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Amis v. Greenberg Traurig LLP

Amis keeps the black box of Mediation Confidentiality tightly closed. The court follows the California Supreme Court's seminal holding in *Cassel v. Superior Court* (2011) 51 Cal. 4th 113, where the court applied the mediation confidentiality statutes and prohibited judicially crafted exceptions, even in situations where justice and rational common sense seemed to call for a different result. The *Cassel* court recognized that its holding may hinder a client's ability to prove a legal malpractice claim against his or her lawyers.

In *Wimsatt v. Superior Court* (2007)152 Cal. App. 4th 137, the appellate court held that mediation briefs and attorney emails written and sent in connection with mediation were protected by the mediation confidentiality statutes, even when a mediation disputant sought those materials to support a legal malpractice action against his own attorneys; there is no attorney-malpractice exception to the mediation confidentiality statutes.

In re *Marriage of Woolsey* (2013) 220 Cal. App. 4th 881, held that the mediation confidentiality presumptions of Evidence Code section 1119 protect the mediation process and preclude application of the presumption of undue influence in a mediated marital settlement agreement.

There has been spirited debate whether the recent case of *In re Marriage of Lappe* (2014) 232 Cal. App. 4th 774 (rev.denied, March 11, 2015) may have lifted the lid ever so slightly on the black box of mediation confidentiality. In *Lappe*, the court held that husband's Final Declaration of Disclosure prepared during mediation was not protected by mediation confidentiality, because it had to be exchanged pursuant to Family Code statutes as a matter of law, and therefore a judicially created exception to mediation confidentiality was not necessary to order its disclosure. Husband agreed to pay wife $10 million for her community interest in eScreen, Inc., then less than 5 months later she learned that he sold his interest in the business for $75 million pre-tax dollars. The appellate court ordered disclosure of the FDD. On remand, won't it be interesting to see what other mediation confidentiality hurdles are placed in front of wife as she tries to prove her case [see footnote 2 of the *Lappe* opinion].

Conceivable ethical questions: The *Cassel* line of cases arguably create tension between an attorney's duty of disclosure to a client regarding risks and benefits of the mediation process. Does an attorney have an affirmative ethical obligation to disclose to a client, pursuant to Rule 3-500, California Rules of Professional Conduct, and Business and Professions Code, section 6068(m), that the client will not be able to hold the attorney responsible for advice given in mediation, even if the advice is negligent or improper? Is lack of such disclosure a matter of disciplinary concern? There probably are no civil consequences to such a failure to disclose, because any error by the attorney would be shielded by mediation confidentiality. But the disciplinary concern remains an open, debatable issue.

While *Amis* signals that the black box of mediation confidentiality remains closed, the clash of equally sacrosanct competing public policy standards ensure that more conflicts, not less, are sure to come [See, Marshall S. Zolla, Deborah Elizabeth Zolla, and Vivian Carrasco

Hosp, *Mediation Confidentiality vs. Breach of Spousal Fiduciary Duty: The Clash of Enshrined Public Policy Titans,* (2012) Cal. Family Law Monthly *(June 2012) 163-171]*.

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