Tips on Getting to the Goal Line in Civil Litigation Part II

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The California Supreme Court, Justice Marvin Baxter, one of the court's known conservatives writing the opinion, has spoken on mediation confidentiality. The Court held that the mediation privilege prevents a client from using testimony regarding what his lawyer told him or did during a mediation in a legal malpractice case by the client against the attorney. The point is that a lawyer can commit malpractice at a mediation and no one will hear about it! Fair? Unfair? The reaction is divided. (See, Kichaven, "Mediation Confidentiality and Anarchy: The California Nightmare," The Los Angeles Daily Journal, February 17, 2011, p. 4.) .

In Cassel v. Superior Court, 51 Cal. 4th 113, 244 P. 3d 1080 (January 13, 2011), the client brought an action against attorneys who represented him in a mediation in a malpractice, breach of fiduciary duty, fraud, and breach of contract action. At trial the attorneys made a motion in limine using the statute relating to mediation confidentiality (Cal. Evid. Code §1119(a), (b)) to exclude all evidence of communications between the client and the lawyer that were related to the mediation, including what was discussed in pre-mediation meetings and private communications between the client and attorneys during the mediation. The trial court granted the motion; the client sought a writ of mandate, which a Court of Appeal granted. The Supreme Court granted review and reversed the Court of Appeal.

Essentially the Supreme Court upheld a broach protection of mediation communications between a client and his lawyer: mediation related communications and discussions between a client and his lawyer are confidential, and therefore were neither discoverable nor admissible for purposes of proving a claim of legal malpractice.

It also held that the application of mediation confidentiality statutes to legal malpractice actions does not implicate due process concerns so fundamental that they might warrant an exception on constitutional grounds.

So there; that is that! Done, over.

In so holding, Justice Baxter said up front in the opinion:
"We have repeatedly said that these confidentially provisions [the Cal. Evid. Code cited, supra] are clear and absolute. Except in rare circumstances, they must be strictly applied and do not permit judicially crafted exceptions or limitations, even where there is a competing public policies may be affected. (Citations omitted.)"
The ruling also could affect other types of tort or contract claims arising out of mediation practice, including mediator malpractice and insurance bad faith. The ruling has been criticized because it a) prevents the truth from being known, and b) it violates the basic principle that for every wrong there is a remedy. These are points that Mediator Kichaven makes in the cited article.
While Justice Baxter has surrounded the mediation process with an aura of strict confidentiality, his view contrasts with the Uniform Mediation Act (www.nccusl.org). In this Act, a "mediation communication is a privileged." Section 4(a). However, under Section 6(a)(6), "There is no privilege under Section 4 for a mediation communication that 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." So, under that approach, the testimony of Cassel, the lawyer, is both discoverable and admissible. It is not protected, and is available in a legal malpractice case, mediator misconduct action or insurance bad faith case. Makes sense to me. It also made sense to the National Conference on Uniform State Laws and those serving on the Advisory Committee on the Uniform Mediation Act and its Reporter, Professor Nancy Rogers of the Moritz College of the Law (a former dean of the law school), and Associate Reporter, Professor Richard C. Reuben of the University of Missouri Law School.

If the rule were otherwise from what Justice Baxter and his colleagues (Justice Chin concurred "reluctantly") held, would the exception to confidentiality discourage mediation? Mr. Kichaven covers this point and quotes Professors Rogers and Reuben who seem to think not. Also Mr. Kichaven points out that settlement conferences held under the auspices of the court system are not be subject to the mediation privilege in California [although there is a confidentiality as to what takes place which prevents disclosure at trial of the offers, counters and discussions]. So the lawyer could be sued for malpractice for conduct at a court supervised settlement conference but not a private mediation. That does not seem to be right; it is illogical and cannot be rationally justified.

Coincidently a couple of weeks after this case was handed down, in walks a client with a potential legal malpractice claim against his attorney who allegedly sold the client "down the river" at a mediation, which the client did not find out about until after the deal was done. But the client is now foreclosed from pursuing that claim – or even considering it. An injustice? Who knows as the client will never find out; he cannot.

So what will happen now in California? My sense is that the trial lawyer groups in California will mount a campaign to the California Legislature to amend the statute to overrule Justice Baxter. With a democratic governor, and a lawyer, Governor Brown, there may be a good chance of altering this rule which puts the clamps on claims that arise from a client's participation in mediation. There is no reason to protect anyone from a sound legal claim if they do not do their job or breach their duties to those to whom they are owed. Professional responsibility is just that – a responsibility to conduct ourselves in any process relating to our representation of a client. What is more important than the mediation process which is designed to allow clients to explore a settlement alternative to trial. There is no reason to allow any protection from professional responsibility and the standards that we must meet in such an important aspect of the overall litigation process.

I agree with Mr. Kichaven: it is a bad decision, is against the weight of thought and analysis as manifested by the Uniform Mediation Act, and needs to be overruled by the Legislature.

Let me here your views to gkornblum@kornblumlaw.com.

Good Mediating. . .