Mediation Confidentiality Should Be Inviolate

By Frank Garfield
Los Angeles Daily Journal,
November 25, 2009

On November 12, 2009, the Court of Appeal for the Second Appellate District decided by a vote of 2-1 that mediation confidentiality did not apply to communications between attorney and client during the course of a mediation. *Cassel v. Los Angeles Superior Court*, No. B215215. In dissent, Justice Perluss opined that the Court should not look for excuses to create exceptions to the principle of mediation confidentiality. Based on an unambiguous public policy and a prior admonition from the California Supreme Court disapproving judicially created exceptions to that policy, Justice Perluss had it right.

The pertinent facts of the case are as follows: Cassel and his attorneys participated in a mediation on August 4, 2004, which resulted in a signed settlement agreement. Cassel subsequently sued his attorneys for malpractice alleging that they forced him to settle for a lower amount than the one he had in mind. Cassel attempted to introduce evidence of conversations and conduct that occurred solely between him and his attorneys. Attorneys contended that mediation confidentiality rendered the conversations inadmissible. The trial court excluded the evidence. Cassel appealed. The Court of Appeal reversed.

On appeal, the attorneys relied on *Wimsatt v. Superior Court* (2007) 152 Cal.App.4th 137. In that action, the client alleged that his attorneys breached their fiduciary duty by lowering the dollar amount of the client's settlement proposal without the client's knowledge or consent on the eve of the mediation. In excluding communications on the basis of mediation confidentiality, the appellate court in that case stated that: "[t]he stringent result we reach here means that when 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. Certainly clients, who have a fiduciary relationship with their lawyers, do not understand that this result is a by-product of an agreement to mediate." *Id.* at 163.

The *Cassell* court concluded that this statement was insufficient authority for a broad and unqualified rule on two grounds.

First, the *Wimsatt* court qualified its own holding by stating that "[p]reventing [a client] from accessing mediation-related communications *may* mean he must forgo his legal malpractice lawsuit against his own attorneys." *Id.* at 162.

Second, the *Wimsatt* court barred the disclosure of statements in mediation briefs and emails, but concluded with respect to telephone conversations that the attorneys had the burden of showing that the conversations were materially related to the mediation; for that reason, the timing, context, and content of those conversations had to be considered. The Court then found that the attorneys had failed to meet their burden to link the conversation at issue to a mediation session and admitted evidence of that conversation.

Wimsatt chipped away at the principle of mediation confidentiality by holding that a settlement demand made by one party's attorney to the other between the first mediation session and the second

mediation session was admissible. *Cassel* chips away at the principle of mediation confidentiality by concluding that conversations and conduct that occur solely between a party and his attorneys in connection with a mediation are also admissible.

The majority reasoned that the principle of mediation confidentiality does not apply to otherwise admissible communications between a client and his attorneys:

> Legislative intent and policy behind mediation confidentiality are to facilitate communication by a party that otherwise the party would not provide, given the potential for another party to the mediation to use the information against the revealing party; they are not to facilitate communication between a party and his own attorney.

The dissent noted that the majority's ruling was at odds with the Supreme Court's repeated disapproval of "judicially crafted exceptions" to the mediation confidentiality statutes. See *Foxgate Homeowners Assn. v. Bramalea California, Inc.* (2001) 26 Cal.4th 1, 14; *Rojas v. Superior Court* (2004) 33 Cal.4th 407, 424; *Fair v. Bakhtiari* (2006) 40 Cal.4th 189, 194. Justice Perluss also relied heavily on the broad language of Section 1119(a) of the *California Evidence Code*:

> No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery, and disclosure of the evidence shall not be compelled, in any . . . civil action . . . .

The statute is not limited to statements made "in the course of" a mediation, but rather covers all statements made *for the purpose of, in the course of, or pursuant to* a mediation. The dissent concluded: "That is, private, unilateral statements that are materially related to the mediation are inadmissible and protected from disclosure, even if they are not communicated to another party or the mediator and do not otherwise reveal anything said or done in the course of the mediation itself."

The dissent acknowledged the majority's concern that protecting private communications between a client and his attorneys under the rubric of mediation confidentiality could shield lawyers from malpractice actions without furthering the fundamental policies favoring mediation; hence the majority's willingness to create an exception to mediation confidentiality. Justice Perluss was simply unpersuaded that this concern justified the Court is usurping the role of the legislature to balance competing public policies.

There is no question that the desire to do justice in any particular case may conflict with public policy, but the issue is whether this authorizes the courts to create exceptions to an important public policy on a case-by-case basis.

First, all public policies may operate unfairly in certain cases. The occasional injustice is the result of any hard and fast rule.

Second, it is the province of the legislature to balance competing public policies, particularly in this area. In *Wimsatt*, the Court noted that it was important to resist attempts to narrow the scope of mediation confidentiality "even in situations where justice seems to call for a different result." In *Foxgate*, the

Supreme Court itself recognized that upholding confidentiality in the case before it left unpunished sanctionable conduct and, in effect, undermined the entire purpose of mediation.

Third, the existence of judicially created exceptions to the public policy of the State of California encourages litigation with respect to additional exceptions that a party may contend are essential to punish sanctionable conduct, or facilitate recovery for a lawyer's malpractice, or otherwise promote the interests of justice.

Why does what some may consider an insignificant limitation on the principle of mediation confidentiality matter? The *Cassel* majority may have believed that they were carving out an extremely narrow exception to that principle. After all, the attorney-client communications at issue would have been admissible in all other circumstances. The only ground for excluding them was that they took place during the course of a mediation. But this is true of all communications. For example, communications between the parties may be admissible as an admission or a declaration against interest. They are nonetheless protected if they take place during the course of mediation.

It is important to remember that the principle of mediation confidentiality is a public policy of the State of California. It is not a privilege that can be waived by the holder. Thus, even if the parties purport to waive the protection of the statute and agree that the mediator may testify to what transpired during the mediation, or to his or her understanding of the parties' settlement, the principle of mediation confidentiality protects the mediator as well as the parties. The occasional case in which a judge compels a mediator to testify is a harbinger of the mischief that would result if a public policy adopted by the legislature became riddled with exceptions created by the courts. See, *e.g.*, *Marriage of Kieturakis* (2006) 138 Cal.App.4th 56.

The purpose of mediation confidentiality is to assure all participants – parties, attorneys, and mediator – that what they say during the course of a mediation cannot and will not ever be used against them in a court of law. As the *Foxgate* court put it: "To carry out the purpose of encouraging mediation by ensuring confidentiality, the statutory scheme . . . unqualifiedly bars disclosure of communications made during mediation absent an express *statutory* exception." (Emphasis added.) The attorneys who participate in the mediation process are no less entitled to that protection than the parties they represent.

Franklin R. Garfield is a family lawyer and mediator in Los Angeles.