuries of Contract Common Law Can't All Be Wrong (2003) *J. Disp. Res.* 135.

Interestingly, mediation confidentiality demands far more extensive confidentiality than the basic statutes governing admissibility of evidence of settlement communications, *Evidence Code* Sections 1152 and 1154.

Attorneys frequently write in settlement negotiation communications, "This settlement offer is privileged and confidential pursuant to California *Evidence Code* Sections 1152 and 1154." Yet, it would be unusual for any attorney to believe that this language shields an attorney from a malpractice claim and that evidence of malpractice would be excluded in a subsequent civil malpractice proceeding.

That is because the evidentiary exclusion of settlement communications pursuant to *Evidence Code* Sections 1152 or 1154 is limited to use of evidence of a settlement offer to prove liability for, or invalidity of, a claim. The communication is not excluded for other purposes. See Edward G. Weil, "Are Settlement Talks Confidential?" *Daily Journal* (a good discussion of the scope of *Evidence Code* Section 1152). This limitation is contained in the language of the statutes.

However, the mediation confidentiality statutes, *Evidence Code* sections 1115 et seq., contain different language. Mediation confidentiality is not a "privilege" that can be waived. Mediation confidentiality is not limited to exclusion of evidence of settlement only for a particular reason, as is true for *Evidence Code* sections 1152 and 1154. It is a law of exclusion of evidence based on public policy.

Could Attorney Alfred have avoided the problem with Client Lucy by providing her with appropriate warnings before the mediation? We will address this question in our next installment.

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