NEW CASES SUGGEST “WIMSATT WARNINGS” ARE A BETTER PRACTICE

Attorney Alfred has gotten himself in a pickle. His client, Lucy, is unhappy with his performance at mediation in a case he handled for her, even though the mediation resulted in millions of dollars for Lucy. Now she is suing him based on representations she claims he made to her privately during the mediation. But Alfred cannot introduce statements made in front of the mediator or other party to the mediation because such evidence is excluded by the law of mediation confidentiality.

What are the public policy reasons for the expansive evidentiary exclusions of our mediation statutes, even though our basic settlement privilege statutes, *Evidence Code* Sections 1152 and 1154, do not shield negligent or intentional wrongdoing by legal counsel?

Three reasons are most commonly proffered.

One, allowing a client to provide testimony about an alleged malpractice or breach of oral contract during a private caucus between just the attorney and the client would be inherently inequitable and unfair to the attorney. After all, the attorney would be precluded from introducing any exculpatory or explanatory contextual information as to what happened during the mediation when the mediator or opposing side was present because that communication would clearly be covered by the evidentiary exclusions of *Evidence Code* Section 1119.

In *Benesch v Green*, (N.D. Cal.) U.S. LEXIS 117641 (Dec. 17, 2009); 2009 WL 4885215, in a case not dissimilar to interpreting the rational basis for California’s expansive mediation confidentiality provisions, the Court held: [I]t would be inequitable and unfair if Plaintiff could provide evidence of communications with Defendant when they were alone together during the mediation, but Defendant, by virtue of the mediation confidentiality statutes, could not defend herself with other relevant evidence such as communications with opposing parties in the mediation and/or the mediator. While a client may desire a certain term in a comprehensive settlement and initially tell her attorney that she insists on it, it is not uncommon at a mediation -- when, for example, opposing parties communicate a refusal to agree to that term or the mediator provides a persuasive reason why it cannot be part of the settlement -- that the client accepts the need to compromise and agrees to drop the condition. Thus, it would be inequitable to prevent Defendant from presenting any such evidence of what was said or done in the course of, for the purpose of, or pursuant to the mediation. See also, Appellant’s Reply to Cassel’s Answer to Petition, January 26, 2010 Cal. Supreme Court, *Cassel*, supra.

Two, consistent with Cal. *Bus. & Prof. Code* Section 6068(m), an attorney must be brave enough to risk the ire of the client and fully inform the client of the potential risks, costs and uncertainties of ongoing litigation. Preparation for mediation often includes more candid disclosures than an attorney may have previously provided to a client earlier in the litigation when the attorney is in the information gathering stage and the client expects the attorney to be a strong advocate.

Detailed discussion about whether the client’s attitudes, status, past acts or statements will be regarded unfavorably by a likely jury pool, whether the client’s deposition testimony may seriously jeopardize a favorable outcome of the case, whether the client may be regarded as having failed to avoid or mitigate the harm caused by his or her own choices, are important components in Reality Testing in

mediation, in which a client must realistically evaluate the worth of continuing with litigation, rather than settling.

Also, mediation often occurs at a time the client is becoming increasingly aware of the economic uncertainty of litigation costs and the risk it may be difficult to justify or perhaps pay mounting legal fees.

In a myriad of ways, a client who is confronted belatedly and forcefully at mediation with the risks of litigation may come to feel during mediation that he has been dropped into a 'hot cauldron' from which the capacity to make reflective choices is not possible – both because there is insufficient time and space for the client to consider alternatives appropriately and because the ability to experience the feedback and benefits of a secure support network of family, friends and advisers is often not present at mediation.

Apparently, the Legislature did not want such a client to have an easy path of revisiting the mediation settlement's wisdom through a subsequent legal malpractice lawsuit. Clients who are mentally competent and properly informed about mediation confidentiality are presumably capable of stepping back and seeking additional time to think for themselves or to get further advice from family, friends and other attorneys, and to insist on each oral agreement being placed in writing if they are experiencing the feeling that there is too much emotional pressure at mediation or too much new and adverse information being placed before them to process appropriately.

The certainty and finality that parties seek through mediation resulting from a frank and candid exchange of information between each of the mediation participants, including between a litigant and counsel, may justify the Legislature's preference for excluding evidence of legal malpractice occurring at mediation by negligent or even unscrupulous attorneys during the brief stressful time periods that may occur during mediation. *Foxgate* supra at 17 fn13.

Three, both buyer and seller 'remorse' are well-known psychological phenomena. Settling a major dispute often gives rise to feelings of 'remorse', particularly when the settlement is unexpected and differs from the recent expectations of the litigant, who may have agreed to reasonable, but unanticipated, concessions at mediation. California courts have recognized the litigation risk of settler's remorse. See *Fair v Bakhtiari* (2006) 40 Cal. 4th 189,198; *Barnard v. Langer* (2003) 109 Cal. App. 4th 1453, 1461 fn12

Since the risk of a subsequent malpractice action motivated by 'remorse' exists in the context of any and every settlement, this third argument suggests that the Legislature recognized the 'hot cauldron' aspect of the mediation process and approves of it.

While the California Supreme Court may decide in *Cassel* and perhaps in *Porter*, whether and when the right of a client to gain relief from mediation confidentiality statutes to pursue counsel with evidence arising from private attorney client communications, the appellate opinion of *Wimsatt* contain an important cautionary lesson for attorneys who wish to avoid being a similar target of post-mediation malpractice litigation: "In light of the harsh and inequitable result of mediation confidentiality statutes (*Evid. Code* Section 1115 et. seq.), the parties and their attorneys **should be**

warned of the unintended consequences of agreeing to mediate a dispute. *Wimsatt* supra at 164 (emphasis added).

Two clear "Wimsatt Warnings" should be drafted as part of an attorney's retainer letter with a prospective client.

First Warning: Communications made in the course of the mediation process are entitled to special protections of confidentiality that are likely to prevent a client from being successful in setting aside a mediation agreement for fraudulent procurement, intentional misrepresentation, mutual mistake as to a material term or even a scrivener's error, as well as for other reasons which are otherwise available to rescind or modify a signed agreement. Were the same settlement agreement made outside of a mediation it would be a contract for which such defenses to rescind or to modify are likely to be permitted. If you agree to be bound by mediation confidentiality, you agree that you and your attorney's ability to correct errors in the mediation settlement agreement will be significantly limited.

Second Warning: To the extent you choose to seek resolution using the process of mediation and you are dissatisfied with our representation of you at mediation, you may not be able to introduce evidence in any subsequent lawsuit or administrative action against our firm that we provided negligent or wrongful advice to you during the mediation process. This is because of special mediation confidentiality rules enacted by the Legislature and approved by the California Supreme Court.

Conclusion. Perhaps, just perhaps, attorneys who fail to give written *Wimsatt* Warnings prior to taking a client into mediation will be exposing themselves and their firm to potential malpractice lawsuits for a failure to inform adequately a client of the likely limitations to a client's rights and remedies based on California's expansive view that most mediation related communications are intended to be shielded from subsequent court scrutiny.

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