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Frailty, Thy Name Is Privilege:

Mediation Confidentiality and its Jurisdictional Challenges

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A. Introduction

Any lawyer who has taken a case to mediation knows – at least in some vague, general way – that settlement discussions occurring during the mediation enjoy some level of confidentiality protection. Mediators themselves, of course, may have some greater understanding of what is and is not confidential during the mediation process, but even a seasoned mediator may not know all of the ins and outs of the sometimes helter skelter confidentiality case law. Even more likely is that neither the lawyers nor the mediator fully appreciates the nuances of the confidentiality rules in each of the jurisdictions in which a dispute potentially could arise.

Suppose two California residents in an ongoing California state court litigation concerning California state law claims go to mediation in California. Any dispute arising from that mediation – including a determination of what is and is not confidential – would be determined by California law. But what if a class of New York and New Jersey plaintiffs has a dispute with a California corporation doing business around the world on a mixture of federal and Delaware claims? If the parties go to pre-litigation mediation in Nevada, and a dispute arises from that mediation, which mediation privilege rules will the court ultimately hearing the dispute apply? And does it matter? While the answer to the penultimate question above is not so clear, the answer to the last question is a resounding "yes." It matters because, depending on what law is applied, the results can be starkly different.

B. Choice of Law in the Privilege Context

1. The Attorney-Client Privilege Provides a Useful Analogy

To understand how the choice of law can affect the end result, it is helpful to look at another privilege rule – the attorney-client privilege. In a recent, high profile case involving allegations of stock option backdating by Broadcom's CFO, William Ruehle, the Ninth Circuit reversed the district court's decision that conversations between Mr. Ruehle and the company's attorneys were protected by the attorney-client privilege. *United States v. Ruehle*, 583 F.3d 600, 607 (9th Cir. 2009). The district court had applied California's attorney-client privilege rules, which are among the most protective of a client's interests in confidentiality. As a result, it suppressed evidence of Mr. Ruehle's conversations with the company's counsel, whom Mr. Ruehle testified he believed were representing his interests. In so doing, the district court emphasized California's presumption that "communications made in the course of an attorney-client relationship are presumed confidential." *Id.* at 608.

In overturning the district court's suppression order, the Ninth Circuit found that the district court's application of California law was a "critical" legal error, stating that "[a]t the outset we note a fundamental flaw in the district court's analysis. 'Issues concerning application of the attorney-client privilege in the adjudication of federal law are governed by federal common law.'" *Id.* (quoting *United States v. Bauer*, 132 F.3d

504, 510 (9th Cir. 1997)).[1] The application of federal common law to this issue proved to be dispositive. Even though the Ninth Circuit accepted the district court's findings that Mr. Ruehle reasonably believed he had an attorney-client relationship with Broadcom's corporate counsel, it concluded that Mr. Ruehle did not have a reasonable expectation that his statements to counsel would remain confidential. *Id.* at 609-10. Significantly, the Ninth Circuit pointed out that under federal law, unlike under California law, the attorney-client privilege is "strictly construed," and this strict construction led to reversal of the district court's suppression order.

Wide variances between a state court's approach to a privilege issue and a federal court's approach to the same issue are not limited to the *Ruehle* case or the Ninth Circuit. One particularly telling quote about some federal courts' approach to attorney-client privilege questions comes from the Fourth Circuit:

> [T]he privilege remains an exception to the general duty to disclose. Its benefits are all indirect and speculative; its obstruction is plain and concrete. It is worth preserving for the sake of a general policy, but it is nonetheless an obstacle to the investigation of the truth. It ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle.

NLRB v. Harvey, 349 F.2d 900, 907 (4th Cir. 1965) (quotation and internal punctuation omitted); *see also Ruehle*, 583 F.3d at 607 ("The privilege stands in derogation of the public's right to every man's evidence and as an obstacle to the investigation of the truth . . . .") (quotation and internal punctuation omitted). Such an attitude toward a privilege not surprisingly leads to very different conclusions than those of a court applying a state privilege rule to an identical fact pattern, where that state privilege rule applies a presumption ***in favor of*** the privilege.

