Study K-402 October 5, 2015

First Supplement to Memorandum 2015-46

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

Attached for the Commission's consideration are some additional comments on this study of the relationship between mediation confidentiality and attorney malpractice and other misconduct.[1] The new comments are listed in the attached table of contents.

As in Memorandum 2015-46, the new comments are quite polarized. Accordingly, the staff again segregated them into two groups:

(1) ***Comments that oppose the Commission's preliminary approach.*** There are 39 such comments.[2] One of them is on behalf of an organization (Collaborative Attorneys & Mediators of Marin).[3] Another comment is signed by two individuals.[4] Still another of the new comments is from an individual who commented previously.[5]

(2) ***Comments urging the Commission to recommend revisions of the mediation confidentiality statutes to promote attorney accountability.*** In preparing this memorandum, the staff found the names of 13 new signatories[6] of the online petition previously presented.[7] Some of those signatories submitted supplemental comments.[8] The Change.org website and emails are somewhat

1. For other recently submitted comments and materials, see Memorandum 2015-45, Exhibit pp. 8-31; Memorandum 2015-46, Exhibit pp. 1-234.

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. See Exhibit pp. 1-41.
3. See Exhibit p. 1.
4. See Exhibit pp. 19-20 (comments of Lance LaBelle & David Ezra).
5. For an earlier comment by B. Elaine Thompson, see Memorandum 2015-46, Exhibit p. 179.
6. See Exhibit p. 42.
7. The online petition and earlier list of signatories can be found at Memorandum 2015-46, Exhibit pp. 210-13.
8. See Exhibit pp. 42-43.

> confusing; there might be a few more new signatories as well.[9] The Commission also received five other comments from individuals urging revisions of the mediation confidentiality statutes to promote attorney accountability.[10] Two of those sources previously submitted oral or written input to the Commission.[11]

The staff will refer to these comments in future memoranda as appears appropriate.

The staff also received an email message from Larry Doyle alerting the Commission to a new case decided in Oregon: *Yoshida's Inc. v. Dunn Carney Allen Higgins & Tongue LLP*.[12] In that case, the court of appeals concluded that the trial court had erroneously admitted certain evidence from a mediation, in violation of Oregon's mediation confidentiality statute. The court's opinion is attached for the Commission's consideration.[13]

Respectfully submitted,

Barbara Gaal
Chief Deputy Counsel

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9. As of October 5, 2015, the staff only found the names of 39 signatories in total, but the Change.org website referred to "45 Supporters" in one place and "43 Supporters" in another place. *Compare* https://www.change.org/p/the-california-law-revision-commission-change-the-statutes-that-legalize-malpractice?recruiter=336268339&utm_source=share_petition&utm_medium=copylink ("45 Supporters") *with* https://www.change.org/organizations/citizens_against_legalized_malpractice_2 ("43 Supporters").
10. See Exhibit pp. 44-57.
11. See Exhibit pp. 44-48 (comments of Jeff Kichaven), 57 (comments of Nancy Yeend).
12. 272 Ore. App. 436 (Ore. Ct. App. 2015).
13. See Exhibit pp. 58-67.

TABLE OF CONTENTS

Comments & Related Materials That Oppose the Commission's Preliminary Approach

Exhibit p.

- Rodney Johnson, Collaborative Attorneys & Mediators of Marin (9/21/15) 1
- Michael Altshuler, San Francisco (9/24/15) 2
- Marc Bertone (9/17/15) 3
- Gillian Brady (9/16/15) 4
- Pamela Canter, San Mateo (9/21/15) 5
- Cathy Coleman (9/8/15) 6
- Hon. Susan Finlay (ret.) (10/2/15) 7
- Albert Fiore, Newport Beach (9/16/15) 9
- Janet Frankel, San Francisco (10/5/15) 10
- Chris Gayler, Sebastopol (9/8/15) 11
- Robert Glasser (9/16/15) 12
- Penelope Haas (9/8/15) 13
- Leslie Hart, Hermosa Beach (9/16/15) 14
- Win, Heiskala (10/1/15) 15
- Suanne Honey, Santa Ana (9/16/15) 16
- Elizabeth Jones, Newport Beach (9/17/15) 17
- Sean Joyce, San Francisco (9/29/15) 18
- Lance LaBelle & David Ezra, Irvine, CA (9/30/15) 19
- James Laflin, Stanford (9/29/15) 21
- Richard Levi, Penngrove (9/8/15) 22
- Brian D. Levy (9/16/15) 23
- Justyn Lezin, Oakland (9/16/15) 24
- David Libman, Santa Ana (10/2/15) 25
- Duncan Mackintosh (9/9/15) 26
- Jerald Marrs, San Ramon (9/22/15) 27
- Jessica Metoyer, San Francisco (9/17/15) 28
- Shahrad Milanfar, Emeryville (9/10/15) 29
- Audrey Roybal, Petaluma (9/8/15) 30
- Victoria Scarth (10/4/15) 31
- Jennifer Segura, Del Mar (9/16/15) 32
- Chip Sharpe, Bayside (9/10/15) 33
- Jerry Spolter (9/28/15) 34
- Eric Stromberger (9/8/15) 35
- Hon. Gretchen Taylor (ret.), Beverly Hills (9/23/15) 36
- B. Elaine Thompson (9/16/15) 38

- Jennifer Webb, Newport Beach (9/16/15) 39
- Matthew N. White, San Rafael (9/23/15) 40
- Lisa Zonder, Westlake Village (9/24/15) 41

Comments Urging Revisions of the Mediation Confidentiality Statutes to Promote Attorney Accountability

Online Petition

Exhibit p.

- Updated petitioner list & supplemental comments (as of 10/5/15) 42

Other Comments Submitted By Email

Exhibit p.

- Jeff Kichaven, Los Angeles (9/30/15) 44
- Gerald Klein, Newport Beach (9/14/15) 49
- Robert Sall, Laguna Beach (9/11/15) 52
- William Slomanson, with abstract from Sarah Brand (9/30/15) 55
- Nancy Neal Yeend (10/5/15) 57

New Court Decision (Interpreting Oregon Law)

Exhibit p.

- *Yoshida's Inc. v. Dunn Carney Allen Higgins & Tongue LLP*, 272 Ore. App. 436 (Ore. Ct. App. 2015) 58

EMAIL FROM RODNEY JOHNSON, ON BEHALF OF COLLABORATIVE ATTORNEYS AND MEDIATORS OF MARIN (9/21/15)

Re: Study of K-402

Dear Law Revision Commission,

We oppose the Commission's August 7th decision to draft recommended legislation removing our current confidentiality protections when a mediation participant alleges lawyer misconduct. We will oppose this legislation if it goes to the Legislature and will urge organizations of which we are members to oppose it.

For thirty years our current right to choose confidential mediation and also to opt out of it has served the people and courts of California extremely well. Removing this right is a very radical change which should require solid evidence establishing a need. Dozens of alternative solutions have been suggested to the Commission to address the alleged problem without removing our confidentiality protections. We request you pursue these instead.

We urge you not to turn your back on the Commission's own 1996 statement recommending our current statutory protections be enacted – "All persons attending a mediation, parties as well as nonparties, should be able to speak frankly, without fear of having their words turned against them."

Regards,

Rodney N. Johnson
on behalf of Collaborative Attorneys and Mediators of Marin

Law & Mediation Offices of
Rodney N. Johnson
1120 Nye Street, Ste. 200
San Rafael, CA 94901
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Fax: 415.457-6439
Please reply to Rodney@johnsonmediation.com and
Jackie@johnsonmediation.com

EMAIL FROM MICHAEL ALTSHULER (9/24/15)

Re: Protecting Confidentiality in Mediation

I urge you to reconsider the protection of confidentiality in mediation.

Allowing the parties to break confidentiality with claims agains a lawyer advocate or lawyer mediator greatly undermines the dynamics that contribute to the successful resolution of cases. It will greatly inhibit the sharing of information that not only contributes to successful dispute resolution, but also provides the participating parties with considerable satisfaction with the mediation process.

To enable mediation to continue to be a successful venue for conflict resolution, the right to confidentiality must be protected.

Michael Altshuler
Altshuler & Associates
www.AltshulerAssociates.com
San Francisco, CA 415-577-3605

EMAIL FROM MARC BERTONE (9/17/15)

Re: Study K-402

California Law Revision Commission
c/o Ms. Barbara Gaal, Chief Deputy Counsel

I oppose the Commission's August 7th decision to draft recommended legislation removing our current confidentiality protections when a mediation participant alleges lawyer misconduct. I will oppose this legislation if it goes to the Legislature and will urge organizations of which I'm a member to oppose it.

For thirty years our current right to choose confidential mediation and also to opt out of it has served the people and courts of California extremely well. Removing this right is a very radical change which should require solid evidence establishing a need. Dozens of alternative solutions have been suggested to the Commission to address the alleged problem without removing our confidentiality protections. I request you pursue these instead.

I urge you not to turn your back on the Commission's own 1996 statement recommending our current statutory protections be enacted – "All persons attending a mediation, parties as well as nonparties, should be able to speak frankly, without fear of having their words turned against them."

EMAIL FROM GILLIAN BRADY (9/16/15)

Re: Mediation confidentiality

I strongly disagree with the recommendation to remove confidentiality from private, confidential mediation. Mediating parties must be free to conduct their mediations with the freedom and protection that confidential mediation provides. These mediations are voluntary and entered into with the understanding that the discussions at the mediation table will be confidential unless the parties agree otherwise. Any experienced mediator will agree that confidentiality is an integral party of the mediation process.

If the issue is unethical or incompetent lawyers or lawyer Mediators, then that issue should be addressed through certification and/or licensing to practice.

Yours,

EMAIL FROM PAMELA CANTER (9/21/15)

Re: Oppose new mediation legislation

I OPPOSE THE COMMISSION'S AUGUST 7TH DECISION TO DRAFT RECOMMENDED LEGISLATION REMOVING OUR CURRENT CONFIDENTIALITY PROTECTIONS WHEN A MEDIATION PARTICIPANT ALLEGES LAWYER MISCONDUCT. I WILL OPPOSE THIS LEGISLATION IF IT GOES TO THE LEGISLATURE AND WILL URGE ORGANIZATIONS OF WHICH I'M A MEMBER TO OPPOSE IT.

FOR THIRTY YEARS OUR CURRENT RIGHT TO CHOOSE CONFIDENTIAL MEDIATION AND ALSO TO OPT OUT OF IT HAS SERVED THE PEOPLE AND COURTS OF CALIFORNIA EXTREMELY WELL. REMOVING THIS RIGHT IS A VERY RADICAL CHANGE WHICH SHOULD REQUIRE SOLID EVIDENCE ESTABLISHING A NEED. DOZENS OF ALTERNATIVE SOLUTIONS HAVE BEEN SUGGESTED TO THE COMMISSION TO ADDRESS THE ALLEGED PROBLEM WITHOUT REMOVING OUR CONFIDENTIALITY PROTECTIONS. I REQUEST YOU PURSUE THESE INSTEAD.

I URGE YOU NOT TO TURN YOUR BACK ON THE COMMISSION'S OWN 1996 STATEMENT RECOMMENDING OUR CURRENT STATUTORY PROTECTIONS BE ENACTED – "ALL PERSONS ATTENDING A MEDIATION, PARTIES AS WELL AS NONPARTIES, SHOULD BE ABLE TO SPEAK FRANKLY, WITHOUT FEAR OF HAVING THEIR WORDS TURNED AGAINST THEM.

