Confidentiality is essential to effective mediation because it promotes a candid and informal exchange...

Confidentiality provisions are a key element of mediation processes. They allow parties to engage in open and honest discussions without fear of their communications being used against them in court. This is essential to the effectiveness of mediation, as it encourages parties to be fully transparent in their negotiations.

In California, confidentiality is protected by state law. The California Mediation Act, which governs the conduct of mediation, provides that communications made during mediation are confidential. This means that mediators, parties, and their counsel are bound by a duty of confidentiality to keep all communications and documents exchanged during mediation private. This confidentiality is not waiverable without the parties’ consent.

The risk of confidentiality violations is a significant concern for parties involved in mediation. While the confidentiality of communications made during mediation is generally protected, there are exceptions to this rule. For example, confidentiality can be waived if a court order requires it, or if the parties agree to disclosure.

One such case is Foxgate Homeowners’ Association, Inc. v. Bramalea California, Inc., 26 Cal. 4th 3, 1-15, 25 P.3d 1117 (2008). In this case, the California Supreme Court held that a mediation agreement was not enforceable because the confidential communications made during mediation were not protected by confidentiality provisions.

In another case, Cassel v. Superior Court, 51 Cal. 4th 113, 136, 1117 (2008), the Court ruled that mediation confidentiality protections did not apply to communications made outside of the mediation process. In this case, the mediation confidentiality provisions were not applicable to communications made after the mediation had ended.

These cases highlight the importance of understanding the scope and limits of confidentiality provisions in mediation. Parties involved in mediation should be aware of the potential risks of confidentiality violations and take steps to protect the confidentiality of their communications.

The Professional Liability Defense Federation supports diversity in our member recruitment efforts, in our committee and association leadership positions, and in the choices of counsel, expert witnesses and mediators involved in professional liability claims.
and for less than the case was worth. Prior to trial, the attorney moved to exclude all evidence of private attorney-client discussions immediately preceding and during the mediation concerning mediation settlement strategies. The motion was granted, but the Court of Appeal vacated the trial court’s order. Requiring that the mediation confidentiality statutes were not intended to exclude from malpractice claims the confidential communications of their own clients. The dissenting justices argued that the majority had created an unwarranted judicial exception to the mediation confidentiality statutes.

The California Supreme Court granted review and agreed with the dissenting justices. The Court held that the attorney-client confidentiality discussions with the client were confidential, and therefore were neither discoverable nor admissible for purposes of proving the malpractice claim. The Court found that the mediation confidentiality statutes include no exception for legal malpractice actions by mediation disputants against their own counsel. Further, the statutes do not create a “privilege” in favor of any particular person, and do not support a conclusion that they are subject to an attorney-client privilege for lawsuits between attorney and client. Cassel, supra, 51 Cal. 4th at pp. 132, 133. The Court cited an earlier appellate court decision, Wimsatt v. Superior Court, 152 Cal. App. 4th 137, 61 Cal. Rptr. 3d 200 (2007) for support.

In Wimsatt, the Court held that mediation briefs and attorney emails written and sent in connection with mediation were protected from disclosure, even when one of the clients sought to use the material in support of their legal malpractice action against his attorneys. (Wimsatt, supra, at p. 142.) The Court was not deciding whether the client and/or attorneys accessed mediation-related communications effectively precluded his malpractice lawsuit, concluded that “the Supreme Court has declared that exceptions to mediation confidentiality must be expressly stated in the statutes.” The Court found that an exception to be made for legal misconduct is not for the Legislature to do, and not the courts, encouraging the legislature to take action. Id. at p. 162-163.

Certainly, clients who have a fiduciary relationship with their doctors, 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 unavenged and the administration of justice is not served.

Given the number of cases in which the fair and equitable administration of justice have been thwarted, it is time for the Legislature to reconsider California’s broad and expansive mediation confidentiality statutes and to craft ones that will permit counter- vailing public policies be considered. Id., at p. 164, Italics added. In reaction to these explicit instructions from the courts, the legislature is now considering the issue.