2. Choice of Law and the Mediation Privilege

Although the attorney-client privilege may be the most prominent privilege that is affected by application of state versus federal law, or by one state's law versus another state's law, it certainly is not the only one. The mediation privilege[2] is yet another

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[1] Were the district court sitting in diversity, it would have applied California state privilege rules. Federal Rule of Evidence 501 sets forth the standard:

> [T]he privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

[2] The confidentiality of discussions during and related to a mediation proceeding is referred to as a privilege in some jurisdictions, and a rule of confidentiality in others. Indeed, even within the same jurisdiction, different courts and commentators do not always agree on what to call it. The

privilege where not only do court attitudes about its scope vary widely, but the express rules defining the scope also vary widely among jurisdictions.

Just as the differences between California state law and federal common law on the attorney-client privilege provide a nice contrast to demonstrate the significance of choice of law determinations, so too are California versus federal law differences helpful to the discussion of the mediation privilege. Like the attorney-client privilege in California, the mediation privilege in California is established by statute. Cal. Evid. Code §§ 1115-1128. Specifically, California Evidence Code section 1119(a) provides:

> No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery, and disclosure of the evidence shall not be compelled . . . .

Id. at § 1119(a).[3] Section 1119(b) clarifies that writings enjoy the same protection as oral communications, while subsection (c) states that "[a]ll communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential." Moreover, Evidence Code section 703.5 expressly provides that, with certain exceptions, a mediator is not "competent" to testify at a hearing about anything that occurred during a mediation. Both California courts and federal courts applying California law have applied these statutes strictly, and generally have refused to allow any judicially created exceptions – even where the result may have seemed unfair to one of the parties. *See Cassel*, 51 Cal. 4th at

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Uniform Mediation Act refers to it as a privilege. In California, the word "privilege" is not used, and some California commentators balk at calling it a privilege because it is not subject to all of the same implied waiver rules as the various privileges expressly enumerated in California Evidence Code section 912. *See Eisendrath v. Super. Ct.*, 109 Cal. App. 4th 351, 362 (2003); *see also Cassel v. Super. Ct.*, 51 Cal. 4th 113, 132 (2011) (noting that "mediation confidentiality statutes do not create a 'privilege' in favor of any particular person," in contrast to the attorney-client privilege and other similar privileges). These authors believe that, no matter the distinctions between the mediation privilege and other statutory privileges (*e.g.*, the attorney-client privilege), the mediation privilege is much more similar to a privilege than a mere rule of confidentiality in that, among other reasons, disclosure of the protected communications cannot be compelled even if subject to a protective order. *See Folb v. Motion Picture Indus. Pension & Health Plans*, 16 F. Supp. 2d 1164, 1171 (C.D. Cal. 1998) (noting that without a federal mediation privilege, information exchanged in confidential mediations would be discoverable under the Federal Rules of Civil Procedure, without regard to whether it ultimately would be admissible).

[3] "Mediation" is defined in the California Evidence Code as a "process in which a neutral person or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement." Cal. Evid. Code § 1115(a). "Mediator" is defined as "a neutral person who conducts a mediation . . . [and] includes any person designated by a mediator either to assist in the mediation or to communicate with the participants in preparation for a mediation." *Id.* at § 1115(b). "Mediation consultation" is defined as "a communication between a person and a mediator for the purpose of initiating, considering, or reconvening a mediation or retaining the mediator." *Id.* at § 1115(c).

118 ("We have repeatedly said that these confidentiality provisions are clear and absolute. Except in rare circumstances, they must be strictly applied and do not permit judicially crafted exceptions or limitations, even where competing public policies may be affected."); *Simmons v. Ghaderi*, 44 Cal. 4th 570, 580 (2008) (limiting exceptions to narrowly prescribed statutory exemptions).[4]

Federal law also recognizes a federal mediation privilege, but it is based on federal common law rather than statute. *See Folb*, 16 F. Supp. 2d at 1179-80; *Sheldone v. Pa. Turnpike Comm'n*, 104 F. Supp. 2d 511, 517 (W.D. Pa. 2000). As a result, it is not as strictly or even uniformly applied. Moreover, federal courts applying federal common law are much more apt to find an exception that allows a privileged communication to be disclosed. *See Trammel v. United States*, 445 U.S. 40, 47 (1980) ("The Federal Rules of Evidence acknowledge the authority of the federal courts to continue the evolutionary development of testimonial privileges in federal criminal trials 'governed by the principles of the common law as they may be interpreted . . . in the light of reason and experience.'") (quoting Fed. R. Evid. 501).

