MEDIATION/SETTLEMENT CONFERENCE CONFIDENTIALITY: IS THERE A DIFFERENCE?

BY: JENNIFER K. SAUNDERS, ESQ. AND BLYTHE GOLAY, ESQ.

Alternative dispute resolution is a phrase heard over and over again by lawyers and judges and we know it can take many forms: mediation, voluntary settlement conference, mandatory settlement conference. But there is a difference between them when it comes to whether discussions during the course of those "alternative dispute resolution" methods are confidential and that difference could have an impact for you and your client.

Mediation is a process by which a third party facilitates communication and negotiation to assist the parties in reaching a resolution of their dispute. It provides a simple, quick, and economical means of resolving disputes, and because it may also help reduce the court system's backlog of cases, it is in the public interest to encourage its use. For this reason, most states have enacted their own mediation laws such that by 2001, according to the National Conference of Commissioners on Uniform State Laws, there were over 2,500 separate state statutes covering different aspects of mediation. *See* Uniform Laws Comm'n, Mediation Act Summary.

The "settlement conference" too is a process by which a third party facilitates communication and negotiation to assist the parties in reaching a resolution of their dispute and can be voluntary or mandatory. Settlement conferences generally occur when a lawsuit has already been filed and is usually conducted by a judicial officer or someone who has the legal training and can help each party evaluate the strengths and weaknesses of their case.

As the use of mediation has increased, so too has the debate regarding the level of confidentiality that should be applied to evidence and materials introduced in mediation. Tension lies in the conflicting policies of protecting communications and evidence in order to encourage mediation on the one hand, and ensuring relevant and truthful evidence is made available for parties in litigation on the other hand. Confidentiality is essential to effective mediation because it promotes a candid and informal exchange, which "is achieved only if participants know that what is said in the mediation will not be used to their detriment through later court proceedings . . . ." *Rojas v. Superior Court,* 33 Cal. 4th 407, 417, 93 P.3d 260 (2004); *see Foxgate Homeowners' Association, Inc. v. Bramalea California, Inc.*, 26 Cal. 4th 1, 1-15, 25 P.3d 1117 (2001). In California, one of the fundamental ways the courts and legislature have sought to encourage mediation is through the enactment of several mediation confidentiality provisions.

California's statutory scheme[1] unqualifiedly bars disclosure of specified communications and writings associated with mediation, absent any express statutory exception.[2] Specifically, "[a]ll communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential. They remain so both during the mediation and after it ends. *See* Evid. Code, §1126. Confidentiality is also provided to a mediator who is deemed incompetent to testify in any subsequent civil proceeding as to statements made or matters occurring at or in conjunction with the mediation. Further, neither a mediator nor anyone else may submit to a court or other adjudicative body any report, assessment, evaluation, recommendation, or finding of any kind by the mediator concerning a mediation conducted by the mediator. *See* Evid. Code, §703.5; 1121. The California Supreme Court has repeatedly said that the confidentiality provisions are clear and absolute and the courts are absolutely forbidden from crafting exceptions to mediation confidentiality.

Past Legislation

California's statutory scheme governing mediation confidentiality developed gradually, becoming more extensive and detailed as mediation grew in popularity.

The California Evidence Code was enacted on the recommendation of the California Law Revision Commission (CLRC) in 1965, a decade before the Federal Rules of Evidence were approved. From its inception, the Evidence Code included some provisions that restricted admissibility of evidence of settlement negotiations. (*See* CLRC, Memorandum 2013-39 (July 23, 2013), p. 2, *available at* http://www.clrc.ca.gov/pub/2013/MM13-39.pdf.). In the early 1980s, mediation began to gain acceptance as a means of resolving disputes. Accordingly, the CLRC undertook a study and concluded that legislation was needed to protect information disclosed in a mediation from later disclosure in a judicial proceeding. The legislature adopted a provision that protected mediation information from disclosure but only if the participants agreed in advance and in writing.

By the mid-1990s, there was a general perception among mediators that California law provided inadequate confidentiality within the mediation process. In 1997, the Legislature passed the California Mediation Act, and pursuant to recommendations of the CLRC, adopted the current version of the mediation confidentiality statutes.

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Case Law Interpreting Confidentiality Statutes

Since the enactment of the mediation confidentiality statutes, the California Supreme Court has issued five decisions interpreting and clarifying the provisions.

