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LITIGATION

Does the Mediation Privilege Apply in Legal Malpractice Cases?

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Special to the Legal

In August, *The Legal Intelligencer* reported a federal court opinion in which the defendant law firm in a legal malpractice suit in state court requested the deposition of the chief mediator of the United States Court of Appeals as part of its defense. (See *McKissock & Hoffman P.C. v. Waldron*, Aug. 4).

The clerk of court denied the firm's request, and the court held that the clerk's denial was exempt from review under the Administrative Procedure Act. The court's decision, however, did not address the other basis for the clerk's decision, i.e., that allowing the mediator to testify about mediation communications in a legal malpractice case would be a breach of mediation confidentiality under federal regulations. (Statutes and court opinions often use "confidentiality" and "privilege" interchangeably, when "privilege" is what is generally intended.)

Nonetheless, this second issue aroused the interest of attorney Bob Fiebach, who called to discuss whether the Pennsylvania mediation privilege statute makes it virtually impossible to prove legal malpractice committed during the mediation.

An initial reaction might be to reject this notion if one assumed that communications during mediation between attorney and client should be viewed in the same



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light as the attorney-client privilege. In legal malpractice cases, clients are free to waive attorney-client privilege and testify about exchanges with their attorneys who may, by reason of the waiver, defend themselves by relying on such communications. Moreover, the mediation privilege in the legal malpractice context might be perceived as unfairly immunizing the attorney so that an injured client would be left without a remedy.

Further consideration, however, would reflect that the answer is not so clear. First, the language of the Pennsylvania statute, 42 P.S. 5949, (with limited exceptions that are not here relevant), provides no exception to the prohibition against the admissibility "in any action or proceeding" of attorney-client communications made during the mediation session. Indeed, the statute states specifically that a privileged mediation "communication" is one that is made "by, between or among a party, mediator, mediation program or any other person present to further the mediation process, when the communication occurs during a mediation session or outside a session when made to or by the mediator or mediator program." This language on

its face would appear to relate to any communications among any of the mediation participants, including those between client and attorney.

Moreover, allowing such an exception to the mediation privilege in malpractice cases might adversely affect parties other than the client and attorney. For example, the opposing parties in the mediation may be concerned independently about the disclosure of business information communicated by them during the mediation based upon which the attorney being sued advised the client. In short, making an exception in legal malpractice actions for statements made during the mediation may effectively undermine the privilege reasonably expected and relied upon by the other parties to the mediation.

Research into cases throughout the U.S. reflects a similar reluctance to allow the admissibility of statements made during mediation, even in legal malpractice cases. A most recent case was decided this year by the California Supreme Court on Jan. 13. (See *Cassel v. Superior Court*.)

The California Supreme Court's opinion detailed the following: Michael Cassel alleged that in preparing for the mediation, he and his attorneys discussed not accepting less than \$2 million. After a 14-hour mediation, however, during which Cassel was feeling sick, he finally settled for \$1.25 million. His claim of malpractice alleged that his attorneys forced him to accept the lesser amount, threatening, among other things,

to withdraw from representing him on the eve of trial. The attorneys moved to exclude the conduct and conversations concerning preparation for and during the mediation. The intermediate appellate court held that mediation confidentiality did not apply to mediation communications outside of the presence of the mediator and the opposing party; it viewed the attorney and client as “disputants” under the statute who should be viewed as a single party so that there was no confidentiality that either might assert against the other.

The California Supreme Court reversed, relying upon the language of California statutes that provided for no such judicial exception. In particular, it noted that there was no basis to restrict confidentiality to “potentially damaging mediation-related exchanges between [the] disputing parties” at the mediation. Rather the confidentiality relates to the communication itself. The statute provides that “no evidence of anything said” and “no writing ... is discoverable or admissible in a legal proceeding if the writing was ‘for the purpose of, in the course of or pursuant to a mediation.’” The court found that confidentiality “is not limited by the identity of the communicator, by his or her status as a ‘party,’ ‘disputant’ or ‘participant’ in the mediation itself, by the nature of the communication or by its specific potential for damage to a disputing party.”

The California court determined, therefore, that the mediation confidentiality statutes do not create a privilege in favor of any particular person. Instead they serve the public policy of encouraging the resolution of disputes by means short of litigation; they are designed to provide maximum protection for the privacy of mediation communications. It concluded that communications between attorney and client are materially related to the mediation and confidential even if they are not made to another party or to the mediator.

Finally, the court determined that an

application of the mediation confidentiality statutes in this manner did not implicate due process concerns so fundamental that they might warrant an exception on constitutional grounds. If there is to be any change, the court stated, it must be for the legislature to determine the policy considerations relating to confidentiality in these circumstances.

The Uniform Mediation Act, which has not been adopted in Pennsylvania, does provide language that would expand the exceptions to the mediation privilege. It specifically exempts from the privilege mediation communications sought to prove or disprove a claim of professional misconduct or malpractice by the mediator or a party, nonparty participant or representative of a party, based on conduct occurring during the mediation. Opposition to these provisions quickly developed in the Philadelphia Bar Association prior to the act’s approval by the American Bar Association. A resolution was adopted in 2002 opposing the act on the ground that it “fails to protect the reasonable expectations of confidentiality by the parties and is inconsistent with and significantly inferior to the Pennsylvania mediation confidentiality statute 42 Pa. C.S. 5949.”

