

Memorandum 2014-36

Relationship Between Mediation Confidentiality and Attorney Malpractice and Other Misconduct: Public Comment

Attached are the following new communications relating to the Commission’s study of the relationship between mediation confidentiality and attorney malpractice and other misconduct:

	<i>Exhibit p.</i>
• Doug deVries, Sacramento (8/24/14)	1
• Jullie Doyle (6/14/14)	3
• Karen Mak, Foster City (7/16/14)	5

We discuss each comment briefly below, and will further analyze the ideas raised as this study proceeds.

COMMENTS OF DOUG DeVRIES

Doug deVries is “a full-time California mediator with Judicate West and a former plaintiff-side civil trial lawyer who served as President of the California Trial Lawyers Association in 1994 (currently known as the Consumer Attorneys of California).”¹ He writes to provide his personal input (not on behalf of CAOC or any other organization) “cautioning against weakening mediation confidentiality as it is presently constituted.”²

Based on his “extensive experience as both a consumer of and a provider of mediation services,” Mr. deVries is convinced that “presently available mediation confidentiality serves several important interests, both directly and

1. 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.

2. Exhibit p. 1.

indirectly, that must be respected and protected.”³ In particular, Mr. deVries makes the following points:

- “[C]onfidentiality is one of the core factors that directly drives the high rate of success in case resolution associated with mediation”⁴
- “[C]onfidentiality serves to protect the neutral mediator’s essential function in the mediation process.”⁵
- “[M]ediation confidentiality further serves the inter-related goals of certainty and finality.”⁶

He explains each of these points in detail.⁷

Having identified the interests served by mediation confidentiality, Mr. deVries concludes that the Legislature “correctly enacted” California’s mediation confidentiality statute⁸ for “good and important reasons.”⁹ In his view, “rare anecdotal incidents of a party alleging malfeasance on the part of their attorney during mediation and the even rarer incidents of a party alleging mediator malfeasance would not justify the larger widespread systemic harm that would certainly result from undermining mediation confidentiality.”¹⁰

COMMENTS OF JULLIE DOYLE

Jullie Doyle writes “to express concerns regarding California Evidence Code section 1119 as interpreted by the California Supreme Court in the case of *Cassel v. Superior Court* (2011) 51 Cal. 4th 113.”¹¹ She does not provide any information about her background; we presume she is neither a lawyer nor a mediator.

Ms. Doyle describes a mediation involving a friend of hers who had cancer. According to Ms. Doyle, her friend’s attorney lied to him, signed a comprehensive “mediator’s proposal” without informing him, threatened him, and engaged in other mediation-related misconduct.¹² To protect privacy interests and safeguard against any claim of defamation, the staff has redacted

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. See *id.* at Exhibit pp. 1-2.

8. Evid. Code §§ 1115-1128.

9. Exhibit p. 2.

10. *Id.*

11. Exhibit p. 3.

12. See Exhibit pp. 3-4.

the names of Ms. Doyle's friend and his attorney.¹³ The rest of her description is reproduced verbatim.

In light of that incident, Ms. Doyle says that

[t]here is good cause for an amendment to the statute because of how it has been interpreted by the Supreme Court which effectively immunizes attorneys who are able to lie, cheat and steal from their clients and then hide behind the "mediation privilege" for protection. This amendment literally says that an attorney can commit a fraudulent act and it cannot be presented in court and he cannot be held accountable. My mouth literally drops open ... at the absolute audacity! Come on fix it now, what in the world do you need?¹⁴

She urges the Commission to take action because "[c]lients need protection from errant lawyers."¹⁵

COMMENTS OF KAREN MAK

Karen Mak has an MBA from Kellogg Graduate School of Business and considerable experience as a real estate investor and strategy consultant.¹⁶ On a number of occasions, she chose to use mediation to settle a dispute in California. She "was pleased with the results" and considers herself "a reasonably sophisticated user of the mediation process."¹⁷

Ms. Mak's comments touch on a number of different points, one of which warrants immediate attention from the Commission. We describe her comments first, and then respond to the point of immediate concern.