That is not to say, however, that certain federal statutes do not place some restrictions on courts. Indeed, the Alternative Dispute Resolution Act of 1998, 28 U.S.C. section 652, requires that each district court adopt local rules that provide for the confidentiality of alternative dispute resolution processes. But Section 652 does not specify what must be included in those local rules. Not surprisingly, the result is a hodgepodge of local rules that often conflict both with each other and with the privilege rules of the state in which the district court sits. For example, the Northern District of California's Local Rules for Alternative Dispute Resolution provide certain enumerated exceptions to the mediation privilege that are wholly inconsistent with California state law. Northern District of California ADR Local Rule 6-12(a). Moreover, the Commentary to Rule 6-12 states that "the court may consider whether the interest in mediation confidentiality outweighs the asserted need for disclosure." *Id.* (citing *Olam v. Congress Mortg. Co.*, 68 F. Supp. 2d 1110 (N.D. Cal. 1999)). Because California's mediation privilege law – which is based on a strict statute and the cases that have interpreted that statute – does not allow for such a weighing of interests except in very limited circumstances, a Northern District court would have to ignore its own local rule if it were to apply California substantive privilege law in deciding a mediation privilege issue in a diversity case.

Other federal statutes also may be relevant to the mediation privilege analysis. For example, Federal Rule of Evidence 408 – which forms the basis of some states' mediation privilege – makes inadmissible statements made in compromise discussions

[4] California courts, including the California Supreme Court in *Cassel* (51 Cal. 4th at 135) and *Simmons* (44 Cal. 4th at 583), frequently cite to the decision in *Rinaker v. Super. Ct.*, 62 Cal. App. 4th 155 (1998), as an example of a judicially created exception that has been allowed to stand. In *Rinaker*, the confidential information sought to be introduced was potentially exculpatory evidence in a delinquency proceeding where minors were being charged with criminal conduct. The court found that the minors' constitutional rights in that case outweighed the mediation privilege. 62 Cal. App. 4th at 167.

"when offered to prove liability for, invalidity of, or amount of a claim that was disputed . . . ." Fed. R. Evid. 408(a). Rule 408, however, does not limit the admissibility of settlement discussions if offered for some other purpose. Thus, it is far less protective of mediation discussions than most state statutes or even federal common law. Similarly, the Federal Administrative Procedures Act provides some statutory basis for mediator confidentiality in the limited context of an administrative proceeding, but even that statute is fairly limited in what it protects.[5]

A determination of whether state or federal law applies is not the only choice of law decision that could be determinative of the outcome. Among the individual states, the scope of the privilege also varies widely. Some, like California, have adopted fairly strict privilege rules by statute, which the courts strictly enforce. *See, e.g.,* Cal. Evid. Code § 1119. Some states have privilege statutes that have been less strictly interpreted and enforced by state courts. *See, e.g., Doe v. Nebraska*, 971 F. Supp. 1305, 1307-08 (D. Neb. 1997) (interpreting Nebraska Revised Statute section 25-2914 as allowing evidence of mediation communications to be admitted in subsequent sanction proceeding). Other states merely rely on their case law and the provisions of Federal Rule of Evidence 408 or an equivalent state statute.[6] *See, e.g.,* Haw. R. Evid. 408; Vt. R. Evid. 408.

Whether or not the parties and mediator recognize the possible variations of the different jurisdictions' confidentiality rules, those variations may be significant. Below are three examples of scenarios where the mediation privilege may apply, and how that application may differ depending on choice of law decisions.

C. <u>The Duty To Participate in Mediation in Good Faith</u>

One such distinction comes in the context of a dispute over a party's conduct at mediation. At some point during the life of a federal court lawsuit, the parties may find themselves ordered to participate in a mediation. *See, e.g.,* Central District of California Local Rule 16-15.1 ("Unless exempted by the trial judge, the parties in each civil case shall participate in one of the settlement procedures set forth in this rule or as otherwise approved by the trial judge."). Of course, an order to participate in mediation obliges the parties to participate in good faith. Failure to do so may result in sanctions. *See* Fed. R. Civ. P. 16(f) (judge may impose sanctions upon a party or the party's attorney for failure to participate in good faith in a court-ordered conference); Southern District of California General Order No. 387 at Rule 600-7(g) (1992) ("For any failure of a party, its representative or its counsel to participate or proceed in good faith in accordance with these rules, the Court may impose sanctions.").

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[5] The Act provides that "a neutral in a dispute resolution proceeding shall not voluntarily disclose or through discovery or compulsory process be required to disclose any dispute resolution communication or any communication provided in confidence to the neutral . . . ." 5 U.S.C. § 574(a). It then goes on, however, to list a number of exceptions, including where a court determines that disclosure is necessary to "prevent a manifest injustice," or to "help establish a violation of law." *Id.* at § 574(a)(3)(A) and (B).

