LOS ANGELES
Daily Journal
www.dailyjournal.com
FRIDAY, MARCH 27, 2015

PROFESSIONAL RESPONSIBILITY

Lawyers behaving badly... in mediation

By Matthew S. Kahn

In *Amis v. Greenberg Traurig LLP*, 2015 DJDAR 3179 (Cal. Ct. App. 2d Dist. March 18, 2015), the Court of Appeal revisited the issue of legal malpractice claims that arise out of alleged attorney negligence in the course of a confidential mediation. In a unanimous opinion, the court came down firmly on the side of maintaining the statutorily prescribed strict confidentiality of mediations — even where it would mean wholly depriving client-plaintiffs of lawsuits against their former lawyers.

The Evidence Code broadly mandates the absolute confidentiality of mediations and associated documents and communications. Such materials are both protected from discovery and inadmissible in any litigation — be it the litigation to which the mediation pertains or subsequent proceedings. Evidence Code Section 1119. In *Cassel v. Superior Court*, 51 Cal.4th 113 (2011), the state Supreme Court held that these proscriptions apply even where a client who was represented by an attorney in a mediation later sues that attorney for legal malpractice relating to conduct occurring during the mediation, reasoning that "[n]either the language nor the purpose of the mediation confidentiality statutes supports a conclusion that they are subject to an exception ... for lawsuits between attorney and client." The court held that such an exception would be "nothing more or less than a judicially crafted exception to the unambiguous language of the mediation confidentiality statutes," which "[w]e and the Courts of Appeal have consistently disallowed … even when the equities appeared to favor them."

In Amis, the plaintiff, Amis, sought to sue his former attorneys for negligently advising him to sign a settlement agreement at a mediation. After Amis admitted at deposition that all of the alleged misconduct occurred at or in connection with the mediation, the former attorneys moved for summary judgment on the ground that Amis could not prove an essential element of his claim because the only way to do so would be with evidence of what occurred at the mediation, i.e., evidence that is both inadmissible and not discoverable.

In response, Amis proffered a novel theory: relying exclusively on evidence of what occurred outside of the mediation context, he urged the court to make an inference that his attorneys had committed legal malpractice during the mediation. In effect, Amis argued that no reasonable client who was properly advised would have signed the settlement agreement he signed at the mediation, and therefore a reasonable jury could conclude that his lawyers must have committed legal malpractice.

Both the trial court and the Court of Appeal rejected Amis' attempt to "circumvent" the Evidence Code in this fashion. The Court of Appeal, echoing Cassel and its own earlier precedents, did so on two principal grounds. First, the court noted that Amis' proposed inference was "fundamentally at odds with the mediation confidentiality statutes' directive" because it "would allow Amis to attempt to accomplish indirectly what the statutes prohibit him from doing directly — namely, proving [his lawyers] advised him to execute the settlement agreement during the mediation."

Second, the court observed that permitting Amis to press the inference of malpractice would be fundamentally unfair to the defendants, his former lawyers, because "there is no statutory exception to mediation confidentiality that permits [them] to rebut the inference by showing what advice [they] actually gave Amis during mediation." Drawing on the recent Court of Appeal decision In re Marriage of Woolsey, 220 Cal. App. 4th 881 (2013), the Amis court noted that Amis' theory "would turn mediation confidentiality into a sword by which Amis could claim he received negligent legal advice during mediation, while precluding [the lawyers] from rebutting the inference by explaining the context and content of the advice that was actually given."

Amis represents a substantial further obstacle to plaintiffs asserting legal malpractice and other claims that arise out of mediations. The Court of Appeal left little doubt that such plaintiffs cannot do an end run around the mediation confidentiality statutes by relying on non-mediation-related evidence to attempt to prove by inference what occurred at a mediation. And even if such circumstantial evidence were permissible to prove these kinds of claims, the Court of Appeal also made clear that they nonetheless would be barred because of unfairness to the defendants, who would be precluded by the Evidence Code from defending themselves based on evidence of what actually did occur during the mediation.

The Court of Appeal recognized in Amis that a "seemingly unintended consequence" of the mediation confidentiality statutes is that some wronged plaintiffs may be left without a cognizable cause of action. But, pointing to the Supreme Court's opinion in Cassel — which likewise had noted that "its holding may hinder the client's ability to prove a legal malpractice claim against his or her lawyers" — the Court of Appeal observed that "[w]here competing policy concerns are present, it is for the Legislature to resolve them," not the courts.

Matthew S. Kahn *is a partner in the San Francisco office of Gibson, Dunn & Crutcher LLP. Mr. Kahn's practice focuses on securities and derivative litigation, class action defense and law firm defense.*

MATTHEW S. KAHN
Gibson, Dunn & Crutcher

Reprinted with permission from the ***Daily Journal***. ©2015 Daily Journal Corporation. All rights reserved. Reprinted by ReprintPros 949-702-5390.