Ms. Mak's Perspective on the Commission's Study

Ms. Mak "recently became aware of California's strict mediation confidentiality statutes and of the work of this Commission while attending a seminar about mediation at a university in Australia."¹⁸ She reports that at the seminar, California's mediation confidentiality rules and cases "were brought to the attention of the audience, not as a model for how to promote the use of mediation, but as a joke."¹⁹ More specifically, she says "[t]he statutes were

13. See CLRC Handbook Rule 2.5.4.

14. Exhibit p. 3.

15. *Id.* at 4.

16. Exhibit p. 5.

17. *Id.*

18. *Id.*

19. *Id.* (footnote omitted).

mentioned as an example of what not to do, of what happens when legislators fail to consider the needs of the true ‘customer’ of the mediation process (the client with the dispute), and of what happens when the issue of confidentiality is wrongly believed to be the only important factor driving the decision to settle a dispute through mediation.”²⁰

Ms. Mak notes that when she decided to use mediation to resolve her disputes, she “was unaware of California’s strict mediation confidential[ity] provisions and the potentially dangerous ramifications that could have resulted from acts which occurred in the course of mediation — specifically, in the event the lawyers or mediator engaged in misconduct (intentional or accidental), a threat of violence had been made, or a gross error appeared in the final settlement agreement.”²¹ If she had been aware of the possibility of not being able to introduce evidence of such misconduct, “there is *no conceivable way*” she would have considered participating in mediation.²²

Ms. Mak is “confident that individuals in California like [her], who are not habitually engaged in litigation, willingly participate in mediation only because they are unaware of the extent to which they are vulnerable to these dangers.”²³ She says that “[d]espite the importance of the client, feedback from these important stakeholders appears to be almost non-existent in the Commission’s study.”²⁴ She “would like to know whether there is any plan to get feedback from actual clients of the mediation process.”²⁵

Ms. Mak further states that most of the comments in the Commission’s study have come from lawyers and mediators, “as a result of intense lobbying efforts on the part of self-interested lawyers and mediators attempting to protect themselves from being held accountable should they engage in misconduct.”²⁶ As an example, she has attached a communication from mediator Ron Kelly, which encourages the recipient “Friend of Mediation” to submit input on Assembly Bill 2025 (Wagner), the 2012 bill that led to the Commission’s study.²⁷ She views this as “analogous to the fox guarding the chicken house,” and

20. *Id.*

21. *Id.*

22. *Id.* at 6 (emphasis in original).

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* at 7.

27. *Id.* at 9-11.

counsels that the best way to instill confidence in mediation is to “hold all parties accountable for their wrongful actions.”²⁸

Ms. Mak believes that mediation “is flourishing around the world, not because of extreme confidentiality regulations like California’s, but because it works.”²⁹ She says “there is no guarantee” that California’s confidentiality rules will govern a particular mediation session, because a dispute relating to the mediation might be litigated in another jurisdiction.³⁰ To encourage the use of mediation, she thinks California should “become more consistent with other jurisdictions” and “consider adopting some of the UMA’s more sensible, client-friendly provisions in place of the California provisions.”³¹

Response to Ms. Mak’s Concern About Stakeholder Input

The Commission has been examining the UMA and will analyze the pros and cons of its relevant provisions in detail later in this study, when we compare and contrast different possible approaches. Of immediate concern, however, is Ms. Mak’s query about obtaining input from clients, particularly ones who are not regularly engaged in litigation.

As Ms. Mak notes, many of the comments submitted to the Commission have come from lawyers and mediators. That is not surprising, because lawyers and mediators are regularly engaged in mediation and thus particularly knowledgeable about and interested in this study. They can also spread word about the study readily among themselves through professional associations. Contrary to the impression one might get from Ms. Mak’s comments, the input from the legal and mediation community is divided; some comments stress the importance of retaining existing law, while others urge reform for reasons similar to those voiced by Ms. Mak.

While many of the comments submitted have come from lawyers and mediators, the Commission has also received some comments from clients and other laypersons, such as Ms. Mak, Jullie Doyle, Bill Chan,³² and Deborah Blair Porter.³³ Such input is relatively difficult to obtain, because mediation clients are

28. *Id.* at 7.

29. *Id.* at 8.