Pamela R. Canter
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(650) 341-1395 Fax
www.canterhagan.com

EMAIL FROM CATHY COLEMAN (9/8/15)

Re: Opposition to recommended legislation to remove confidentiality protections in mediation

I oppose the Commission's August 7th decision to draft recommended legislation removing our current confidentiality protections when a mediation participant alleges lawyer misconduct. I will oppose this legislation if it goes to the Legislature and will urge organizations of which I'm a member to oppose it.

For thirty years our current right to choose confidential mediation and also to opt out of it has served the people and courts of California extremely well. Removing this right is a very radical change which should require solid evidence establishing a need. Dozens of alternative solutions have been suggested to the Commission to address the alleged problem without removing our confidentiality protections. I request you pursue these instead.

I urge you not to turn your back on the Commission's own 1996 statement recommending our current statutory protections be enacted – "All persons attending a mediation, parties as well as nonparties, should be able to speak frankly, without fear of having their words turned against them."

Cathy Coleman, Ph.D.
707-334-3284
ccoleman829@gmail.com
www.cathycoleman.co

EMAIL FROM HON. SUSAN FINLAY (RET.) (10/2/15)

Re: Study K-402

Dear Ms. Gaal:

I strongly oppose the Commission's August 7th decision to draft recommended legislation removing our current confidentiality protections when a mediation participant alleges lawyer misconduct. I will urge every organization of which I am a member to oppose it.

As a bench officer for 32 years, I can affirm the value of the mediation process for litigants and particularly for families going through a dissolution. After leaving the bench, I became involved in mediation in order to help parties stay out of court, which I know to be a harmful, toxic experience for the majority of litigants.

Yes, there are a few cases of attorney malpractice; the Commission's desire to protect these victimized consumers is understandable. The result, however, will in turn victimize all of those thousands of parties who participate in mediation each year, with the assurance of knowing that their negotiations are confidential and can't be used against them in subsequent proceedings. For the Commission to recommend removing this safeguard for mediating parties is to penalize the vast majority for the malpractice of a few.

We have all seen the "sign and sue" cases, where the parties sign an enforceable agreement, then have buyers' remorse at a later time and either blame their attorneys or their mediators. Perhaps we should have a statute that contains a clause, as we do in other types of contracts, to the effect that the parties have 5 days to cancel their agreement and if they fail to act within the proscribed time, then the evidence code as it relates to confidentiality applies. This would give the parties time to "cool off", seek a first or second opinion, and to think it over. Surely there has to be a way to protect all of the clients who mediate, not just the few who allege attorney malpractice.

Mediation, as we know it, will not survive this change. Access to our courts and access to justice will be further restricted. The Courts can't handle their case loads now; adding clients who would otherwise mediate would cause an even greater overload.

Mediation has been particularly helpful to divorcing parents since it enables them to preserve their co-parent relationship which benefits the children. If if they do not have this option, then they are forced to litigate which destroys families, seriously damaging the children in the process.

It is difficult to imagine any mediator who would want to expose herself or himself to litigation of any kind. Most of us are in the mediation business because we know how harmful litigation can be. The majority of mediators would not choose to be part of an on-going case as a witness or a party. We would not choose to have our records subject to subpoena and our depositions taken, or be forced to testify against or for a client when we have been their "neutral". Why would a party tell the mediator anything in confidence if it is not going to be confidential? The answer is that they won't. Few would risk being candid when they know every statement is discoverable and could be used against them in future litigation.

For thirty years the parties' right to choose confidential mediation has served the courts and the parties well. Please consider alternatives to removing this beneficial process as a choice for the people of the State of California.

Sincerely yours,

Susan P. Finlay
Judge of the Superior Court, ret.
619 251 2721

EMAIL FROM ALBERT FIORE (9/16/15)

Re: Study K-402

California Law Revision Commission
c/o Ms. Barbara Gaal, Chief Deputy Counsel

I oppose the Commission's August 7th decision to draft recommended legislation removing our current confidentiality protections when a mediation participant alleges lawyer misconduct. I will oppose this legislation if it goes to the Legislature and will urge organizations of which I'm a member to oppose it.

For thirty years our current right to choose confidential mediation and also to opt out of it has served the people and courts of California extremely well. Removing this right is a very radical change which should require solid evidence establishing a need. Dozens of alternative solutions have been suggested to the Commission to address the alleged problem without removing our confidentiality protections. I request you pursue these instead.

I urge you not to turn your back on the Commission's own 1996 statement recommending our current statutory protections be enacted – "All persons attending a mediation, parties as well as nonparties, should be able to speak frankly, without fear of having their words turned against them."

Albert A. Fiore
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Albert A. Fiore provides Family Law services.

EMAIL FROM JANET FRANKEL (10/5/15)

Re: Study K-402

I oppose the Commission's August 7th decision to draft recommended legislation removing the current confidentiality protections when a mediation participant alleges lawyer misconduct. I will oppose this legislation if it goes to the Legislature and will urge organizations of which I'm a member to oppose it.

For thirty years, the current right of parties to choose confidential mediation - and also to opt out of it - has served the people and courts of California extremely well. Removing this right is a very radical change which should require solid evidence establishing a need. Dozens of alternative solutions have been suggested to the Commission to address the alleged problems without removing the confidentiality protections. I request you pursue these instead.

Please recall the California Law Revision Commission's 1996 statement recommending the current statutory protections be enacted – "All persons attending a mediation, parties as well as nonparties, should be able to speak frankly, without fear of having their words turned against them." I urge you to reverse your decision and consider alternative solutions which preserve the confidentiality protections.

Please fee free to contact me if you wish to discuss this further.

Best regards,

Janet L. Frankel
Certified Family Law Specialist
State Bar of California, Board of Legal Specialization
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janet@janetfrankel.com
www.janetfrankel.com

EMAIL FROM CHRIS GAYLER (9/8/15)

Re: Concerns about K-402

California Law Revision Commission
c/o Ms. Barbara Gaal, Chief Deputy Counsel

Re Study K-402

It would be a great disservice to all if confidentiality were no longer offered in mediation. If diplomats, who know something about negotiation, can do it in secrecy, why can't we?

I oppose the Commission's August 7th decision to draft recommended legislation removing our current confidentiality protections when a mediation participant alleges lawyer misconduct. I will oppose this legislation if it goes to the Legislature and will urge organizations of which I'm a member to oppose it.

For thirty years our current right to choose confidential mediation and also to opt out of it has served the people and courts of California extremely well. Removing this right is a very radical change which should require solid evidence establishing a need. Dozens of alternative solutions have been suggested to the Commission to address the alleged problem without removing our confidentiality protections. I request you pursue these instead.

I urge you not to turn your back on the Commission's own 1996 statement recommending our current statutory protections be enacted – "All persons attending a mediation, parties as well as nonparties, should be able to speak frankly, without fear of having their words turned against them."

Chris Gayler
Sebastopol, CA

EMAIL FROM ROBERT GLASSER (9/16/15)

Re: Mediation Confidentiality

Dear Gentle persons,

Two factors allow mediation to work. One is the fact that the disputing parties make the decisions that settle their dispute. The process seeks to empower both to make good decisions, ones that will work and that they can live with.

The other is that anything said in mediation is confidential except the signed written agreement to mediate and the signed settlement agreement. An exception is documentation otherwise available from third parties (banks, for example) or prepared in the ordinary course (and not for mediation). The idea is to promote candor in creating and exploring options that the disputing parties can live with, and not litigate for someone else to decide for them. Another example, in my opinion, is the Family Code required disclosures and supporting data.

I have been doing divorce mediation since 1984. We always advise the clients that they have a right to have consulting attorneys at any stage of the mediation process and to review their end product, their written settlement agreement Before they sign it. Just as what a client in a mediation may say or present his or her attorney is confidential under the attorney/client privilege, so too is what the client says or prepares for their mediation.

Otherwise, should "buyers remorse" occur, the time and cost of litigation will likely become overwhelming, not only to the burden of the court system, but to the parties, the mediators and their consulting counsel.

Furthermore, there are remedies already in place in the Family Code for some one who believes fraud occurred. The code addresses undisclosed and after discovered assets, for example. The law already has available grounds for setting aside a judgment based on mistake of fact, the income and expense and asset and debt declarations having been exchanged, as required, and thus not covered by mediation confidentiality (at least, in my opinion).

Bad cases make bad law. I urge you not to allow alleged malfeasance destroy the public's opportunity to settle their disputes in a peaceful and confidential manner.

Robert Glasser

EMAIL FROM PENELOPE HAAS (9/8/15)

Re: Confidential Mediation

I oppose the Commission's August 7th decision to draft recommended legislation removing our current confidentiality protections when a mediation participant alleges lawyer misconduct. I will oppose this legislation if it goes to the Legislature and will urge organizations of which I'm a member to oppose it.

For thirty years our current right to choose confidential mediation and also to opt out of it has served the people and courts of California extremely well. Removing this right is a very radical change which should require solid evidence establishing a need. Dozens of alternative solutions have been suggested to the Commission to address the alleged problem without removing our confidentiality protections. I request you pursue these instead.

I urge you not to turn your back on the Commission's own 1996 statement recommending our current statutory protections be enacted – "All persons attending a mediation, parties as well as nonparties, should be able to speak frankly, without fear of having their words turned against them."

Regards,
Penelope Haas

EMAIL FROM LESLIE HART (9/16/15)

Re: Study K-402

California Law Revision Commission
c/o Ms. Barbara Gaal, Chief Deputy Counsel

I oppose the Commission's August 7th decision to draft recommended legislation removing our current confidentiality protections when a mediation participant alleges lawyer misconduct. I will oppose this legislation if it goes to the Legislature and will urge organizations of which I'm a member to oppose it.

For thirty years our current right to choose confidential mediation and also to opt out of it has served the people and courts of California extremely well. Removing this right is a very radical change which should require solid evidence establishing a need. Dozens of alternative solutions have been suggested to the Commission to address the alleged problem without removing our confidentiality protections. I request you pursue these instead.

I urge you not to turn your back on the Commission's own 1996 statement recommending our current statutory protections be enacted – "All persons attending a mediation, parties as well as nonparties, should be able to speak frankly, without fear of having their words turned against them."

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EMAIL FROM WIN HEISKALA, CFS-F (10/1/15)

Re: Study K-402

Confidential mediation allows divorcing parties to make their own decisions regarding the financial and emotional welfare of their family with the assistance of professionals to assist and facilitate them through that process. This can only take place in a mutually confidential setting.

I strenuously oppose the Commission's August 7th decision to draft recommended legislation removing our current confidentiality protections when a mediation participant alleges lawyer misconduct. I will oppose the legislation if it goes to the Legislature and will urge organization os which I am a member, such as the San Diego County Bar Association, San Diego County Family Law Bar Association, Foothills Bar Association, Association of Family Law Specialists and the Collaborative Family Law Group of San Diego, to oppose it.

An argument of fundamental unfairness and unequal protection is also raised if attorneys are the only professionals or mediators that are singled out for the loss of confidentiality on the mere allegation of "misconduct" or "malpractice". Attorneys are not the only ones facilitating mediation.

For thirty years our current right to choose confidential mediation, and also to opt out of it, has served the people and courts of California extremely well. I do not have ready statistics, but I truly believe the number of satisfied participants, lay and professional alike, vastly outnumbers the ones voicing a negative experience. Removing the protection of confidentiality for all participants and professionals is a very radical change which should require **very** solid evidence establishing a need for the change. Dozens of alternative solutions have been suggested to the Commission to address the alleged problem without removing our confidentiality protections. I request that you pursue and evaluate these instead. Do not permit a small minority to rule for the very satisfied and well served majority.