[6] For a general discussion about which states have adopted which form of rules, including a list of relevant state statutes, *see*, *generally*, Ellen E. Deason, *Predictable Mediation Confidentiality in the U.S. Federal System*, 17 Ohio St. J. on Disp. Resol. 239 (2002).

Parties naturally would expect that their communications at a court-ordered mediation would be protected by the federal common law mediation privilege. As discussed above, the confidentiality of the parties' mediation communications also may be protected by local court rule. *See, e.g.,* Central District of California Local Rule 16-15.8 ("All settlement proceedings shall be confidential. No part of a settlement proceeding shall be reported, or otherwise recorded, without the consent of the parties, except for any memorialization of a settlement and the Clerk's minutes of the proceeding."); Northern District of California ADR Local Rule 6-12 ("[T]his court, the mediator, all counsel and parties, and any other persons attending the mediation shall treat as 'confidential information' the contents of the written Mediation Statements, anything that happened or was said, any position taken, and any view of the merits of the case expressed by any participant in connection with any mediation.").[7]

But what happens if one of the parties decides not to participate in the mediation in good faith and instead uses the occasion as an opportunity for some free discovery regarding the strengths and weaknesses of the other party's case? For example, one party may reveal – after hours of negotiations – that the party representative does not have authority to enter into a settlement. Would the wronged party or even the mediator be allowed to report to the court regarding the offending party's violation of a court order to mediate in good faith, even if doing so would require revealing otherwise confidential mediation communications?

Local court rules may provide the answer here. In the case of the Northern District of California, while ADR Local Rule 6-12 broadly protects mediation communications from being "used for any purpose" in the action, the rule also specifically allows for a report to be made to the ADR magistrate regarding a possible violation of the ADR local rules.

Even absent such a rule, a federal court may abrogate the mediation privilege to allow the parties to report a potential violation of a court order. *See, e.g., Nick v. Morgan's Foods, Inc.*, 99 F. Supp. 2d 1056, 1058-59 (E.D. Mo. 2000) (entering sanctions against a non-cooperative party based in part upon a report by the mediator regarding its level of participation in the process); *Pueblo of San Ildefonso v. Ridlon*, 90 F.3d 423, 424 & n.1 (10th Cir. 1996) (noting that the defendant's counsel disclosed the content of the parties' discussions at a settlement conference (which otherwise would be a "serious violation" of the Tenth Circuit's rule of confidentiality), but concluding that there was no violation of the confidentiality rule because disclosure was necessary to respond to the court's order to show cause why counsel should not be sanctioned for failure to

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[7] As demonstrated by a recent Eleventh Circuit decision, courts may construe these rules rather narrowly. *See Angiolillo v. Collier County*, No. 10-10895, 394 Fed. Appx. 609, 615 (11th Cir. Aug. 25, 2010) (finding that the Middle District of Florida's confidentiality rule "protects parties participating in mediation from the use of any statement made during mediation proceedings as an admission against their interest," but concluding that the magistrate judge did not violate that rule by determining that the defendants never offered to settle (which information was derived from a mediation) because the magistrate "did not use any statement made by Angiolillo during mediation as an admission against his interest").

participate in a subsequent settlement conference).

In 2006, Joe Francis, the founder of Girls Gone Wild, found himself on the receiving end of a sanctions award by a district court judge in the Middle District of Florida when he arrived at a court-ordered mediation barefoot and wearing shorts and a baseball hat, then proceeded to inform opposing counsel (in a profanity-laced tirade) that he had no interest in settling the case and only was at the mediation because the court ordered him to be there.[8] Although the mediator issued a simple report that the mediation had resulted in an impasse, opposing counsel was allowed to testify about Mr. Francis' antics at an evidentiary hearing on their request for sanctions.[9] The court found that financial sanctions would not have the desired effect, and so ordered Mr. Francis to jail. When Mr. Francis failed to satisfy the contempt order by cooperating in another mediation, he was arrested and jailed.[10]

In state court – or in federal court where the court is exercising diversity jurisdiction – the result may have been entirely different.