30. *Id.*

31. *Id.*

32. See First Supplement to Memorandum 2013-47, Exhibit p. 5. Mr. Chan also testified at the Commission meeting on June 12, 2014.

33. See First Supplement to Memorandum 2013-47, Exhibit pp. 17-23. Ms. Porter also testified at the Commission meeting on August 2, 2013, and submitted materials from the *Porter v. Wyner* litigation that are posted on the Commission’s website.

not organized into cohesive groups (to the staff's knowledge), and mediation clients (particularly satisfied ones) might be less-motivated to invest time and energy in this matter than lawyers and mediators.

All of the materials relating to the Commission's study are publicly available on the Commission's website,³⁴ and those materials repeatedly encourage interested persons to submit comments on the Commission's study. **If anyone has a suggestion about how to further encourage and obtain input from mediation clients, we would like to hear it.** Obtaining comments from the full spectrum of mediation participants will help the Commission understand the nature of the issues and the concerns at stake, so that it can take those matters into account in developing an effective solution.

Respectfully submitted,

Barbara Gaal
Chief Deputy Counsel

34. See <http://www.clrc.ca.gov/K402.html>.

EMAIL FROM DOUG DEVRIES (8/24/14)

Re: Preserving Mediation Confidentiality

Dear Ms. Gaal,

I do not recall if I forwarded my comments to you already; to be sure I am sending them now.

I am a full-time California mediator with Judicate West and a former plaintiff-side civil trial lawyer who served as President of the California Trial Lawyers Association in 1994 (currently known as the Consumer Attorneys of California). I write to provide my personal input, not on behalf of CAOC or any other organization, cautioning against weakening mediation confidentiality as it is presently constituted. Based on my extensive experience as both a consumer of and a provider of mediation services I believe that presently available mediation confidentiality serves several important interests, both directly and indirectly, that must be respected and protected. I note that your Staff Memos have documented these interests.

First, confidentiality is one of the core factors that directly drives the high rate of success in case resolution associated with mediation (widely reported in the 80 per cent range). Confidentiality both allows and encourages open exchange of information and competing positions in furtherance of a realistic assessment of a case by all parties. Indirectly, mediation confidentiality positively contributes to the reduction of caseload impacts on the court system, which is well known to be overburdened and underfunded. Anything that serves to undermine the efficiency and effectiveness of mediation will adversely impact the courts, including access to and utilization of all court functions.

Second, confidentiality serves to protect the neutral mediator's essential function in the mediation process. On this point, it is important to acknowledge the need for trust and neutrality, and the vital role they play in making mediation successful. Mediators do not make decisions, represent parties, bind or direct parties or help one party negotiate at the expense of another; instead, they help the parties negotiate with each other and have no financial interest in the outcome. Mediating is a complex and challenging task often performed under significant pressure, and essential ingredients for success include building trust and maintaining neutrality; absence of complete confidentiality would undermine both. Presently, mediation-related communications are protected and mediators cannot be compelled to testify about mediation communications; thus, they cannot be dragged into post-mediation disputes. Without that protection, every mediation would present the possibility of subsequent adversity, and consequently both trust and openness would be completely undermined from the outset.

Third, mediation confidentiality further serves the inter-related goals of certainty and finality. The product of a successful mediation is settlement, the hallmark of which is a certain and final outcome in the form of a mutually agreed resolution. It is important, as a matter of public and legal policy in this respect, that all mediation participants or stakeholders realize and share in the benefits of certainty and finality - parties, counsel,

insurers and mediators. If a disgruntled party or a party with simply a change of heart can pry open mediation confidentiality and use mediation communications to open new disputes there will be no predictable or enforceable certainty and finality. Any dilution of existing mediation confidentiality and privilege would present a classic case of a slippery slope - an exception that could swallow the rule and threaten the integrity and effectiveness of the entire process.