A Legislative Exception for Attorney Malpractice?

The reaction to the Cassel decision was dividedly received. Following the decision, two sides have emerged: those who support the creation of a confidentiality exception for evidence of attorney malpractice, and those who support the need to maintain the status quo of mediation confidentiality.

Those in the former group have suggested that strict confidentiality prevents the courts from exploring and judging the correctness of malpractice claims. "If an attorney should prove or disprove a claim of professional misconduct filed against a mediator, or against a party, representative, or non-party party based on conduct during a mediations..." (CALIFORNIA MEDICAL ASSOCIATION JOURNAL 33:11). Some propose adopting an exception similar to that of the Uniform Mediation Act (UMA), which provides that a communication is not confidential if it is one that would prove or disprove a claim of professional misconduct filed against a mediator, or against a party, representative, or non-party party based on conduct during a mediation... (CALIFORNIA MEDICAL ASSOCIATION JOURNAL 33:11).

Those who oppose changes to the confidentiality provisions for mediations assert that the cure—making redress possible for those whose interests were not well served by their counsel—will be worse than the disease. They argue that the proposed change to the legislation will have a chilling effect on parties and their counsel. Even a very competent attorney would be excessively cautious about entering into mediation or working to persuade a client of the merits of a mediated agreement. It could become very difficult for mediators and attorneys to work with clients to arrive at an agreement that best serves the client’s needs, while taking into account all of the circumstances. Thus, those in favor of maintaining the current rules contend that more is achieved by the number of individuals participating in mediation than is lost by some potential number of individuals agreeing to avoidance directions. (Association for Dispute Resolution of Northern California Letter to CLRC (Sept. 16, 2013.)

In short, most practitioners agree that some degree of confidentiality is an essential part of the mediation process. But the issue is now whether to carve a new exception for legal malpractice. In the aftermath of Cassel, efforts are currently underway to amend section 1120 to make admissible mediation-related attorney-client communications (otherwise protected by the mediation confidentiality statutes) in disciplinary proceedings and legal malpractice actions.

Somewhat surprisingly, until recently, the issue of attorney malpractice was not immediately viewed as needing to be discussed by the CLRC or raised in the legislature. In the high likelihood of injury resulting from the conduct, was actually known by the managing agent, director, officer, or other person responsible for making policy decision on behalf of the defendant. The Court found that the award of punitive damages no to exceed the greater of:

1. Four times the amount of compensatory damages awarded to each claimant entitled thereto, consistent with the remaining provisions of this section; or
2. The sum of $2 million.

(c) Where the fact finder determines that a time the injury the defendant had a specific intent to harm the defendant and determines that the defendant’s conduct did in fact harm the claimant, there shall be no cap on punitive damage.

(d) This subsection is not intended to prohibit an appropriate court from exercising its jurisdiction under s. 768.74 in determining the reasonableness of an award of punitive damages.

Further, Florida courts have established a three step test to determine whether an award of punitive damages passes constitutional muster: (1) the manifest weight of the evidence must not permit the award of punitive damages assessed out of all reasonable proportion to the malice, outrage, or wantonness of the tortuous conduct; (2) the award must bear some relation to an defendant’s ability to pay and not result in economic castigation or bankruptcy to defendant; and (3) the award must exist between the compensatory and punitive amounts awarded. R.J. Reynolds Tobacco Co. v. Morin, 55 So. 3d 1060 (Fla. 1st DCA 2010).

