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Court Weighs Confidentiality in Mediations

By Laura Ernde

Some state Supreme Court justices appeared troubled Tuesday that lawyers can use the state's mediation confidentiality law to escape being sued for malpractice.

But other justices - including Chief Justice Ronald M. George, who often votes in the majority in close cases - suggested that's the price clients have to pay to ensure that everyone involved in settlement talks is free to speak the truth.

The Legislature, hoping to encourage more disputes to be settled out of court, passed a law in 1997 broadly shielding anything that's said in mediation from being used in later litigation.

"Does it basically boil down to this - the Legislature determined the interest in mediation confidentiality outweighs the occasional substandard performance by an attorney?" Chief Justice Ronald M. George said.

Justices Marvin R. Baxter and Carol A. Corrigan seemed to agree that the Legislature was clear when it enacted broad protections for mediation confidentiality. Baxter pointed out that the law was thoroughly vetted by the impartial California Law Revision Commission.

Justice Ming W. Chin seemed skeptical of the idea that state lawmakers intended to prevent lawyers from being sued for malpractice.

"Are you telling me the mediation process works better when attorneys commit malpractice?" Chin asked lawyer Peter Q. Ezzell of Haight Brown & Bonesteel, who is defending a law firm against malpractice charges.

Ezzell argued that confidentiality is crucial to mediation and attorneys need to be free to give candid advice to their clients.

"But there's a competing interest - justice with respect to the client," said Justice Joyce L. Kennard.

Kennard suggested the court might ask the Legislature to take another look at the mediation confidentiality law in light of the potential for injustice.

"It doesn't seem the result was even contemplated by the Legislature," she said.

Attorneys who represent plaintiffs in legal malpractice cases argued that the law shouldn't nullify the long-standing concept of attorney-client privilege, which gives clients the right to reveal confidential discussions if they later sour on their attorneys and decide to sue.

Gerald L. Sauer of Sauer & Wagner argued that conversations solely between attorney and client are different than discussions that occur during the mediation.

But George wasn't seeing it his way.

"You're parsing it out between communications made outside the room as opposed to discussions in the mediation," George said. "I don't know how you can do that."

"A mediation is not some safe house," Sauer said, arguing that if it was, lawyers would warn clients going into mediation that they are giving up the right to sue for malpractice.

"Maybe it's so obvious it doesn't have to be part of the discussion," George said.

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Several of the justices pointed out that mediation confidentiality does not protect participants from being prosecuted for criminal fraud.

Sauer argued as a friend of the court, joining Ronald Makarem of Makarem & Associates, who represents the plaintiff in the case before the high court.

Makarem's client Michael Cassel claims his former attorneys at Wasserman, Comden, Casselman & Pearson threatened to abandon him two weeks before trial in a trademark dispute that had gone to mediation, unless he agreed to settle for \$1.25 million.

Los Angeles County Superior Court Judge James MacLaughlin ruled that conversations Cassel had with his lawyers about the settlement were protected by mediation confidentiality and couldn't be used against the firm in a legal malpractice trial.

But when Cassel challenged MacLaughlin's decision in a writ petition, a 2-1 panel of the 2nd District Court of Appeal found discussions that took place outside of the mediation session could come into evidence.

The state Supreme Court seemed to be concerned about the impact its decision in the case would have on mediation as well as legal malpractice cases.

Chin asked Ezzell, the law firm's lawyer, what would happen if everyone involved in the mediation waived confidentiality except for the firm.

Ezzell said the information must remain secret.

"That's the price we pay in this situation for a free exchange of ideas," he said.

A decision in the case is due within 90 days. It's *Cassel v. Superior Court of Los Angeles County*, S178914.