I urge you not to turn your back on the Commission's own 1996 statement recommending our current statutory protections be enacted – *"All persons attending a mediation, parties as well as nonparties, should be able to speak frankly, without fear of having their words turned against them."*

Yours truly,

Win Heiskala, CFS-F
Attorney at Law, State Bar #71159

EMAIL FROM SUANNE HONEY (9/16/15)

Re: Confidentiality of mediation & collaborative law

This is very troubling if the rumors I hear are true that there is an effort to put an end to confidentiality in mediation. This will put a monkey wrench in the court system that will slow things down to a great degree. People feel free to go into a mediation, let the truth come out without fear of someone using it against them at a later time so that a resolution can be obtained. I used to practice civil law. I had a case in mediation where the opposing party used fraud all over the place to get the result he wanted. I tried to set this aside based on the fraud and could not. So I have been on both sides of this issue. The take away for me was get the proof before you sign on the dotted line, not to stop confidentiality. I have heard of a collaborative law where they are trying to set aside a mistake and cannot use the statements to show the truth. I have heard a suggestion that disclosure documents are not subject to confidentiality even though that is a part of a mediation or collaboration. That makes sense. But to open up the entire mediation, that is a problem. People perceive a problem and overreact to prevent such a problem from happening in the future and unwittingly create many more problems. All the mediators will be subpoenaed into court, thus making them unavailable for other mediations and making them less willing to help people resolve issues. You will have people not willing to let the entire truth out in mediation out of fear of future repercussions, making less cases settle. There is a good reason for confidentiality. Please be careful.

Suanne I. Honey, CFLS*
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Santa Ana, CA 92701-8302
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E-Mail: honey@honeylaw.com

EMAIL FROM ELIZABETH JONES (9/17/15)

Re: Mediation Confidentiality is at the Core of the effectiveness of Mediation

California Law Revision Commission
c/o Ms. Barbara Gall, Chief Deputy Counsel

Re Study K-402

I oppose the Commission's August 7th decision to draft recommended legislation removing our current confidentiality protections when a mediation participant alleges lawyer misconduct. I will oppose this legislation if it goes to the Legislature and will urge organizations of which I am a member to oppose it.

For thirty years our current right to choose confidential mediation and also to opt out of it has served the people and courts of California extremely well. Removing this right is a very radical change which should require solid evidence establishing a need. Dozens of alternative solutions have been suggested to the Commission to address the alleged problem without removing our confidentiality protections. I request you pursue these instead.

I urge you not to turn your back on the Commission's own 1996 statement recommending our current statutory protections be enacted – "All persons attending a mediation, parties as well as nonparties, should be able to speak frankly, without fear of having their words turned against them."

I am a Family Law Mediator. Confidentiality is a major reason why divorcing couples choose mediation. They want their information kept confidential. They want what they say in the Mediation kept confidential. They do not want their children or anyone else to read about what went on behind closed doors.

Confidentiality is at the core of why people seek out alternate dispute resolution. Please DO NOT REMOVE CONFIDENTIALITY PROTECTION FROM MEDIATION.

Elizabeth Jones, Esq.
Law Offices of Elizabeth Jones

Elizabeth Jones, Esq.
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714-973-7904
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EMAIL FROM SEAN PATRICK JOYCE (9/29/15)

Re: Study K-402

I oppose the Commission's August 7th decision to draft recommended legislation removing our current confidentiality protections when a mediation participant alleges lawyer misconduct. I will oppose this legislation if it goes to the Legislature and will urge organizations of which I'm a member to oppose it.

For thirty years our current right to choose confidential mediation and also to opt out of it has served the people and courts of California extremely well. Removing this right is a very radical change which should require solid evidence establishing a need. Dozens of alternative solutions have been suggested to the Commission to address the alleged problem without removing our confidentiality protections. I request you pursue these instead.

I urge you not to turn your back on the Commission's own 1996 statement recommending our current statutory protections be enacted- "All persons attending a mediation, parties as well as nonparties, should be able to speak frankly, without fear of having their words turned against them."

Kindest Regards,
Sean Patrick Joyce

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A Family Law Firm

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September 30, 2015

Via E-Mail and U.S. Mail Delivery

California Law Revision Commission
% UC Davis School of Law
400 Mrak Hall Drive
Davis, CA 95616

Attention: Barbara Gaal

Re: Study K-402

Dear Ms Gaal:

We take this opportunity to join in the September 25, 2015 Memorandum submitted by Paul J. Dubow (copy attached). We would like to offer a few additional points--in particular with respect to potentially creating a cause of action for malpractice against the attorney mediator.

As experienced attorneys and mediators, we know that mediation is instrumental to resolving litigation and provides a tremendous benefit to society as a whole. Confidentiality is the cornerstone of the mediation process. It's what makes mediation tick.

During the course of the mediation, the mediator is provided confidential information by the parties. Oftentimes that information is in the form of a confidential brief (or statements made on the basis that they are to be used by the mediator but not shared with the other side). The mediator must build trust with the parties. But how can a mediator realistically receive such confidential information if the mediator can later be sued for failing to maintain such confidences (or perhaps *for* maintaining a confidence)?

It is often said that a good settlement is where neither side is happy with the result. That is probably an understatement in the case of mediated resolutions. We have successfully settled many disputes where both sides left very unhappy about the result, but they were both far better off than if they had incurred the expense and risk of continued litigation and trial. Are we now going to create a system where any unhappy settling party can sue the mediator for allegedly strong-arming a settlement? (Or perhaps for not doing enough to get a case settled?) If so--the unhappy party merely needs to allege duress on the part of the mediator. That creates a factual dispute that survives demurrer and summary judgment. The mediator will either need to settle the suit or go to trial.

What precise duties does a mediator undertake? The parties are paying the mediator to help them find a way to both compromise and reach a result that by definition is not desirable and not as good as if they went to trial and prevailed.

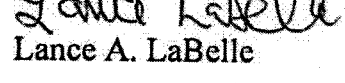
Opening the door to post-mediation discovery of all communications where there is a malpractice claim against the mediator will inevitably lead to creative attorneys and litigants trying to make up for a "bad" settlement by suing the mediator who helped them achieve that settlement. Or alternatively, when a litigant loses at trial, they will come back and blame the mediator for failing to help them understand that they could have settled at mediation for $50,000 (yes, although they told the mediator they would never settle for less than $125,000--they will say it was the mediator's job to recognize that bluff and communicate the $50,000 offer the other side would have made).

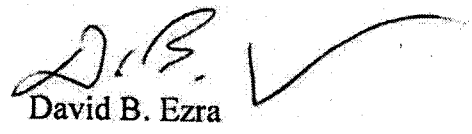
These may be extreme examples, but we can honestly report that in having attending thousand of mediations as attorneys, we cannot think of a single instance of mediator malpractice. That is not to say that the mediator is always effective in a specific matter. Of course, some mediators are far better at their craft than others. Some work far harder than others to try to achieve a settlement. But we would be grossly over-reacting by doing away with confidentiality in the alleged "public interest" of creating a cause of action against the mediator. To be sure, such an approach would be a little like "throwing the baby out with the bathwater".

We are of course very upset by stories involving an attorney who gets a case settled by verbally promising a fee discount, only to back out, demand a full fee, and assert mediation confidentiality against his or her own client. That is appalling. But we think that should be handled as a matter of attorney ethics, such as by requiring attorneys who represent individuals to have their client sign paperwork indicating whether any fee reduction was offered to induce settlement, and if so, spelling out the terms of the fee modification.

We will not reiterate here the points well articulated by Mr. Dubow. If we can answer any questions or be of any assistance to you as the Commission grapples with these difficult issues, please feel free to contact us.

Very truly yours,


Lance A. LaBelle


David B. Ezra

LAL/DBE/bjf
Attachment

☞ **Staff Note.** Paul Dubow's letter is attached to Memorandum 2015-45 as Exhibit pp. 11-15.

EMAIL FROM JAMES LAFLIN (9/29/15)

Re: Study K-402

Dear Ms Gaal:

A colleague, Ron Kelly, recently brought to my attention the Commission's August 7 decision to draft recommended legislation removing current confidentiality protections when a mediation participant alleges lawyer misconduct.

As a professional mediator for more than 20 plus years, I'm opposed to such action. Confidentiality is the bedrock on which the mediation process rests. For all of the reason I'm sure Ron and others have articulated I urge the commission to reconsider its position and NOT recommend removal of current confidentiality protections.

Sincerely,

Jim Laflin

James Laflin
Ombudsperson
Stanford University School of Medicine
1265 Welch Road - MSOB X301
Stanford, CA 94305-5501
Telephone: 650-498-5744
Cell: 650-576-9493
Fax: 650-498-5865
EM: jlaflin@stanford.edu
Web: http://med.stanford.edu/ombuds

The Office of the Ombudsperson is a neutral and confidential resource for members of the Stanford University School of Medicine community. Consistent with the neutrality of the Ombudsperson and the confidential nature of the process, communication with the Office of the Ombudsperson does not place Stanford University School of Medicine on notice of the content of the communication.

Because of the nature of email, the Office of the Ombudsperson is unable to guarantee the confidentiality of email communications.

EMAIL FROM RICHARD LEVI (9/8/15)

Re: confidentiality in mediation

I oppose the Commission's August 7th decision to draft recommended legislation removing our current confidentiality protections when a mediation participant alleges lawyer misconduct. I will oppose this legislation if it goes to the Legislature and will urge organizations of which I'm a member to oppose it.

For thirty years our current right to choose confidential mediation and also to opt out of it has served the people and courts of California extremely well. Removing this right is a very radical change which should require solid evidence establishing a need. Dozens of alternative solutions have been suggested to the Commission to address the alleged problem without removing our confidentiality protections. I request you pursue these instead.

I urge you not to turn your back on the Commission's own 1996 statement recommending our current statutory protections be enacted – "All persons attending a mediation, parties as well as nonparties, should be able to speak frankly, without fear of having their words turned against them."

Richard Levi
6975 Eagle Ridge Road
Penngrove, ca. 94951
H: 707-795-3566
C: 707-888-5406
richard@richardlevi.com

EMAIL FROM BRIAN LEVY (9/16/15)

Re: Study K-402

California Law Revision Commission
c/o Ms. Barbara Gaal, Chief Deputy Counsel

I oppose the Commission's August 7th decision to draft recommended legislation removing our current confidentiality protections when a mediation participant alleges lawyer misconduct. I will oppose this legislation if it goes to the Legislature and will urge organizations of which I'm a member to oppose it.

For thirty years our current right to choose confidential mediation and also to opt out of it has served the people and courts of California extremely well. Removing this right is a very radical change which should require solid evidence establishing a need. Dozens of alternative solutions have been suggested to the Commission to address the alleged problem without removing our confidentiality protections. I request you pursue these instead. Removing the confidentiality protections would be a disaster for California families and for California businesses.

I urge you not to turn your back on the Commission's own 1996 statement recommending our current statutory protections be enacted – "All persons attending a mediation, parties as well as nonparties, should be able to speak frankly, without fear of having their words turned against them."

Kind Regards,

Brian Levy, Esq.
www.CollaborativeAttorney.com
https://www.facebook.com/pages/Law-Mediation-Office-of-Brian-Don-Levy/1534868716748824
www.CollaborativeDivorceServices.com
COLLABORATIVE DIVORCE & MEDIATION SERVICES
Collaborative Lawyer
Mediator
Collaborative Trainer
Published Author - Mediation & Collaborative Practice

EMAIL FROM JUSTYN LEZIN (9/16/15)

Re: Please act now to preserve the integrity and value of confidential mediation

California Law Revision Commission
c/o Ms. Barbara Gaal, Chief Deputy Counsel

Re Study K-402

I oppose the Commission's August 7th decision to draft recommended legislation removing our current confidentiality protections when a mediation participant alleges lawyer misconduct. I will oppose this legislation if it goes to the Legislature and will urge organizations of which I'm a member to oppose it.