The Legislature correctly enacted Cal. Evid. Code 1115 et seq providing mediation confidentiality and privilege in 1998 for good and important reasons. The Courts that have recently addressed the subject of mediation confidentiality and privilege correctly recognized and reaffirmed their importance and justification - the California Supreme Court in Cassell and the 9th Circuit in Facebook. I know you are well-informed on these issues and cases, so I will not elaborate further except to say that rare anecdotal incidents of a party alleging malfeasance on the part of their attorney during mediation and the even rarer incidents of a party alleging mediator malfeasance would not justify the larger widespread systemic harm that would certainly result from undermining mediation confidentiality.

Thank you for your attention and consideration. Should you need any additional input or clarification, please feel free to contact me.

Sincerely,

Doug deVries, Mediator
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Please visit www.dkdmediation.com

Judicate West affiliated - Statewide - No travel charges

EMAIL FROM JULLIE DOYLE (6/14/14)

 **Staff Note.** This comment refers to a mediation involving one of Jullie Doyle's friends. To protect privacy interests and safeguard against any claim of defamation, we have redacted the friend's name and the name of the friend's attorney. See CLRC Handbook Rule 2.5.4.

Jullie Doyle's comment also includes a link to what appears to be password-protected material on the Internet (the FN 13 signal). The staff was not able to access or reproduce that material.

Re: Study K-2 Relationship Between Mediation Confidentiality and Attorney Malpractice

Dear Ms. Gaal,

I understand that the Study K-2 will be discussed at a meeting in the near future. Please bring this email to the participants' attention. We the people are in desperate need of your assistance in this matter.

I am writing to express concerns regarding California Evidence Code section 1119 as interpreted by the California Supreme Court in the case of *Cassel v. Superior Court* (2011) 51 Cal.4th 113. There is good cause for an amendment to the statute because of how it has been interpreted by the Supreme Court **which effectively immunizes attorneys who are able to lie, cheat and steal from their clients and then hide behind the "mediation privilege" for protection. This amendment literally says that an attorney can commit a fraudulent act and it cannot be presented in court and he cannot be held accountable. My mouth literally drops open s at the absolute audacity! Come on fix it now, what in the world do you need?**

I have a friend with two stage four cancers and he was told he only had a few months left to live, but surprise he did!. [Attorney's name] in Los Angles, CA. attorney is a low life jerk picking on a man dying of 2 stage 4 cancers! what a pathetic individual ! It is my understanding that the Legislature is in place so that the voice of the people is heard. and protected. excuse me correcting this ruling is a no brainier! not corrected each day that goes by is deplorable some things are obviously wrong and in the name of truth, prosperity and the american way! please fix this now, no delay. please.

. I have been involved a case for a friend of mine where not only was [my friend] was lied to, the attorney, [attorney's name], himself signed a comprehensive "mediator's proposal" that the client did not even learn about until he was threatened with a lawsuit by his attorney, [attorney's name] two months later, [the attorney] signed the Mediation Proposal changing the terms on August 27, 2010 and [my friend] finally found out about its existence on November 1, 2010 ! when the lawyer demanded that the client sign a lengthy settlement agreement saying he had seen all documents relating to the case When in fact, he did not see the document that the attorney signed on [my friend's] behalf that changed the terms extensively , not to mention terms discussed that my friend told him and was admit that he would not agree to lie to the courts for anyone, or agree to hide

