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CALIFORNIA SUPREME COURT DECLARES OPEN SEASON FOR ATTORNEYS TO LIE TO AND CHEAT THEIR CLIENTS, IF IT'S RELATED TO A MEDIATION AND NO CRIMINAL LAWS ARE BROKEN

by Shirish Gupta

Summary of the Case

In January, the California Supreme Court ruled that the mediation privilege trumps clients' right to present evidence in future civil or administrative actions against their attorneys. (*Cassel v. Superior Court* (2011) 51 Cal.4th 113.) In *Cassel*, a client sued his attorneys for "for malpractice, breach of fiduciary duty, fraud, and breach of contract. His complaint alleged that by bad advice, deception, and coercion, the attorneys, who had a conflict of interest, induced him [at mediation] to settle for a lower amount than he had told them he would accept, and for less than the case was worth." (*Id.* at p. 117.) The client sought to introduce at trial evidence of communications between him and his attorneys during the mediation. These communications occurred when no one else was in the room, not even the mediator.

The court upheld the exclusion of the evidence, citing "the Legislature's explicit command that, unless the confidentiality of a particular communication is expressly waived, under statutory procedures, by all mediation 'participants,' or at least by all those 'participants' by or for whom it was prepared ([Evid. Code,] § 1122, subd. (a) (1), (2)), things said or written 'for the purpose of' and 'pursuant to' a mediation shall be inadmissible in 'any . . . civil action.' ([Evid. Code,] § 1119, subds. (a), (b).)" (*Cassel v. Superior Court, supra*, 51 Cal.4th at p. 119.) The court acknowledged that its decision would compromise the client's ability to prove a claim of legal malpractice, but claimed that its hands were tied by the statute's plain meaning. The reality, however, is that no legislator would agree that it was the legislature's intent to permit attorneys to defraud clients with impunity. Indeed, legislators would point out that there is no provision in the statute or the legislative history suggesting that the mediation privilege was intended to limit future malpractice actions or the court's ability to regulate and discipline attorneys.

The Supreme Court's Ruling Hurts the Court, the Profession and the Public

In order to practice law in California and become a member of the bar, one must comply with rules approved by the Supreme Court and seek the court's permission to practice. (Bus. & Prof. Code, §§ 6060, 6062, 6064.) The Supreme Court has the authority and duty to regulate attorneys. For example, Business and Professions Code sections 6076 and 6077 authorize the State Bar, with the approval of the Supreme Court, to establish rules of conduct for attorneys and consequences for breach of those rules. In addition, Business and Professions Code section 6077 permits the Supreme Court to suspend an attorney for up to three years for breaching those rules.

However, because of the court's ruling in *Cassel*, clients will not be able to present evidence of their attorneys' malpractice in administrative complaints filed with the State Bar. This will directly impede the State Bar's and thus the Supreme Court's ability to discipline attorneys who violate the Rules of Professional Conduct. Given that the Supreme Court has a duty to regulate all attorneys licensed in California, it could and should have held that the legislature never intended the mediation privilege to apply to private communications between an attorney and his or her client.

Furthermore, the *Cassel* decision gives further justification to a legislature openly hostile to the State Bar and to the judicial branch. In recent years, the legislature has taken the State Bar to task for lax internal controls and oversight and poor public protection. In addition, the legislature is critical of the courts' ability to manage their electronic records and their finances, even threatening to take away much of their building funds. In a climate of such hostility, it is all the more surprising that the court would so openly abdicate its duties to protect the public from unscrupulous attorneys. In essence, the court is inviting the legislature to further encroach on its and the

State Bar's daily activities, possibly even taking attorney discipline from the court's purview.

The court tried to limit the impact of its ruling by saying that only those communications related to mediation are protected. However, depending on the county, nearly every civil case in California goes through mediation at one point or another. Therefore, a portion of attorney-client communications in nearly every civil case will be excluded from evidence in potential civil and administrative actions. These will be crucial gaps in evidence that clients will have a hard time overcoming.

Conclusion

The reality is that vast majority of attorneys in California take their ethical duties seriously. For them, the *Cassel* opinion will not impact how they interact with their clients; likewise, their clients will not be more vulnerable due to this ruling.

The problem will be the few attorneys who give the rest of us a bad name. Their malpractice, even if not admissible in courts, will be spread by the media and there will inevitably be a backlash against the profession, the bar and the courts for failing to ensure public protection. The profession has been a target for the legislature's populist ire over the past few years. It is unfortunate that the Supreme Court, in *Cassel*, has given the legislature yet another stick to beat the profession with. Hopefully, the legislature will remedy this promptly.

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