For thirty years our current right to choose confidential mediation and also to opt out of it has served the people and courts of California extremely well. Removing this right is a very radical change which should require solid evidence establishing a need. Dozens of alternative solutions have been suggested to the Commission to address the alleged problem without removing our confidentiality protections. I request you pursue these instead.

I urge you not to turn your back on the Commission's own 1996 statement recommending our current statutory protections be enacted – "All persons attending a mediation, parties as well as nonparties, should be able to speak frankly, without fear of having their words turned against them."

Justyn Lezin
Attorney
Cabello & Lezin, L.L.P.
1300 Clay Street, Suite 600
Oakland, CA 94612
(510) 601-0565 phone
(510) 601-0561 fax
www.cabellolezin.com

EMAIL FROM DAVID LIBMAN (10/2/15)

Re: Study K-402

California Law Revision Commission
c/o Ms. Barbara Gaal, Chief Deputy Counsel

I oppose the Commission's August 7th decision to draft recommended legislation removing our current confidentiality protections when a mediation participant alleges lawyer misconduct. I will oppose this legislation if it goes to the Legislature and will urge organizations of which I'm a member to oppose it.

For thirty years our current right to choose confidential mediation and also to opt out of it has served the people and courts of California extremely well. Removing this right is a very radical change which should require solid evidence establishing a need. Dozens of alternative solutions have been suggested to the Commission to address the alleged problem without removing our confidentiality protections. I request you pursue these instead.

I urge you not to turn your back on the Commission's own 1996 statement recommending our current statutory protections be enacted – "All persons attending a mediation, parties as well as nonparties, should be able to speak frankly, without fear of having their words turned against them."

Regards,

David

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Fax: (714) 784-2426
DavidELibman@Outlook.com
www.DavidELibman.com

2041 N. Main Street, Ste. A
Santa Ana, CA 92706

EMAIL FROM DUNCAN MACKINTOSH (9/9/15)

Re: mediation confidentiality

California Law Revision Commission
c/o Ms. Barbara Gaal, Chief Deputy Counsel

Re Study K-402

I oppose the Commission's August 7th decision to draft recommended legislation removing our current confidentiality protections when a mediation participant alleges lawyer misconduct. I will oppose this legislation if it goes to the Legislature and will urge organizations of which I'm a member to oppose it.

For thirty years our current right to choose confidential mediation and also to opt out of it has served the people and courts of California extremely well. Removing this right is a very radical change which should require solid evidence establishing a need. Dozens of alternative solutions have been suggested to the Commission to address the alleged problem without removing our confidentiality protections. I request you pursue these instead.

I urge you not to turn your back on the Commission's own 1996 statement recommending our current statutory protections be enacted – "All persons attending a mediation, parties as well as nonparties, should be able to speak frankly, without fear of having their words turned against them."

Duncan Mackintosh

EMAIL FROM JERALD MARRS (9/22/15)

Re: Study K-402

I oppose the Commission's August 7th decision to draft recommended legislation removing our current confidentiality protections when a mediation participant alleges lawyer misconduct. I will oppose this legislation if it goes to the Legislature and will urge organizations of which I'm a member to oppose it.

For mediation to be successful confidentiality must be maintained. Confidentiality allows the parties to be honest about what their needs are and how those needs should be met. Removing this confidentiality will keep mediation from being effective and productive.

I urge you to stay true to the purpose mediation and not remove the statutory protections as currently enacted.

Sincerely,
Jerald Marrs, J.D.

--
Jerald Marrs
Mediation Office of Jerald Marrs
Centerpoint Building
18 Crow Canyon Ct, Suite 295
San Ramon, CA 94583
Office: 925-208-1136
Cell: 925-822-2466
Fax: 925-820-5533
jerry@marrsmediator.com
www.marrsmediator.com

EMAIL FROM JESSICA METOYER (9/17/15)

Re: Mediation Confidentiality

California Law Revision Commission
c/o Ms. Barbara Gaal, Chief Deputy Counsel

Re Study K-402

I am a family law attorney and mediator. I believe the confidentiality of mediation is key to the process of reaching agreement in mediation, by allowing a softening of litigation positions, understanding and considering the positions of the other participant(s), brainstorming solutions, among other benefits.

I oppose the Commission's August 7th decision to draft recommended legislation removing our current confidentiality protections when a mediation participant alleges lawyer misconduct. I will oppose this legislation if it goes to the Legislature and will urge organizations of which I'm a member to oppose it.

For thirty years our current right to choose confidential mediation and also to opt out of it has served the people and courts of California extremely well. Removing this right is a very radical change which should require solid evidence establishing a need. Dozens of alternative solutions have been suggested to the Commission to address the alleged problem without removing our confidentiality protections. I request you pursue these instead.

I urge you not to turn your back on the Commission's own 1996 statement recommending our current statutory protections be enacted – "All persons attending a mediation, parties as well as nonparties, should be able to speak frankly, without fear of having their words turned against them."

Sincerely,

Jessica Metoyer, CFLS*

*Certified as a specialist in family law by the
State Bar of California, Board of Legal Specialization

METOYER LAW OFFICES
291 Geary Street, Suite 600
San Francisco, CA 94102
415-982-3800 Telephone
415-982-3810 Facsimile
jmetoyer@metoyerlaw.com

EMAIL FROM SHAHRAD MILANFAR (9/10/15)

Re: Study K-402

California Law Revision Commission
c/o Ms. Barbara Gaal, Chief Deputy Counsel

Dear Ms. Gaal,

I oppose the Commission's August 7th decision to draft recommended legislation removing our current confidentiality protections when a mediation participant alleges lawyer misconduct. I will oppose this legislation if it goes to the Legislature and will urge organizations of which I'm a member to oppose it.

For thirty years our current right to choose confidential mediation and also to opt out of it has served the people and courts of California extremely well. Removing this right is a very radical change which should require solid evidence establishing a need. Dozens of alternative solutions have been suggested to the Commission to address the alleged problem without removing our confidentiality protections. I request you pursue these instead.

I urge you not to turn your back on the Commission's own 1996 statement recommending our current statutory protections be enacted: "All persons attending a mediation, parties as well as nonparties, should be able to speak frankly, without fear of having their words turned against them."

Regards,
Shahrad
==========
Shahrad Milanfar, Esq.
Becherer Kannett & Schweitzer
The Water Tower
1255 Powell Street
Emeryville, CA 94608E-mail: smilanfar@bkscal.com
Bio: http://www.bkscal.com/Milanfar.php
Phone: (510) 658-3600
Direct: (510) 597-3320
Fax: (510) 658-1151

EMAIL FROM AUDREY ROYBAL (9/8/15)

Re: Study K-402

I oppose the Commission's August 7th decision to draft recommended legislation removing our current confidentiality protections when a mediation participant alleges lawyer misconduct. I will oppose this legislation if it goes to the Legislature and will urge organizations of which I'm a member to oppose it.

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--
Audrey Ng Roybal
Attorney-at-Law
35 Fifth Street
Petaluma, CA 94953
Tel. 707-778-1551
www.audreyroybal.com

EMAIL FROM VICTORIA SCARTH (10/4/15)

Re: Study K-402

I oppose the Commission's August 7th decision to draft recommended legislation removing our current confidentiality protections when a mediation participant alleges lawyer misconduct. I will oppose this legislation if it goes to the Legislature and will urge organizations of which I'm a member to oppose it.

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I urge you not to turn your back on the Commission's own 1996 statement recommending our current statutory protections be enacted – "All persons attending a mediation, parties as well as nonparties, should be able to speak frankly, without fear of having their words turned against them."

Thank you

Victoria Scarth

EMAIL FROM JENNIFER SEGURA (9/16/15)

Re: Study K-402

California Law Revision Commission
c/o Ms. Barbara Gaal, Chief Deputy Counsel

I oppose the Commission's August 7th decision to draft recommended legislation removing our current confidentiality protections when a mediation participant alleges lawyer misconduct. I will oppose this legislation if it goes to the Legislature and will urge organizations of which I'm a member to oppose it.

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I urge you not to turn your back on the Commission's own 1996 statement recommending our current statutory protections be enacted – "All persons attending a mediation, parties as well as nonparties, should be able to speak frankly, without fear of having their words turned against them."

Very truly yours,

Jennifer M. Segura, J.D., CDFA
Divorce Mediator and Certified Divorce Financial Analyst
T (858) 736-2411 / F (858) 737-2412

For Family Mediation Services:
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San Diego Family Mediation Center
2010 Jimmy Durante Blvd., Suite 220
Del Mar, California 92014

Satellite Office:

528 S Coast Hwy.
Oceanside, CA 92054

Jen@SanDiegoFamilyMediation.com
www.SanDiegoFamilyMediation.com

EMAIL FROM CHIP SHARPE (9/10/15)

Re: Protecting mediation process

Dear friends,

Since founding Humboldt Mediation Services in 1983, our organization of carefully trained volunteers has been an important resource for our county and an essential recourse for people struggling with a variety of interpersonal conflicts. By providing a forum in which clients know that they can speak freely without fear that their admissions or explorations could bring reprisals or court action, we have seen resolutions, transformations even, that amaze and inspire the mediators and the parties.

Essential to our mediation process is the promise of confidentiality. Clients are advised that, excepting very narrow and specific circumstances, such as the requirement that child abuse must be known to county authorities, nothing revealed and learned in our sessions will be used in court. This commitment to confidentiality by all present is basic to good-faith negotiations and the spirit of reconciliation.

Our organization and our band of volunteers are counting on you to preserve and protect the confidentiality of mediation processes. Please advise me of any of your recommendations or decisions that will impact confidentiality in mediation. I trust that you will search for and find the proper revision to your August 7 recommendation.

Thank you for giving this matter the consideration that it deserves.

Sincerely,
Chip Sharpe

Home address: 1644 Old Arcata Road, Bayside CA 95524

EMAIL FROM JERRY SPOLTER (9/28/15)

Re: Mediation Confidentiality

California Law Revision Commission
c/o Ms. Barbara Gaal, Chief Deputy Counsel

This letter is sent in response to what I understand is a proposal under consideration by The Commission to punch a crack in the dyke of mediation confidentiality. Bad idea.

Without a doubt, confidentiality is the cornerstone protection which renders the mediation process successful. Without it, the process is emasculated.

I first transitioned from trial lawyer to mediator in 1985, finding mediation a much more elegant and efficacious dispute resolution process than traditional litigation. Mediation allows litigants to retain control over the outcome of their dispute, rather than turning the decision over to a judge, arbitrator or twelve strangers.

In more than 4,000 mediations since 1985, I have introduced EVERY mediation guaranteeing the participant total confidentiality and have in each of those mediations required each participant—party-principal, attorney, claims rep, whomever—to sign a confidentiality agreement based upon Evidence Code Section 1115, et seq.

Should the Commission's proposal be adopted, I will not in the future be able to assure confidentiality. That will effectively undermine and weaken the mediation process, if not render it totally ineffective once participants start alleging they were deceived/malpracticed upon by their counsel and/or lawyer-mediator. Will other mediation participants be subject to subpoena? Will the mediator be subject to subpoena? No thanks.

Please take these comments into consideration and, hopefully, NOT send the Mediation Confidentiality Termination proposal to the Legislature.

