

Memorandum 2015-24

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

The Commission¹ has received a few new comments and submissions, as follows:

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|---|-------------------|
| | <i>Exhibit p.</i> |
| • Perry Smith, Irvine, CA (5/7/15)..... | 1 |
| • John Warnlof, Walnut Creek (4/13/15)..... | 2 |
| • Nancy Neal Yeend (4/23/15)..... | 3 |

Each of these items is discussed below.

COMMENTS OF PERRY SMITH

Attorney Perry Smith expresses concern about the impact of the mediation confidentiality statutes on a lawyer’s ability to obtain payment pursuant to a particular type of fee agreement.² Specifically, he describes a lawyer-client engagement agreement stating essentially that

If ...

- the lawyer goes to significant pre-litigation effort to try to settle the matter,
- the lawyer obtains a substantial offer for the client,
- the client refuses the offer,
- the client terminates the lawyer, and
- the client later settles the case “around the lawyer” for approximately the amount previously offered,

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.

Then the lawyer is entitled to a certain percentage of the amount that was originally offered.³

He points out that this type of fee agreement could be problematic with regard to a settlement offer obtained during a mediation.

As he explains it,

If the offer is made in a mediation, ... it seems the current law would not permit the lawyer to prove that it was an offer made during his or her representation. Indeed, at present, I do not see a way around this for the lawyer. The client can cause the lawyer to work up a solid case, go into mediation and get offered \$100,000, reject it, terminate the lawyer, and settle with the [opponent] for \$100,000 and not pay the lawyer.⁴

In Mr. Smith's view, the lawyer "is left in a situation certainly as unjust as the plaintiff who cannot prove malpractice."⁵ He hopes that if the mediation confidentiality statutes are revised to allow a client to prove claims against a lawyer, the statutory revisions would also allow a lawyer to prove claims against a client.⁶

The staff appreciates being alerted to the scenario Mr. Smith describes. The Commission should bear it in mind in developing a tentative recommendation.

FORM USED BY JOHN WARNLOF

At the April meeting, mediator John Warnlof described a one-page form that he presents to participants at the beginning of each mediation. He has since provided a copy of that form to the Commission, which is attached as an Exhibit.⁷

The form is entitled "Acknowledgments Concerning Mediation Confidentiality." It states that the mediation participants "acknowledge that Evidence Code §§ 703.5 and 1115 through 1128 apply to the above-captioned mediation, including, but not limited to," several key provisions that are quoted in the form.⁸

There are signature blocks for the participants to complete, as well as a caption area for identifying the mediation. The form makes clear that the quoted

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. See Exhibit p. 2.

8. *Id.*

rules “are not intended to be exhaustive of all of the matters concerning confidentiality and admissibility addressed in Evidence Code §§ 1115 through 1128 including disclosure and admissibility of communications or writings and written settlement agreements pursuant to Sections 1122 and 1123.”⁹

Mr. Warnlof’s form does not contain any warnings or additional information. We thank him for providing it as an example for the Commission to consider.

COMMENTS OF NANCY NEAL YEEND

Mediator Nancy Neal Yeend submitted a one-page document entitled “Fundamental Questions Regarding Continued Protection of Malpractice.”¹⁰ The document begins by stating that “[t]here are a few basic questions to consider when discussing if the protection of attorney and mediator malpractice, committed during mediation, is to continue.”¹¹ The document then defines the terms “malpractice” and “ethics” for purposes of those questions, and says:

Do the present mediation confidentiality statutes and rules protect attorney and mediator malpractice? If the answer is “yes”, then the following questions must be addressed.¹²

The remainder of the document consists of a list of twelve questions, as follows:

1. Are attorneys professionals? Are mediators professionals?
2. Does a professional have a specific obligation to disclose that the present mediation confidentiality statutes protect malpractice?
3. Do attorneys and mediators have an ethical obligation to disclose that present mediation confidentiality statutes protect malpractice?
4. To what extent are mediation parties specifically informed, in writing, by attorneys and mediators that attorney and mediator malpractice is protected?
5. Is there an obligation for court-connected mediation programs to specifically inform mediation parties that attorney and mediator malpractice is protected?
6. Do judges, encouraging or mandating mediation, have an obligation to inform mediation parties that present mediation confidentiality statutes protect malpractice?