7. From 1986 to 1995, section 768.73, Fla. Stat., provided that an award of punitive damages was to be split between the plaintiff and the state. Initially, the statute permitted the state to take 60% of a punitive damages award. Later, the statute was amended to permit the state to take only 35% of the award. Ultimately, this statute was repealed by operation of a sunset provision in 1995. However, prior to 1995 this fee split provision provided room for additional constitutional arguments against the application of punitive damages in legal malpractice actions. First, Defendant attorneys were able to argue that the statute constituted a derogation of their substantive due process rights and an unlawful taking by the state when applied against attorneys who were not the actual wrong-doers. Secondly, Defendant attorneys were also able to argue that a punitive damages award in which the evidence is a governor the amount of damage may be restricted by the Excess Fines Clause, contained in the Eighth Amendment to the U.S. Constitution and in Article I, Section 17 of the Florida Constitution, as they have not committed the culpable conduct for which punitive damages may be constitutionally assessed. Lastly, the Defendant attorneys could argue that the statute did not comply with the constitutional guarantees of due process and equal protection as the statute could not survive the strict scrutiny test or the lesser, rational relationship test. Under the strict scrutiny test the statute have the burden to prove that it has a compelling interest and there are no less burdensome means by which it can accomplish the compelling interest. Assuming arguing, the State of Florida did have some compelling interest for punitive damages and committed a wrong against society by taking a portion of their property, that bears some reasonable relationship to the wrong committed. This compelling objective is not effectuated by taking property from an attorney, who has not committed a wrong against society but who, through mere negligence, has done a disservice to the client. In this regard, there was no nexus between the award of punitive damages and the legislature's objective to punish "willful, wanton or gross misconduct." Fla. Stat. §768.72(2). Alternatively, the application of the punitive damages statute against an attorney found liable for negligence fails to satisfy the rational relationship as there was simply no reasonable relationship between the state’s objective to punish malicious acts and the class of individuals that constitute a "class of attorneys," who are innocent of culpable conduct, responsible for the conduct of another.

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hird punitive damages. The consequence of Malprac-
tice Plaintiffs’ claims are ordinary punitive damages become an item of compensatory damages in a subsequent legal malpractice action is that the wrong-doer, whose conduct caused the harm, is not free from liability. This will not deter him or others from committing such conduct in the future.

Florida’s second legislative goal, to discourage punitive
damage claims by making them less remunerative,
will be completely defeated. Plaintiffs who cannot prove punitive damages will be encouraged to seek a second bite at the apple by using their attorneys for malpractice in an attempt to recoup the monetary windfall. This does not allow to give effect to the legislative intent in enacting Florida Statute, section 768.73, as well as the entire tort reform legislation.

It is undisputed that there must be redress to the client who suffers actual damages as a result of the
attorney’s negligence. Indeed, this already exists as an award of compensatory damages for actual injuries. Reward for the economic loss of the contractual benefit will make the aggrieved client whole. It creates a windfall for the
attorney’s most basic, inalienable right, guaranteed by the United States Constitution and Florida Statutes.

Conclusion

Malpractice Plaintiffs’ claims that punitive damages are recoverable as an item of compensatory damages in a subsequent legal malpractice action has no precedent in this, the contrary, Florida preceden-
tent mandates that courts apply the public policy justi-
fications, to punish wrong-doers, underlying awards of punitive damages to the issue before it today. Other-
wise, application of Florida Statutes, section 768.73 to Defendant attorneys will result in the derangement of their entire dispute but instead heard evidence and made and
proceeded as if the mediation confidentiality rules applied. The court rejected this because the mediation was an MSC “especially con-
considering that the obvious and commonsense intended use of the terms “settlement” and “mediation” interchangeably did not mean that the mediation was an MSC especially con-
sidering the obvious and commonsense intended result of a mediation is to reach a settlement.” The court then noted that if the participants wish to avoid the effect of the mediation confidentiality rules, they should make it clear at the outset that something other than a mediation is intended. That is, “[e]xcept where the parties have expressly agreed otherwise. . . . courts do not have the duty to consider whether a proceeding is a ‘settlement’ as a means to frustrate the mediation con-
fidentiality statutes.” (Id. at pp. 1166-1167.)

Another layer to this is that the confidentiality rules do not apply to mandatory settlement conferences. This is a case that addressed this issue whether a proceeding is subject to the rules applicable to the conduct of mediation proceedings. Instead, we apply the mediation rules to the mediation.

February 2012, Assemble...
the mediation.