The first was *Foxgate Homeowners' Association, Inc. v. Bramalea California, Inc.,* 26 Cal. 4th 1, 1-15, 25 P.3d

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1117 (2001) which involved a mediation conducted pursuant to a case management order, stating that confidentiality protections would apply to the mediation and directing the parties to make their best efforts to cooperate. The plaintiffs' attorney came to the mediation with nine experts, but the defense showed up late and without any experts, despite a court order to do so. The mediation did not result in an agreement, and the mediator ended it early, concluding that mediation without defense experts would be futile.

Thereafter, the plaintiff sought sanctions in the form of mediator's fees, costs of producing nine experts, and attorney's fees in preparing for the mediation. The mediator filed a report in support of plaintiff's motion. The Court concluded that the mediator could not submit the report of communications or conduct by the party that the mediator believed constituted a failure to participate in good faith in the mediation process. The Court noted that the confidentiality statutes are clear and unambiguous. Even though it meant no sanction for the wrongful party, the Court found that the legislature had concluded that the better policy was to promote effective mediation.

Three years later, the Court considered the statutes again in *Rojas v. Superior Court,* 33 Cal. 4th 407, 415, 93 P.3d 260 (2004). *Rojas* concerned photographs that had been prepared in connection with a construction defect dispute between an owner and builders who settled at mediation. Non-mediating tenants later sued the owner for health problems and sought disclosure of the materials prepared in connection with the earlier dispute. The Court confirmed that under the plain language of the mediation confidentiality statutes, all writings (including photographs) prepared for the purpose of, in the course of, or pursuant to, mediation are confidential.

The next decision was *Fair v. Bakhtiari,* 40 Cal. 4th 189, 147 P.3d 653 (2006) which arose when parties concluded a mediation by signing a handwritten, single-page memorandum that included an arbitration clause. The question before the Court was whether inclusion of the arbitration clause satisfied section 1123(b)'s requirement that the agreement state that it is enforceable or binding. The Court held it did not, noting that a tentative working document could include terms, such as an arbitration provision, without reflecting an actual agreement to be bound.

In 2008, the Court considered mediation confidentiality yet again and stuck to its firm approach of prohibiting courts from crafting judicial exceptions to statutory rules. *Simmons v. Ghaderi,* 44 Cal. 4th 570, 187 P.3d 934 (2008) arose out of a medical malpractice suit that mediated, resulting in an oral agreement that was never reduced to writing. The plaintiffs then filed a motion to enforce the settlement under *Code of Civil Procedure* section 664.6. The Court held that the oral statement of settlement was not enforceable, and the judicial doctrines of equitable estoppel and implied waiver are not exceptions to the strict technical requirements set forth in the statute for the disclosure and admissibility of oral settlement agreements reached in mediation. Thus, when the plaintiffs sued to enforce the oral agreement that the defendant refused to sign, plaintiffs could not claim the defendant's pretrial disclosure of the agreement for litigation purposes estopped her from invoking mediation confidentiality.

The final and most recent case, *Cassel v. Superior Court,* 51 Cal. 4th 113, 117, 244 P.3d 1080 (2011), addressed application of the confidentiality statutes in subsequent legal malpractice actions. The case is analyzed in the next section.

Confidentiality Protects All Participants, Even Attorneys

As noted above, the purpose of confidentiality provisions is to encourage the mediation of disputes by eliminating a concern that things said or written in connection with such a proceeding will later be used against a participant. Toward that end, the statutory scheme unqualifiedly bars disclosure absent an express statutory exception.

One effect of these confidentiality provisions is that when clients participate in a mediation, they are in fact relinquishing claims for new and independent torts arising from the mediation, including legal malpractice claims against their own counsel. *Provost v. Regents of University of California,* 201 Cal. App. 4th 1289, 1303, 135 Cal. Rptr. 3d 591 (2011). The Supreme Court has recognized that its construction of the mediation statutes does not adequately punish "bad behavior" but it nonetheless honors a legislative choice:

> The Legislature decided that the encouragement of mediation to resolve disputes requires broad protection for the confidentiality of communications exchanged in relation to that process, even where this protection may sometimes result in the unavailability of valuable civil evidence.

