Study K-402 June 2, 2015

First Supplement to Memorandum 2015-22

Relationship Between Mediation Confidentiality and Attorney Malpractice and Other Misconduct: Further Discussion of California Law

This supplement provides additional information about two matters discussed in Memorandum 2015-22:[1] (1) the implications of Evidence Code Section 958 for the Commission's study and (2) the State Bar's position on mediation confidentiality.

Implications of Evidence Code Section 958 for The Commission's Study

In an article prepared for the 26th Annual Intellectual Property Law Conference (convened by the Intellectual Property Law Section of the American Bar Association), California attorneys Scott Garner and Shawn Kennedy discuss Evidence Code Section 958, *McDermott, Will & Emery v. Superior Court*,[2] and the possibility of following the *McDermott* approach with regard to mediation confidentiality.[3] It might be helpful to share their comments here.

The article points out that in *Cassel v. Superior Court*,[4] the California Supreme Court concluded that "the exception to the attorney-client privilege set forth in Evidence Code section 958 — creating a waiver of the privilege when a client sues his lawyer for malpractice — does not apply in the context of the mediation privilege."[5] The authors explain that as a practical result of *Cassel*, "a lawyer who acts negligently or even fraudulently during a mediation may be immune from

1. Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

2. 83 Cal. App. 4th 378, 99 Cal. Rptr. 2d 622 (2000).

3. Scott Garner & Shawn Kennedy, *Frailty, Thy Name Is Privilege: Mediation Confidentiality and its Jurisdictional Challenges,* 26th Annual Intellectual Property Law Conference (April 6-9, 2011), *available at* http://www.morganlewis.com/pubs/frailty-thy-name-is-privilege-mediation-confidentiality-and-its-jurisdictional-challenges-article-presented-at-the-26th-annual-intellectual-law-conference.

4. 51 Cal. 4th 113, 244 P.3d 1080, 119 Cal. Rptr. 3d 437 (2011).

5. Garner & Kennedy, *supra* note 3, at 10.

liability to his client."[6] They note that this "is just one of the tradeoffs to protecting the confidentiality of the mediation process."[7]

Messrs. Garner and Kennedy then explain that the mediation confidentiality rule is a two-way street, barring both lawyer and client from using mediation evidence in a subsequent lawyer-client dispute. They query, however, whether the lawyer and client are in comparable positions:

> As the *Cassel* court pointed out, just as the client may not rely on mediation-related communications to prove his malpractice claims, neither can the lawyer rely on mediation-related communications to defend against such a claim. But is that really a fair comparison? Aren't a civil defendant's due process rights implicated more strongly than a plaintiff's when that defendant is precluded from offering a defense?[8]

To make their point, they pose the following hypothetical:

> Suppose, for example, that a client sues his lawyer for malpractice, alleging that for the two years the case was on file, the lawyer never once suggested that the client settle for anything more than $100,000. Suppose further that the lawyer advised the client during a mediation that he offer to pay up to $500,000 to settle the claim. Under that factual scenario, the client presumably can make out his *prima facie* case without relying on any mediation-related communications, and thus will not be adversely affected by *Cassel* and similar cases. The lawyer, by contrast, will be precluded from putting on his only evidence in defense — that is, his mediation-related advice.[9]

The authors observe that under California's mediation confidentiality statute, "a court likely would not allow the lawyer to disclose the protected communications, even in defense of the malpractice claim."[10] They then ask: "How, if at all, could a court deal with this seemingly significant due process violation, while still remaining true to the mediation privilege statute?"[11]

Proceeding to answer their own question, they describe the *McDermott* approach, in which the court dismissed a legal malpractice case on due process grounds because the lawyer-client privilege prevented the law firm from presenting evidence that was central to its defense.[12] They suggest that a court

6. *Id.* at 11.
7. *Id.*
8. *Id.* (citation omitted).
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.* at 11-12.

could use the same approach in the mediation confidentiality context, such as in their hypothetical:

> Although we are not aware of any cases where this same approach was applied in the context of the mediation privilege, in states like California *it could be argued that dismissing the lawsuit would be the right result* in a case like the hypothetical situation describe[d] above, where a lawyer otherwise would be denied the opportunity to put on a defense to a claim of malpractice.[13]

They note, however, that "[s]hort of finding a waiver of the mediation privilege, … it is less clear how a client seeking to assert a claim of legal malpractice based on communications during the mediation can be saved from an otherwise harsh result."[14]

Application of the Mediation Confidentiality Statutes in a State Bar Disciplinary Proceeding

Memorandum 2015-22 describes the trial level opinion (i.e., the opinion issued by the Hearing Department of the State Bar Court) in *In re Bolanos*,[15] a state bar disciplinary proceeding that involved a mediation confidentiality issue. Among other things, that opinion refers to a modification of a lawyer-client fee agreement, which occurred during a mediation. A fee dispute arose after the mediation and led to the disciplinary proceeding, in which the Hearing Department "allow[ed] evidence that there was a modification and why [the lawyer] did not think the modification was valid."[16] Relying on *Cassel v. Superior Court*, however, the Hearing Department excluded evidence of the mediation discussion and the exact terms of the modification.[17] Based on all of the evidence admitted in the disciplinary proceeding, the Hearing Department found a number of ethical violations and recommended certain disciplinary measures.

The Hearing Department's decision was pending before the Review Department of the State Bar Court when Memorandum 2015-22 was being written. Since then, the Review Department has issued its own unpublished opinion in the *Bolanos* matter,[18] which reaches the same result as the Hearing Department. The Review Department's 2-1 decision is not yet final, because an appeal could still be taken to the California Supreme Court.

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13. *Id.* at 12 (emphasis added).
14. *Id.*
15. No. 12-0-12167-PEM (Sept. 16, 2013).
16. *Id.* at n.7.
17. *Id.*
18. No. 12-0-12167 (May 18, 2015).

Like the Hearing Department's opinion, the Review Department's opinion contains only a brief discussion of the mediation confidentiality issue. The Review Department says:

> [The lawyer] admits he agreed to modify his fee agreement at the mediation so that [his unhappy client] would receive $250,000, rather than a percentage, from the settlement. [The unhappy client] testified that her willingness to settle was contingent on the modification. At all relevant times thereafter, [the lawyer] knew [his unhappy client] believed she was entitled to $250,000.[6]
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> The hearing judge found that, after the mediation, [the lawyer] "came to the conclusion that the modification was invalid because there was no consideration for the alteration of the [original fee agreement]." The judge also found he "believed that [the unhappy client's] claim of $250,000 was unreasonable and invalid and that he was entitled to the disputed funds given his hard work." [The lawyer] testified he thought the modification was not valid because $250,000 was more than [the unhappy client] would have received under the original contract if [the lawyer's other client] had not appealed.
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> 6/ *At trial, the hearing judge excluded all evidence concerning this modified fee agreement as being subject to mediation confidentiality. OCTC* [i.e., The Office of the Chief Trial Counsel of the State Bar] *renews its trial argument that it was prejudiced* because it could not submit evidence establishing that [the lawyer] agreed to reduce his fees. *We reject this argument* since most evidence about which OCTC complains became part of the record and proved that [the lawyer] agreed to the $250,000 modification. Further, the hearing judge took into account that [the lawyer] agreed to reduce his fee, and [the lawyer] concedes the point on review. (See *in the Matter of Johnson* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 233, 241 [absent actual prejudice, party not entitled to relief on evidentiary ruling].)[19]

Because the case is still pending, the staff is reluctant to say any more about it.

Respectfully submitted,

Barbara Gaal
Chief Deputy Counsel

19. *Id.* (emphasis added).