

## ***Armstrong v. Bluz: An Opinion Regarding Mediation Confidentiality in Legal Malpractice Cases***

Attorney Alan Armstrong represented Penelope Bluz in a mediation that stemmed from a landlord-tenant dispute. Displeased with Armstrong's representation, Bluz sued him for legal malpractice. Over Armstrong's objections, the trial court invoked our state's mediation confidentiality statute, Evidence Code § 111 et seq., to exclude from the trial any and all communications related to the mediation. Armstrong lost the malpractice suit. He appeals, arguing that the excluded communications were essential to vindicating him of malpractice and that the trial court erred in excluding them.

Armstrong's appeal presents us with a unique challenge — reconciling our state's vital mediation confidentiality law with fundamental principles of justice and evenhandedness. Although we empathize easily with Armstrong's difficult position, we affirm the trial court's judgment. Were we to comply with Armstrong's request, we would not only severely undermine the intent of the General Assembly in passing an expansive mediation confidentiality statute; we would also jeopardize the health of our state's all-important mediation system.

### **I. FACTUAL BACKGROUND**

What began with the promise of great music ended instead in total discord. Penelope Bluz, a trained saxophonist who appears in the 2006 edition of *Who's Who In American Jazz Musicians*, opened a jazz club, Penelope's Place, three years ago on State Street in downtown Metropolis. From the start, Bluz's relationship with her landlord, Leonard Tuffman, was acrimonious. The two clashed over almost every element of their

agreement. Bluz accused Tuffman of not paying the club's electric bill and leaving the club without air conditioning on hot summer days. She also accused Tuffman of using his antique car collection to block off the area of the parking lot he promised to her. Bluz's club, Penelope's Place, faltered and eventually closed. Bluz sued Tuffman for breach of contract and sought \$4 million in lost profits, claiming that were it not for Tuffman's sabotage, the club would have flourished. Tuffman claimed that Bluz's poor management was to blame for the club's closing; he argued that her lackluster marketing plan had brought Penelope's Place down.

At mediation, Tuffman made an initial settlement offer of \$200,000. Over the advice of Armstrong and mediator Mary Midland, Bluz rejected the offer. Midland's assessment was that, based on the evidence, Bluz could not hope to see more than \$100,000 in damages. But Bluz was adamant that she would not settle for less than half a million dollars, a counteroffer that Tuffman quickly rejected. The mediation ultimately broke down as a result of an email that Bluz sent to Tuffman in which she said, "Your offer may cover my losses, Leonard, but I am going after every penny I can get because you're a lousy landlord, so no deal."

The case proceeded to trial. Bluz fired Armstrong and instead hired an attorney who she found through a commercial on daytime television. Bluz presented evidence of the unpaid electric bills and the obscured parking lot. However, because Armstrong missed the deadline for disclosing Bluz's key damages expert, Bluz was unsuccessful in proving that she suffered lost profits as a result of Tuffman's actions. A directed verdict was entered for Tuffman and Bluz received no damages.

Bluz sued Armstrong for legal malpractice, alleging that his failure to timely disclose the expert witness caused her to lose her case. Armstrong sought to enter evidence of the angry email and other communications from the mediation to prove that it was Bluz's refusal to settle for a reasonable amount — and not Armstrong's legal work — that cost Bluz her case. The trial court refused to admit the communications on grounds that they were prohibited by Section 111, our state's mediation confidentiality statute. The jury returned a verdict against Armstrong for \$300,000.

## **II. STANDARD OF REVIEW**

Admission or exclusion of evidence rests within the sound discretion of the trial court. *State v. Sage*, 31 Ohio St. 3d 173 (1987). As such, we review the trial court's evidentiary rulings for abuse of discretion only. *State ex rel. Miller v. National Dietary Research, Inc.*, 454 N.W.2d 820 (Iowa 1990); *Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 906 (Tex. 2000). We will reverse the trial court's evidentiary ruling only if it is found to have caused the rendition of an improper judgment. *Id.* at 906.