Best Personal Regards, Jerry Spolter

Jerry Spolter

E-mail: jspolter@jamsadr.com
415-806-0211 (Cell)

Case Manager: Darcy English
415-774-2635 (Direct)
415-982-5287 (Facsimile)

EMAIL FROM ERIC STROMBERGER (9/8/15)

Re: Confidentiality in Mediation

California Law Revision Commission
c/o Ms. Barbara Gaal, Chief Deputy Counsel

Re Study K-402

I oppose the Commission's August 7th decision to draft recommended legislation removing our current confidentiality protections when a mediation participant alleges lawyer misconduct. I will oppose this legislation if it goes to the Legislature and will urge organizations of which I'm a member to oppose it.

For thirty years our current right to choose confidential mediation and also to opt out of it has served the people and courts of California extremely well. Removing this right is a very radical change which should require solid evidence establishing a need. Dozens of alternative solutions have been suggested to the Commission to address the alleged problem without removing our confidentiality protections. I request you pursue these instead.

I urge you not to turn your back on the Commission's own 1996 statement recommending our current statutory protections be enacted – "All persons attending a mediation, parties as well as nonparties, should be able to speak frankly, without fear of having their words turned against them."

Thank you for your consideration of this.

Best regards,

Eric Stromberger
Common Ground Mediation Services

EMAIL FROM HON. GRETCHEN TAYLOR (RET.) (9/23/15)

Re: Mediation confidentiality

California Law Revision Commission
c/o Ms. Barbara Gaal, Chief Deputy Counsel

Re Study K-402

I oppose the Commission's August 7th decision to draft recommended legislation removing our current confidentiality protections when a mediation participant alleges lawyer misconduct. I will oppose this legislation if it goes to the Legislature and will urge organizations of which I'm a member to oppose it.

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I urge you not to turn your back on the Commission's own 1996 statement recommending our current statutory protections be enacted – "All persons attending a mediation, parties as well as nonparties, should be able to speak frankly, without fear of having their words turned against them."

I am a Certified specialist in Family Law, a divorce lawyer for 18 years, a former bench officer with 12 years of service in Superior Court Family Law in Riverside and Los Angeles counties, and a full time mediator and neutral in Family Law since my retirement from the bench in 2009.

The subject matter and the emotional volatility of this area of the law burdens courts with intractable cases fueled by jealousy, revenge and power imbalances. The lives of children and many weaker spouses gets little attention as the calendars are overwhelming and impossible to meet with dignity and full consideration.

I retired as a popular bench officer. That meant that I had 25 to 32 requests for orders each morning to handle between 9 am and noon. There was and currently still is no plan in place to lower a good bench officers caseload. The uninterested judges do their time, amass 170's and leave for a different assignment.

The only light in my field is the safe place for these broken families, and many times their desperate attorneys who are not being paid, to end the ordeal is a full day of mediation where all sides get to vent and be heard. I have over a 95% success ratio since retirement of these litigated cases almost all completed in an 8 to 10 hour day.

The human heart being as it is, is fickle and volatile. Mediation gives this open field of safety for hurt and angry litigants to enter with the confidence that it will not backfire if successful. We have statutes that require fiduciary disclosure of all financial information. The recent case of Lappe confirmed that the mediation confidentiality does not override this important public policy.

Attorneys in my field are bombarded with spurious malpractice claims to offset their request to be paid the balance of the fees owed them at the end of the case. Their malpractice premiums are already the highest of any field. Due to the nature of ending intimate relationships, a scapegoat is often the lawyer.

Making any exception to the mediation privilege will topple an already delicate and difficult process. I have witnessed very rare instances of what might be deemed malpractice . Maybe once or twice in the past six years a Lawyer has espoused a position not supported by law. Mostly the lack of perfect evidence, as in life, leads to compromise. This is true after a trial or in mediation.

Please consider the danger of opening a crack in the wall of protection that surrounds mediation. It is not worth it to allow litigation over unhappy decisions that surely will follow.

Thank you for your consideration.

Gretchen Taylor

Hon. Gretchen W. Taylor
269 South Beverly Drive, Suite 1316,
Beverly Hills, Ca. 90212
tel: 310-948-6408

www.gretchentaylor.com
www.gretchentaylormediation.com
www.losangelesfamilymediationservices.com
www.arc4adr.com

EMAIL FROM B. ELAINE THOMPSON (9/16/15)

Re: Study K-402

California Law Revision Commission
c/o Ms. Barbara Gaal, Chief Deputy Counsel

I oppose the Commission's August 7th decision to draft recommended legislation removing our current confidentiality protections when a mediation participant alleges lawyer misconduct. I will oppose this legislation if it goes to the Legislature and will urge organizations of which I'm a member to oppose it.

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I urge you not to turn your back on the Commission's own 1996 statement recommending our current statutory protections be enacted – "All persons attending a mediation, parties as well as nonparties, should be able to speak frankly, without fear of having their words turned against them."

Very truly yours,

B. Elaine Thompson

EMAIL FROM JENNIFER WEBB (9/16/15)

Re: Study K-402

California Law Revision Commission
c/o Ms. Barbara Gaal, Chief Deputy Counsel

I oppose the Commission's August 7th decision to draft recommended legislation removing our current confidentiality protections when a mediation participant alleges lawyer misconduct. I am urging organizations of which I'm a member to oppose it.

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I have been a mediator working with divorcing couples for 25 years and know that parties often choose mediation because of the confidentiality afforded them in the process; electing to resolving private issues and those involving their children in the safety of a confidential environment. I do not want the mediation environment compromised.

I urge you not to turn your back on the Commission's own 1996 statement recommending our current statutory protections be enacted – "All persons attending a mediation, parties as well as nonparties, should be able to speak frankly, without fear of having their words turned against them."

Jennifer Webb

Jennifer Webb Gordon, CFLS
Webb Gordon Family Law
4100 Newport Place Drive, Ste. 660
Newport Beach, CA 92660
949/955-1678 – Office
949/752-8295 – Facsimile
Email : jennifer@wgfamilylaw.com
Website: www.WebbGordonLaw.com

EMAIL FROM MATTHEW N. WHITE (9/23/15)

Re: Mediation Confidentiality (Re Study K-402)

Confidentiality is key to mediation. As a mediator, I promise the participants that they can be open, honest, and candid, without fear that anything they say will come back to harm them. I tell them it's a reverse Miranda warning: Nothing they say can or will be used against them in a court of law.

This is what helps resolve disputes fairly and finally, in ways that benefit all participants. The alternative is resolution in a taxpayer-funded, overcrowded courtroom, where most participants end up with an unsatisfactory result.

Adding the proposed exception to this rule may weaken or destroy the effectiveness of civil mediation.

As a mediator, I am obligated to explain the confidentiality rules at the beginning of a session. What am I supposed to say? "What we say in here is confidential, unless you decide to sue your lawyer for bad advice, in case what we say in here is NOT confidential." That will discourage full and candid conversation, and it adds an element (the option of suing the lawyer) that doesn't belong.

The current proposal will create too large an exception to mediation confidentiality. The practical effect will be to suppress candid conversation, limit the success of mediations, and add further burdens to our already underfunded court system.

Matthew N. White
mwhite@montywhitelaw.com
Direct Dial: 415.226-4040

Monty White LLP offers modern, professional, responsive legal services in a wide variety of civil matters, including personal injury, commercial, employment, estate planning, elder law, and construction.

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San Rafael, CA 94901 Santa Rosa, CA 95405
tel: 415.453.1010
fax: 888.831.5842
www.montywhitelaw.com

EMAIL FROM LISA ZONDER (9/24/15)

Re: Study K-402

I oppose the Commission's August 7th decision to draft recommended legislation removing our current confidentiality protections when a mediation participant alleges lawyer misconduct. I will oppose this legislation if it goes to the Legislature and will urge organizations of which I'm a member to oppose it.

For thirty years our current right to choose confidential mediation and also to opt out of it has served the people and courts of California extremely well. Removing this right is a very radical change which should require solid evidence establishing a need. Dozens of alternative solutions have been suggested to the Commission to address the alleged problem without removing our confidentiality protections. I request you pursue these instead.

I urge you not to turn your back on the Commission's own 1996 statement recommending our current statutory protections be enacted – "All persons attending a mediation, parties as well as nonparties, should be able to speak frankly, without fear of having their words turned against them."

Thank you.

Lisa Zonder

--
Lisa R. Zonder, Attorney and Mediator
Certified Family Law Specialist, Cert. by State Bar CA, Bd. Legal Specialization
2660 Townsgate Road, Suite 550
Westlake Village, CA 91361
Telephone (805) 777.7740
Website: zonderfamilylawmediation.com

Lisa's other projects:
For Lisa's radio shows see divorcetalkradiocalifornia.com
For Lisa's workshops see secondsaturdaydivorceworkshop.org

ADDITIONAL PERSONS SIGNING THE ONLINE PETITION

(1) Abel Bachelier, Lomita, California
(2) James Cause, Beverly, Massachusetts
(3) Maria Eke
(4) Judy Greaves, Warwick, Rhode Island
(5) Kathy Johnson
(6) Laura Kaplan, Denham Springs, Louisiana
(7) Michelle Martinez
(8) Ernie Otto
(9) Dieter Scherer, San Leandro, California*
(10) James Smith, Yucaipa, California
(11) Eva Maria Uhl, Dreieich, Delaware
(12) Ali Van Zee
(13) John Waldorf, Washington Crossing, Pennsylvania

*/ Bill Chan notified the staff that Mr. Scherer signed the petition. The staff did not find Mr. Scherer's name on the Change.org website or in an email from Change.org to the staff. The Change.org website and emails are somewhat confusing. The staff tried hard to find all of the available information, but we are not sure we uncovered everything. In particular, as of October 5, 2015, we only found the names of 39 signatories in total, but the Change.org website refers to "45 Supporters" in one place and "43 Supporters" in another place.

SUPPLEMENTAL COMMENTS OF PETITIONER JAMES CAUSE

It's absurd that a court would lawfully allow abuse of the law

SUPPLEMENTAL COMMENTS OF PETITIONER JUDY GREAVES

Whatever happened to Attorney/Client privilege? THIS takes it way too far as it should not be the attorney's PRIVILEGE to betray their client who "employs" their expertise and entrusts them for their decent, honest representation.

SUPPLEMENTAL COMMENTS OF PETITIONER LAURA KAPLAN

I believe in all states that all attorneys are being disbarred over petty things. The only attorneys who should be disbarred is the ones that work for the disaplianary bar association. They disbarred the wrong lawyers and keep them lawyers who work for the devil himself.

SUPPLEMENTAL COMMENTS OF PETITIONER TRISH MANY (TARRYTOWN, NEW YORK)

I have been the victim of corrupt lawyers and judges at my kids expense

SUPPLEMENTAL COMMENTS OF PETITIONER SHANNA MOYER (BRADENTON, FLORIDA)

I think this is happing in all states .. And more than those extortion tactics are used against client's

SUPPLEMENTAL COMMENTS OF PETITIONER JAMES SMITH

Legalized attorney malpractice is not only unethical, but it is essentially encouraging fraud. People hire a specific attorney because they believe the attorney will act in the best interest of the client. If attorney malpractice is legal, and the attorney acts in their own best interest, this is fraud as well because they are not providing the implied legal services by not acting in the best interest of the client

SUPPLEMENTAL COMMENTS OF PETITIONER EVA MARIA UHL

what about justice????