Assuming, therefore, that the Pennsylvania statute does prohibit the disclosure or admissibility of mediation communications in legal malpractice actions, several issues remain unresolved:

WHAT IS THE MEANING OF ‘DURING A MEDIATION SESSION’?

The language in the California statute provides for confidentiality for all communications “made for, in the course of or pursuant to a mediation,” which conceivably includes conversations not necessarily made during a mediation session, so long as they related to the mediation. In contrast, the language of the Pennsylvania statute restricts “mediation communications” only to “those statements made by, between or among a party, mediator, mediation program or any

other person present to further the mediation process when the communication occurs during a mediation session.” Statements made outside of the mediation session also come within the definition of “mediation communication,” when made directly to or from the mediator.

It might be argued, therefore, that the Pennsylvania statute provides a privilege as to anything said by any of the participants only when the mediation session is being conducted with the mediator but does not apply when the only individuals in the room are the attorney and the client (the position which was essentially accepted by the intermediate appellate court in California but ultimately rejected by the California Supreme Court).

Does this mean that the mediator must be present? If the mediator is caucusing with the opposing party, are the private conversations between the attorney and client while awaiting the return of the mediator made “during the mediation session”? Moreover, that the privilege encompasses communications occurring outside “a [mediation] session to or by the mediator” neither clarifies 1) when a communication is outside the session or 2) whether the privilege would apply to separate meetings between the attorney and the client, in which the attorney advises the client of communications allegedly made to him directly by the mediator and upon which legal advice is based.

WHEN HAS THE MEDIATION BEGUN?

The Pennsylvania statute states that the “mediation commences at the time of the initial contact with a mediator or mediation program.” But, following such initial contact, does a mediation session include preliminary meetings with opposing counsel to discuss the scope, agenda and ground rules for the meditation? It must be remembered that the privilege also extends to mediation documents, which are defined to mean

“written material ... prepared for the purpose of, in the course of or pursuant to mediation.” Such written material would typically include pre-mediation memoranda exchanged by counsel in advance of the actual mediation session. Should oral discussions between counsel in advance of the formal mediation meeting but which are also conducted for the purpose of the mediation have any less protection under the privilege statute than written documents; or, perhaps, may it be argued that such oral exchanges are deemed to have occurred during a mediation “session”?

WHEN HAS THE MEDIATION ENDED?

Equally important is determining when the mediation session has ended so that the privilege is no longer in effect. Very often, the end of a formal mediation meeting does not necessarily signify that the mediation itself has terminated. Often the mediator or the parties among themselves, continue to communicate following the meeting, in an attempt to construct a settlement based upon the progress made when the parties were together. The California statute provides for guidelines establishing when the mediation is deemed to have ended. These include:

- The parties design an agreement that fully or partially resolves the dispute.
- A recorded oral agreement that fully or partially resolves the dispute is reduced to writing within 72 hours.
- The mediator signs and sends a notice that the mediation is terminated.
- A party provides written notice to the other party and the mediator that the mediation is terminated.
- For 10 calendar days there is no communication between the mediator and either of the parties related to the mediation.

The Pennsylvania statute, however, provides no such guidelines. Accordingly, it is less clear whether subsequent conversations, in which the mediator may be involved to a greater or lesser extent, may be deemed to be

pursuant to a continuing mediation so that those communications would remain inadmissible in a subsequent malpractice action.

IS THE PRIVILEGE A ONE-WAY STREET IN LEGAL MAL CASES?

The mediation privilege as it relates to legal malpractice actions is generally characterized as benefiting attorneys who are insulated from liability. Often ignored, however, is that the privilege may also act to the detriment of the defendant attorney. For example, the plaintiff may be alleging that the attorney provided incorrect information to the client prior to the mediation. The attorney may wish to defend by presenting evidence that correct information was, in fact, provided to the client during the mediation. However, if the client would not be permitted to advance his claim by relying on statements made during the mediation, the attorney may be similarly precluded from presenting a defense by relying on other statements made during the mediation.

The California court in *Cassel* recognized that if the attorney could present his defense based upon mediation communications while the plaintiff could not, the attorney would have the best of both worlds. The California court rejected this, however, stating that “the mediation confidentiality statutes work both ways, they prevent either party to the malpractice suit from disclosing the content of their meditation-related communications.”

Indeed, in the *McKissock & Hoffman* case, the privilege worked to the detriment of the defendant attorneys who were rebuffed in their attempt to overcome the mediation privilege and introduce the testimony of the mediator.

IS THERE A DUTY TO ADVISE THE CLIENT OF THIS PRIVILEGE?

Finally, some commentators have suggested that recommending mediation may create a conflict of interest for the attorney. The client presumably prefers the most expeditious and cost-effective manner of

resolving the matter. Would the client agree to mediation, however, if told that the attorney may, effectively, be insulated from professional negligence? Will the attorney later be suspected of putting his own interests over the interests of the client who is unaware that he is waiving his right to bring a malpractice action? Some commentators have even gone so far as to suggest that attorneys must either agree to waive confidentiality (assuming they can do so over the objection of other parties to the mediation) or advise clients that because mediation communications may not be used to support a subsequent legal malpractice claim, they should consider seeking the advice of independent counsel before agreeing to mediation.

Whether and to what extent the Pennsylvania mediation privilege statute applies to legal malpractice cases has not been decided. The analysis of the California Supreme Court, as applied to the Pennsylvania statute, would suggest that the privilege may constitute both a sword and a shield in presenting and opposing such claims. As should be apparent, however, the ultimate resolution of this question will leave us with multiple issues to be faced in the future. •