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MEDIATION CONFIDENTIALITY

California Law

By Jennifer A. Becker

**Wimsatt v. Superior Court (Kausch)** (2007) 152 Cal. App. 4th 137

*The Second District holds that mediation confidentiality protects mediation communications in the context of a legal malpractice action arising from the handling of the underlying settlement process.*

Corey Kausch retained Marc Goldstein and Magaña, Cathcart & McCarthy attorney William Wimsatt to represent him in a personal injury lawsuit. Defense counsel submitted a brief stating that Kausch’s counsel had communicated a 1.5 million dollar demand, which was a substantial reduction from a prior demand. Defense counsel later reported that Wimsatt had referenced the demand in the course of a phone conversation. When Goldstein questioned Wimsatt about this issue he denied making the demand but did say that he had reevaluated the case and that a reduced demand was in order. The case settled shortly thereafter with Kausch’s consent. Kausch filed a complaint alleging that Magaña had breached its fiduciary duty by reducing the settlement demand without Kausch’s knowledge or consent, which undermined his settlement position and affected the outcome of the mediation.

When Kausch sought discovery about the settlement demand Magaña filed a protective order under Evid. Code § 1115, California’s mediation privilege.

Kausch countered that he intended to conduct discovery about incidents that occurred prior to the actual mediation, not statements that occurred in the mediation itself. Magaña contended that the mediation confidentiality protects not only communications made in the presence of the mediator, but also any communication made before the mediation ends, those materially related to the mediation, and those made for the purpose of mediation or pursuant to mediation.

The trial court denied the motion stating that the legislature did not intend mediation confidentiality to shield perjury or inconsistent statements. The court held that precedent recognized that there were some situations in which the privilege did not make inadmissible all mediation related information and that Ev. Code § 703.5 excepted from the prohibition of mediator testimony statements relating to conduct that would constitute a crime.

The Court of Appeal noted that Evid. Code § 1115 et seq. is not limited to

communications made in the course of mediation but includes communications made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation, as well as all communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation. Such evidence is not subject to discovery. The only mediation communications that are admissible are defined by statute.

The Supreme Court has repeatedly resisted attempts to narrow the scope of mediation confidentiality or to create judicial exceptions. Even in situations where justice appears to require an exception, the Legislature has adopted a policy that promotes effective mediation by requiring confidentiality against a policy that might better encourage good faith participation in the process.

The Court noted that the only time a Court of Appeal has deviated from the Supreme Court's strict interpretation of the mediation confidentiality statutes involved the constitutional rights of a minor in a juvenile proceeding. The Supreme Court limited the holding of that case to its precise facts.

The mere introduction of a matter into mediation does not bestow the protection of confidentiality upon it. For example, a witness's observations reduced to a statement for mediation does not prevent the witness from testifying about facts at trial, even if the statement itself is protected. A writing that qualifies as evidence is not protected solely by reason of its introduction or use in mediation. It is protected only if it was prepared for the purpose of, in the course of, or pursuant to, mediation. This prevents parties from using mediation as

a pretext to shield materials from disclosure.

The court held that the mediation briefs utilized in the underlying lawsuit were protected from disclosure. Such briefs epitomize the types of writings that the mediation confidentiality statutes have been designed to protect. They provide a global view of the dispute, focus the positions of the parties, and are designed to facilitate an open and frank dialogue. Authors expect the briefs will always be kept confidential and used only in mediation by the mediator and the parties.

Certain e-mails that were written before a mediation session and that were quoted and referenced in a mediation brief were also privileged. They were written to clarify statements made in the mediation briefs and to affect the negotiations.

Kausch was permitted to obtain discovery about statements Wimsatt made in which he purportedly lowered Kausch's settlement demand. Magaña had the burden to show that the conversation was protected. Thus, it was incumbent upon it to specify the timing, context, and content of the communication to show it was materially related to, and fostered, the mediation. The party seeking protection must demonstrate that the writing or statement would not have existed but for a mediation communication, negotiation, or settlement discussion. The evidence is that the conversation took place during a phone call about discovery. Thus, Magaña failed to show that the conversation was anything other than expected negotiation posturing that occurs in most civil litigation. A conversation is not protected simply

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because it occurs before a scheduled mediation.

Recognizing that Kausch might be forced to forgo his legal malpractice lawsuit, the Court of Appeal nonetheless followed the Supreme Court's dictate that exceptions to mediation confidentiality must be expressly stated in the statutes. The effect of this dictate is that when represented parties participate in mediation, they effectively relinquish claims for new and independent torts arising from mediation, including legal malpractice causes of action against their own counsel. The Court noted that clients generally do not understand that this and advocated that the purpose of mediation is not enhanced by such an effect since wrongs will go unpunished and the administration of justice is not served.

The Court reviewed commentaries criticizing the inequities of California's mediation confidentiality rules and agreed with the conclusion that a strict approach to mediation confidentiality often prevents courts from exploring and justly deciding controversies that might arise out of mediated agreements. The Court urged the Legislature to reconsider California's broad and expansive mediation confidentiality statutes and to craft ones that would permit countervailing public policies to be considered. The Court also recommended that parties and attorneys consider the unintended consequences of agreeing to mediate a dispute.

*Comment:* Other commentators would argue that relaxing mediation confidentiality rules could result in other unintended consequences that would discourage the settlement of lawsuits.

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