SUPPLEMENTAL COMMENTS OF PETITIONER JOHN WALDORF

Legalized Malpractice.… how absurd

JEFF KICHAVEN
COMMERCIAL MEDIATION

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310.721.5785 Direct 888.425.2520 Scheduling jk@jeffkichaven.com

September 30, 2015

Barbara S. Gaal, Esq.
California Law Revision Commission
4000 Middlefield Road, Suite D2
Palo Alto, CA 94303

In Re: Mediation Confidentiality

Dear Ms. Gaal:

Thank you for your continued interest in and openness to comments on the Commission's proposed changes to California's mediation confidentiality rules. I appreciate the opportunity to contribute my views, and the respectful consideration received from you and the Commission.

The Commission's actions on August 7 are important steps toward restoring consumer protection and the Rule of Law in California mediations. I am pleased to see that there will be further discussion of these issues at the Commission's October 8 meeting in Davis.

While I am not able to attend the October 8 meeting, I did want to share some thoughts, which I hope will help the Commission as it moves forward in its work. These thoughts are in three areas. The first regards the proper ways to consider assertions that changes to the mediation confidentiality rules will unleash a parade of horribles. The second regards whether *in camera* review serves any purpose. The third regards the need to allow mediators to testify in their own defense, if ever they are sued for malpractice.

WILL CHANGES TO MEDIATION CONFIDENTIALITY UNLEASH A PARADE OF HORRIBLES?

We have all heard assertions that changes to California's mediation confidentiality rules will unleash a parade of horribles. The purpose of this letter is not to rebut the assertions one by one, but rather to suggest a method of analysis to the Commission which will get to the truth, based on evidence.

For any asserted horrible which concerns the Commission, we should ask, is there any actual evidence that lesser mediation confidentiality would actually cause that horrible to happen? Fortunately, there are ways to put these asserted horribles to empirical tests. Mediation confidentiality (or privilege) rules around the country vary. And, even in California, different standards of confidentiality have existed at different times. So, we should ask:

1. In California, confidentiality was at one time protected only by Evidence Code sections 1152 and 1154. Those sections provide, generally, that settlement offers and demands, and statements made in the negotiations which surround those offers and demands, are inadmissible to prove the validity or invalidity of the claims and defenses being negotiated. For any asserted horrible, is there any actual evidence that that horrible existed when only Evidence Code sections 1152 and 1154 governed?

2. Ten states and the District of Columbia have adopted the Uniform Mediation Act. Section (6)(a), subsections (5) and (6), generally provide that the privilege of that Act does not apply in malpractice claims against mediators or lawyers representing parties in mediation – in substance, what the Commission decided to recommend on August 7. Some UMA States—Washington, Illinois, Ohio, New Jersey – and the District of Columbia – have dynamic commercial centers with busy courts, as we have in California. For any asserted horrible, is there any actual evidence that that horrible exists in any UMA State?

3. Some Federal Courts may not apply state confidentiality rules to mediations, but rather may apply only Rule 408 of the Federal Rules of Evidence. Rule 408 is in substance the same as Evidence Code sections 1152 and 1154. Rule 408 has been in effect since 1975. For any asserted horrible, is there any actual evidence that that horrible exists in any situation governed by Rule 408?

Confidentiality and privilege rules prevent courts from considering relevant evidence as they try to fulfill their duty to adjudicate fairly the claims and defenses which are before them. The fair adjudication of those claims and defenses is the essence of the Rule of Law – bedrock of our society. We adopt confidentiality and privilege rules to limit courts' consideration of relevant evidence, and thereby limit their ability to adjudicate fairly, only if there are actual, compelling reasons to do so. This is why I repeatedly and firmly emphasize the need for the proponents of Absolute Mediation Confidentiality to produce actual evidence to prove that their asserted horribles are real. The burden should and must be on them. There are plenty of places they could get that actual evidence, if it existed, as described above. Absent such evidence, there is no reason to think that the asserted horribles are real, and therefore the Commission should ignore those assertions.

WILL *IN CAMERA* REVIEW SERVE ANY PURPOSE?

On August 7, the Commission voted for some form of *in camera* review of evidence from the mediation in which the alleged malpractice is claimed to have taken place. Further consideration, though, of the

traditional purposes of *in camera* review will show that such review really would serve no purpose in the current context. And, the need to conduct *in* camera reviews would produce just the sort of burden on courts which the proponents of Absolute Mediation Confidentiality profess to disapprove. I would respectfully request the Commission to reconsider imposing the burdens of *in camera* review in this context.

Traditionally, the purpose of *in camera* review is to test an asserted claim of privilege or confidentiality. So, if a party responding to discovery objects to the production of documents on the grounds that those documents contain trade secrets or attorney-client privileged information, that responding party may be able to obtain *in camera* review before the requested documents must be produced. Compare, for example, Evidence Code section 915(b).

Here, though, *in camera* review would not be necessary. There is no need for a court to test whether the mediation communications come within the ambit of mediation confidentiality; by definition, they do, but the new statute will provide that the confidentiality rules may not be used to exclude this evidence in the subsequent malpractice case.

Moreover, saddling courts with the need to conduct these *in camera* reviews would create just the sort of unnecessary burden on courts which the proponents of Absolute Mediation Confidentiality say they seek to avoid. We all agree that the workload of our busy courts should not be unnecessarily burdened; it seems that, upon further scrutiny, the idea of *in camera* review should not be part of the proposed legislation.

(There is one other type of case where *in camera* review is used, and which is easily distinguished from our situation. I mention it only to prevent confusion. Sometimes, parties seek to discover evidence of events or transactions distinct from the events directly at issue in a lawsuit, but which may be relevant. For example, in police excessive force cases, parties sometimes seek to discover evidence from the officer's personnel records which document other incidents where a particular officer used force. In such cases, the party seeking discovery must make what is commonly called a "Pitchess Motion" pursuant to Evidence Code section 1043, and the court will make an *in camera* review of the personnel records before production is required. *In camera* reviews of this type are unrelated to our situation, where we are talking about the use of evidence of what happened in the very mediation which is the subject of the malpractice action, not other cases or mediations in which the parties were involved.)

SHOULD MEDIATORS BE ALLOWED TO TESTIFY IN THEIR OWN DEFENSE?

It would be curious indeed if a mediator, sued for malpractice, were found statutorily incompetent to testify in his own defense. Yet that would be the result if Evidence Code section 1115 et seq. is amended to allow malpractice actions against mediators, but Evidence Code section 703.5 is not amended at the same time.

Evidence Code section 703.5 generally makes a mediator incompetent to testify, in any subsequent civil proceeding, to anything said or done in a mediation which that mediator conducted.

Clearly, if a mediator is sued, he should be allowed to testify in his own defense. Section 703.5 should be amended, at least to that extent.

More broadly, though, a mediator's testimony may also be important in a malpractice action against an attorney, where the alleged malpractice took place at a mediation .

In a paradigm case, a plaintiff might sue her former lawyer for malpractice, claiming that, at a mediation, the lawyer advised the client to settle too cheaply. The lawyer's defense might be that the mediator told him of new evidence against his client, in light of which the settlement was reasonable. The lawyer would likely want to call the mediator as a witness, to testify that this new evidence was in fact disclosed and discussed. Due process would seem to require no less. Therefore, I would respectfully request that, once the Commission recommends changes to Section 1115 et seq, the Commission also recommend elimination of those portions of Section 703.5 which make a mediator's testimony incompetent.

The proponents of Absolute Mediation Confidentiality may respond by adding to their Parade of Horribles, and arguing that this would result in mediators being endlessly drawn away from their work and into depositions and trials to testify as to long-ago mediations of which they remember little. The response, again, is to ask whether this horrible has become a reality in the Uniform Mediation Act states, where mediator testimony is permitted. Is there any actual evidence of this being a problem in any UMA state? If not, what is the reason to believe that it would be a problem in California?

Ms. Gaal, I once again thank you for your generous consideration of my views, and for forwarding this letter to the members of the Commission.

Please let me know if there are any questions, or if I can be of any further help.

With all best regards,

Sincerely,

Jeff Kichaven

JK:abm

KLEIN & WILSON
BUSINESS TRIAL LAWYERS

SEP 28 2015

September 14, 2015

California Law Revision Commissions
Attention: Ms. Barbara Gaal
c/o University of California Davis School of Law
400 Mrak Hall Drive
Davis, CA 95616

Re: ***Mediation Privilege***

Dear Commissioners:

I have been a lawyer for 35 years and want to comment publically regarding Study K-402 and Memorandum 2015-46 dated September 9, 2015.

MY BACKGROUND

I think it is important to understand the perspective of people commenting on proposed changes to existing rules and legislation to ascertain perspective and potential bias. I am a 1982 graduate of the University of California, Los Angeles, School of Law. After spending a year as a prosecutor for the Ventura County District attorney, I spent the last 32 years as a civil trial lawyer. I have practiced on both the defense and plaintiff sides in personal injury cases, but I have spent almost my entire professional career as a business trial lawyer. Over the last six years, my practice has included both defending lawyers and other professionals, as well as prosecuting legal malpractice claims.

I am a member of the American Board of Trial Advocates. My colleagues in the Orange County Trial Lawyers Association ("OCTLA") have twice elected me Trial Lawyer of the Year. I have served on the board of directors for the OCTLA as well as the board of governors for the Association of Business Trial Lawyers – two very different organizations. I served as chairman of the Orange County Business Litigation section. Accordingly, I have a breadth of experience and understanding not common in the profession.

THE PURPOSE OF THE MEDIATION PRIVILEGE

The purpose of the mediation privilege is to allow parties to discuss settlement candidly without any fear that things said and done in the mediation could come back to haunt them. But the focus of this "privilege" has always been on ***protecting the parties***– not the attorneys.

EX 49

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In 2011, the California Supreme Court decided *Cassel v. Superior Court* (2011) 51 Cal.4th 113. In that case, the Supreme Court confirmed (reluctantly) that the mediation privilege may have gone beyond what was best for the public but that such a decision was something the Legislature had to make, not the courts:

> "We express no view about whether the statutory language, thus applied, ideally balances the competing concerns or represents the soundest public policy. Such is not our responsibility or our province. We simply conclude, as a matter of statutory construction, that application of the statues' plain terms to the circumstances of this case does not produce absurd results that are clearly contrary to the Legislature's intent. ***Of course, the Legislature is free to reconsider whether the mediation confidentially statutes should preclude the use of mediation – related attorneys-client discussions to support a client's civil claims of malpractice against his or her attorneys.*** (Emphasis added)" *Cassel v. Superior Court, supra*, 51 Cal.4th at 136.

This is about as open an invitation we are ever going to see from the Supreme Court regarding amending a bad law. It is time to consider that invitation.

SHIELDING LAWYERS FROM MALPRACTICE WAS NEVER THE INTENT OF THE LEGISLATURE

As noted above, the purpose of the "mediation privilege" was to protect ***parties*** from repercussions of statements made during mediation. It is preposterous to believe the Legislature intended to shield dishonest or inept attorneys from their own malpractice. Taken to its logical extreme, the courts would be powerless to allow the client of an attorney to present evidence that his or her attorney defrauded the client into believing his or her case had no merit when the case had substantial merit. The mediation privilege can shield an attorney from intentionally false misrepresentation to the client made during mediation. This is an absurd situation. It defies common sense. It protects bad and dishonest attorneys. It is bad public policy. Continuing to apply this type of rule only reinforces negative stereotypes the general public has about attorneys.

THE CURRENT RULE ALSO PROTECTS DISHONEST CLIENTS

The only redeeming quality of the current rule is that it evenhandedly protects dishonest clients as well as dishonest lawyers. The current rule would prohibit an attorney from testifying

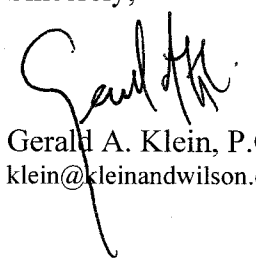
about what he or she told the client at mediation and what the client said in response. For example, an attorney could be precluded from introducing evidence that even though the attorney pleaded with the client not to accept a good settlement offer, the client refused. Thus, even if the client later testified that he or she never had a reasonable settlement proposal, the attorney could not introduce such evidence to demonstrate what really happened during the settlement process. Again, an absurd result.