9. *Id.*

10. Exhibit p. 3.

11. *Id.*

12. *Id.*

7. To what degree does the average mediation party understand that attorney and mediator malpractice is presently protected?
8. How are mediation parties presently informed that attorney and mediator malpractice is protected?
9. What impact would full disclosure of the fact that attorney and mediator malpractice is protected have on party participation in mediation?
10. Is failure to place mediation participants on notice that attorney and mediator malpractice is protected an ethical violation, or is it a deeper legal question involving informed consent?
11. To what extent do attorneys and mediators assume liability for failing to inform mediation participants that attorney and mediator malpractice is presently protected?
12. Is failure to change the present rules and statutes protecting attorney and mediator malpractice in the public's best interest?¹³

Ms. Yeend has previously voiced her concerns about California's current mediation confidentiality statutes. Through this set of questions, she seems to imply that if those statutes remain unchanged, attorneys and mediators should be required to disclose to mediation parties that the mediation confidentiality statutes might impede recovery for any malpractice occurring during a mediation. That type of advance warning would be quite different from the form that Mr. Warnlof uses. The staff appreciates the effort Ms. Yeend put into sharing her perspective on this matter.

Respectfully submitted,

Barbara Gaal
Chief Deputy Counsel

13. *Id.*

EMAIL FROM PERRY SMITH (5/7/15)

Re: Mediation Confidentiality — Has this concern been addressed?

Chief Deputy Gaal,

I know your time is extremely valuable. If you find the time, please take a quick look at this and if you think it a valid concern, keep it on the list of considerations regarding potential revisions to mediation confidentiality.

Sometimes an engagement agreement with a client/plaintiff in a labor and employment matter, for example, will state that if counsel goes to significant pre-litigation effort to try to settle a matter and:

- (1) Obtains a substantial offer;
- (2) The client does not want to take the offer;
- (3) The client terminates the lawyer; and
- (4) The client then settles the case around the lawyer for the amount offered in mediation (or maybe even a little more or a little less);

The lawyer is entitled to his or her percentage of the amount offered during his or her representation.

If the offer is made in a mediation, however, it seems the current law would not permit the lawyer to prove that it was an offer made during his or her representation. Indeed, at present, I do not see a way around this for the lawyer. The client can cause the lawyer to work up a solid case, go into mediation and get offered \$100,000, reject it, terminate the lawyer, and settle with the employer for \$100,000 and not pay the lawyer. The lawyer is left in a situation certainly as unjust as the plaintiff who cannot prove malpractice.

Do you know if this has ever been considered? I would just hope that to the extent any changes would allow a client to prove his or her claims against a lawyer, the changes would allow a lawyer to prove his or her claims against a client.

Sincerely,

Perry

Perry G. Smith
Barritt Smith ^{LLP}

3 Corporate Park, Ste 150 | Irvine, CA 92606 | www.barrittsmith.com
Phone: 949-553-0700 ext. 2 | Fax: 949-553-0715 | psmith@barrittsmith.com

ACKNOWLEDGMENTS CONCERNING MEDIATION CONFIDENTIALITY

SUPERIOR COURT: _____
MEDIATOR: _____
PLAINTIFF: _____
DEFENDANT: _____
CASE NUMBER: _____
DATE: _____

The participants acknowledge that Evidence Code §§703.5 and 1115 through 1128 apply to the above-captioned mediation, including, but not limited to, the following :

1. That no mediator shall be competent to testify, in any subsequent civil proceeding, as to any statement, conduct, decision, or ruling, occurring at or in connection with a prior mediation, except as to a statement or conduct that could give rise to civil or criminal contempt, constitute a crime, be the subject of investigation by the State Bar or Commission on Judicial Performance, or give rise to disqualification procedures under CCP §170.1(a)(1) or (c) (Evidence Code §703.5).