**Other jurisdictions**

California is not the only state that fraught with confusion regarding confidentiality in the dispute resolution arena. Many states have adopted catchphrases of laws, which reflect that only recently, states began adopting comprehensive statutes, such as California’s. Thus, mediation and related processes have been established, yet confidentiality laws differ greatly among jurisdictions. Discrepancies also exist among courts (state versus federal). Each has at least one or more statutes or court rules affecting confidentiality in mediation.

Approximately half of the states have enacted comprehensive rules by themselves to govern mediation confidentiality. In the modern trend, as followed by California, is to adopt mediation statutes or evidentiary rules of general application. Other states that have adopted general evidentiary rules include, but are not limited to: Arizona, Arkansas, Iowa, Kansas, Louisiana, Maine, Massachusetts, Minnesota, Missouri, Montana, Nebraska, Nevada, New Jersey, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Texas, Utah, Vermont, Wisconsin, and Wyoming. A handful of those states use the UMA as their enacted law. A significant number of these states have, like California and New Jersey, like California, also attempt to prevent all mediator testimony by formally declaring that mediators lack capacity or are incapable to testify about communications they have preserved over.

Of course, in practice these rules are not absolute, and courts often use rules to modify confidentiality with an evidentiary exclusion that makes all evidence of statements made and conduct that constitute professional misconduct or which give rise to disciplinary proceedings under the Rules of Professional Conduct for attorneys. The states that follow the older trend (by not adopting a comprehensive statute) have enacted statutes to establish a particular mediation program and confer confidentiality rules that are limited to mediation in a specific context. For example, Iowa’s statute regarding private rights actions contains a provision regarding mediation confidentiality for such cases. In these jurisdictions without a general mediation statute, the limits on disclosure depend on whether the mediation is covered by one of the specialized statutes.

The resulting patchwork of laws is a major factor contributing to the confusion about confidentiality protection for mediation. The statutory and judicially created exceptions, too, contribute to this uncertainty. To lend further confusion, many states have more than one such statute, each granting a different degree of confidentiality depending on the mediation program.

Other states have simply adopted the equivalent of Rule 408 of the Federal Rules of Evidence, which provides that evidence of an offer to compromise a claim is inadmissible in evidence as an admission of the validity or invalidity of the claim. This may provide partial protection for mediation communications, but far less than the comprehensive statutes in other states, however, have made their version of Rule 408 explicitly applicable to mediation. Nonetheless, in the federal realm of common law, rules for mediation confidentiality are sparse.

Alternative dispute resolution, whether in the form of mediation, arbitration, or other dispute resolution processes, is governed by rules that may be less developed than the statutes. Other than federal law, there are three primary sources that address confidentiality in mediation. The Code of Federal Regulations (CFR) section 37.311 provides that evidence of statements made and conduct occurring in a mediation settlement conference or other settlement proceeding conducted, whether attributable to a party, the mediator, another neutral, or a neutral observer present at the settlement proceeding, shall not be subject to discovery and shall be admissible in any proceeding in the action or other civil actions on the same claim, except in disciplinary proceedings before the State Bar or any agency established to enforce standards of conduct for mediators or other neutrals.

The analysis of constitutionality must begin with the proposition that all legislative enactments directly with attorney misconduct. Minnesota Statutes Annotated section 595.02(1a)(2), (3) permits testimony from a person presiding at an alternative dispute resolution proceeding to testify concerning professional misconduct or which give rise to disciplinary proceedings under the Rules of Professional Conduct for attorneys. The states that follow the older trend (by not adopting a comprehensive statute) have enacted statutes to establish a particular mediation program and confer confidentiality rules that are limited to mediation in a specific context. For example, Iowa’s statute regarding private rights actions contains a provision regarding mediation confidentiality for such cases. In these jurisdictions without a general mediation statute, the limits on disclosure depend on whether the mediation is covered by one of the specialized statutes. The resulting patchwork of laws is a major factor contributing to the confusion about confidentiality protection for mediation. The statutory and judicially created exceptions, too, contribute to this uncertainty. To lend further confusion, many states have more than one such statute, each granting a different degree of confidentiality depending on the mediation program.