In *Foxgate Homeowners' Ass'n, Inc. v. Bramalea Cal., Inc.*, 26 Cal. 4th 1 (2001), the California Supreme Court found that California's mediation privilege prohibited both the parties and the mediator from revealing mediation communications for the purpose of reporting bad faith conduct during the mediation. *Id.* at 17 ("Although a party may report obstructive conduct to the court, none of the confidentiality statutes currently make an exception for reporting bad faith conduct or for imposition of sanctions under that section when doing so would require disclosure of communications or a mediator's assessment of a party's conduct . . . ."). The court recognized that resolving the conflict in favor of the preservation of mediation confidentiality may inhibit enforcement of professional responsibility standards, but it left that issue at the feet of the California Legislature. *Id.* at 17 & n.13.

Other states similarly may protect the mediation privilege, even where it means that a party's bad faith participation in mediation cannot be reported to the court. *See In re Acceptance Ins. Co.*, 33 S.W. 3d 443, 452-53 (Tex. App. 2000) (finding that the "manner in which participants negotiate" at mediation – including evidence regarding a party's lack of settlement authority – should not be disclosed to the trial court because, pursuant to Texas statute, mediation participants may not be required to testify in any proceedings relating to the mediation or be required to disclose confidential information

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[8] *See* Victoria Pynchon, *Mediating? Bring Your Toothbrush. Joe Francis and "Girls Gone Wild,"* available at http://www.negotiationlawblog.com/conflict-resolution/mediating-bring-your-toothbrush-joe-francis-and-girls-gone-wild/ ("Pynchon").

[9] *See id.* By allowing opposing counsel to testify regarding what Mr. Francis said at the mediation, the court apparently did not strictly construe or apply the terms of the local mediation privilege rule. *See* Middle District of Florida Local Rule 9.07(b) ("Restrictions on the Use of Information Derived During the Mediation Conference: All proceedings of the mediation conference, including statements made by any party, attorney, or other participant, are privileged in all respects. The proceedings may not be reported, recorded, placed into evidence, made known to the trial court or jury, or construed for any purpose as an admission against interest.").

[10] *See* Pynchon, *supra*.

or data relating to the matter).

Still other states provide statutory exceptions to their mediation privileges to allow for the reporting of a party's failure to comply with a court order. *See, e.g.*, Fla. Stat. § 44.405(4)(a)(6) (no confidentiality or privilege attaches to a mediation communication offered to report professional misconduct during the mediation); *Massey v. Beagle*, 754 So. 2d 146, 147 (Fla. Dist. Ct. App. 2000) (denying sanctions against plaintiffs who reported confidential mediation communications in arguing that the defendant's insurance adjuster should be sanctioned for failure to secure lump-sum settlement authority prior to the parties' mediation).

As this patchwork quilt of strict statutory privileges, local rules, and case law makes clear, the ability for our theoretical mediation participants to report one party's bad faith failure to participate could vary widely from jurisdiction to jurisdiction.

D. Determination of "Amount in Controversy" in Establishing Federal Jurisdiction

The distinction between federal and state mediation confidentiality standards also may be important in the removal context. Where mediation is conducted in a state court action – ostensibly under the mediation privilege afforded by state law – but that action is later removed to federal court, what privilege standard will apply? The answer may depend on the context in which the issue arises post-removal.

Where the propriety of removal itself is at issue, courts in the Ninth Circuit will apply federal mediation privilege standards. In *Molina v. Lexmark Int'l, Inc.*, No. CV 08-04796 MMM (FMx), 2008 U.S. Dist. LEXIS 83014 (C.D. Cal. Sept. 30, 2008), the plaintiff ("Molina") asserted purely state law wage and hours claims under California's Labor Code and Unfair Competition Law. *Id.* at *1. Two weeks before trial, the defendant ("Lexmark") removed the action under the federal Class Action Fairness Act ("CAFA") (28 U.S.C. § 1332(d)), based in part on its only recently having become aware that Molina sought in excess of the jurisdictional limit under CAFA. *Id.* at **1-2. Molina moved to remand, arguing that Lexmark became aware two years prior that the amount in controversy exceeded the jurisdictional limit, based upon communications during and following the parties' mediation. *Id.* at **2, 4-8, 18-19. Molina's evidence in support of remand included (1) a damages analysis that was prepared by Molina's experts and shared with Lexmark's counsel at the mediation; and (2) two post-mediation letters from the mediator to Molina's counsel, in which the mediator stated that he told Lexmark's counsel of Molina's position that settling the case would require $8-10 million. *Id.* at **4-5, 18.