## **III. DISCUSSION**

### **1. Mediation Confidentiality**

As a general rule, evidence is admissible if it is relevant, as judged by its “tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” *Fed. Rule Evid. 401*. However, there are statutory restrictions that at times prevent us from admitting even the most relevant evidence. Section 111 et seq. is one such restriction.

Section 111 prohibits the admission of “evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or mediation consultation...” Evid. Code § 111(a). It also states, “All communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential.” Evid. Code. 111(c). Section 112 adds, “Evidence otherwise admissible or subject to discovery outside of a mediation or a mediation consultation shall not be or become inadmissible or protected from disclosure solely by reason of its introduction or use in a mediation or a mediation consultation.” Evid. Code 112.

The breadth of our state’s mediation confidentiality protections reflects our General Assembly’s noble goal: to encourage parties to disputes to resolve their differences through mediation rather than litigation. *Ryan v. Garcia*, 27 Cal. App. 4th 1006, 1010 (1994). As our court system becomes increasingly taxed by its burgeoning case load, we look to mediation as a way to free up the resources of the judiciary and minimize costs for everyone involved.

The confidence that mediation communications will remain private not only motivates parties to mediate; it also improves the negotiation process once mediation is underway. Experts believe that the knowledge that settlement discussions are confidential allows mediation participants to disclose information they would not share were there a chance it could be disclosed later as evidence. *See Anne M. Burr, Confidentiality in Mediation Communications: A Privilege Worth Protecting*, 57 Disp. Resol. J. 64, 64 (Feb.-Apr. 2002). It is no surprise, then, that all fifty states have enacted some form of mediation confidentiality protection. *See Pamela A. Kentra, Hear No Evil*,

*See No Evil, Speak No Evil: The Intolerable Conflict for Attorney Mediators Between the Duty to Report Fellow Attorney Misconduct*, 1997 B.Y.U. L. Rev. 715, Appx. A (listing mediation confidentiality statutes by state).

As valuable as mediation confidentiality is to the parties, it is perhaps even more essential for their attorneys, whose ability to negotiate depends on candor from all sides. To quote the United States Court of Appeals for the Second Circuit, "If participants cannot rely on the confidential treatment of everything that transpires during these sessions then counsel of necessity will feel constrained to conduct themselves in a cautious, tight-lipped, non-committal manner more suitable to poker players in a high-stakes game than to adversaries attempting to arrive at a just resolution of a civil dispute." *Lake Utopia Paper Ltd. v. Connelly Containers, Inc.*, 608 F.2d 928, 930 (2nd Cir. 1979).

Courts have long realized that freedom to negotiate without repercussions "is the heart of confidentiality protections." Dennis Sharp, *The Many Faces of Mediation Confidentiality*, Disp. Resol. J. 56, 56 (Nov. 1998). This is why they have been reluctant to erode these protections, even when upholding them may prevent the revelation of crucial evidence. *See, e.g., People of the State of New York v. Snyder*, 129 Misc. 2d 137, 139 (1985) (quashing district attorney's subpoena for all information related to murder defendant's participation in mediation session).

## **2. Application of the Statute**

As we interpret and apply the mediation confidentiality statute, our goal is to carry out the intent of the legislature. *People v. Rockwell*, 125 P.3d 410, 417 (Colo. 2005). In so doing, we are guided by fundamental principles of statutory interpretation.

We start by examining the plain language of the statute, as the words themselves provide the best indication of legislative intent. *People v. Trevino* 26 Cal.App.4th 237, 241 (2001). We are mindful that the words of the statute should be given their ordinary meaning and should be construed in their statutory context. *Trope v. Katz*, 11 Cal.App.4th 274, 282 (1995). If the statutory language is clear and unambiguous, we need look no further. *State v. Nieto*, 993 P.2d 493, 499 (Colo. 2000).

Here, the statutory language could not be more clear. It expressly prohibits “evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or mediation consultation...” Evid. Code § 111(a). It also provides that “[n]o writing...that is prepared for the purpose of, in the course of, or pursuant to, a mediation...is admissible.” Evid Code § 111(b).

