

MARX MEDIATION MEMO, #2

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Friends and colleagues,

Marx Mediation Memo #1 (MMM#1) discussed mediation confidentiality requirements as applied to attorney-client discussions at a mediation session. (If you didn't receive MMM#1, email me (peterjmarx@earthlink.net), and I will be happy to provide it.) This second memo continues that topic, alerting you to a very recent California Supreme Court decision which practitioners must keep in mind when discussing matters with clients, not only at a mediation session, but also in the relatively broad context of "pursuant to" a mediation. I trust you will find this information useful, and as always I welcome your comments and suggestions.



California Supreme Court Reaffirms Strict - and Broad - Application of Mediation Confidentiality

Confidentiality is considered essential to mediation, and this is reflected not only in Evidence Code mediation confidentiality requirements, but also in California Supreme Court decisions which have consistently upheld strict application of such requirements. Evidence Code 1115 et seq., and see, e.g., Simmons v. Ghaderi, 44 Cal.4th 570, 80 Cal. Rptr. 3d 83 (2008); Foxgate Homeowners' Assn. v. Bramalea California, Inc., 26 Cal.4th 1, 108 Cal. Rptr. 2d 642 (2001). In MMM#1, I discussed Porter v. Wyner, presently pending before the California Supreme Court, in which the principal question is whether confidentiality requirements apply to discussions between counsel and client at the mediation. I added that "the decision in Porter may in fact depend upon the outcome of Cassel v. Superior Court, which involves similar issues and which was argued before the California Supreme Court in early November." As it turned out, on January 13, 2011, the California Supreme Court did indeed issue its opinion in Cassel, and it is mandatory reading for any attorney utilizing the mediation process. (The opinion was published in the January 14, 2011 issue of the Los Angeles Daily Journal, 2011 DJDAR 658, and can also be viewed at 2011 WL 10270.)

The underlying facts in Cassel reflect a situation which could constitute something of a nightmare for any attorney. In a previous case, Mr. Cassel had agreed to a settlement reached through mediation. Thereafter, he sued his counsel for malpractice, breach of fiduciary duty, etc., complaining, in the words of the California Supreme Court, "that by bad advice, deception, and coercion, the attorneys, who had a conflict of interest, induced him to settle for a lower amount than he told them he would accept, and for less than the case was worth." The question thus addressed by the court was whether evidence of private discussions between Mr. Cassel and his attorneys immediately preceding and during the mediation, concerning mediation settlement strategies and efforts of counsel to persuade Mr. Cassel to settle, were admissible in the malpractice action. The court's response was a rather resounding no, evidence of those attorney-client discussions was not admissible, by virtue of explicit statutory mediation confidentiality requirements, notwithstanding the fact that exclusion of such evidence might well compromise Mr. Cassel's ability to prove his claim of legal malpractice.

The court's view of the matter was distinctly set forth in the first paragraph of the opinion:

“We have repeatedly said that these confidentiality provisions are clear and absolute. Except in rare circumstances, they must be strictly applied and do not permit judicially crafted exceptions or limitations, even where compelling public policies may be affected. [Citing, inter alia, Simmons, and Foxgate, both supra.]”
_____ Cal. 4th at _____.

There were two important elements to the Court’s decision, both grounded in explicit language set forth in the Evidence Code. First of all, Evidence Code sections 1119(a),(b) preclude evidence or discovery of anything said or written “for the purpose of, in the course of, or pursuant to, a mediation....” Thus, the requirement of confidentiality is not limited to what is said or written in or for the mediation session. It applies equally, e.g., to discussions between counsel and client which occurred “pursuant to” a mediation, i.e., certain of the discussions Mr. Cassel sought to introduce into evidence in his subsequent malpractice action. Secondly, confidentiality requirements are not limited to what is said or written by the disputants in a mediation, i.e., the parties themselves, in this case, Mr. Cassel and his opposing party in the mediation in the underlying case. Rather, the statutory language is very clear that confidentiality applies to all participants, not just parties, which of course included Mr. Cassel’s attorneys. Accordingly, the Evidence Code does not limit confidentiality “by the identity of the communicator, by his or her status as a ‘party,’ ‘disputant,’ or ‘participant’ in the mediation itself, by the communication’s nature, or by the specific potential for damage to a disputing party.”
___ Cal.4th at ____.

The court also stressed that any exception to the attorney-client privilege which might obtain in a legal malpractice action did not change or limit the application of mediation confidentiality:

“Neither the language nor the purpose of the mediation confidentiality statutes supports a conclusion that they are subject to an exception, similar to that provided for the attorney-client privilege, for lawsuits between attorney and client.” ___ Cal.4th at ____.

The interplay between the attorney-client privilege and mediation confidentiality requirements was the subject of some discussion in the Court of Appeal opinion in Porter, as discussed in MMM#1. Porter is still pending before the California Supreme Court, although given the court’s opinion in Cassel, it is reasonable to anticipate that Porter will be similarly decided.

In Cassel, mediation confidentiality protected counsel from the possibility of an adverse malpractice verdict, if indeed Mr. Cassel’s claims were viable. But this could work both ways, as the court noted in footnote 10 (though see the concurring opinion of Justice Chin). As suggested in MMM#1, prudent counsel will consider whether (also) to discuss settlement strategy and just about anything else not only outside mediation proceedings, but indeed outside the entire mediation context.

I mediate through ADR Services, Inc. Feel free to call my Case Manager, Sara Loop, at (310) 201-0010, if I may be of service in mediating any pending matters, or call me directly at the number below for that purpose or if you have any questions concerning mediation.

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