Memorandum 2016-9

Relationship Between Mediation Confidentiality and Attorney Malpractice and Other Misconduct: In Camera Screening Process

In this study of the relationship between mediation confidentiality and attorney malpractice and other misconduct, the Commission is in the process of preparing a tentative recommendation that would “propose an exception to the mediation confidentiality statutes (Evid. Code §§ 1115-1128) to address ‘attorney malpractice and other misconduct.’”¹ The Commission has made some key decisions about the proposed new exception, but the staff still needs further guidance before drafting proposed legislation.

Among other things, the Commission tentatively decided that the exception should utilize an in camera screening process.² The Commission has not yet fleshed out any details of the in camera screening process. A staff memorandum for the December meeting presented information on in camera approaches used in other jurisdictions, discussed the possibility of combining such an approach with other judicial techniques (e.g., sealing orders, protective orders, and closure orders), and raised numerous questions for the Commission’s consideration.³

At the end of that memorandum, the staff pointed out that a substantial body of case law establishes that citizens have rights to observe their courts in action and obtain access to judicial records. The staff cautioned that in considering the use of an in camera screening approach and similar judicial techniques, the Commission “will need to understand and take into account the case law on public access to judicial records and proceedings.”⁴

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¹. See Minutes (Aug. 7, 2015), p. 5; Minutes (Oct. 8, 2015, p. 4).
². See Minutes (Aug. 7, 2015).
³. See Memorandum 2015-55.
⁴. Id. at 41.
As contemplated in December, the staff has been working hard to prepare a memorandum exploring that topic. The issues are weighty and difficult. The staff is still refining its analysis and believes it would be potentially confusing and counterproductive to release anything addressing the topic at this time. We do not plan to raise the topic for discussion at tomorrow’s meeting.

Respectfully submitted,

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