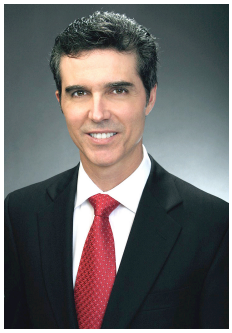

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ADR SERVICES, INC.

Cassel Lives On

In the recent case, *Amis v. Greenberg Traurig, et al.* (2015) __Cal.App.4th__, the California Court of Appeal for the Second District acknowledged the California Supreme Court's prohibition against judicially crafted exceptions to the mediation confidentiality statutes. The Court of Appeal held that the plaintiff in a malpractice action could not prove that any act or omission by his attorneys caused him to sign a settlement agreement and suffer alleged injuries, because all communications with his attorneys regarding the agreement occurred in the context of mediation.

John Amis (Amis) and his company retained the law firm Greenberg Traurig (GT) to represent him and his company in litigation. The case settled at mediation. The resulting settlement agreement was secured by a stipulated judgment by Amis's company for $2.4 million, with a payment plan. His company defaulted on the payments, and judgment was entered against Amis and his company for the $2.4 million. Amis brought a legal malpractice action against GT, based in part upon the allegation that GT failed to advise him that the settlement agreement and stipulated judgment converted the corporate obligations of his company into Amis's personal obligations.

The trial court granted GT's summary judgment motion. The court agreed that Amis could not establish an essential element of his claims, because it was undisputed that any act or omission by GT that purportedly caused Amis to execute the settlement agreement occurred during the mediation. The court also refused to entertain an inference that GT caused Amis to execute the settlement agreement during mediation, because the mediation confidentiality statutes effectively barred GT from defending itself against such an inference.

The Court of Appeal affirmed, following the Supreme Court's holding in *Cassel v. Superior Court* (2011) 51 Cal.4th 113. Cassel sued his attorneys for malpractice, alleging they "induced him to settle" a business dispute for less than the case was worth by coercing him to enter a settlement agreement during mediation. The Supreme Court upheld the trial court's order precluding evidence related to the mediation, including private discussions the plaintiff had with his attorneys about the settlement. In doing so, the high court rejected the Court of Appeal majority's view that "[t]he mediation confidentiality statutes do not extend to communications between a mediation participant and his or her own attorneys outside the presence of other participants in the mediation." (*Id*. at pp. 121-122 and 129-134.)

Mediation confidentiality is codified in Evidence Code section 1115, *et seq*. "With specified statutory exceptions, neither 'evidence of anything said,' nor any 'writing,' is discoverable or admissible 'in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which . . . testimony can be compelled to be given,' if the statement was made, or the writing was prepared, 'for the purpose of, in the course of,

or pursuant to, a mediation . . . .'" (*Cassel v. Superior Court, supra.*, 51 Cal.4th at p. 117.) Even after mediation ends, communications and writings protected by the statutes remain confidential. (Evid. Code, § 1126.)

Mediation confidentiality was never intended to protect attorneys from malpractice claims. However, that seemingly unintended consequence is for the Legislature, not the courts, to correct. For now, there is no attorney malpractice exception to the mediation confidentiality statutes.