

# NAVIGATING THE BLACK HOLE OF CALIFORNIA'S

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## MEDIATION CONFIDENTIALITY STATUTES

In California, mediation is the evidentiary equivalent of a black hole; the participants' thoughts, acts, and omissions get in—but they can't get back out. Unfortunately, astrophysicist Neil deGrasse Tyson is not a member of our state bar, so we must navigate the wide-ranging and largely misunderstood effects of engaging in mediation ourselves.


In 1997, seeking to promote the “candid and informal exchange of information”<sup>1</sup> between parties attempting to settle their disputes short of trial, the California Legislature enacted Evidence Code §§ 1115-1128, commonly called the “mediation confidentiality statutes.”<sup>2</sup> Taken as a whole, these provisions effectively render inadmissible and confidential evidence of almost everything that occurs—or does not occur—at, in preparation for, or even just related to a mediation. (Id. at § 1119(a).)

The legislature purposefully defined “mediation” to be extremely broad. It covers any “process in which a neutral person or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement.” (Cal. Ev. Code § 1115(a).) The only real exceptions are formal Mandatory Settlement Conferences and certain limited family law proceedings. (*Id.* at § 1117(b).) In other words, anything goes: “there are simply no procedural strictures imposed on mediation other than those the parties wish to adopt.” (Hon. H. Warren Knight (Ret.), et al., Cal. Prac. Guide: Alt. Disp. Res., § 3.28 (Rutter Group 2017.))

The Legislature similarly defined the scope of mediation confidentiality to be extremely broad—it covers everything said, written, or done “for the purpose of, in the course of, or pursuant to” a mediation. (Cal. Ev. Code § 1119(a).)

This includes not only the mediation session itself (including private communications between attorneys and their own clients), but also anything said or done outside of the mediation session—so long as it relates to the mediation.

The California Supreme Court confirmed the Legislature’s broad statutory intent in the seminal opinion of *Cassel v. Superior Court* (2011) 51 Cal.4th 113. In *Cassel*, the plaintiff alleged that at an underlying mediation, his lawyers “harass[ed] and coerc[ed] him to accept” an unfavorable settlement after misrepresenting its terms. (*Id.* at 120.) However, the trial court excluded in limine evidence of all of the parties’ mediation-related communications—including pre-mediation strategy and preparation discussions. (*Cassel*, supra, 51 Cal.4th at 121.)



*Do attorneys have any ethical obligations to advise their clients about the potentially draconian effects of the mediation confidentiality statutes?*

*How might a lawyer limit the 'practical' risks of engaging in mediation? How can one reduce the risk of a client with 'settler's remorse' filing a malpractice complaint after reaching a mediated solution?*

The California Supreme Court ultimately affirmed, holding that in light of the Legislature's clear intent, "[i]t follows that . . . all discussions conducted in preparation for a mediation, as well as all mediation-related communications that take place during the mediation itself, are protected from disclosure." (*Cassel*, supra, 51 Cal.4th at 128; see also, id. at 138 (conc. opn. of Chin, J.) ["This holding will effectively shield an attorney's actions during mediation, including advising the client, from a malpractice action even if those actions are incompetent or even deceptive."])

*Cassel's* ripple effects are severe. In fact, so long as a dispute settles during a mediation, clients cannot sue their attorneys for almost any error or omission that occurred even prior to or outside of the mediation context. (See, *Amis v. Greenberg Traurig* (2015) 235 Cal.App.4th 331, 334; id. at 329 ["We sympathize with *Amis's* assertion that '[m]ediation confidentiality was never intended to protect attorneys from malpractice claims'; however . . . that seemingly unintended consequence is for the Legislature, not the courts, to correct."])

To be clear, clients who sign a settlement agreement at mediation waive the right to claim that any misconduct by their attorneys caused them to settle on less favorable terms than they otherwise would have. Such was the case in *Amis*, where the client alleged that had he received proper advice

before agreeing to mediate, he never would have mediated in the first place. (*Amis*, supra, 235 Cal.App.4th at 334.)

The *Amis* court ruled that even such a theory of liability-by-inference would put defendant attorneys at a huge disadvantage by turning "mediation confidentiality into a sword by which [the client] could claim he received negligent legal advice during [or before] mediation, while precluding [the defendant attorneys] from rebutting the inference by explaining the context and content of the advice that was actually given." (*Amis*, supra, 235 Cal.App.4th at 341.)

There are, of course, some very limited exceptions. The mediating parties themselves can waive the privilege (but only if all such parties agree, and do so expressly). (Cal. Ev. Code § 1122.) A criminal defendant's Constitutional right to due process permits him to introduce at trial mediation-related evidence that otherwise would be inadmissible. (*Rinaker v. Superior Court* (1998) 62 Cal.App.4th 155, 165.) And if excluding mediation-related evidence would lead to results "either absurd or clearly contrary to legislative intent," the statutes do not apply. (But good luck proving that: see, e.g., *Foxgate Homeowners' Ass'n, Inc. v. Bramalea California, Inc.* (2001) 26 Cal.4th 1, 13; *Simmons v. Ghaderi* (2008) 44 Cal.4th 570, 582-583.)