Should Molina have attempted to use either of those communications in California state court, he likely would have been prevented from doing so. *See Rojas v. Super. Ct.*, 33 Cal. 4th 407, 416-17 (2003) (California's mediation privilege extends to photographs, written witness statements, analyses and other writings prepared for, in the course of, or pursuant to a mediation); *Wimsatt v. Super. Ct.*, 152 Cal. App. 4th 137, 140 (2007) (finding emails following an initial mediation that made reference to items

discussed at the mediation were protected from disclosure by the mediation privilege because they would not have existed if the mediation had not taken place and they were "materially related" to a second mediation that was to take place the following day). The damage analysis in *Molina* likely would have been subject to California Evidence Code section 1119 if in fact it were prepared for the mediation, and the post-mediation letters probably would have been protected as either writings made "pursuant to" the mediation or as writings that would not have existed without the mediation.

Not surprisingly, in opposing Molina's motion to remand, Lexmark argued for the application of California's mediation privilege. *Molina*, 2008 U.S. Dist. LEXIS 83014 at *20. Lexmark argued that Molina was precluded – under both state and federal mediation privilege law – from relying upon the information exchanged during the mediation to show that Lexmark had early knowledge of the amount in controversy for purposes of defeating removal under CAFA. *Id.*

The district court rejected Lexmark's attempt to apply California' mediation privilege even though federal jurisdiction was based upon diversity and California state law would provide the rule of decision in the case. *Id.* Citing the Ninth Circuit's decision in *Babasa v. LensCrafters*, 498 F.3d 972 (9th Cir. 2007), the court found that federal common law – and not state statutory mediation privilege law – governs in determining whether the amount in controversy requirement for diversity jurisdiction has been met. *Id.* at **20-21. As a result, California's mediation privilege was inapplicable. *Id.* at *22. Applying federal common law, the district court considered the proffered mediation communications and, after so doing, granted the motion to remand.

It is not entirely far-fetched to imagine a scenario where a court would be required to apply the more lenient federal mediation privilege standards in determining the amount in controversy upon removal and later be required to apply a stricter state law mediation privilege – all in the course of the same case. Say, as was the case in *Molina*, a federal court applies federal common law and decides that it may consider statements made by a plaintiff during a mediation in order to determine when the defendant was aware of the amount in controversy. After removal, the defendant files a cross-complaint against a third party, who later seeks discovery of the materials and information exchanged during that same mediation. If the federal court were exercising diversity jurisdiction, it likely would apply California's mediation privilege in evaluating the third party's request. Thus, statements made during the mediation – some of which previously may have been considered by the same court in the remand motion – now would be protected from both discovery and consideration by the court.

E. <u>Post-Mediation Disputes Between a Lawyer and His Client</u>

Another area where the mediation privilege has come under fire by individual litigants is the area of post-mediation disputes between a lawyer and his client. Once again, the attorney-client privilege provides a good analogy.

The holder of the attorney-client privilege is the client, and not the lawyer – except to the extent the lawyer is asserting the privilege on behalf of the client. *See, e.g.,*

Cal. Evid. Code § 954. Even in California, which is among the states most protective of the privilege, the attorney-client privilege can be expressly or implicitly waived. One such waiver comes when a client sues his attorney for legal malpractice, thereby putting the otherwise confidential and privileged advice at issue. *See* Cal. Evid. Code § 958 ("There is no privilege under this article as to a communication relevant to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship."); *see also In re Rindlisbacher*, 225 B.R. 180, 183 (9th Cir. BAP 1998) (citing *Arden v. State Bar of Cal.*, 52 Cal. 2d 310, 320 (1959)); ABA Model Rule 1.6(b)(5).

A somewhat analogous issue has been addressed by several California courts in the context of the mediation privilege. In *Wimsatt*, for example, a client alleged that his lawyer submitted an unauthorized settlement demand, which the client learned about through a confidential mediation brief submitted in the underlying litigation. Notwithstanding the client's need to rely on the mediation brief to prove his allegations of legal malpractice, the court upheld the privileged nature of the mediation brief, refusing to recognize an "attorney malpractice" exception. 152 Cal. App. 4th at 163. The court acknowledged that the result of its ruling may be to foreclose clients from seeking "new and independent torts arising from mediation, including legal malpractice causes of action against their own counsel[,]" but nonetheless reiterated that a court "may not craft exceptions to mediation confidentiality." *Id.* A federal court applying California law reached a similar conclusion in *Benesch v. Green*, No. C-07-03784 EDL, 2009 U.S. Dist. LEXIS 117641 (N.D. Cal. Dec. 17, 2009). There, in refusing to consider evidence of a confidential mediation-related communication between a client and his lawyer, the court confirmed that in California the privilege applies even when it effectively precludes a client's claim for malpractice against his attorney. *Id.* at **21-23.[11]