At trial, Armstrong sought to introduce three types of mediation communications: (1) the settlement offers; (2) the mediator’s statements regarding the strength of Bluz’s claim; and (3) Bluz’s email to Tuffman. Each of these communications fits squarely within the prohibited statements outlined in the statute.

The settlement offers represent the core of what is protected; it is the knowledge that these offers are inadmissible that encourages parties to negotiate with candor. Settlement offers are also widely recognized to be of little probative value. This is the reasoning behind Federal Rule of Evidence 408, which prohibits the admission of statements made by the parties during settlement negotiations when offered to show liability or lack of liability for the underlying claim. Daniel R. Conrad, *Confidentiality Protection in Mediation: Methods and Potential Problems in North Dakota*, 74 N. Dak. L. Rev. 45, 52 (1998).

The mediator's statements, like the settlement offers, are protected as communication "said...for the purpose of, in the course of, or pursuant to, a mediation or mediation consultation..." Evid. Code § 111(a). We are especially careful to protect the statements of mediators because we recognize the need to maintain the appearance of mediator neutrality. *Lehr v. Afflitto*, 382 N.J. Super. 376, 394-95 (2006).

The email from Bluz to Tuffman is also covered by the statute. Section 111 (b) prohibits "writing[s]" prepared pursuant to a mediation. An email is a "writing" for the purpose of mediation confidentiality. *Wimsatt v. Superior Court of Los Angeles County*, 152 Cal. App. 4th 137, 159 (2007). Although it was sent outside the mediation session itself, it communicated one party's intentions with regard to the ongoing negotiations and was therefore sent "pursuant to" a mediation. The email does not lose its protection simply because its goal was to instigate. *See Dedefo v. Wake*, 2006 Minn. App. Unpub. LEXIS 188, \*8 (Minn. App. Ct. Feb 21, 2006) (barring letter from admission based on mediation privilege despite plaintiff's claim that it "was only presented to communicate defamatory statements about him, not to engage in dispute resolution.").

### **3. Public Policy**

Armstrong acknowledges that that the plain language of the Evidence Code expressly prohibits the admission of mediation evidence during subsequent litigation. He argues that this court should make an exception to the statutory ban in cases involving legal malpractice claims that grow out of mediations. These cases deserve different treatment, says Armstrong, because they involve what one commentator calls "the legitimacy of the mediation process itself." Note, *The Mediation Privilege and Its Limits*,

5 Harv. Negotiation L. Rev. 383, 383 (2000). Armstrong maintains that the trial court, by excluding the evidence, left him unable to mount a proper defense against Bluz's malpractice allegations. Such a restriction, Armstrong argues, has the unjust result of forcing participants in a mediation to abandon their due process rights at the door.

We disagree with the suggestion that our state's broad mediation protection should be tapered whenever the legitimacy of a mediation or its participants' behavior is challenged. Although Armstrong is correct that California — whose mediation confidentiality statute mirrors our own — relaxed its confidentiality protections to protect an aggrieved mediation participant in *Olam v. Congress Mortgage Co.*, 68 F. Supp. 2d 1110 (N.D. Cal. 1999), the circumstances in that case were unique. In *Olam*, the federal district court was faced with a party's claim that she had signed a settlement agreement while under duress. The mediator was permitted to testify regarding the party's competence during the mediation. Unlike this case, where the appellant is seeking to admit key statements made by parties to the mediation who had an expectation of confidentiality, the mediator in *Olam* was permitted to speak only about her general perception of the plaintiff's ability to give viable consent to the settlement. *Id.* at 1118.

More importantly, in *Olam*, the parties waived confidentiality. *Id.* at 1118-1119. This key prerequisite is present in almost every case in which courts have seen fit to loosen a mediation confidentiality restriction. Even the Uniform Mediation Act, which provides an exception to mediation confidentiality for a communication that is "sought or offered to prove or disprove a claim or complaint of professional malpractice filed against a mediation party, nonparty participant, or representative of a party based on

conduct occurring during a mediation,” does not allow the evidence to be admitted unless the parties waive confidentiality. UMA § 6(a)(6).

