

# MEDIATION CONFIDENTIALITY TRUMPS MALPRACTICE ... BARELY



By Michael D. Young \*

Once again, the trial courts are trying to mess up mediation confidentiality by judicially creating (legislating?) exceptions to the confidentiality statutes. When faced with a public policy that competes with California's strong public policy favoring mediation confidentiality, the trial courts too often seem to tip the balance the wrong way by inventing unwritten exceptions to the law. Luckily, in the recently-penned decision in [Wimsatt v. Superior Court](#) (Kausch) (Cal. App. No. B196903), the appellate court patched things up ... although it was clearly not happy about it.

*Wimsatt* involves a legal malpractice action against a prominent plaintiff's personal injury firm. In the trial court, the former client and malpractice plaintiff claimed that the law firm "breached its fiduciary duty by significantly lowering [the client's] settlement demand without his knowledge or consent." The client claimed he first learned of this fact from the confidential mediation brief that was provided to the mediator. You can see the public policy conflict already, can't you?

In the malpractice action, the client reasonably enough wants to obtain and introduce the smoking gun mediation brief, the one on which his entire case rests. However, as California practitioners should know by now, there is a slight problem with the plaintiff's wish: Evidence Code Sections 1115 et seq., and in particular Section 1119. California is serious, and rightfully so, about protecting the very cornerstone of mediation – confidentiality. Under Section 1119, no mediation communications, including mediation briefs, are admissible in court. This has been reaffirmed time and time again by the Supreme Court (go re-read *Foxgate* [26 Cal.4th 1] and *Rojas* [33 Cal.4th 407] if you don't believe me).

So what happened in the *Wimsatt* case? According to the opinion, in the underlying personal injury lawsuit, the client's lawyer made a comment to the personal injury defense counsel that it might be more appropriate to discuss settlement in the \$1.5 million range rather than the \$3.5 million range they had been discussing before. Because of this comment, claimed the client, he was forced to settle his personal injury case at mediation for an amount that was much less than the case was worth. Despite agreeing to the mediated settlement, the client brought a malpractice claim against his attorneys claiming he could have done better if only....

In the malpractice case, the client deposed his former lawyer and asked him questions about what was said and done in the mediation and between the two mediation sessions, to which the

attorney repeatedly objected. The client also sought the mediation briefs. The law firm filed for a protective order on the grounds that the mediation confidentiality statutes rendered all of the testimony and documents inadmissible, including communications made between mediation sessions so long as they were "materially related" to the mediation.

Here's where the trial court messed up (though I understand there will be many of you out there who will disagree). In ruling on the motion for protective order, the trial court determined that it had to choose between mediation confidentiality on the one hand, and "shielding perjury and inconsistent statements" on the other. The trial court chose "the other hand" and denied the motion for protective order, refusing to seal the mediation documents.

The appellate court reversed. Properly relying on *Foxgate, Rojas, Fair* [40 Cal.4th 189], and the Evidence Code, the court reaffirmed the importance of confidentiality to the mediation process and emphasized the Supreme Court's repeated refusal to "judicially create exceptions to the statutory scheme, even in situations where justice seems to call for a different result." It accordingly protected from disclosure all mediation briefs and all written communications between the adverse attorneys regarding the mediation. The only thing that did not fall within this protective cloak were communications that the law firm had failed to show were linked to the mediation process.

Significantly, but very reluctantly, the appellate recognized the conflict between competing and important policies, and came down on the side of confidentiality: "We appreciate the trial court's desire to avoid the strict limitations of mediation confidentiality in this case. Preventing [the client] from accessing mediation-related communications may mean he must forgo his legal malpractice lawsuit against his own attorneys. However, the Supreme Court has declared that exceptions to mediation confidentiality must be expressly stated in the statutes.... [P] Our Supreme Court has clearly and unequivocally stated that we may not craft exceptions to mediation confidentiality."

*The Court then began its call to the legislature to relax the confidentiality rules.* It noted with obvious distaste that because mediation is a private and confidential process, wrongs may occur that cannot be remedied in court: "The stringent result we reach here means that when clients, such as Kausch, participate in mediation they are, in effect, relinquishing all claims for new and

independent torts arising from mediation, including legal malpractice causes of action against their own counsel. Certainly clients, who have a fiduciary relationship with their lawyers, do not understand that this result is a by-product of an agreement to mediate. We believe that the purpose of mediation is not enhanced by such a result because wrongs will go unpunished and the administration of justice is not served."

The court went on to note our friend Pepperdine professor Peter Robinson's scholarly work that has collected cases from around the country where strict adherence to confidentiality appear to have allowed an injustice to occur. And it concluded by warning parties and attorneys of the potential unintended consequences that can come from mediation confidentiality: "In light of the harsh and inequitable results of the mediation confidentiality statutes (Evid. Code, § 1115 et seq.), such as those set out above, the parties and their attorneys should be warned of the unintended consequences of agreeing to mediate a dispute. If they do not intend to be bound by the mediation confidentiality statutes, then they should 'make [it] clear at the outset that something other than a mediation is intended.'"

So where does that leave us? Confidentiality is still king. But the courts continue to nibble away.

Who's right? I have always been a strong proponent of mediation confidentiality. But should there be exceptions? Or will the exceptions swallow the rule? Speak up.

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