

## Legal Malpractice Update

### **California Supreme Court Rules that Attorney-Client Communication For the Purpose of Mediation is Inadmissible Evidence in Legal Malpractice Cases**

**By: Jason E. Fellner**

On January 13, 2011, the California Supreme Court determined as a matter of statutory construction that an attorney's mediation-related discussions with a client were confidential and, therefore, were neither discoverable nor admissible for purposes of proving a claim of legal malpractice. (*Cassel v. Superior Court*, 2011 WL 102710). The recent Supreme Court decision will have an immediate impact on legal malpractice litigation in California.

The Supreme Court's decision stemmed from a case in which the plaintiff client brought an action against his former attorneys who represented him in mediation for legal malpractice. At trial, the defendant attorneys brought a motion in limine under the mediation confidentiality statutes to exclude all evidence of communications between attorneys and client that were related to the mediation, including all matters discussed at the pre-mediation meeting and private communications between plaintiff client and defendant attorneys while the mediation was under way. The trial court granted the motion finding that the attorney-client communications that occurred at mediation, even those discussions that occurred in private and away from any other mediation participant, could not be used in evidence at trial to prove plaintiff's case. Plaintiff client sought mandate, which was granted by the Court of Appeal.

In reaching its decision to reverse the Court of Appeal and uphold the trial court order, the Supreme Court analyzed the express statutory language of the mediation confidentiality statutes in Evidence Code § 1119. The Court found that the "[t]he obvious purpose of the expanded language [of § 1119] is to ensure that the statutory protection extends beyond discussions carried out directly between the opposing parties to the dispute, or with the mediator, during the mediation proceedings themselves. All oral or written communications are covered, if they are made 'for the purpose of' or 'pursuant to' a mediation (§ 1119, subds. (a), (b).) *It follows that, absent an express statutory exception, all discussions conducted in preparation for a mediation, as well as all mediation-related communications that take place during the mediation itself, are protected from disclosure. Plainly, such communications include those between a mediation disputant and his or her own counsel, even if these do not occur in the presence of the mediator or other disputants.*" (*Id.* at p. 2 (emphasis added).) The court further emphasized that the application of mediation confidentiality statutes to legal malpractice actions does not implicate due process concerns. (*Id.* at 14.)

The Supreme Court intimated that its decision could be altered by legislative changes to the mediation confidentiality statutes: the "Legislature is free to reconsider whether the mediation confidentiality statutes should preclude the use of mediation-related attorney-client discussions to support a client's civil claims of malpractice against his or her attorneys." (*Id.* at 15.)

The significance of the Supreme Court decision is that neither an attorney nor a client in a legal malpractice case can point to attorney-client communications that occurred within the mediation context as evidence in support of their respective claims or defenses. As the Court

pointed out: “the mediation confidentiality statutes work *both ways*; they prevent *either* party to the malpractice suit from disclosing the content of their private mediation-related communications unless (1) the other agrees by the statutory means, and (2) the disclosure reveals nothing said or done in the mediation proceedings themselves.” (*Id.* at p. 12, fn. 10 (emphasis in original).)

Despite the Court’s assurances, it is more likely that defendant attorneys will benefit from the Supreme Court’s decision to a greater degree than plaintiffs because the Court’s ruling limits the type of evidence a plaintiff may use in support of his or her legal malpractice claim. Without the use of such evidence, a plaintiff is more vulnerable to defendants’ pre-trial motions to dismiss, motions in limine, and motions for nonsuit.

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