A Vital Weapon in Legal Malpractice Defense

Mediation Confidentiality

By Thomas J. D'Amato and Adam M. Koss

It goes without saying that if your job is to defend litigators, you must know about this powerful tool.

A new legal malpractice case comes into your office. After some initial investigation, you determine that it is a settle and sue case after a mediation gone wrong. Initial investigation turns up the following relevant facts.

Your client was retained to represent the current plaintiff in a personal injury case. Your client and his or her opposing counsel, with their clients' consent, agree to private mediation. A week before the mediation, your client met with his or her client, the plaintiff, and presented him or her with a letter telling him or her what to expect during the mediation. The letter valued the plaintiff's case at $1,000,000 but recommended a fair settlement in the range of $500,000. The letter also advised that your client had researched the defendant's assets, and although the defendant appeared to be insolvent, your client had a suspicion that the defendant had hidden assets.

The mediation attendees were the plaintiff and the defendant, their respective lawyers, including your client, and the mediator. During the mediation the defendant and his or her counsel, as anticipated, claimed that the defendant had no insurance or assets, and thus that even if the plaintiff's claim was valid, the defendant had no money to satisfy the claim. The mediator retreated to his or her office to do some quick research and failed to turn up information suggesting that the defendant's claim was false. The mediator relayed this information to the plaintiff and your client in a side session, along with a note from the defendant offering $100,000 to settle and advising that he or she had no assets to satisfy the judgment. The mediator advised the plaintiff that he or she should take the money. According to the plaintiff, in the presence of the mediator, your client told the plaintiff that if he or she did not accept the settlement then your client would withdraw from the matter. Your client denies making that statement, and the mediator does not recall it either. The plaintiff reluctantly accepted the payment, and all parties signed a settlement agreement.

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About a month after the case resolved, the plaintiff learned that the defendant and his or her counsel had lied, and in fact the defendant had real estate investments worth more than $5,000,000, plenty to satisfy the claim, as your client initially suspected. The plaintiff sued his or her former counsel, your client, for malpractice and breach of fiduciary duty, claiming that the attorney should not have advised the plaintiff to accept the $100,000 settlement and that the attorney breached his or her fiduciary duties by threatening to withdraw.

You vaguely know that mediation privilege laws may come into play but are not sure what exactly that means. What portions of the facts set forth above are admissible, if any? What is discoverable? Is any of it discoverable only under certain circumstances? Which of the participants can be forced to testify, and which cannot testify even if they want to? Knowing the mediation confidentiality laws in your jurisdiction is vital to providing a good defense to the attorney. In fact, depending on where your case is located, you may very well use the evidentiary privileges to end the litigation before it takes off.

Importance of Mediation in Modern Litigation

In recent years mediation has become almost a given in civil litigation. Many statutes require an attempt at *mediation* even before a plaintiff files a lawsuit, and many courts order mediation, or some other form or alternative dispute resolution, before setting a trial date. We have all heard the cliché that 99 percent of civil cases end in settlements. Many, if not most of those settlements result from, or at the very least were assisted by, mediation. What does this mean for legal malpractice defense? It means that the chances are very high that if you defend an attorney accused of malpractice in an underlying litigation matter, that underlying case at one point or another likely involved at least one mediation attempt. For that reason, you must know the mediation-related evidentiary privileges and rules of your jurisdiction.

State courts generally recognize that to promote mediation effectively, confidentiality is essential. *See, e.g., DR Lakes v. Brandsmart U.S.A. of West Palm Beach,* 819 So.2d 971, 974 (Fla. Dist. Ct. App. 2002) ("Mediation could not take place if litigants had to worry about admissions against interest being offered into evidence at trial, if a settlement was not reached."); *Alford v. Bryant* 137 S.W.3d 916 (Tex. App. 2004); *Cassel v. Super. Ct.*, 51 Cal. 4th 113, 137 (Cal. 2011). *See also* Uniform Mediation Act, Prefatory Note (2003), available at http://www.uniformlaws.org/shared/docs/mediation/uma_final_03.pdf. But courts of the different states treat mediation confidentiality much less uniformly than they do most other privileges.

