THE RECORDER
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Viewpoint: Mediation Confidentiality, We Need Exceptions

By Richard Zitrin Contact All Articles

Back in the mid-1990s, there was a general perspective among mediators that California law provided inadequate confidentiality within the mediation process. Then in 1997, the legislature passed the California Mediation Act, which included a chapter on confidentiality and privilege, at Evidence Code §§1115 *et. seq*. This legislation set forth virtually absolute rules protecting confidentiality in the mediation process.

Then, the court of appeal decided *Foxgate Homeowners' Association v. Bramalea California Inc.*, 78 Cal.App.4th 653 (2000). In *Foxgate*, an appointed hybrid mediator/discovery master required the parties to appear with their experts for five days of hearing. Defense counsel refused to bring his experts, saying he didn't want to respond to the plaintiff's frivolous claim. The mediator prepared a report to the court, a procedure the parties had agreed to, and based on that report's conclusion that counsel had delayed and obstructed the mediation process, the trial court sanctioned defense counsel. The appeals court wrote that "[w]hile confidentiality is essential to make mediation work, so too is the meaningful, good faith participation of the parties and their lawyers." Concluding that no privilege should be read so broadly as to immunize parties and their lawyers from sanctions for disobeying court orders, the court held the mediation privilege must be waived notwithstanding the clear statutory language.

Most mediators who read this opinion were worried if not appalled that all the gains in confidentiality had been snatched away by the appeals court. But their fears were soon assuaged by the state's highest court. In its *Foxgate* opinion, 26 Cal.4th 1 (2001), the California Supreme Court, saying that confidentiality is essential to effective mediation, held that the new act provided for "no exceptions," and that the statute "unqualifiedly bars disclosure of communications" in the mediation. It reversed the appellate court and held that the mediator/referee could not report the conduct of defense counsel, even if the mediator thought

counsel acted in bad faith. The two competing issues of good faith and confidentiality directly squared off in *Foxgate*, and confidentiality won. Mediators heralded the day, I among them.

But we were wrong. A statute that allows for "no exceptions" often results in serious unintended consequences. So was it with the California Mediation Act.

In 2011, the California Supreme Court again opined on this act and again found the confidentiality protections immutable. *Cassel v. Superior Court*, 51 Cal.4th 113 (2011), concerned a client who filed a complaint against his own lawyers for legal malpractice due to advice below the standard of care given prior to and at the mediation. "Petitioner's deposition testimony," noted the court, "was consistent with the complaint's claims that his attorneys employed various tactics to keep him at the mediation and to pressure him to accept [the opposing party's] proffered settlement for an amount he and the attorneys had previously agreed was too low." But the plaintiff's own testimony as to his lawyer's incompetence was ruled inadmissible:

"The plain language of the statutes compels us to agree with ... the legislature's explicit command that, unless the confidentiality of a particular communication is expressly waived, ... [it] extends beyond utterances or writings 'in the course of' a mediation, and thus is not confined to communications that occur between mediation disputants during the mediation proceeding itself....

Plainly, such communications include those between a mediation disputant and his ... own counsel, even if these do not occur in the presence of the mediator or other disputants."

The *Cassel* court recognized the extreme consequences of its opinion, but felt compelled to "apply the plain terms of the mediation confidentiality statutes to the facts of this case unless such a result would violate due process, or would lead to absurd results that clearly undermine the statutory purpose." Justice Ming Chin, concurring "reluctantly," noted that "this holding will effectively shield an attorney's actions during mediation, including advising the client, from a malpractice action even if those actions are incompetent or even deceptive. ... This is a high price to pay to preserve total confidentiality in the mediation process."

Too high a price. If the *Cassel* result was not so "absurd" as to "undermine the statutory purpose" in the unanimous view of our seven highest jurists, then the legislature must change the statute so that the unintended consequences of protecting incompetent, "deceptive," and even overtly dishonest lawyers who hurt their own clients can be corrected.

Want an example? I have recently been involved in a matter in which, in the underlying case, the plaintiffs' attorneys settled with a bank on behalf of a large number of individual plaintiffs without their clients being present at the mediation or even being aware of that the mediation was taking place. The lawyers then drafted a settlement agreement between the bank and the lawyers. Almost a year went by until the lawyers told their clients about the settlement, offered each client a pittance, and left the lawyers with millions of dollars in unearned fees. Fraudlent? Clearly. Criminal? Very possibly. But when the civil suits were filed by the clients against the lawyers, the lawyers tried to hide behind the mediation privilege; they claimed, as mediation

"participants," their conversations with the bank's lawyers at the mediation and afterwards were confidential and privileged. Even though their own clients had no idea what they were doing.

This, obviously, is an extreme case, and one in which, I believe the mediation privilege will fail. But its extreme facts harken back to the danger of the Mediation Act as drafted — that, to paraphrase Justice Chin, the act will be used to shield even deceptive (or crooked) lawyers.

Privilege and confidentiality are vitally important to the mediation process. I'm glad *Foxgate* protected that process. But while the court's reasoning is understandable, the *Cassel* case leads to an absurd result — one that allows lawyers to be sloppy, negligent and incompetent without cost to them, and even worse, to cheat their clients with impunity. Lawyers who says at mediation "I'll quit your case tomorrow if you don't settle," or "I want a 10 percent higher contingency fee before I 'let you' settle" get a free pass under the current statutes.

These statutes must be changed. The Uniform Mediation Act, approved in 2003, and now adopted or closely followed in 16 states, has a firm but wiser confidentiality policy. From the summary of the act written by the National Conference of Commissioners on Uniform State Laws:

"[T]he central rule of the UMA is that a mediation communication is confidential, and if privileged, is not subject to discovery or admission into evidence in a formal proceeding." But "as is the case with all general rules, there are exceptions." Among them:

• "Evidence that is otherwise admissible or subject to discovery";

• "A party that discloses a mediation communication and thereby prejudices another person in a proceeding is precluded from asserting the privilege to the extent necessary for the prejudiced person to respond";

• "A person who intentionally uses a mediation to plan or attempt to commit a crime, or to conceal an ongoing crime";

• A communication "made during a mediation session that is open to the public, that contains a threat to inflict bodily injury, that is sought or offered to prove or disprove abuse, neglect, abandonment, or exploitation [of] a child"; or

• A communication "that would prove or disprove a claim of professional misconduct filed against a mediator, or against a party, party representative, or non-party participant based on conduct during a mediation."

The UMA exceptions make sense. So does the recognition that any general rule needs exceptions. California needs a strong mediation confidentiality rule. We also, clearly, need reasonable exceptions.

Richard Zitrin is a professor at UC-Hastings and of counsel to San Francisco's Carlson, Calladine & Peterson. He is the lead author of three books on legal ethics, including The Moral Compass of the American Lawyer.