information, he changed the percentage that my friend had to pay from 40% to 50% costing my friend \$20,000 promising not to notify the Bankruptcy Court and Trustee about fraud that was committed by one of the people that [the attorney] was supposed to be protecting his interests from.. The agreement favored the lawyer (who had numerous fee agreements, some for services, for instance, if any litigation stems from the sale of the painting, the litigation those services was inclusive under the current agreement.. Yet he badgered my friend and threatened him literally refusing those services unless he signed a new fee agreement that he agreed in previous agreements he would cover. were presumptuously fraudulent) more than it did the client. Based on *Cassel v. Superior Court* nothing that this lawyer said or did can ever be used against him. Justice Chin, in the concurring opinion in *Cassel v. Superior Court* appropriately observed: This type of egregious conduct by lawyers occurs far more than we would like to believe. To think that a ruling protects them is outrageous. This is america! The governmental bodies are in place to protect the people. Remember they are supposed to support and protect the people! I ask you what in the world do you have to investigate! Courts hours are cut back to a minimum most agreements have arbitration and or mediation clauses. Think you yourself may find yourself behind the eight ball in a similar situation [The attorney] has three prior malpractice cases! and he is working this system. The court holds today that private communications between an attorney and a client related to mediation remain confidential even in a lawsuit between the two. This holding will effectively shield an attorney's actions during mediation, including advising the client, from a malpractice action even if those actions are incompetent or even deceptive.¹³ Attorneys participating in mediation will not be held accountable for any incompetent or fraudulent actions during that mediation unless the actions are so extreme as to engender a *criminal* prosecution against the attorney [citation]. This is a high price to pay to preserve total confidentiality in the mediation process. This case does not present the question of what happens if every participant in the mediation except the attorney waives confidentiality. Could the attorney even then prevent disclosure so as to be immune from a malpractice action? I can imagine no valid policy reason for the Legislature to shield attorneys even in that situation. I doubt greatly that one of the Legislature's purposes in mandating confidentiality was to permit attorneys to commit malpractice without accountability. Interpreting the statute to require confidentiality even when everyone but the attorney has waived it might well result in absurd consequences that the Legislature did not intend. That question will have to await another case. But the Legislature might also want to consider this point. The commission has received input from mediators. They do not need protection. Clients need protection from errant lawyers. Please, please correct this ruling, don't let this wrong continue.. Please feel free to contact me at jullie2sl@gmail.com

Jullie

California Law Review Commission
Attn: Barbara S. Gaal
Via email: bgaal@clrc.ca.gov

RE: Study on Mediation Confidentiality

Dear Ms. Gaal,

I am a California resident. I am not a lawyer or a mediator. I have chosen to use mediation to settle my disputes in California on a number of occasions and was pleased with the results. I have had considerable experience as a real estate investor, strategy consultant and I have an MBA from Kellogg Graduate School of Business; I would regard myself as a reasonably sophisticated user of the mediation process.

I recently became aware of California's strict mediation confidentiality statutes and of the work of this Commission while attending a seminar about mediation at a university in Australia. At the seminar, California's current mediation confidentiality rules and a number of related cases were brought to the attention of the audience,¹ not as a model for how to promote the use of mediation, but as a joke. The statutes were mentioned as an example of what not to do, of what happens when legislators fail to consider the needs of the true 'customer' of the mediation process (the client with the dispute), and of what happens when the issue of confidentiality is wrongly believed to be the only important factor driving the decision to settle a dispute through mediation.

When I made the decision to participate in mediation to resolve my disputes, I did so because I believed mediation provided a positive opportunity to resolve my issues as an alternative to litigation. However, when I made the decision to use mediation, I was unaware of California's strict mediation confidentiality provisions and the potentially dangerous ramifications that could have resulted from acts which occurred in the course of mediation- specifically, in the event the lawyers or mediator engaged in misconduct (intentional or accidental), a threat of violence had been made, or a gross error appeared in the final settlement agreement. In these situations, California's confidentiality statutes

¹ Such as Cassell, *Hadley v The Cochran Firm*, *Foxgate, Rojas, Fair v Bakhtiari*, and others- cases which highlight the injustice of California's current confidentiality regulations.

would have prohibited the use of evidence to prove what had, in fact, occurred. Or, as a judge stated in *Wimsatt v Superior Court*, that by participating in mediation I was, in effect, ‘relinquishing all claims for new and independent torts arising from mediation, including legal malpractice causes of action against [my] own counsel.’

Had I been aware of these potential risks, there is no conceivable way I would have considered participating in mediation. I would have preferred to have taken my chances in court, where principles of justice and transparency are in effect.

I am confident that individuals in California like me, who are not habitually engaged in litigation, willingly participate in mediation only because they are unaware of the extent to which they are vulnerable to these dangers.

Absence of relevant stakeholder feedback

The most important stakeholder in the mediation process is the client, particularly clients who are not regularly engaged in litigation or mediation, and for whom dispute resolution is a daunting and uncertain process. In this respect, I draw a distinction between individuals like myself who are infrequently involved in litigation, and large corporate entities (e.g., insurance companies) who deal with litigation as part of their day-to-day operations. It is clients like me who chooses to resolve their dispute through mediation. They make the decision to participate in mediation, to hire the lawyer, and to hire the mediator.