For instance, in some states, such as Texas, the courts must hold an in camera hearing if the confidentiality laws conflict with other legal requirements for disclosure of mediation communications, while California treats essentially every mediation communication as confidential, with almost no exception. Many states, such as Florida and those that have adopted the Uniform Mediation Act, have specific exceptions to the mediation privilege, including when a communication is used to show professional negligence occurring during a mediation. Other states, including New York, have no statutory scheme at all regarding mediation confidentiality. To remedy the lack of cohesive laws across jurisdictions, and to create uniformity in how the states treat mediation confidentiality, the National Conference of Commissioners on Uniform State Laws drafted the Uniform Mediation Act, which was last revised in 2003. Ten states, Idaho, Illinois, Iowa, Nebraska, New Jersey, Ohio, South Dakota, Utah, Vermont, and Washington, and the District of Columbia have adopted the Uniform Mediation Act. Three others, Hawaii, Massachusetts, and New York, have active bills proposing adopting the Uniform Mediation Act.

Reviewing the Uniform Mediation Act and the law in three states, Texas, Florida and California, highlights some of the main differences in how the privileges may apply in a legal malpractice action and the issues that you need to consider when faced with a legal malpractice claim arising from a mediation.

Uniform Mediation Act

The Uniform Mediation Act broadly defines a "mediation" to mean any "process in which a mediator facilitates communications and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute." Uniform Mediation Act §2(1). The Uniform Mediation Act applies to mediations, including those that are court ordered, other than those related to collective bargaining, mediations conducted by judges who may make rulings in the cases, and other minor exceptions. *Id.* at §3. The parties may also agree before a mediation that the Uniform Mediation Act does not apply.

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A "mediation communication" is "a statement, whether oral or in a record or verbal or nonverbal, that occurs during a mediation or is made for purposes of considering, conducting, participating in, initiating, continuing, or reconvening a mediation or retaining a mediator." Uniform Mediation Act §2(1). A "party" is a person whose agreement is necessary to resolve the dispute, a "mediator" is the person conducting the mediation, and a "nonparty participant" is anyone else other than a party or mediator who participates in the mediation. The term "proceeding" is defined as any official proceeding, including judicial, administrative, arbitral, or other adjudicative process, and includes legislative proceedings. *Id.* at §2(7).

Sections four through six explain the confidentiality scheme. Section four states the applicable privilege. Unless otherwise specified "a mediation communications is privileged… and is not subject to discovery or admissible in evidence in a proceed-

ing unless waived." Uniform Mediation Act §4(a). A mediation party may refuse to disclose and prevent others from disclosing any mediation communications. *Id.* at §4(b). A mediator or a nonparty mediation participant may refuse to disclose and may prevent others from disclosing only their own respective communications. *Id.* A mediator and a nonparty participant may refuse to disclose their own statements only. However, they do not have complete control over whether they do disclose their own communications, and they may do so only if all the mediation parties consent. As the comments to section 4 make clear, the drafters intended to give mediation parties the most control by requiring every mediating party to consent to disclosing a communication as discoverable or admissible as evidence later during subsequent litigation even if another party, a mediator, or another participant wishes to disclose it.

All the statutory schemes, including the Uniform Mediation Act, agree that if a communication or a document is otherwise discoverable, simply introducing it in a mediation does not make it privileged.

The Uniform Mediation Act contains several exceptions to the mediation privilege's confidentiality protection. The most relevant circumstances permitting disclosing a mediation statement include: (1) if all parties have signed an agreement to permit disclosure; (2) if it threatens or communicates a plot to commit a violent crime or bodily harm; (3) if it is used to plan or to attempt to conceal a crime or to conceal an ongoing crime; (4) if it can prove or disprove a claim or complaint of professional misconduct or malpractice against a mediator, a meditation party, a nonparty participant, or a representative of a party based on conduct occurring during the mediation and someone seeks it for that purpose; or (5) if it can prove or disprove child abuse or neglect and someone has sought it for that purpose, subject to other specific exceptions within that exceptions. Uniform Mediation Act §6(a). The act also contains an exception similar to many work product exceptions that deems a communication discoverable or admissible if, after an in camera hearing, a judge determines that the party seeking it cannot acquire the evidence elsewhere and the need for the evidence substantially outweighs the interest in protecting confidentiality. *Id.* at §6(b). Importantly, a mediator cannot be compelled to testify regarding a claim of professional misconduct or malpractice against a person other than the mediator or under the in camera exception either. *Id.* at §6(c).