And the waters have grown even murkier still. Two years after *Cassel*, a federal trial court for the Central District of California (i.e., a court unbound by California state procedural law) found that due process entitled an insurance company to introduce mediation-related evidence in order to present a full defense to a civil bad faith case. (*Milhouse v. Travelers Commercial Ins. Co.* (C.D.Cal. 2013) 982 F.Supp.2d 1088, 1108-1109.)

So how does one reconcile all of this confusing—and at times seemingly contradictory—case law? Well, one thing is certainly clear: "there is no 'attorney malpractice' exception to mediation confidentiality." (*Cassel*, supra, 51 Cal.4th at 133.) Many believe this is an unintended consequence of

the statutory scheme. As noted above, Justice Chin said as much in his *Cassel* concurrence. (*Id.* at 138.)

But do attorneys have any ethical obligations to advise their clients about the potentially draconian effects of the mediation confidentiality statutes? More specifically, do we have a duty to warn our clients beforehand that if they engage in mediation and reach a settlement during that session, they can't sue us for almost anything we may do wrong in their case? That they effectively can't even rely on the advice we give them during the mediation process?

Some courts think we do. (See, e.g. *Wimsatt v. Superior Court* (2007) 152 Cal.App.4th 137, 164 [“In light of the harsh and inequitable results of the mediation confidentiality statutes . . . the parties and their attorneys should be warned of the unintended consequences of agreeing to mediate a dispute.”]) The Advisory Committee for the California Rules of Court seems to agree. (See, Advisory Comment to Subdivision (d) of Cal. R. Ct. 3.1380 [“To prevent confusion about the confidentiality of the proceedings, it is important to clearly distinguish between settlement conferences held under this rule and mediations.”])

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And regardless, California Rule of Professional Conduct 3-500 requires an attorney to, among other things, keep the client “reasonably informed about significant developments relating to the employment or representation.” (Describing the ramifications of engaging in mediation as “significant” would be an understatement.)

But whatever our obligations, they are, quite frankly, unenforceable. Again, even if a client asserts a malpractice claim or a State Bar complaint against an attorney for allegedly failing to explain the mediation process adequately beforehand, due process would bar the claim; there's no way the attorney could defend him- or herself fully without introducing evidence of what happened at the mediation. (See, *Amis*, supra, 235 Cal.App.4th at 340.)

Many believe this is unfair to the client. But one could just as convincingly argue it is a necessary protection for the attorney. For instance, what if the attorney did an exemplary job of explaining the mediation confidentiality statutes, but simply waited until the actual mediation began to advise the client? All evidence the attorney would need to defend him- or herself from the client's malpractice claim would be inadmissible.

Regardless, as many attorneys and clients alike know all too well, just because the law says you're safe doesn't mean you won't get sued anyway. So ethical issues aside, how might a lawyer limit the “practical” risks of engaging in mediation? How can one reduce the risk of a client with “settler's remorse” filing a malpractice complaint after reaching a mediated resolution?

Unfortunately, this quagmire has no foolproof solution. Certainly, the best practice is to develop a form disclosure and waiver that fully and explicitly explains the mediation confidentiality statutes and their effects—including that they insulate the attorney from liability for any malpractice committed during the mediation process. The attorney should then provide that document to the client, discuss it thoroughly and candidly, and have the client execute it before agreeing to mediate.

But to quote Dr. deGrasse Tyson, “inquiry shouldn’t stop just because a reasonable explanation has apparently been found.” Indeed, even a thorough and forthright written disclosure won’t eliminate the risk of your client suing you. And that document itself probably wouldn’t be admissible in a subsequent malpractice case anyway, because you arguably drafted and discussed it with your client “in preparation for” mediation. (Cal. Ev. Code § 1119(b); see, *Cassel*, supra, 51 Cal.4th at 123-124, 128.)

So what, if anything, should be done about these “unintended” effects of the mediation confidentiality statutes? Our Legislature has been considering this question for years, and its delay in reaching a solution suggests a perfect one doesn’t exist. The California Law Revision Commission’s most recent recommendation is an exception limited to proving or disproving State Bar disciplinary proceedings, legal malpractice claims, and attorney-client fee disputes. (*Recommendation: Relationship Between Mediation Confidentiality And Attorney Malpractice And Other Misconduct* (Dec. 2017) Cal. Law Revision Com. Rep. (2017), p. 135 [preprint copy].) But there’s no telling whether or when the Legislature might act on it.

While the current situation may not be perfect, the Legislature’s goal of “encouraging candid and informal exchange[s]” of information at mediation is an important one. (Nat. Conf. of Comrs. on U. State Laws, U. Mediation Act, supra, § 2, Reporter’s working notes, ¶ 1.) And the widely-adopted reasoning that this “frank exchange is achieved only if the participants know that what is said in the mediation will not be used to their detriment” thereafter is sound. (*Id.*) Furthermore, the mediation confidentiality

statutes provide attorneys with a powerful defense against meritless “settler’s remorse” malpractice suits.

Only time will tell whether our Legislature determines if the mediation confidentiality statutes extend too far. But for the time being, mediation will continue on as a powerful process that attorneys and clients should approach with eyes wide open.

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#### Notes:

1. See, Nat. Conf. of Comrs. on U. State Laws, U. Mediation Act (May 2001) § 2, Reporter’s working notes, ¶ 1.
2. Many refer to these provisions as the “mediation privilege,” but the statutory scheme doesn’t create a privilege per se—just a set of evidentiary exclusions.