Most recently, the California Supreme Court in *Cassel* addressed a client's allegation that his lawyer fraudulently induced the client to consent to a mediated settlement, relying on evidence of attorney-client discussions during the mediation. The trial and appellate courts both created an exception to the mediation privilege for legal malpractice lawsuits, and admitted the client's evidence of his mediation-related communications with his lawyer. The court reversed, expressly finding that the exception to the attorney-client privilege set forth in Evidence Code section 958 – creating a waiver of the privilege when a client sues his lawyer for malpractice – does not apply in the context of the mediation privilege.[12] 51 Cal. 4th at 132-33. The court also

[11] The court also explained that "mediation-related communications" include even "[c]ommunications between counsel and client that are materially related to the mediation, even if they are not made to another party or the mediator . . . ." *Id.* at *22. Such communications are "'for purpose of' or 'pursuant to' mediation." *Id.*

[12] The court also explained that a waiver of the privilege as to mediation-related communications requires the express waiver of all of the participants to the mediation, including, presumably, the mediator. 51 Cal. 4th at 130-31 (citing Cal. Evid. Code § 1122(a)(1)). By contrast, the parties to a specific mediation-related communication may expressly waive the privilege as to that communication (without first obtaining the express waiver of all of the mediation participants), if

reiterated the long-standing and oft-cited view in California that courts may not, except in the rarest of circumstances, create exceptions to statutory privileges. *Id.* at 118, 133.

The result of *Cassel* and predecessor cases is that, as a practical matter, a lawyer who acts negligently or even fraudulently during a mediation may be immune from liability to his client. As California courts consistently have pointed out, however, that is just one of the tradeoffs to protecting the confidentiality of the mediation process. *See Foxgate*, 26 Cal. 4th at 17 ("[T]he Legislature has weighed and balanced the policy that promotes effective mediation by requiring confidentiality against a policy that might better encourage good faith participation in the process."); *Eisendrath*, 109 Cal. App. 4th at 358 (noting that the "statutory scheme implements a strong legislative policy regarding the confidentiality of mediation"). Indeed, some courts have suggested in not-so-subtle terms that the Legislature reconsider the statutory framework that establishes the mediation privilege (*see, e.g., Cassel*, 51 Cal. 4th at 138-40 (Chin, J., concurring)), but so far the Legislature has declined to do so.

As the *Cassel* court pointed out, just as the client may not rely on mediation-related communications to prove his malpractice claims, neither can the lawyer rely on mediation-related communications to defend against such a claim. *Id.* at 133 n.10. But is that really a fair comparison? Aren't a civil defendant's due process rights implicated more strongly than a plaintiff's when that defendant is precluded from offering a defense? Suppose, for example, that a client sues his lawyer for malpractice, alleging that for the two years the case was on file, the lawyer never once suggested that the client settle for anything more than $100,000. Suppose further that the lawyer advised the client during a mediation that he offer to pay up to $500,000 to settle the claim. Under that factual scenario, the client presumably can make out his *prima facie* case without relying on any mediation-related communications, and thus will not be adversely affected by *Cassel* and similar cases. The lawyer, by contrast, will be precluded from putting on his only evidence in defense – that is, his mediation-related advice.

Strictly construing California's mediation privilege statute, a court likely would not allow the lawyer to disclose the protected communications, even in defense of the malpractice claim. How, if at all, could a court deal with this seemingly significant due process violation, while still remaining true to the mediation privilege statute?

Again, we turn to the attorney-client privilege for guidance. In the shareholder derivative lawsuit context, although a shareholder stands in the shoes of the corporation for purposes of asserting claims, the shareholder does not stand in the shoes of the corporation for purposes of asserting or, more importantly, waiving the corporation's attorney-client privilege. *See Favila v. Katten Muchin Rosenman LLP*, 188 Cal. App. 4th 189, 218 (2010). In *Favila*, a shareholder's estate sued outside corporate counsel for legal malpractice and related causes of action. Because the shareholder could not implicitly waive the corporation's attorney-client privilege by suing the corporation's lawyer, the lawyer was not able to introduce as evidence in the case the advice he gave to

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the communication "'does not disclose anything said or done . . . in the course of the mediation.'" 51 Cal. 4th at 131 (quoting Cal. Evid. Code § 1122(a)(2)).

the corporation – which he argued was central to his defense. Following California's strict application of the attorney-client privilege, the court declined to find that the privilege had been waived, and consequently would not allow the lawyer to testify about advice given to his corporate client as part of his defense in the malpractice action.[13] *Id.* at 221-22.