As stated above, ten states and the District of Columbia have adopted the Uniform Mediation Act, and another three have it under consideration. The mediation confidentiality laws of the other 37 states, as well as of the federal courts, vary. Some other states do not have statutory schemes at all. Others, such as California, Florida, and Texas, have traditions of mediation confidentiality laws apart from the Uniform Mediation Act.

Some major differing aspects include the following:

- The type of hearings covered by the laws, such as court-ordered mediations, settlement conferences, or private contractual mediations, among other types;
- The scope of communications covered by the laws, meaning whether the laws cover communications made before, during, or after the actual mediation hearing;
- The extent of a mediator's right to refuse to testify;
- The position taken on a "malpractice" exception; and
- The position taken on in camera review to evaluate whether not otherwise obtainable information is necessary to the seeker.

All the statutory schemes, including the Uniform Mediation Act, agree that if a communication or a document is otherwise discoverable, simply introducing it in a mediation does not make it privileged. *See* generally Uniform Mediation Act §4(c); Tex. Civ. Prac. & Rem. Code Ann. §154.073; Fla. Stat. Ann. §44.405(5); Cal. Evid. Code §1120.

The Texas Mediation Confidentiality Law

The Texas mediation confidentiality law is codified in Texas Civil Practices and Remedies Code section 154.073. Subject to certain exceptions, under the statute "a communication relating to the subject matter of any civil or criminal dispute made by a participant in an alternative dispute resolution procedure, whether before or after the institution of formal judicial proceedings, is confidential." Tex. Civ. Pract. & Rem. Code §154.073(a). Notably if the confidentiality law conflicts with other legal requirements for disclosure the issue may be presented to a court in camera to determine whether disclosure is appropriate. *Id.* at §154.073(e).

Avary v. Bank of America, N.A., 72 S.W.3d 779 (Tex. App. 2002), best explains the "legal requirement of disclosure" exception. In *Avary,* discovery was permitted when beneficiaries alleged breach of fiduciary duty by an executor in rejecting a higher settlement demand in a mediation. The court reasoned that the alleged breach of fiduciary duty was a new and independent tort, separate and apart from the mediation. Further, despite the public policy to protect confidentiality, an equally important policy sought to preserve significant and well-established procedural and substantive rights. The court held, after an in camera review under the "other legal requirements for disclosure" subsection (e),

> that where a claim is based upon a new and independent tort committed in the course of the mediation proceedings, and that tort encompasses a duty to disclose, section 154.073 does not bar discovery of the claim where the trial judge finds in light of the 'facts, circumstances, and context,' disclosure is warranted.

Id. at 803.

Another case permitting testimony of a mediation communication, this time from a mediator, is *Alford v. Bryant,* 137 S.W.3d 916 (Tex. App. 2004). There a client sued his attorney for malpractice in connection with settlement reached in a media-

tion. *Alford* concluded that the testimony of the mediator was admissible despite the client's objection because the client waived confidentiality, the information was likely outcome determinative, and the mediator's testimony was critical evidence. The case relied upon the "offensive use" doctrine in Texas for privileges generally, under which a party may not use a privilege as a sword in litigation. The offensive use doctrine requires the following: (1) the party asserting the privilege seeks affirmative relief; (2) the information sought would likely determine a dispute's outcome; and (3) the seeking party could not obtain the evidence any other way. *Id.* at 921. The client was, therefore, not permitted to prevent a mediator from testifying about what happened in the very mediation for which she, the client, claimed attorney malpractice.

