

First Supplement to Memorandum 2013-39

Relationship Between Mediation Confidentiality and Attorney Malpractice and Other Misconduct: Additional Matters

The Commission has received the following written communication:

Exhibit p.

- Nancy Yeend, Silicon Valley Mediation Group (July 29, 2013) 1

The staff also wishes to clarify a point made in Memorandum 2013-39.

Those matters are discussed briefly below.

COMMENTS OF NANCY YEEND

Nancy Yeend is a mediator who has over 30 years of mediation experience, including “serving as faculty at the National Judicial College for nearly 20 years; working with judges from all 50 states and US territories; and gaining a familiarity with each state’s mediation confidentiality statutes.” Exhibit p. 1.

She “support[s] an addition to Evidence Code §1120 to include an exception for the purpose of disclosing an action involving legal malpractice and/or breach of fiduciary duty to the appropriate investigative body.” *Id.* at 2. She warns that “[w]ithout an exception to the present confidentiality statute, and with no requirement for disclosure regarding the concealment of malpractice, I have a greater fear that the credibility of mediation will be irreparably damaged.” *Id.* In her view, “the ‘parade of horrors’ presented by those opposed, appear to be based on speculation rather than fact.” *Id.* at 1.

In support of her position, she points to Florida’s mediation confidentiality statutes, which include two exceptions relating to professional malpractice. *Id.* The staff will take a good look at those provisions and how they have functioned when we examine and report on the mediation confidentiality laws of other jurisdictions later in this study.

Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission’s website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission’s staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

Ms. Yeend also notes that mediation as defined in Evidence Code Section 1115 is for the disputants, not their attorneys. *Id.* She then says:

Disclosure of malpractice does not mean that all other aspects of what was said, prepared for, or occurred in the course of the mediation would be disclosed — only malpractice. The continuing, specious claims that courts will be burdened with malpractice litigation appear unfounded. Where is the evidence? After reading opposition letters that are included in the study's Exhibit section, it appears that supposition, innuendo, and speculation are common threads. Perhaps the Commission should ask, "*Where's the beef?*"

Id. at 1-2 (emphasis in original).

Finally, Ms. Yeend asks a question: "If attorneys are going to represent clients in mediation, and are protected from malpractice or professional misconduct claims, then will these same attorneys provide written disclosures to their clients?" *Id.* at 2. Her guess is that "no one is making such disclosures." *Id.*

The staff will further discuss the points raised by Ms. Yeend at appropriate junctures as this study progresses.

CLARIFICATION REGARDING USE OF EXPERT ADVISER

After Memorandum 2013-39 was released, the staff realized that the discussion at page 33 might create some confusion about Ron Kelly's role in the current study. Specifically, it came to our attention that the discussion might inadvertently give the impression that Mr. Kelly would be serving as an expert adviser to the Commission in this study, as he did in the Commission's earlier study.

The staff did not mean to convey that impression. In his letter, Mr. Kelly does not say he would like to be an expert advisor. He just says that he "hope[s] to again be of assistance to the Commission in its study of this topic." Memorandum 2013-39, Exhibit p. 20. The staff responded by welcoming his help, just as we welcome and value assistance from other knowledgeable sources. See Memorandum 2013-39, p. 33.

In the current study, unlike the one in the early 1990's, a broad variety of knowledgeable sources have already contacted the Commission and expressed interest in the topic. It is clear from the outset that the Commission will receive abundant input from persons with expertise in the area. There is no need for the Commission to select a particular person as its expert adviser. Taking that step

could be divisive and counterproductive. **The staff recommends that the Commission conduct the study without designating an expert adviser.**

Respectfully submitted,

Barbara Gaal
Chief Deputy Counsel



SILICON VALLEY MEDIATION GROUP

July 29, 2013

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Re: Memorandum 2013-39 (Study K-402)

Dear Commissioners:

Due to the demands of my mediation practice, I am unable to attend the Commission's August 2nd meeting; however, this letter reflects three key points for your consideration. To put my comments in perspective, please know that they are influenced by over 30 years of mediation experience; serving as faculty at the National Judicial College for nearly 20 years; working with judges from all 50 states and US territories; and gaining a familiarity with each state's mediation confidentiality statutes.

First, as mentioned in my March 21, 2012 letter, Exhibit 42, of the Commission's report, the "*parade of horrors*" presented by those opposed, appear to be based on speculation rather than fact. Florida was the first state to establish a sweeping mandatory mediation statute for civil cases, and has over 25 years experience with exceptions to confidentiality. Specifically, Chapter 44, Mediation Alternatives to Judicial Action, Section 44.405 (Confidentiality; privilege; exceptions) addresses two exceptions that are relevant to the Commission's current discussions:

- (4) Offered to report, prove, or disprove professional malpractice occurring during the mediation, solely for the purpose of the professional malpractice proceeding;
- (6) Offered to report, prove, or disprove professional misconduct occurring during the mediation, solely for the internal use of the body conducting the investigation of the conduct.

These exceptions apply to both attorney and/or mediator malpractice and/or professional misconduct.

Second, consider for a moment the claim that being able to present evidence that took place during mediation would somehow harm the participants. As statutorily defined in Evidence Code §1115 (a) "*Mediation means a process in which a neutral person or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement.*"

The key word is *disputants*: the mediation is for them—not their attorneys. Attorneys are not parties to the dispute. Disclosure of malpractice does not mean that all other aspects of what was said, prepared for, or occurred in the course of the mediation would be disclosed—only malpractice. The continuing, specious claims that courts will be burdened with malpractice litigation appear unfounded. Where is the evidence? After reading opposition letters that are included in the study's

EX 1

141 FIRST STREET. LOS ALTOS. CALIFORNIA 94022
TELEPHONE (650) 947-1799 • FACSIMILE (650) 949-0240

svmediators.com

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Exhibit section, it appears that supposition, innuendo, and speculation are common threads. Perhaps the Commission should ask, "*Where's the beef?*"

Third, I would like to have the Commission consider the greater travesty, if a confidentiality exception is not added—informed consent. If attorneys are going to represent clients in mediation, and are protected from malpractice or professional misconduct claims, then will these same attorneys provide written disclosures to their clients? Have any provided such written disclosures to their clients, since the *Cassel* decision? My guess: no one is making such disclosures.

I support an addition to Evidence Code §1120 to include an exception for the purpose of disclosing an action involving legal malpractice and/or breach of fiduciary duty to the appropriate investigative body. Without an exception to the present confidentiality statute, and with no requirement for disclosure regarding the concealment of malpractice, I have a greater fear that the credibility of mediation will be irreparably damaged.

Sincerely,



Nancy Neal Yeend

nny:dlg