Mediation Confidentiality—Latest Status In The Legislature

By Paul J. Dubow

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In its December 2015 meeting, the Commission attempted to find some middle ground by directing the staff to draft a bill that allowed for an in camera proceeding that would determine whether a lawsuit alleging attorney malpractice committed during the course of a mediation could proceed. Presumably, such a procedure would siphon out the spurious lawsuits and limit utilization of the exception only in those cases where a claim was colorable.

However, the Commission's suggestion, while laudable, begets three questions which probably doom the idea. Those three questions begin with the words what, when, and why.

What documents give rise to the in camera proceeding? Is it the complaint? The attorney for the plaintiff alleging malpractice cannot simply state in the complaint that the plaintiff was victimized by an act of malpractice. The act will need to be spelled out. For example, if the plaintiff alleges that he or she was damaged because the defendant attorney made false representations which induced the plaintiff to settle the matter in mediation, the complaint will have to state what those representations were and why they were false. In doing so, the plaintiff will be revealing communications to the public that are deemed to be confidential under the Evidence Code.

Should the court order the complaint to be sealed? If so, should the entire complaint be sealed or only the reference to the mediation communications? Bear in mind that the plaintiff might also assert claims of malpractice committed outside of the mediation or demand a return of some of the fees because the plaintiff believes that he or she was overcharged or that the fees were unauthorized. If only part of the complaint is sealed, what about mediation communications that are irrelevant to the basic complaint? Should references to such communications be sealed simply because they were made during the mediation, even though they had little or nothing to do with the issues in the mediated case?

In its memorandum numbered MM 16-18, the Commission staff prepared a hypothetical complaint which stated, inter alia, that the defendant attorney took a call from his doctor before making the challenged representations. That event would appear to be irrelevant to

the issues in the mediated case and to the charge of malpractice. But what are the criteria for sealing the statement?

As the staff points out, the statement may have been inserted into the complaint to show that the attorney was distracted. But, presuming that the plaintiff would prefer to have all or most of the complaint unsealed, he or she would face the Hobson's choice of admitting that the statement was not relevant or arguing that the statement was relevant and therefore needed to be sealed.

What about discovery? Will discovery responses that allegedly reveal mediation communications have to be sealed? Will this lead to more discovery disputes than what normally arise in a trial because confidentiality will now be an issue in discovery in addition to the normal issues such as relevance? Should the court order that a response to the request be filed and then decide on its admissibility if there is an attempt to introduce it during trial?

When does the in camera proceeding commence? Does it commence when the complaint is filed? If so, how does the court determine whether the case should proceed? Does the court conduct a mini trial to determine if the malpractice claims are valid? If the court finds the claims to be invalid, then the suit, or at least the portion of the suit that contains the malpractice claim, is over. If the court finds the claim to be valid, then the suit will end if it is a bench trial and there is a good chance that the defendant will be disinclined to proceed further if it is a jury trial. In short, the issue will have been decided in a secret trial.

Or, should the in camera proceeding commence when the plaintiff attempts to introduce the relevant mediation communications at trial? If so, then the complaint and other pleadings will be part of the public record and confidentiality will have already been breached, notwithstanding the outcome of the in camera proceeding.

Why solve the problem through an in camera proceeding? It sounds nice, but as we can see from the above examples it probably won't work. The Commission staff recognized the problem and was unable to come up with a proposed statute at the April 2016 meeting.

The Commission appeared to agree with the staff's problem. However, it did not quite give up. It instructed the staff to determine whether there was any constitutionally permissible method of in camera screening or quasi-screening by a judicial officer at the inception of a legal malpractice case with the goal of eliminating malpractice claims that were not viable in order to avoid public disclosure of mediation communications where there was in fact no malpractice.

The next meeting of the Commission is on June 1. We shall see what the next step of the Commission will be.

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