The Florida Mediation and Confidentiality Act

The Florida Mediation and Confidentiality Act applies to any mediation required by statute, rule, or order, or as agreed to by the parties. Fla. Stat. Ann. §44.402. A mediation begins when the parties agree to mediate and ends when the parties sign an agreement, a court orders it, the mediator declares an impasse, the parties agree that it has, or one of the parties declares it so, but the termination is only effective for the withdrawing party. Fla. Stat. §44.404. The act assigns a privilege to a mediation communication made by a participant during the course of a mediation, or before a mediation if made in furtherance of a mediation, with several exceptions, including a crime exception, a malpractice exception, an exception to prove the validity of a settlement, and a report of professional misconduct. Fla. Stat. §44.405. The statute specifically defines participant as "a person who attends a mediation in person or by telephone, videoconference, or other electronic means." Fla. Stat. Ann. §44.403. However, under the act only a mediation *party* has the privilege to refuse to testify and to prevent any other person from testifying in a subsequent proceeding regarding mediation communications. Fla. Stat. Ann. §44.405(2). Thus, when a mediation party does not object, the mediator may testify. *See Williams v. Williams*, 939 So. 2d 1154, 1156 (Fla. Dist. Ct. App. 2006). The act also establishes civil remedies for violations of the privilege. Fla. Stat. Ann. §44.406.

The California Mediation Confidentiality Statute

The California mediation confidentiality statute is codified in the state Evidence Code. According to the statutory scheme, a mediation is a process in which a neutral person or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement. Cal. Evid. Code §1115. The confidentiality rules do not apply to family law mediations or to court ordered settlement conferences. *Id.* at §1117. Any communication including a writing that someone makes "for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation" is inadmissible and not subject to discovery. *Id.* at §1119. Courts have found that this language is broad and includes communications made or documents created before a mediation for the purpose of that mediation. *See Rojas v. Superior Court*, 33 Cal. 4th 407, 416 (Cal. 2004). The California state courts have not delineated exactly how much before the hearing falls within the "for the purpose of mediation" ambit. *Cassel v. Super. Ct.*, 51 Cal. 4th 113, 137 (Cal. 2011). The mediation ends upon a settlement, if a party or the mediator gives notice of termination, or if no contact occurs between the mediator and any party for ten days. Cal. Evid. Code §1125.

The statute does not offer exceptions "even where the equities appear to favor them." *Cassel,* 51 Cal. 4th at 133. Specifically, there is no "attorney-malpractice exception" to mediation confidentiality. *Id.* at 133. *See also Wimsatt v. Superior Court*, 152 Cal. App. 4th 137, 163 (Cal. Ct. App. 2007). One justice of the California Supreme Court put it this way: "Attorneys participating in mediation will not be held accountable for any incompetent or fraudulent actions during that mediation unless the actions are so extreme as to engender a *criminal* prosecution against the attorney." *Cassel,* 51 Cal. 4th at 138. In light of the recent holding in *Cassel*, the California State Assembly may amend the statute to make an exception for attorney-client mediation communications in a subsequent legal malpractice claim. However, as of this date, the California Law Revision Commission, directed by the state assembly to study the bill and the topic, has not yet made a final decision. 2012 Cal. Stat. res. ch. 108 (ACR 98 (Wagner & Gorrell)); Cal. Law Revision Comm'n Study K-402.

The only ways that a mediation communication can later become admissible is by express agreement of all the mediation participants, or when a communication or document is prepared by or on behalf of fewer than all the mediation participants, if those participants expressly agree to its disclosure. Cal. Evid. Code Ann. §1122(a)(2). The term "participants" includes more than just the parties; other persons involved in the mediation, such as attorneys, the mediator, or experts, are themselves distinct "participants." *Cassel,* 51 Cal. 4th at 130. California does not have a specific rule regarding the testimony of a mediator, nor does it need one because confidentiality is absolute unless the parties agree to disclose something as explained above. The California statute does contain a specific provision that permits a court to impose attorneys' fees on a party seeking to subpoena a mediator if the court finds that the party has sought inadmissible testimony or other evidence. Cal. Evid. Code §1127.