Cassel, *supra*, 51 Cal. 4th 113, 136. Currently, it is immaterial that application of the mandatory mediation confidentiality statutes may compromise or even effectively preclude a party's ability to prove a legal malpractice claim against his or her attorney. In *Cassel*, during mediation the client agreed to the settlement of business litigation to which he was a party. He then sued his attorneys for malpractice, breach of fiduciary duty, fraud, and breach of contract. The operative pleading alleged that the attorneys had a conflict of interest and provided bad advice, which induced him to settle for a lower amount than he told his counsel he would accept

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and for less than the case was worth. Prior to trial, the attorneys moved to exclude all evidence of private attorney-client discussions immediately preceding and during the mediation concerning mediation settlement strategies. The trial court granted the motion, but the Court of Appeal vacated the trial court's order, reasoning that the mediation confidentiality statutes were not intended to protect attorneys from malpractice claims of their own clients. The dissenting justice urged 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 justice. The Court held that the attorneys' mediation-related 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 exception similar to that provided for by the 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 e-mails written and sent in connection with mediation were protected from disclosure, even when one of the clients sought these materials in support of his legal malpractice action against his attorneys. (*Wimsatt*, *supra*, at p. 142.) The Court, while noting that preventing the client from accessing 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 foreshadowed, "if an exception is to be made for legal misconduct, it is 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 lawyers, 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 unpunished* and the administration of justice is not served.
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> …
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> Given the number of cases in which the fair and equitable administration of justice have been thwarted, perhaps it is time for the Legislature to reconsider California's broad and expansive mediation confidentiality statutes and to craft ones that would permit countervailing 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?

Reaction to the *Cassel* decision was decidedly mixed. Following the decision, two sides have emerged: those who support the creation of a confidentiality exception for evidence of attorney malpractice, and those who want to maintain the status quo of mediation confidentiality.

Those in the former group have suggested that strict confidentiality prevents the courts from exploring and justly deciding controversies that might arise out of mediated agreements. (*E.g., Id*.) 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, party representative, or non-party participant based on conduct during a mediation. (UMA, § 6(a)(5)-(6), (c).)

Those who oppose changes to the confidentiality provisions for mediations assert that the cure—making redress possible for those clients 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 ill-advised resolutions. (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 during mediation had never been discussed by the CLRC or raised in the legislature. In

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February 2012, Assemblyman Donald Wagner introduced AB2025, which proposed adding a fourth exception to section 1120, providing that "communications between a client and his or her attorney during mediation are admissible in an action for legal malpractice or breach of fiduciary duty, or both, and in a State Bar disciplinary action, if the attorney's professional negligence or misconduct forms the basis of the client's allegations against the attorney."

As introduced, the bill prompted significant opposition and was amended to direct the CLRC to conduct a study. (CLRC, Memorandum 2013-39, *supra*, at p. 31.) According, the legislature directed the CLRC to analyze:

> [T]he relationship under current law between mediation confidentiality and attorney malpractice and other misconduct, and the purposes for, and impact of, those laws on public protection, professional ethics, attorney discipline, client rights, the willingness of parties to participate in voluntary and mandatory mediation, and the effectiveness of mediation, as well as any other issues the commission deems relevant. (*Ibid.*)

Mandatory Settlement Conferences

Another layer to the issue is that the confidentiality rules do not apply to mandatory settlement conferences (MSCs). *See* Evid. Code §1117, subd. (b)(2). MSCs are generally set on the court's own motion or at the request of any party. An MSC is not considered a mediation and therefore, the confidentiality protections do not apply.

The Advisory Committee Note to California Rules of Court, 3.1380 explains that the provision is not intended to discourage settlement conferences or mediations, but that problems have arises where distinctions between different ADR processes have been blurred. Indeed, despite the express distinction made by the legislature that mediation does not include an MSC, it is sometimes difficult in practice for parties to know whether the proceeding is a mediation subject to privilege. It is particularly difficult to recognize the difference between a mediation and an MSC when a judicial officer is presiding at those talks.

The problem of distinguishing mediations from MSCs is exacerbated by the courts' reluctance to address the issue and/or the parties' ignorance of the issue. (*E.g.*, *Rojas v. Superior Court,* 33 Cal. 4th 407, 417, 93 P.3d 260 (2004) (declining to address the issue because it was not raised below; *see also Travelers Cas. & Sur. Co. v. Superior Court*, 126 Cal. App. 4th 1131, 1139, 24 Cal. Rptr. 3d 751 (2005) ("We expressly decline to consider or clarify any differences that might exist between a mediation and voluntary settlement conference. . . . our decision should not be construed as holding that all voluntary settlement conferences are mediations which are subject to the rules concerning the conduct of mediation proceedings. Instead, we apply the various mediation rules to the Valuation Order only because that order was the result of a mediation.")