2. That no evidence of anything said or any admission made for the purpose of, or in the course of, or pursuant to, a mediation or mediation consultation is admissible or subject to discovery, and disclosure of the evidence shall not be compelled, in any arbitration, administrative adjudication, civil action, or other non-criminal proceeding in which, pursuant to law, testimony can be compelled to be given (Evidence Code §1119(a)).

3. That no writing, as defined in Evidence Code §250, that is prepared for the purpose of, in the course of, or pursuant to, a mediation or mediation consultation, is admissible or subject to discovery, and disclosure of the writing shall not be compelled, in any action, administrative adjudication, civil action, or other non-criminal proceeding in which, pursuant to law, testimony can be compelled to be given (Evidence Code §1119(b)).

4. That all communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential (Evidence Code §1119(c)).

5. That evidence otherwise admissible or subject to discovery outside of a mediation or mediation consultation shall not be or become inadmissible or protected from disclosure solely by its introduction or use in a mediation or a mediation consultation (Evidence Code §1120(a)).

6. That anything said, any admission made, or any writing that is inadmissible, protected from disclosure, and confidential under this chapter before a mediation ends, shall remain inadmissible, protected from disclosure, and confidential to the same extent after the mediation ends (Evidence Code §1126).

The foregoing acknowledgments are not intended to be exhaustive of all of the matters concerning confidentiality and admissibility addressed in Evidence Code §§1115 through 1128 including disclosure and admissibility of communications or writings and written settlement agreements pursuant to Sections 1122 and 1123.

| | | |
|-------------------------------|------------------------------|----------------------|
| _____ [Participant's Name] | _____ [Role in Mediation] | _____ [Signature] |
| _____ [Participant's Name] | _____ [Role in Mediation] | _____ [Signature] |
| _____ [Participant's Name] | _____ [Role in Mediation] | _____ [Signature] |
| _____ [Participant's Name] | _____ [Role in Mediation] | _____ [Signature] |
| _____ [Participant's Name] | _____ [Role in Mediation] | _____ [Signature] |

FUNDAMENTAL QUESTIONS REGARDING CONTINUED PROTECTION OF MALPRACTICE

There are a few basic questions to consider when discussing if the protection of attorney and mediator malpractice, committed during mediation, is to continue. The following definitions provide the framework for these questions:

MALPRACTICE: *"a professional's improper or immoral conduct in the performance of duties, done either intentionally or through carelessness or ignorance."*¹

Ethics: *"The rules or standards governing the conduct of the members of a profession."*²

QUESTIONS

Do the present mediation confidentiality statutes and rules protect attorney and mediator malpractice? If the answer is "yes", then the following questions must be addressed.

1. Are attorneys professionals? Are mediators professionals?
2. Does a professional have a specific obligation to disclose that the present mediation confidentiality statutes protect malpractice?
3. Do attorneys and mediators have an ethical obligation to disclose that present mediation confidentiality statutes protect malpractice?
4. To what extent are mediation parties specifically informed, in writing, by attorneys and mediators that attorney and mediator malpractice is protected?
5. Is there an obligation for court-connected mediation programs to specifically inform mediation parties that attorney and mediator malpractice is protected?
6. Do judges, encouraging or mandating mediation, have an obligation to inform mediation parties that present mediation confidentiality statutes protect malpractice?
7. To what degree does the average mediation party understand that attorney and mediator malpractice is presently protected?
8. How are mediation parties presently informed that attorney and mediator malpractice is protected?
9. What impact would full disclosure of the fact that attorney and mediator malpractice is protected have on party participation in mediation?
10. Is failure to place mediation participants on notice that attorney and mediator malpractice is protected an ethical violation, or is it a deeper legal question involving informed consent?
11. To what extent do attorneys and mediators assume liability for failing to inform mediation participants that attorney and mediator malpractice is presently protected?
12. Is failure to change the present rules and statutes protecting attorney and mediator malpractice in the public's best interest?

¹ Barron's Law Dictionary. The definition goes further stating that the "term" denotes the "negligent or unskillful performance of duties"... "during a professional relationship" with clients.

² American Heritage Dictionary. Looking at the word "ethical" the word means, "Being in accordance with the accepted principles that govern the conduct of a group, especially of a profession."