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tantly, Defendant attorneys are not the original wrong-doers and should not be punished for the alleged egregious conduct of an underlying tortfeasor.

U.S. Supreme Court Jurisprudence

Punitive damages have long been an entrenched part of the American legal tradition. The U.S. Supreme Court has recognized that awards of punitive damages can violate constitutionally guaranteed protections such as due process when the purpose of punitive damages, namely to punish civil wrongdoers and to deter others, results in an excessive punitive damage award. See Pacific Mutual Life Insurance Co. v. Haslip, 499 U.S. 1 (1995).

In the U.S. Supreme Court’s first review of a punitive damage award, the crew of the private armed American brig, Scourge, seized the cargo, crew and papers from the Amiable Nancy, a Haitian schooner. Amiable Nancy, 16 U.S. (3 Wheat.) 546, 4 L. Ed. 456 (1818). When the Amiable Nancy arrived at St. John’s Antigua without papers, she was seized by the British guard-brig Spider. Id. The Scourge’s owner was ordered to pay damages for the real injuries and personal wrongs sustained by the crew of the Amiable Nancy, but the Scourge’s owner was not liable for the vindictive damages. Amiable Nancy, 16 U.S. (3 Wheat.) at 559. Justice Story, writing for a unanimous Court, stated:

Upon the facts disclosed in the evidence, this must be pronounced a case of gross and wanton outrage, without any just provocation or excuse. And if this were a suit against the original wrong-doers, it might be proper to go yet further and visit upon them in the shape of such damages, the proper punishment. But it is to be considered that this is a suit against the owners of the priva- teer...who are innocent of the detriment of this transaction, having neither directed it or en- countersanned it, nor participated in it in the slightest degree...they are not bound to the extent of vindictive damages. Id. at 559. Em- phasis added.

Similar reasoning has been employed over the years to limit vicarious liability for punitive damages to situa- tions in which the individual or corporate employer participated in or authorized the conduct that is the basis of the punitive damage award. Florida courts follow this complicity rule when faced with a claim for punitive damages based upon a theory of vicarious liability. See, e.g., Mercury Motors Express v. Smith, 393 So. 2d 554 (Fla. 1981).

The Supreme Court of Oregon has joined the Su- preme Court of Georgia and the Massachusetts Su- preme Judicial Court in holding that under certain circumstances an attorney representing a current cli- ent can confidentially communicate with counsel re- garding potential liability to that current client. For example, P.K. v. P.K., 346 S.W.3d 592, 597-98 (Mo. App. 2011) (holding that confidential communications between attorneys are constitutionally protected). The equal protection provision of our state constitution provides, “All natural persons are equal before the law.” Article I, Section 2 of the Florida Constitution. Florida courts have interpreted at least as broadly as the equal protection provision of the United States Constitution and may be given even broader meaning. See Woodward v. Golfo- gopher, 992 N.W. 22579 (Florida Circuit Court, Orange County). The Equal Protection Clause of the Fourteenth Amendment commands, “nor shall any State deny to any person within its jurisdiction the equal protection of the laws,” which is essentially a direction that all per- sons similarly situated should be treated alike. Id. Defendant attorneys may assert that Florida law, section 768.73, is overbroad and violates the security of attorneys’ confidentiality. However, the Florida Supreme Court held that 768.73, is unconstitutional as applied in legal malpractice suits. See, e.g., Smith v. Smith, 545 So. 2d 557 (Fla. 1988).