One case that did address the difference is *Doe 1 v. Superior Court,* 132 Cal. App. 4th 1160, 1166-1167, 34 Cal. Rptr. 3d 248 (2005). That case held that the court's use of the terms "settlement" and "mediation" interchangeably does not automatically turn a mediation into an MSC. In *Doe 1*, a judge was appointed as the "settlement and mediation judge" to resolve nearly 500 lawsuits based on allegations that various priests committed acts of childhood sexual molestation on plaintiffs. The court held that the use of the terms "settlement" and "mediation" interchangeably did not mean that the mediation was an MSC "especially considering that 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 should not seize on an occasional reference to 'settlement' as a means to frustrate the mediation confidentiality statutes." (*Id.* at pp. 1166-1167.)

Another case that addressed this was *Saeta v. Superior Court,* 117 Cal. App. 4th 261, 11 Cal. Rptr. 3d 610 (2004). *Saeta* dealt with an employee who sought to compel deposition testimony of a retired judge who had taken part in a company sponsored three-person review panel. The judge claimed that mediation confidentiality provisions applied. The court rejected this because the review panel did not conduct a mediation designed to help the parties voluntarily and independently resolve their dispute but instead heard evidence and made and transmitted recommendations.

In order to protect themselves and preserve the protections of mediation confidentiality, the parties should clearly specify "on the record" that the proceeding they are engaging in is a mediation. The courts in *Doe 1* and *Saeta* relied heavily on the record for the determination that the proceeding was a mediation.

Indeed, although there is a dearth of case authority discussing what factors determine whether a proceeding is a "mediation" for confidentiality purposes, the Advisory Committee Note for California Rule of Court, Rule 3.1380, suggests that all participants clearly distinguish whether the mediation confidentiality rules apply. The Note also provides that the rule is not intended to prohibit a court from appointing a person who has previously served as a mediator in a case to conduct a settlement conference in that case following conclusion of

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the mediation.

Other Jurisdictions

California is not the only state fraught with confusion regarding confidentiality in the dispute resolution arena. Many states have a patchwork of laws, which reflect that only recently, states begun adopting comprehensive statutes, such as California's. Thus, mediation and settlement conference confidentiality laws differ greatly among jurisdictions. Discrepancies also exist among courts (state versus federal). Each state has at least one or more statutes or local court rules affecting confidentiality in mediation.

Approximately half of the states have enacted comprehensive statutes or rules to govern confidentiality in mediation. 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, Virginia, Washington, Wisconsin, and Wyoming. A handful of those states use the UMA as their enacted law. A significant number of these states[4] have, like California, also chosen to protect confidentiality with an evidentiary exclusion that makes all evidence of mediation communications inadmissible at trial. Minnesota and New Jersey, like California, also attempt to prevent all mediator testimony by formally declaring that mediators lack capacity or are incompetent to testify about mediations they have presided over.

Of course, in practice these rules are not absolute, and courts have carved out exceptions to the exclusionary rules. In Louisiana, for example, Louisiana Revised Statute Annotated section 9:4112(B)(1)(b) provides that the parties, counsel, and other participants shall not be required to testify concerning the mediation proceedings, except in connection with a motion for sanctions made by a party to the mediation based on a claim of a party's noncompliance with the court's order to participate in the mediation proceedings. North Carolina General Statute section 7A-38.1(1) provides that evidence of statements made and conduct occurring in a mediated settlement conference or other settlement proceeding conducted, whether attributable to a party, the mediator, other neutral, or a neutral observer present at the settlement proceeding, shall not be subject to discovery and shall be inadmissible 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.

Minnesota appears to be the only state with an exception dealing directly with attorney misconduct. Minnesota Statute Annotated section 595.02(1a)(2), (3) permits testimony from a person presiding at an alternative dispute resolution proceeding for statements or conduct that constitute professional misconduct or which give rise to disqualification 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 civil 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 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 not receivable 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. Some of those states, however, have made their version of Rule 408 explicitly applicable to mediation. Nonetheless, in the realm of federal common law, rules for mediation confidentiality are sparse[5]

Alternative dispute resolution, whether in the form of a mediation or settlement conference, serves many valuable purposes but the confidentiality laws may differ. Maintaining clarity in the form of resolution intended by the parties and the laws applicable in your jurisdiction may be an important issue to discuss with the client before proceeding or during the proceeding as the confidentiality laws continue to develop across the states.