Faced with the prospect of a denial of due process to the lawyer, the court ultimately stayed the action until such time as the shareholder-plaintiff could demonstrate that the corporation's attorney-client privilege had been waived by some other means (*e.g.*, the crime-fraud exception). *Id.* Absent such a waiver, however, the shareholder could not proceed in his lawsuit against the lawyer. *Id.* Far from being an outlier, *Favila* is consistent with prior California precedent. *See McDermott, Will & Emery v. Super. Ct.*, 83 Cal. App. 4th 378, 383-85 (2000) (directing trial court to grant judgment on the pleadings in favor of a law firm defendant because, absent a waiver of the attorney-client privilege by the law firm's corporate client, the law firm could not fairly defend itself against a shareholder derivative action). Thus, in the face of an apparently unfair result, courts still will uphold the attorney-client privilege, but may seek some other means to offset any perceived injustice.

Although we are not aware of any cases where this same approach was applied in the context of the mediation privilege, in states like California it could be argued that dismissing the lawsuit would be the right result in a case like the hypothetical situation describe above, where a lawyer otherwise would be denied the opportunity to put on a defense to a claim of malpractice. Short of finding a waiver of the mediation privilege, however, it is less clear how a client seeking to assert a claim of legal malpractice based on communications during the mediation can be saved from an otherwise harsh result.

If this same issue arose under federal common law, a court might be more inclined to allow the lawyer to disclose privileged communications, as the lawyer's due process rights might be seen as outweighing the need to preserve mediation confidentiality. Unhindered by a strict statute like California Evidence Code section 1119, the court would be free (at least relatively so) to fashion what it considered to be a more just result. Of course, that could turn out to be better for the lawyer (if he were allowed to put on a more fulsome defense), or worse (if he were forced to litigate a case that otherwise might be dismissed if the other parties to the mediation refused to waive the privilege). Whatever the result, it likely would be driven by the court's choice of law determination.

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[13] In yet another example of the sometimes significant differences between state and federal law's application of the attorney-client privilege, federal common law generally follows the case of *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970), which held that a shareholder asserting a derivative claim against a corporation or its lawyer could gain access to otherwise privileged communications between the corporation and its counsel upon a showing of good cause. *Id.* at 1103-04. Thus, a court applying federal common law may not even have to address the dilemma faced by the court in *Favila*, and thus may not need to find a creative solution to the due process dilemma.

F. **Conclusion**

California provides a good example of a state that is very protective of the mediation privilege, just as it is very protective of the attorney-client privilege. Even in the face of an arguably unfair result, California courts consistently refuse to create exceptions to these privileges that are not expressly delineated in the applicable statutes. Thus, a mediator conducting a mediation in California, among California residents, related to issues of California law, can be reasonably confident that whatever she says or does in the mediation will not be disclosed in a subsequent proceeding. That confidence may influence the way the mediator proceeds, and how effective she can be. Similarly, the lawyers participating in the same California-focused litigation can say and do what they need to achieve their purpose, with little risk of disciplinary or other adverse consequences. While one could argue – and many have – whether this is a good or bad result, there can be little doubt that at least some lawyers will behave differently knowing their behavior cannot be questioned later.

On the other hand, if a mediator presides over a case where the ultimate choice of substantive law is unclear, she must keep that in mind, and not be nearly as confident that what she says ultimately won't become public – either by her own choice or by compulsion. Similarly, counsel must be aware that, without the protection of a statute like the one in California, there is at least some risk that bad or careless behavior can lead to adverse consequences – be it in the form of a sanctions order based on a mediator report or a subsequent legal malpractice action.

It must be noted, however, that protecting bad lawyer behavior is merely a side effect of the mediation privilege, and certainly not the purpose of it. There are many reasons – some discussed above – why preserving the confidentiality of the mediation process helps make the mediation process more successful in general, notwithstanding those (hopefully) rare cases where the mediation process is misused by counsel or parties. Whether these side effects are deemed serious enough to warrant finding exceptions to the mediation privilege will depend in large part not on the facts of the case, but rather on the choice of law applied by whatever court ultimately hears the issue.

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