

MEDIATION CONFIDENTIALITY IN FEDERAL COURT REVISITED

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In the Summer 2009 issue of *The Resolver*, I published an article on mediation confidentiality in federal court entitled *Mediation Confidentiality: A Federal Court Oxymoron*. The article noted that mediation confidentiality is quite limited in the federal courts. Even though Section 4 of the Alternative Resolution Act of 1998, Pub. L. No. 105-315, 112 Stat. 2998 (105th Cong. 2nd Sess.) (Oct. 30, 1998), codified at 28 U.S.C. §651-658, 652 authorizes each district court to adopt local rules providing for mediation confidentiality, the courts, citing Rules 408 and 501 of the Federal Rule of Evidence, have, instead, fashioned a very limited “federal mediation privilege” that will be pierced for any number of reasons.

Notably, the cases reviewed in that article addressed confidentiality only in the contexts of removal and federal question jurisdiction. Neither involved the diversity jurisdiction of the court *after* removal had been granted.

Thus, it was with great interest that I read the recent unpublished decision in *Benesch v. Green*, 2009 WL 4885215, Case No. C-07-3784 EDL (N.D. Cal. Dec. 17, 2009) (“*Benesch*”) in which the Honorable Elizabeth D. La Porte, United States Magistrate Judge, relied wholly on the California statutes and case law in rendering a decision on mediation confidentiality. In *Benesch*, plaintiff (Fritzi Benesch) sued her former attorney, (Sharon Green) for legal malpractice arising arising from a two day mediation in April, 2006. *Id.* at *1. In that state court action, plaintiff sued her daughter Valli Benesch Tander, son-in-law, Robert Tandler, estate planning attorney William Hosisington and the law firm of Orrick, Herrington & Sutcliffe. The mediation concluded with the execution by all parties of a document entitled “Terms of Settlement” (“Term Sheet”). When defendants moved to enforce the settlement in state court, plaintiff argued that the Term Sheet did not accurately reflect her intent with regard to her other

daughter, Connie Benesch. The state trial court rejected this argument, and entered an order enforcing the settlement. *Id.*

Plaintiff thereafter filed this action in the San Francisco County Superior Court (Case No. 07-462683). Alleging diversity jurisdiction (28 U.S.C. §1332(a)), the defendant removed the action to federal court. There, the matter proceeded until 2009 when defendant moved to amend her Answer (originally filed in July 2007) to assert that plaintiff's complaint was barred by California's mediation confidentiality statutes (California Evidence Code §1115 *et seq.*).¹

Defendant also moved for summary judgment on this same ground: that California's mediation confidentiality statutes “. . .preclude[] plaintiff from establishing her malpractice claim and defendant from meaningfully defending herself. *Id.*

The Court denied defendant's motion for summary judgment, noting California's strong policy of upholding mediation confidentiality and the California Supreme Court's repeated disapproval of “judicially created exceptions” thereto. *Id.at *4,*7.* The district court concluded:

*It appears to the Court that the reasoning of the Cassel dissent, rather than the majority, is more persuasive and true to the statutory language and the California Supreme Court's injunction not to create implied exceptions. See Ticknor v. Choice Hotels Int'l, Inc. 265 F.3d 931, 939 (9th Cir. 2001). (“The task of a federal court in a diversity action is to approximate state law as closely as possible in order to make sure that the vindication of the state right is without discrimination because of the federal forum. In doing so, federal courts are bound by the pronouncements of the state's highest court on applicable state law”). *Id. at*7.(Emphasis original.)**

¹ Because plaintiff filed a non-opposition to defendant's motion to amend her answer, the court naturally granted it.

The district court's reference to *Cassel* bears examination as the most recent California appellate discussion of mediation confidentiality even though the California Supreme Court recently took the case up for review, thereby precluding its citation as authority. In *Cassel v. Superior Court*, 179 Cal. App. 4th 152 (Cal.Ct. App. Nov. 12, 2009) ² Petitioner sued his former attorneys for malpractice, that during the mediation of prior litigation, the defendant attorney forced Petitioner to accept a settlement in a sum far less than acceptable. The issue before the California appellate court was whether communications solely between petitioner and his counsel during the two days preceding the mediation and on the day of the mediation itself were protected by mediation confidentiality. The majority held that such conversations were *not* protected. The dissent strongly took issue, noting that this holding contravened both statutory and case law. *Id* at *6-*7.

Whatever the merits of the *Cassel* majority opinion, it is notable that the district court adopted and applied California statutory and case law without any discussion. In so doing the district court was likely following the principle that state law supplies the rule of decision when the federal court's jurisdiction is based upon diversity of citizenship. ³

Because both *Benesch* and *Babasa* were diversity jurisdiction cases, their holdings seem irreconcilable. The difference between the two, however, is meaningful. As the Ninth Circuit

² 2/5/10 California Judicial Council News Release noting the issues raised by *Cassell* as: (1) Are the private conversations of an attorney and client for the purpose of mediation entitled to confidentiality under Evidence Code sections 1115 through 1128? (2) Is an attorney a "participant" in a mediation such that communications between the attorney and his or her client for purposes of mediation must remain confidential under Evidence Code section 1119, subdivision (c) and 1122, subdivision (a)(2)?

³ Surprisingly, no mention was made of the Ninth Circuit's decision in *Babasa v. LensCrafters, Inc.*, 498 F. 3d 972 (9th Cir. 2007) where the Court, in deciding whether the action met the amount in controversy requirement, held that federal law governed whether statements made in the course of the state proceeding prior to removal were protected mediation confidentiality.

explained in *Babasa*, because federal law applies whenever the Court is determining whether the amount in controversy is sufficient to give rise to diversity jurisdiction, federal law must also apply to the determination whether an allegedly confidential mediation communication constituted notice for purposes of removal jurisdiction. *Babasa* supra at 974-975. Once a federal court has *assumed* jurisdiction based upon diversity, however, state law of privilege applies “with respect to an element of a claim or defense as to which State law supplies the rule of decision,.” F.R. Evid. 501.

Although the California confidentiality provisions are not evidentiary privileges (see *Simmons v. Ghaderi*⁴) if they were properly characterized as privileges, *Benesch* would correctly conclude that state law would apply because the question before the Court concerned the admissibility of evidence in a diversity proceeding “with respect to an element of [the] claim” for legal malpractice. We will never know whether the *Benesch* court ruled as it did based upon Rule 501 because there is no discussion whatsoever of that Rule in the opinion.

The conclusion in my previous article is all the more apt post-*Benesch*: beware and be wary: “mediation confidentiality” and/or “mediation privilege” in federal court varies from case to case in ways we have no current basis for confident predictions..

Caveat: On January 19, 2010, the parties to *Benesch* jointly filed a Notice of Settlement in Principle requesting that the next status conference be postponed for sixty (60) days to allow their settlement to be documented and the action dismissed.

⁴ Note that the *Babasa* Court incorrectly identified California’s mediation confidentiality provisions as “privileges.” See *Simmons v. Ghaderi*, 44 Cal. 4th 570 (2008) (refusing to extend evidentiary waiver provisions applicable to evidentiary privileges on ground that rules of admissibility of mediation confidences are not rules of privilege).