Endnotes

1. *Evidence Code* sections 1115 through 1128.

2. There are other sources of protection for mediation communications as well. For example, the California Constitution includes a right to privacy (Cal. Const. art I., §1), which has been construed to provide protection of communications tendered under a guaranty of privacy. This protection is qualified, not absolute. The California Codes also include a variety of specialized mediation confidentiality provisions (e.g., Fam. Code §3177 (child

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custody), Gov't Code, §12984 (housing discrimination)).

3. *Evid. Code*, §1119, subd. (c).) Subdivisions (a) and (b) of section 1119 forbid the disclosure or discovery in various civil, criminal, and administrative proceedings, or writings prepared as part of a mediation, as well as of evidence of anything said or any admissions made as part of a mediation. Subdivision (c) deals with the related and broader subject of confidentiality.

4. Arkansas, Missouri, Nebraska, Nevada, South Dakota, Texas, and Wisconsin.

5. Sources: Ellen E. Deason, *Predictable Mediation Confidentiality in the U.S. Federal System*, 17 Ohio St. J. Disp. Resol. 239 (2002); Pamela A. Kentra, *Hear No Evil, See No Evil, Speak No Evil: The Intolerable Conflict for Attorney-Mediators Between the Duty to Maintain Mediation Confidentiality and the Duty to Report Fellow Attorney Misconduct*, 1997 BYU L. Rev. 715 (1997).

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ATTORNEY-CLIENT PRIVILEGE: COMMUNICATING WITH THE LAW FIRM'S IN-HOUSE COUNSEL BY: DONALD PATRICK ECKLER, ESQ.

The Supreme Court of Oregon has joined the Supreme Court of Georgia and the Massachusetts 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 litigation 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 the attorney-client privilege and whether the jurisdiction follows the majority *Upjohn* "subject matter test" or the significant minority "control group" test.

Current State of Fiduciary Duty Exception

Recently, several courts have addressed whether the law should extend the attorney-client privilege to protect communications between a law firm's in-house counsel, seeking advice from other firm lawyers on how to handle a client's potential malpractice claim against the firm. *Crimson Trace Corporation v. Davis Wright Tremaine LLP*, 355 Or. 476, 326 P.3d 1181 (2014); *Hunter, Maclean, Exley, & Dunn v. St. Simons Waterfront, LLC*, 317 Ga. App. 1, 730 S.E.2d 608 (2013); *RFF Family Partnership, LP v. Burns & Levinson, LLP*, 465 Mass. 702, 991 N.E.2d 1066 (2013); *Garvy v. Seyfarth & Shaw,* 966 N.E.2d 523 (Ill. App. 2012); *MDA City Apartments, LLC v. DLA Piper* LLP, 967 N.E.2d 424 (Ill. App. 2012). Those communications arguably fall within attorney-client privilege as the lawyer accused of malpractice turned to in-house counsel for legal advice on how to handle the malpractice issue. This exception to the attorney-client privilege is commonly referred to as the fiduciary duty exception. Each of these cases, for sometimes different reasons, has rejected the application of the fiduciary duty exception to the attorney-client privilege and has protected the disputed communications from disclosure to the former client.

Before this recent development, courts often required the production of communications involving a client's malpractice claim, even though the communications arguably fell within the purview of attorney-client privilege. *Koen Book Distributors v. Powell, Trachman, Logan, Carrle, Bowman & Lombardo, P.C.*, 212 F.R.D. 283, 285-286 (E.D. Pa. 2002); *Bank Brussels Lambert v. Credit Lyonnais, S.A.*, 220 F. Supp. 2d 283, 287 (S.D.N.Y. 2002); *SonicBlue, Inc. v. Portside Growth and Opportunity Fund*, 2008 Bankr. LEXIS 181, at *26 (Bankr. N.D. Cal. Jan. 18, 2008); *Thelen Reid & Priest, LLP v. Marland*, 2007 U.S. Dist. LEXIS 17482 (N.D. Cal. Feb. 21, 2007); *TattleTale Alarm Systems v. Calfee, Halter & Griswold,*

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