BY JAN FRANKEL SCHAU

Is Mediation Still "Fairly Legal" in California?

IN THE NEW TELEVISION SHOW *Fairly Legal,* the main character is a mediator who sometimes finds herself mediating street fights, for example between her cab driver and a bicycle rider. Although she is not practicing law, she doles out legal advice with impunity. Here in California, this fictional character's impunity apparently has a basis in reality, given the recent California Supreme Court decision, *Cassel v. Superior Court.*[1]

In *Cassel*, the plaintiff sued his attorneys for malpractice, alleging he received poor legal advice regarding a claim at a mediation. Before trial, the defendant attorneys moved to exclude all evidence of attorney-client communications leading up to and occurring at the mediation that took place outside the presence of the mediator, claiming that the mediation privilege extended to "anything said…for the purpose of, in the course of, or pursuant to mediation."[2] The court weighed the benefits of confidentiality in mediation against the potential injustice of shielding attorneys from liability for bad advice. The court concluded, particularly in light of the wording of the mediation privilege statute, that the importance of confidentiality prevails over the injustice that may result from the loss of evidence of malpractice. In affirming the trial court's ruling excluding the evidence, *Cassel* raises the question of whether mediations are being reduced to mere street fights, without any protection for clients from unscrupulous legal counsel.

Mediations routinely invite a series of difficult conversations between lawyers and clients. When lawyers are initially retained, the case evaluation often leads us to believe that our clients have a winning position. It is often not until preparing for mediation that lawyers are required to reassess the likelihood of success on particular claims and defenses. Also, by the time mediation arrives, clients are generally better apprised of the realistic costs, risks, and challenges of proceeding to trial. A resolution of the dispute demands that lawyer and client engage in sensitive, frank, and honest conversation. That is why courts require the clients to be present during mediation.

A settlement reached during mediation is not the determined outcome of a scientifically applied process but instead is a highly subjective decision based upon advice on myriad factors unique to a particular dispute. For example, is the client likeable and believable? Is the opposing counsel a trial lawyer with a proven track record? Will the dispute capture the jury's sympathy? Lawyers strive to educate the client, make recommendations about strategies, and engage the mediator in helping to reanalyze a case once offers and demands are being exchanged. A lawyer's advice is integral to the decisions made during mediation.

Clients participating in mediation certainly expect to be able to rely on the advice of their counsel. At a mediation, the mediator may explain that the process will require careful consideration of the facts and the evidence, together with the likely costs, in an effort to help each side understand the risks and rewards of proceeding. Imagine if the mediator continued, "The process is completely confidential. That means, dear Client, that if your attorney gives you some false advice, or breaches ethical or professional duties toward you, you won't be able to get me to testify about it, and you won't be able to testify about it either. Client, beware." This disclosure would tend to undermine the relationship between attorney and client and discourage mediation.

A recent Ninth Circuit decision illustrates how challenging it is to contest a mediated settlement. In *Facebook v. ConnectU, Inc.*,[3] ConnectU (or the Winklevosses, as the persons behind ConnectU are collectively addressed in the case) claimed that the settlement agreement releasing the claims against Facebook, which all parties signed, was unenforceable because, the Winklevosses alleged, the agreement was procured by securities fraud. The Winklevosses were not permitted to introduce any evidence of what Facebook said or did not say during the mediation. The Winklevosses could not show that Facebook misled them about the value of its shares and related financial matters. The court noted that all parties had signed a confidentiality agreement in the mediation, which was binding no matter what transpired during the mediation. Without the evidence, their claim of fraud could not be entertained. The court upheld the settlement.

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Clients deserve protection against fraud and malpractice in mediation. In the absence of legislation to carve out a statutory exception for malpractice, lawyers should strive to ensure that the mediation process is never misused to shield or insulate attorneys who give unethical or other bad advice. If clients, lawyers, and mediators are to continue to use and not abuse ADR, all must pledge to safeguard the process in the face of cases such as *Cassel* and *Facebook*.

If lawyers are free to hide behind the Evidence Code rather than answer for poor representation, the result will be injustice for all disputants. Careful preparation and diligent representation in mediation should ensure that the deals that are struck there are as fair as they are unassailable. ■

[1] Cassel v. Superior Court, No. S178914, 2011 WL 102710 (Jan. 13, 2011).
[2] Evid. Code §1119.
[3] Facebook v. ConnectU, Inc., DC 5:07-cv-01389 (Apr. 11, 2011).

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