Yet the client is likely the least sophisticated and most vulnerable person in the process when compared to experienced mediators, lawyers, and frequent litigators such as insurance companies.

Despite the importance of the client, feedback from these important stakeholders appears to be almost non-existent in the Commission’s study. I would like to know whether there is any plan to get feedback from actual clients of the mediation process. I am confident that if this was done, a very different story would emerge than the story you have received from many of those who have already made submissions. Of course, eliciting informed feedback from a client such as myself would require a group such as the Commission or the client’s

own legal counsel to belatedly bring to the client's attention the features/flaws of statutory confidentiality in California.

Feedback from lawyers and mediators

Instead of feedback from the primary stakeholder, the vast majority of the Commission's 'stakeholder' feedback has come from lawyers and mediators. These submissions have come as a result of intense lobbying efforts on the part of self-interested lawyers and mediators attempting to protect themselves from being held accountable should they engage in misconduct. The lawyer and mediator opinions, which simply state the same stock phrases the lobbyists told them to repeat to the Commission, have not been submitted in a good faith attempt to do what is in the best interest to promote the use of mediation.² This is analogous to the fox guarding the chicken house. These lawyers persist in their claims that the rules of mediation confidentiality should not be changed, despite the fact that lawyers are protected by indemnity insurance and vulnerable clients are not protected at all.

In contrast to the submissions of lawyers and mediators, the best way to instil confidence in the mediation process is to hold all parties accountable for their wrongful actions. If lawyers and mediators knew that their behaviour 'in the course of mediation' were to have the same consequences as their behaviour outside mediation, it would encourage them to provide better customer service during a mediation, prompting them to take extra care to double-check their facts before advising a client and improving their communication to ensure the clients understood what they were agreeing to.

I hope the Commission will not mistake the large quantity of boilerplate letters submitted by lawyers and mediators advocating against a change in the confidentiality provisions for unbiased views of those genuinely concerned with promoting the use of mediation. They are not.

² See endnote for a sample of the lobbying efforts consisting of exaggerations, false information and other scare tactics, employed in an effort to persuade lawyers and mediators to advocate against changes to the state's confidentiality provisions. The attached example was written by Ron Kelly, a mediator who has made a number of submissions to this Commission. On his website he claims to be 'one of the principal architects of California mediation law.'

Growth in the use of mediation is occurring worldwide

Mediation is flourishing around the world, not because of extreme confidentiality regulations like California's, but because it works. Outside California, other jurisdictions start mediation with the phrase 'this session is confidential as far as the law allows.' This is satisfactory to encourage full and frank discussion in mediation, and there is nothing to indicate it would not be satisfactory in California as well.

Furthermore, there is no guarantee that California's confidentiality rules would ultimately govern a given mediation session. Should a case be run in a federal court or the jurisdiction of another state, vastly different rules may apply. To encourage the use of mediation, it would be prudent for California to become more consistent with other jurisdictions.

Promoting the use of mediation in California

To encourage the use of mediation, California should approach the situation from the point of view of the party choosing to use mediation to resolve their dispute (the customer). Mediation should be safe, not a place where vulnerable participants may be victims of additional wrongful acts. The Commission should advocate mediation principles along the lines of those in the medical field- the 'first, do no harm' policy. This is simply common sense.

Furthermore, if the objective is to promote use of mediation in California, the Commission should consider adopting some of the UMA's more sensible, client-friendly provisions in place of the current California provisions.

The extent to which information and communications occurring in mediation sessions will be held confidential may be an important factor contributing to the decision to mediate, but it is certainly not the only factor.