We recognize that there are other cases in which the California state courts have allowed for the admission of select mediation evidence in the interests of justice. The one relied upon most heavily by Armstrong, *Rinaker v. Superior Court*, 62 Cal.App.4th 155 (1998), is readily distinguishable. The court in *Rinaker* required a mediator to testify about statements made at a mediation between two juveniles regarding a violent incident. Courts interpreting *Rinaker* agree that the reason confidentiality was relaxed was because the special circumstances of the case — juveniles involved in a quasi-criminal hearing — called for greater attention to constitutional protections. See, e.g., *Wimsatt*, 152 Cal. App. 4th 162.

Rather than announce a new public policy exception, *Rinaker* is limited to its facts. Moreover, unlike the teenagers in *Rinaker* or the plaintiff in *Olam*, Armstrong is hardly a helpless a victim whose rights were abused. As an experienced attorney, he is the most capable litigation party in our legal system and is therefore in a unique position to mount a successful defense despite evidence-related disadvantages.

We choose instead to follow the sound logic of the California Court of Appeals in *Wimsatt*. In that case, the court forbid the disclosure of mediation-related briefs and emails in a legal malpractice claim. Even though the evidence was essential to proving the malpractice claimant’s case, the court saw fit, as we do today, to place the ultimate good — mediation confidentiality — above any one particular outcome.

The dissent worries that our ruling will render attorneys helpless in defending against baseless malpractice suits. This concern betrays an alarming lack of confidence

in today's appellant and all the other skilled attorneys who appear before us. Though it is true that the excluded evidence would have aided Armstrong's defense, he was not without other strategic options. The law is clear that while communications made during or pursuant to a mediation are protected, the *facts* set forth in those communications are not so protected. *Rojas v. Superior Court of Los Angeles County*, 33 Cal. 4th 407, n. 8 (2004). As such, Armstrong could have proven his case by presenting evidence that Bluz's claim against Tuffman was not worth as much as she alleged. For example, witnesses could have testified to the ill will between Bluz and Tuffman and Bluz's desire to get even at any cost. Documentary evidence could have proven that Penelope's Place was doomed to failure, and therefore her case was worthless from the beginning. Experts on litigation malpractice could have testified that Armstrong's error was harmless and therefore he should not have been held responsible for his client's perceived losses.

There are preemptive steps that mediation attorneys like Armstrong can take to protect themselves from malpractice suits. For example, one commentator wisely recommends that that, after a mediation, each lawyer representing a mediation party should provide written confirmation of advice given during the mediation and have the client confirm in writing that this confirmation is not privileged from disclosure. William J. Caplan, *Mediation Confidentiality: The Brightest Line Rule in Law*, 49 Orange County Lawyer 42 (Oct. 2007). This will help to prevent cases like this one, where the "smoking gun" evidence is unavailable to the litigants.

We also respectfully disagree with the dissent's prediction that our broad application of the mediation confidentiality statute will deter the people of our state from embracing mediation as a litigation alternative. Although it is true that the mediation

privilege may at times restrict parties' ability to successfully litigate claims arising from mediation, it also protects them from being sued based on what they say during settlement talks. In this particular case, Armstrong was unable to retrieve the exculpatory evidence he needed. Nonetheless, the rule that disadvantaged him today could greatly benefit him in the future. Our decision to protect all mediation communications ensures that when a party seeks to introduce inculpatory evidence from a mediation to support a malpractice claim against an attorney, that attorney will be fully protected. Section 111, then, can serve gainfully as both a sword and a shield.

#### **IV. CONCLUSION**

Confidential communications are, by their very nature, guided by rules of exclusion." *People of the State of New York v. Snyder*, 129 Misc. 2d 137, 139 (1985). Even in the rare instances when these rules of exclusion seem to encourage an unjust result, we are not at liberty to discard them. We therefore conclude that the trial court did not abuse its discretion when it excluded evidence of the mediation communications that Appellant sought to introduce.

#### **V. DISPOSITION**

The judgment of the trial court is **AFFIRMED**.