Back to the Hypothetical

Obviously depending on your jurisdiction, the hypothetical presented at the beginning of this article will involve different analyses. For instance, since the Uniform Mediation Act and the Florida statute have exceptions for legal malpractice claims, in these jurisdictions a court probably would admit most of the evidence in the hypothetical, and most certainly any of the communications between the attorney, your client, and the plaintiff, his or her client. Most likely a court would admit the communications of the other party and his or her attorney provided that another privilege, such as the attorney-client privilege, does not protect them in some other way. In Florida, a court also might compel the mediator to testify since the Florida statute does not offer any confidentiality exception of any sort. However, under the Uniform Mediation Act, that would not happen since the legal malpractice exception has an exception of its own that does not allow a court to compel a media-

tor to testify. Since in the hypothetical the mediator did his or her own research and advised the plaintiff to settle as well, you may be able to make a due process argument in a Uniform Mediation Act jurisdiction. Additionally, the mediator is the only witness to the alleged statement in which the lawyer threatened to withdraw. While a court may or may not require the mediator to testify, you could potentially resolve your case by showing that the lawyer defendant is not able to defend himself or herself due to privileges and thus the case must be dismissed.

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In Texas, a court likely would hold an in camera hearing about the mediation communications. Under the *Avary* holding, since legal malpractice and breach of fiduciary duty are independent torts, a court in a Texas jurisdiction would probably find the communications admissible. Moreover, a court in a Texas jurisdiction could compel the mediator to testify.

Finally, in California, one of the jurisdictions with the most absolute privilege laws, a court generally would not admit any of the mediation communications, from the meeting and the letter sent to the plaintiff, to the signed settlement agreement. However, change just one small fact to make it a court-ordered settlement conference rather than a private contractual mediation and the mediation privilege would not apply at all. Contrast this with the Unified Mediation Act and the Florida statute, which include court-ordered mediations, and those of Texas, which apply to all alternative dispute resolution procedures.

The Future

Mediation confidentiality has become a hot topic throughout the states and specifically in California in legal malpractice actions and in civil litigation generally. In light of the recent holding in *Cassel*, discussed above, California Assemblyman Jeff Gorell proposed a bill to change the California mediation confidentiality statute to include an attorney malpractice exception similar to the one contained in the Uniform Mediation Act. Cal. AB 2025 (Feb. 23, 2012). The California Assembly later amended the bill and rather than seeking to change the law, it directed the California Law Revision Commission to study and to report to the assembly regarding the interplay of mediation confidentiality and attorney malpractice or misconduct. Cal. AB 2025 (as amended May 10, 2012). The latter bill, seeking only to have the Law Review Commission complete a study, consider the bill, and complete a report, passed by a vote of 49–1 on May 29, 2012. Since that time, the Law Revision Commission has started to study this topic. *See* Cal. Law Revision Comm'n Meeting Agenda (Aug. 2, 2013), http://www.clrc.ca.gov/pub/Agenda-pdf/Agenda1308.pdf; Cal. Law Revision Comm'n, Staff Memorandum 2013-47, Study K-402, Relationship Between Mediation Confidentiality and Attorney Malpractice and Other Misconduct (Public Comment) (Aug. 27, 2012), http://www.clrc.ca.gov/pub/2013/MM13-47.pdf.

One study conducted for the Harvard Negotiations Law Review in 2006 found 1,223 published cases implicating mediation-related issues in the state and the federal court in the United States from 1999 to 2003. 11 Harv. Negot. L. Rev. 43, 50 (2006). Of those cases, a significant amount allowed mediation communications simply because none of the parties had objected. Indeed, the study found that uncontested mediation communication evidence occurred in 30 percent of all the cases reviewed, including 45 in which mediators offered testimony directly, 65 in which others offered evidence about a mediator's communications, and 266 in which either parties or lawyers offered evidence of their own mediation communications. *Id.* at 59. In many of these cases, the only thing preventing a judge from excluding some, if not all, of the evidence was the opposing lawyer's knowledge of the applicable mediation privilege. If goes without saying that if your job is to defend litigators, you must know about this powerful tool. However, even if you are not a legal malpractice attorney, you must still understand the laws of your jurisdiction and of the jurisdiction in which a mediation takes place to protect both yourself and your client in subsequent cases.