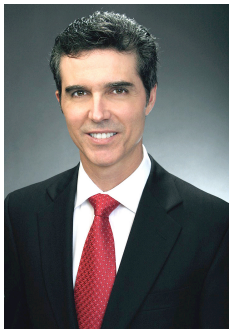

MICHAEL R. DILIBERTO, ESQ.

ADR SERVICES, INC.

The Supreme Court Enforces Confidentiality

It's midnight. The client has been in a mediation for 14 hours. Tired and hungry, and with advice of counsel, he finally signed the settlement agreement. Later, he sued his attorneys for malpractice, alleging that by bad advice, deception, and coercion, his attorneys, who had a conflict of interest, induced him to settle for less than the case was worth.

In the malpractice action, the client wanted to present evidence of attorney-client communications related to the mediation, including premediation strategy and private attorney-client communications during the mediation. However, a recent California Supreme Court decision says those communications are not admissible.[1]

The statutory confidentiality protection covers all *oral* or *written* communications if they are made "*for the purpose of*" "*in the course of*" or "*pursuant to*" a mediation.[2] All discussions conducted in preparation for a mediation, and all mediation-related communications that occur during the mediation itself, are protected from disclosure in any civil action. This includes communications between counsel and client that are related to the mediation, even if they are not made to another party or the mediator.

While the encouragement of mediation requires broad protection for communications, this protection may sometimes result in the unavailability of valuable civil evidence, be it oral or a "writing." An exception is made for criminal proceedings.

After this case, will the legislature create an exception to total confidentiality in civil malpractice cases? Stay tuned.

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[1] *Cassel v. Superior Court* (2011) 51 Cal.4th 113.

[2] Evidence Code section 1119, subdivisions (a)-(c).