FINAL THOUGHTS

I am the first to recognize that our system of justice is less than perfect. I also recognize that sometimes justice loses at the expense of public policy. For example, the attorney-client privilege could protect wrongdoers but we all recognize the importance of protecting confidential information so that an attorney can represent a client's interest effectively.

In contrast, the mediation privilege, when enforced between a client and his or her attorney, has virtually no redeeming characteristics. Unlike the attorney-client privilege, which weighs heavily in favor of protecting candid communication between a client and an attorney, the mediation privilege will more likely protect the guilty. The mediation privilege is a good idea that simply went too far. It is preposterous to believe the Legislature ever intended to protect attorneys (or clients) from their own misdeeds at mediation. The mediation privilege must be amended to allow attorneys and clients to bring up what happened at mediation in cases of legal malpractice. Such an amendment would have no effect on the broader purpose of precluding the admission of statements made at mediation, as between the actual litigants in the given case.

Sincerely,



Gerald A. Klein, P.C.
klein@kleinandwilson.com

ADMIN\COR15\030

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A LAW CORPORATION

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Robert K. Sall
rsall@sallspencer.com

September 11, 2015

Via E-mail & U.S. Mail

bgaal@clrc.ca.gov

The California Law Revision Commission
Attn. Barbara Gaal
c/o UC Davis School of Law
400 Mrak Hall Drive
Davis, CA 95616

Re: Mediation Confidentiality, Study K-402

Dear Ms. Gaal:

I am writing to express my support for the Law Revision Commission to take affirmative steps to recommend swift corrective Legislative amendments to the statutes governing mediation confidentiality.

I am an attorney with practice emphasis in attorney professional responsibility matters, legal malpractice and attorney client fee disputes. My firm handles both the prosecution and defense of these cases. I am a Certified Specialist in Legal Malpractice Law by the State Bar of California's Board of Legal Specialization. I am a former member and chair of the State Bar of California's Standing Committee on Mandatory Fee Arbitration, and a former member of the State Bar of California's Standing Committee on Professional Responsibility and Conduct. I am a current member and former chair of the Professional Responsibility and Ethics Committee of the Los Angeles County Bar Association, and a current member of the Professionalism and Ethics Committee of the Orange County Bar Association. I also serve as a Special Deputy Trial Counsel for the State Bar of California in disciplinary matters, handling assignments where the State Bar has a conflict of interest.

In my experience, the Supreme Court's decision in *Cassel v. Superior Court*, 51 Cal.4th 113 (2011) and the interpretation given to mediation confidentiality has had a significant negative impact upon the rights of clients and denies fundamental fairness. It results in the preclusion of relevant evidence, often favoring law firms, and resulting in significant adverse consequences to clients, who have every right to pursue legitimate claims against their lawyers. Many times since the *Cassel* decision in 2011, I have had to inform prospective clients that they would most likely be unable to prove otherwise viable claim due to the impact of mediation confidentiality. Clients do not understand how justice is served when they cannot present

evidence of lawyer misconduct simply because the discussion took place privately during the course of a mediation or in preparation for mediation. Justice is not served by granting immunity to lawyers.

One of the fundamental duties of a lawyer is to advise. *Nichols v. Keller*, 15 Cal.App.4th 1672, 1683-1684 (1993). The standard of care may be breached when a lawyer fails to fully inform a client about his or her rights and the alternatives reasonably available under the circumstances. *Considine Company v. Shadle Hunt & Hagar*, 187 Cal.App.3d 760, 765 (1986). The failure to competently advise sometimes occurs in the context of settlement negotiations or discussions of settlement preparatory to mediation. Since most significant cases are mediated, we consider mediation to be a significant development in litigation, often fundamental to the ability to resolve cases. The impact of the *Cassel* decision, and the overbroad interpretation given to Evidence Code section 1119 *et seq.*, is so significant that we now even disclose to prospective clients in the engagement letter that should a mediation result, they may be unable to pursue claims against us even if our advice is negligent. We believe this is material to the client's decision both to hire us, as well as to participate in the mediation process. The following is an example of our disclosure:

> MEDIATION DISCLOSURE. It is possible during the course of your case that you will be invited to participate in mediation, in an attempt to settle your case. Under California law, communications relating to mediation are confidential, and may not be admitted into evidence. Under a recent 2011 California Supreme Court decision, known as *Cassel v. Superior Court*, it has been held that communications between a lawyer and a client at mediation or related to mediation are not admissible in evidence even in a malpractice lawsuit between the attorney and the client. Thus, we disclose to you that if you are invited to attend a mediation, and you agree to do so, you should understand that you will not be able to use any evidence related to that mediation in the event that you later decide to pursue a claim against Attorneys relating to the events or communications that took place regarding that mediation.

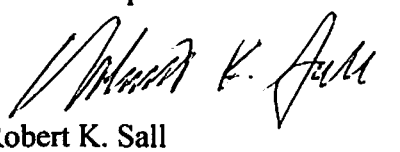
The result of mediation confidentiality is either to have a chilling effect upon use of mediation as a tool to settle cases, for those who are well informed of the risks; or to mislead clients through a false sense of security from lack of disclosure that their lawyers are insulated from potential responsibility for negligent acts or omissions that occur in connection with a mediated effort to settle a case. The ultimate effect of mediation confidentiality when applied in this context is to insulate lawyers from misconduct, and that could never be a just reason for continuing the present statutory scheme.

We firmly believe this is not what the Legislature intended, and steps should be taken immediately to rectify the overbroad interpretation that has been given to mediation confidentiality. In particular, we believe the confidentiality was intended to apply to discussions at mediation with the adverse party and/or with the mediator, but not to the private communications that take place between attorney and client. There should be an exception to the application of mediation confidentiality for those communications that take place privately between attorney and client, as the advice given is no different than any other advice that may expose a lawyer to liability. It should make no difference whether a lawyer gives negligent advice in his or her own office, or in a letter, and there is absolutely no reason to insulate the lawyer from liability merely because the lawyer uses the word mediation in the communication, or gives the negligent advice in connection with mediation. Fundamental fairness dictates that clients who have been injured by lawyer misconduct not be precluded from access to justice merely because the communication was related to mediation.

I believe that the need for action is urgent and the process of corrective Legislative amendments to fix Evidence Code section 1119 et seq. should be implemented as soon as possible.

Very truly yours,

SALL SPENCER CALLAS & KRUEGER,
A Law Corporation



Robert K. Sall

RKS/jvb

EMAIL FROM WILLIAM SLOMANSON (9/30/15)

Re: CLRC Mediation Study Resource

Hi Barbara:

I hope all is going well. I have a suggestion into one of your colleagues, re possibly holding the December meeting at Thomas Jefferson School of Law.

I supervised a senior law student's excellent Cassell-driven article on mediation confidentiality. Sarah Brand is graduating in a few months. In addition to being on Law Review as a 2L, she is now a senior Law Review editor. Sarah took our course in Introduction to Mediation, and participated in TJSL's Mediation Program/Clinic last summer. I supervised her Directed Study, which resulted in her producing this analysis.

I realize that you recently sent out a sizeable public comment's package. But I'm hoping it's not too late for CLRC to consider Sarah's useful analysis. I thought it best to cite, rather than attach, Note, Caution to Clients: California's Mediation Confidentiality Statutes Protect Attorneys From Legal Malpractice Claims Arising Out of Mediation, 37 Thomas Jefferson Law Review 369 (2015).

Here is her abstract—which I'm hoping will make it into an upcoming CLRC communication. It nicely dovetails with what CLRC has proposed in its draft approach:

If an attorney commits legal malpractice, a client should be afforded the opportunity to present relevant mediation-related evidence to prove a legal malpractice claim. Yet, under California's mediation confidentiality statutes, a client is prohibited from using mediation-related evidence, including private attorney-client communications, to prove a claim of legal malpractice against an attorney.

As a result, a client may not be able to prove a claim of legal malpractice simply because the evidence of the attorney's wrongdoing derives from the mediation setting. Even in state bar complaints, the mediation confidentiality statutes protect the admissibility of mediation-related evidence in a similar manner as a legal malpractice claim. Thus, under California's current statutes, clients who fall victim to unethical attorneys in the mediation process are prevented from using mediation-related evidence to prove a legal malpractice claim.

This Note proposes a viable solution to this harsh and inequitable result. It suggests legislative reform and improvement by providing a proposed legal malpractice exception within California's current mediation confidentiality statutes. The proposed exception permits the admissibility of mediation-related evidence to prove or disprove a legal malpractice claim between an attorney and a client.

Mediation confidentiality was designed to encourage open discussions to foster settlement among mediating participants. It therefore does not follow that mediation confidentiality should allow attorneys to be shielded from legal malpractice claims simply because the evidence derives from mediation. California should adopt the proposed legal malpractice exception that allows clients to admit mediation-related evidence in a legal malpractice claim. By allowing the admissibility of such evidence, victims of legal malpractice in the mediation setting will finally have recourse against attorneys who engage in legal malpractice at mediation.

Regards,

Bill

SILICON VALLEY MEDIATION GROUP

October 5, 2015

California Law Revision Commission
Attention: Barbara Gaal, Chief Deputy Counsel
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Re: Relationship Between Mediation Confidentiality and Attorney Malpractice (Study K-402)

Dear Commissioners:

The Commission is to be congratulated for having the courage and wisdom to recommend modifying the present mediation confidentiality statute. It is exceedingly unfortunate that a few mediators continue to advocate for the *"self-serving"* malpractice protection.

Reflecting on the Commission's memos and the various blogs, emails, and articles, I have noticed the lack of any significant discussion regarding *informed consent*. If mediation participants are not specifically notified that *both* attorney and mediator malpractice are protected, then can the issue of informed consent be raised when they ultimately learn of this shield? It is curious that the legal community seems to have been loath to raise this issue. Could an appellate case, asserting lack of informed consent, turn mediation on its head?

If the Commission is unable to put forward a recommendation to the legislature to stop protecting malpractice, then there is a very simple solution: require *all* attorneys and mediators to provide *specific written notice* to all participants, *prior* to the mediation, that their misconduct and malpractice are protected. Parties could then decide if they wanted to participate.

When one considers research findings involving product defects, it must be noted that consumers will rarely buy a product that has previously been identified as *defective*. Without implementing a change in the statute, one can easily envision a decline in the use of mediation with its present *confidentiality defect*.

There appears to be one significant flaw in the Commission's recommendation—it only dealt with *attorney* malpractice. I would urge the Commission to consider removing the misconduct and malpractice protections for *both* attorneys and mediators. If not, then I fear your job will only be half completed.

Sincerely,

Nancy

Nancy Neal Yeend

Telephone (650) 857-9197 • nancy@svmediators.com

Court of Appeals of Oregon.

YOSHIDA'S INC., an Oregon corporation, Plaintiff–Appellant, v. DUNN CARNEY ALLEN HIGGINS & TONGUE LLP, an Oregon limited liability partnership; and Brian Cable, an individual, Defendants–Respondents.

110505726; A152507.

Decided: July 22, 2015

Before DUNCAN, Presiding Judge, and LAGESEN, Judge, and WOLLHEIM, Senior Judge. Corey Tolliver argued the cause for appellant. With him on the briefs were Shannon Flowers, Bonnie Richardson, and Folawn Alterman & Richardson LLP. Thomas W. McPherson argued the cause for respondents. With him on the brief were Dunn Carney Allen Higgins & Tongue, LLP and Brian Cable.

