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Public policy considerations in California's mediation privilege

Mediation aims to promote candor, but critics argue that the privilege can sometimes prioritize secrecy over justice.

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California's legal system champions mediation as a path to quick and cost-effective justice. But for some, like Richard Beach, who allegedly lost critical financial security due to bad legal advice, that system appears to slam the courthouse doors shut. In this way, a growing controversy is boiling over California's mediation privilege: Is it a tool for efficient dispute resolution or a shield that protects lawyers from malpractice claims, leaving vulnerable clients with no recourse?

Consider the following arguments for and against California's mediation privilege.

The pros: Promoting efficiency and settlement

California has heavily invested in mediation as a way to alleviate pressure on its court system. In Fiscal Year 2025-2026, the state will spend $5.3 billion to fund its judicial branch. This level of investment, exceeding the 2022 gross domestic product of nearly 70 countries, underscores California's commitment to its courts.

To manage these costs, California has actively promoted mediation, aiming to resolve disputes without judicial intervention. In 1997, the California Legislature expanded the scope of the mediation privilege, making communications between a client and their counsel inadmissible in court. Lawmakers believed this would encourage candor and facilitate settlements. At the time, the Legislature believed such change to "not [be] controversial," intending for it to promote candor between client and counsel, thereby encouraging settlement during mediation.

Since implementation of those changes, California courts have routinely commented on the soundness of this wisdom, questioning whether patently incorrect legal advice given during mediation should be barred by the mediation privilege. The latest iteration of this commentary comes in the form of the Sixth District Court of Appeal decision *Beach v. Johnson*. While the Court correctly characterized the facts of the case as an "inequity" and stated that Mr. Beach's "plight" may deserve sympathy, the Court likewise noted that Mr. Beach's case was already rendered moot by recent developments enacted by the Legislature. Namely, the 2018 amendment to Evidence Code section 1129 requiring attorneys to disclose to their clients that "... all communications between you and your attorney made in preparation for a mediation, or during a mediation, are confidential and cannot be disclosed or used (except in extremely limited circumstances), even if you later decide to sue your attorney for malpractice ..."

The Legislature's decision to force an express disclosure regarding the risks of mediation represents an incremental step by California to promote mediation while advising clients of the potential risk. Implicit in the Legislature's approach is a belief that an underfunded and overworked judiciary represents a greater threat to the administration of justice than the rare instances of attorneys providing incorrect legal advice during the course of a mediation. That said, the penalties an attorney faces for failing to make this mandatory disclosure remain an open question. If the Legislature were to limit the mediation privilege - as applied to communications between a client and their counsel - to only those instances where the mandatory disclosure has been signed and returned by the client, the mediation privilege would likely face far fewer criticisms by the judiciary (the same judiciary that California invests billions into every year).

The cons: Shielding malpractice and injustice

Critics argue that California's mediation privilege was ostensibly conceived as a shield to foster candid settlement dialogue; but too often it has metastasized into armor for negligent lawyers. *Beach v. Johnson* illustrates the human toll of that metastasized distortion. Richard Beach, already grievously injured and left with an amputated leg, relied on his lawyers' erroneous pre-mediation advice and accepted a settlement that could never fund the annuity they promised. On its face, this injustice seemingly created a logical pathway to sue the parties responsible for his loss for malpractice. However when he did, the Sixth District Court of Appeal, constrained by the precedent in *Cassel v. Superior Ct.* (2011) 51 Cal. 4th 113, 128 ("Cassel"), held that the very communications that misled Mr. Beach and caused him financial

harm were inadmissible. The did Court acknowledge "the inequity of this result," yet declared itself powerless to intervene. Unfortunately for Beach, Justice, it seems, could not pierce the veil of confidentiality.

California Evidence Code Section 1119 broadly protects the confidentiality of mediation communications, stating that any communication "for the purpose of, in the course of, or pursuant to" mediation is neither discoverable nor admissible. *Beach v. Johnson* extended this protection to advice given just days before the session.

This raises concerns about the lawyer's fiduciary duty. Lawyers owe clients undivided loyalty and competent counsel. In most other legal contexts, clients can seek redress for malpractice. However, the mediation privilege can create a "doctrinal asymmetry," where attorneys receive greater protection than the clients who depend on them. As the saying goes, "Who will watch the watchers?"

Attempts at reform

California has considered reforms but has been hesitant to enact significant changes. AB 2025, a 2012 bill that would have created a malpractice exception to the mediation privilege, was referred to the California Law Revision Commission (CLRC) for study but did not pass. A 2017 CLRC study suggested a process for courts to review evidence privately in malpractice and State Bar proceedings, but the legislature took no action.

In 2018, an amendment to Evidence Code section 1129 required attorneys to disclose to their clients that mediation communications might be protected even in a malpractice suit. While this informs clients, it doesn't resolve the core issue.

Conclusion

Mediation aims to promote candor, but critics argue that the privilege can sometimes prioritize secrecy over justice. Cases like Richard Beach's illustrate the potential for harm. The debate continues: Should California prioritize efficient dispute resolution above all else, or should it reform the mediation privilege to better protect clients and ensure accountability?

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