In addition, the Florida Supreme Court has held that Florida attorneys are privileged from disclosing confidential communications with their clients. See, e.g., Rosen v. Rosen, 366 So. 2d 1132 (Fla. 1978). The Florida Supreme Court in Florida Bar v. Celentano, 351 So. 2d 777, 780 (Fla. 1977), held that “the right of an attorney to control access to his client’s files and confidential information is a fundamental right reserved to him by the First and Sixth Amendments to the United States Constitution. Such information is not subject to discovery even if it might be helpful to a jury in understanding the factual background of the case.” In re Firm Blythe, 727 So. 2d 1310 (Fla. 1998), the Florida Supreme Court held that confidential communications between attorneys who establish liability under a less demanding negligence standard may only recover such damages as are sufficient to compensate them for actual injury. Id. at 1317. Defendant attorneys may make the similar argument that malpractice Plaintiffs in a legal malpractice action who establish liability under a less demanding negligence standard may only recover such damages as are sufficient to compensate them for actual injury. Defendant attorneys may also note that the Florida Supreme Court in Florida Bar v. Celentano, 351 So. 2d 777, 780 (Fla. 1977), held that “the right of an attorney to control access to his client’s files and confidential information is a fundamental right reserved to him by the First and Sixth Amendments to the United States Constitution. Such information is not subject to discovery even if it might be helpful to a jury in understanding the factual background of the case.”

A P P E N D I X 4


The Supreme Court of Oregon has joined the Su- preme Court of Georgia and the Massachusetts Su- preme Judicial Court in holding that under certain circumstances an attorney representing a current cli- ent can confidentially communicate with counsel re- garding potential liability to that current client. This trend continues unabated since coming to the fore just a couple of years ago and requires attention by all firms to ensure the appropriate steps are taken to protect communications from disclosure should litiga- tion with the current client ensue. In evaluating these issues, the firm must consider whether the particular jurisdiction has a codified or common law source of confidentiality. The Supreme Judicial Court in holding that under certain circumstances an attorney representing a current client can confidentially communicate with counsel regarding potential liability to that current client. This trend continues unabated since coming to the fore just a couple of years ago and requires attention by all firms to ensure the appropriate steps are taken to protect communications from disclosure should litiga- tion with the current client ensue. In evaluating these issues, the firm must consider whether the particular jurisdiction has a codified or common law source of confidentiality. The Supreme Judicial Court in holding that under certain circumstances an attorney representing a current client can confidentially communicate with counsel regarding potential liability to that current client. This trend continues unabated since coming to the fore just a couple of years ago and requires attention by all firms to ensure the appropriate steps are taken to protect communications from disclosure should litiga- tion with the current client ensue. In evaluating these issues, the firm must consider whether the particular jurisdiction has a codified or common law source of confidentiality. The Supreme Judicial Court in holding that under certain circumstances an attorney representing a current client can confidentially communicate with counsel regarding potential liability to that current client. This trend continues unabated since coming to the fore just a couple of years ago and requires attention by all firms to ensure the appropriate steps are taken to protect communications from disclosure should litiga- tion with the current client ensue. In evaluating these issues, the firm must consider whether the particular jurisdiction has a codified or common law source of confidentiality. The Supreme Judicial Court in holding that under certain circumstances an attorney representing a current client can confidentially communicate with counsel regarding potential liability to that current client. This trend continues unabated since coming to the fore just a couple of years ago and requires attention by all firms to ensure the appropriate steps are taken to protect communications from disclosure should litiga- tion with the current client ensue. In evaluating these issues, the firm must consider whether the particular jurisdiction has a codified or common law source of confidentiality. The Supreme Judicial Court in holding that under certain circumstances an attorney representing a current client can confidentially communicate with counsel regarding potential liability to that current client. This trend continues unabated since coming to the fore just a couple of years ago and requires attention by all firms to ensure the appropriate steps are taken to protect communications from disclosure should litiga- tion with the current client ensue. In evaluating these issues, the firm must consider whether the particular jurisdiction has a codified or common law source of confidentiality. The Supreme Judicial Court in holding that under certain circumstances an attorney representing a current client can confidentially communicate with counsel regarding potential liability to that current client. This trend continues unabated since coming to the fore just a couple of years ago and requires attention by all firms to ensure the appropriate steps are taken to protect communications from disclosure should litiga- tion with the current client ensue. In evaluating these issues, the firm must consider whether the particular jurisdiction has a codified or common law source of confidentiality.

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