Sincerely,

Karen Mak

Foster City, CA 94404

Endnote:

From: <http://www.mediate.com//articles/kellythreat.cfm>

Threat to Mediation Confidentiality in California - Your Help Needed!



by [Ron Kelly](#)



March 2012

Dear Friend of Mediation,

If you appreciate our mediation confidentiality laws or my work on them, then I ask a quick favor. Please take 15 minutes. Read my letter below. If you agree with it, I ask that you send a quick message with the top line "AB 2025 - Oppose" to at least the Chair and Vice Chair of the Assembly Judiciary Committee. They don't accept your emails directly, so please go through the "Contact Majority Policy Leader Mike Feuer" and "Contact Assemblymember Donald Wagner" lines at the far right side of this web page:



<http://ajud.assembly.ca.gov/membersstaff>

Please say whatever you want about why you're opposed, and perhaps explain that you're a mediator or use mediation or believe it's important. A short adequate email could also just be "I oppose AB 2025 for the reasons stated in Ron Kelly's March 13, 2012 letter to the Assembly Judiciary Committee on file." Please copy your comment before hitting submit and email it to me, so I can be sure it doesn't get lost in a swamped Sacramento.

PLEASE do this today. I'm told time to submit opposition comments is very short for them to be included in staff's analysis on whether there is any opposition. If you can't get through on their website please fax your message to the Committee at 916-319-2188.

Please forward this request to anyone else you believe cares and might lend their voice.

Thank you,
Ron Kelly

AB 2025 - Want to Make Our Mediations Fail?

Most mediations are already hard for everyone involved. Want to make them fail? They will, if lawyers can't safely urge their clients to settle.

Our courts are already suffering a crushing scarcity of resources. For decades, mediation has helped lighten that burden. Mediation produces voluntary resolutions, in line with our democratic ideals of self-determination. Hundreds of thousands of mediations take place in California every year.

Now AB 2025 threatens that by cutting a hole in our legal protections for mediation communications (proposed change below).

For fourteen years, everyone in a mediation has been able to take a time out from the battle - to talk frankly and off the record - to try to reach a voluntary settlement. Parties, lawyers, witnesses, mediators, experts - everyone can talk off the record. They can talk frankly because they can be sure they are not creating more evidence to be used against them later (unless it's a later criminal proceeding).

Based on what they hear, lawyers in mediation often urge their own clients to end the fight. They often urge their clients to settle for less than the clients believed they could get going in. Lawyers are now free to be honest in mediation, even if their clients don't like what they hear - and they very often don't. This is really important.

If AB 2025 passes, a client who didn't like hearing this could sue their lawyer for urging them to settle instead of continuing the fight. The client would be free to use these communications. But the accused lawyer could not explain what the mediator or the other side said that caused the lawyer to push their client to settle.

AB 2025 would set up a miserable situation in any later malpractice claim. A trial judge or State Bar tribunal would have to either conduct a completely unfair process, or find a way to ignore our current confidentiality protections. Either way is wrong. A judge might decide that to run a fair hearing he or she had to admit into evidence all communications between lawyer and client discussing what they heard from the mediator or other participants.

** If you let in only selective mediation communications, it's completely unfair to the accused. If you let them all in, there's no more confidentiality.** That's why our current laws were written the way they were. That's why they've worked well for fourteen years. Don't change them. Everyone in our state has benefited from the current confidentiality protections for mediation.

As the California Supreme Court found in its recent unanimous Cassel decision upholding our current laws:

...the Legislature might reasonably believe that protecting attorney-client conversations in this context facilitates the use of mediation as a means of dispute resolution by allowing frank discussions between a mediation disputant and the disputant's counsel about the strengths and weaknesses of the case, the progress of negotiations, and the terms of a fair settlement, without concern that the things said by either the client or the lawyers will become the subjects of later litigation against either. The Legislature also could rationally decide that it would not be fair to allow a client to support a malpractice claim with excerpts from private discussions with counsel concerning the mediation, while barring the attorneys from placing such discussions in context by citing communications within the mediation proceedings themselves.

Yes this is formal judicial language, but it hits the nail right on the head.

Thank you,
Ron Kelly, Mediator

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March 13, 2012

AB 2025 would cut a hole in current mediation confidentiality protections by adding 1120 (b)(4):

Section 1120 of the Evidence Code is amended to read:... (b) This chapter does not limit any of the following: ... (4) The admissibility in an action for legal malpractice, an action for breach of fiduciary duty, or both, or in a State Bar disciplinary action, of communications directly between the client and his or her attorney during mediation if professional negligence or misconduct forms the basis of the client's allegations against the attorney.