This is an action for negligence (legal malpractice) and breach of contract against a law firm, defendant Dunn, Carney, Allen, Higgins & Tongue, LLP, and one of the law firm's partners, Cable (collectively, defendants). The trial court directed a verdict for defendants on plaintiffs breach of contract claim, and the jury returned a defense verdict on the professional negligence claim. The issues on appeal are whether the trial court erroneously admitted evidence of confidential mediation communications, in violation of ORS 36.222,[1] and whether it erred in directing a verdict for defendants on the breach of contract claim. We conclude that the trial court erred in both respects and, accordingly, reverse and remand for further proceedings consistent with this opinion.

I. FACTS

After it was purchased by another entity, defendants' former client, OIA Global Logistics–SCM, Inc. (OIA), assigned to plaintiff, Yoshida's, Inc., its legal malpractice claim against defendants. The claim arose from defendants' alleged mishandling of the termination of an equipment and software lease between OIA and Winthrop Resources Corporation (Winthrop), a corporation located in Minnesota.

OIA produces packaging for a footwear company. In 2006, as part of a sale-leaseback arrangement, OIA sold warehouse equipment and software to Winthrop, and then leased back the equipment and software. The original lease term was three years, ending no later than November 30, 2009; there was some uncertainty as to when the lease term began and when the lease term ended. The lease provided that it would automatically renew for an additional fourth year unless OIA notified Winthrop no later than 120 days before the lease's termination date that OIA intended to terminate the lease. The lease also provided that it would automatically renew for an additional year if, having terminated the lease, OIA did not return the leased equipment and software to Winthrop within 10 days of the termination date.

In July 2009, OIA determined that it wanted to terminate the lease at the expiration of the three-year term, although OIA recognized that it was not certain of the lease's end date. On July 29, 2009, OIA, through its chief financial officer (CFO), Sether, contacted Miller—an associate at defendant law firm who assisted defendant Cable in the firm's work for OIA—by phone and then by follow-up e-mail. Sether requested defendant law firm's assistance in terminating the lease before its end date, which Sether described as being "anytime between Today and 11/1/2009." In the e-mail following up on the phone conversation, Sether informed Miller that "the big things are getting out of the lease ASAP," and that "[a]t the very least it appears the termination notice is in order ASAP." Sether identified "[r]each[ing] a near $1 dollar or less buyout" of the software and equipment as another priority, noting that OIA would not be able to return some portion of the equipment and wanted to continue using the software. The next day, Miller responded:

"Thank you for the information. I will review and follow up with you shortly. I did discuss the matter briefly with Brian Cable as he was involved in the issue during the NGL due diligence period. He has sent me his correspondence with Winthrop and provided me with some additional background."

In response to Miller's e-mail, Sether reiterated that, "as stated [,] probably the intent to terminate notice is the first step and then we work on the other facets * * * and the residual."

Approximately one month later, on August 26, 2009, Miller provided OIA with a notice-of-termination letter for OIA to send to Winthrop. OIA immediately forwarded the letter to Winthrop. Upon receiving the letter, Winthrop notified OIA that the notice of termination was not timely under the terms of the lease and that, in its view, the lease extended for an additional year as a result. After discussing Winthrop's response to OIA's attempt to terminate the lease, defendant law firm concluded that it could no longer represent OIA in connection with the lease dispute because OIA might have "potential claims" against it.

OIA thereafter retained counsel in Minnesota to assist it with the resolution of the lease dispute. Ultimately, on February 10, 2010, OIA and Winthrop mediated their dispute and resolved it through mediation. They executed a "Mediated Settlement Agreement" on February 10, 2010. Two days later, OIA's CFO, Sether, notified OIA's Minnesota lawyers that there were "two minor changes that [OIA] would like to see modified in the Winthrop final documents." Sether requested, among other changes, that the bill of sale indicate that the "residual value" of the equipment was $25,000. The parties then executed a final "Settlement Agreement and Release." Under its terms, Winthrop agreed to transfer title of the equipment and software to OIA, and OIA agreed to pay $325,000 to Winthrop. The agreement required Winthrop to execute a bill of sale to OIA in connection with the transfer of the equipment, upon delivery of the settlement payment. It further specified that the "[p]rice for transferring Winthrop's title to the equipment" to OIA was $25,000 and that the remaining $300,000 was in "[s]ettlement of remaining monthly lease charges due under the Lease." Thereafter, OIA assigned its claims against defendants to plaintiff, and plaintiff filed this action.2

The case was tried to a jury. Before trial, plaintiff moved in limine under ORS 36.222 to exclude "all mediation communications" made in the course of or in connection with the mediation between OIA and Winthrop. In support of the motion, plaintiff provided the court with a packet of the e-mail communications that, in its view, had to be excluded under ORS 36.222. Plaintiff argued that the statute barred the introduction into evidence of those communications, because the parties to the mediation had not consented in writing to their disclosure, and because no other statutory exception authorizing the evidentiary use of such communications applied. Defendants opposed the motion, asserting that Minnesota, not Oregon, law governed the admissibility of mediation communications related to the mediation between OIA and Winthrop, and that ORS 36.222 thus did not preclude the admission of communications related to the OIA and Winthrop mediation. Defendants argued further that the communications were admissible to undercut plaintiffs claim that OIA was damaged by defendants' alleged negligence, and to show that OIA's settlement with Winthrop was not a reasonable one and that OIA could have mitigated its damages. Defendants also argued that plaintiff effectively waived the protections of ORS 36.222 by filing the malpractice action, thereby putting at issue how much plaintiff was damaged by defendants' alleged malpractice. In response, plaintiff contended that Minnesota and Oregon law both required the exclusion of the mediation communications.

The trial court denied the motion. The court did not "debat[e]" that the communications were, in fact, mediation communications under ORS 36.110(7). It nonetheless concluded that "mediation confidentiality" did not apply and "that the issue of what happened at the mediation comes into play, so I think it is admissible, and so the communications that happened around that are going to be admissible." The court reasoned that the mediation communications that defendant sought to introduce were from a mediation in a different case—the dispute between OIA and Winthrop—and that the statute therefore did not preclude the introduction of the communications in the malpractice case, because the communications were relevant to the issue of whether plaintiff had been harmed by defendants' alleged malpractice.

Based on the court's ruling, three e-mails connected to the resolution of the lease dispute between OIA and Winthrop were introduced into evidence at trial, and Sether was examined about them. The first e-mail, dated January 5, 2010, was from Sether to OIA's Minnesota attorneys for the lease dispute. In it, as "a starting point for conversation related to the equipment values," Sether estimates that the market value of the equipment was "$250–$275K." The second e-mail, dated February 5, 2010, was from Sether to OIA's president. In it, Sether states that he had requested an OIA employee, Wogan, to evaluate the assets under the lease with Winthrop. Sether notes that Wogan came up with a value "in the $200K range," which provides some "good context" for negotiation in the upcoming mediation. The attached analysis by Wogan identifies three different methods for valuing the equipment; depending on the valuation method employed, Wogan's analysis attributes a value to the property ranging from $0–$239,000. The third e-mail, dated two days after the mediation between OIA and Winthrop, is from Sether to OIA's attorney in the lease dispute. In the e-mail, Sether requests that OIA's attorney arrange for changes in the final settlement paperwork:

"They would like the bill of sale to show—'residual value—equipment $25,000' obviously the settlement agreement is fine as we paid a total of $325,000[,] but for the equipment that's not the sales amount, that includes residual value termination contract value."

(Emphasis omitted.)

At the close of plaintiffs case, defendants moved for a directed verdict on both claims. With respect to the breach of contract claim, defendants argued that, in the case of an attorney-client relationship, a client cannot sue an attorney for breach of contract and negligence unless the contract is "an express specific promise to achieve a certain result." Defendants then asserted that there was no evidence that would permit a finding that OIA had an express contract with defendants, requiring the grant of a directed verdict. The trial court agreed and granted the motion as to the breach of contract claim, explaining that "it does take an express agreement," and that "I don't think an express agreement, even in the light applied to a directed verdict standard, has been met here. And I am granting directed verdict on the contract claim."

The trial court subsequently submitted the negligence claim to the jury. In closing argument, defendants urged the jury to find that defendants were not negligent. Alternatively, defendants argued that any negligence by defendants did not damage plaintiff. Defendants pointed out that plaintiff had sold some of the equipment covered by the lease and urged the jury to conclude that the lease would have automatically renewed anyway, even if defendants had not been negligent, because plaintiff would not have been able to return the equipment to Winthrop within 10 days of the date the lease terminated, as required by the lease. Defendants also argued that plaintiff was not harmed by any negligence of defendants because the settlement was, in effect, the purchase of the equipment at a reasonable price—something that plaintiff had wanted to accomplish all along. In making that argument, defendants relied heavily on plaintiffs mediation communications estimating the value of the equipment to OIA. The jury returned a verdict for defendants. The jury found that defendants were negligent, but that defendants' negligence did not cause damages to plaintiff. The trial court entered a general judgment in favor of defendants, and plaintiff timely appealed.

On appeal, plaintiff assigns error to the trial court's denial of plaintiff's pre-trial motion in limine to exclude evidence of confidential mediation communications under ORS 36.222. Plaintiff also assigns error to the trial court's grant of defendants' motion for a directed verdict on the breach of contract claim.

II. STANDARDS OF REVIEW

The trial court denied plaintiff's motion in limine regarding mediation communications, based on its interpretation of the scope of ORS 36.222. Where the trial court admits or excludes evidence based on the court's interpretation of a statute, we review the court's ruling for legal error. See State v. Edwards. 231 Or.App. 531, 533, 219 P3d 602 (2009) (so doing). On review of the trial court's grant of defendants' motion for a directed verdict, we view the evidence, and all reasonable inferences therefrom, in the light most favorable to the nonmoving party (in this case, plaintiff), and review to determine whether any reasonable factfinder could find in favor of the nonmoving party. Trees v. Ordonez, 354 Or 197, 205–06, 311 P3d 848 (2013). A directed verdict is appropriate only if the moving party is entitled to judgment as a matter of law. Id.

III. ANALYSIS

A. Mediation communications

We first address plaintiffs contention that the trial court erred by denying its motion to exclude communications related to the mediation of the lease dispute between OIA and Winthrop. In particular,

plaintiff contends that the trial court erred by admitting three documents that plaintiff asserts are not admissible under ORS 36.222:(1) the January 5, 2010, e-mail from Sether to OIA's president and Minnesota counsel regarding the valuation of the equipment at issue in the lease; (2) the February 5, 2010, e-mail from Sether to OIA's president further discussing the equipment values and "wondering if [they] should share [the valuation information] with [Minnesota counsel] before next week's mediation"; and (3) the February 12, 2012, e-mail from Sether to Minnesota counsel asking for adjustments to the final settlement documents, including the equipment bill of sale to reflect a "residual value" of $25,000.[3] As noted, the trial court denied plaintiffs motion based on its conclusion that ORS 36.222 did not require the exclusion of those communications and material because the mediation took place in a different case, not in the instant malpractice case.

That conclusion is erroneous. ORS 36.222 generally makes any communication that qualifies as a confidential "mediation communication" under ORS 36.110(7)[4] inadmissible in any "adjudicatory proceeding" occurring after the communication. ORS 36.222 states, in pertinent part:

"(1) Except as provided in ORS 36.220 to 36.238, mediation communications and mediation agreements that are confidential under ORS 36.220 to 36.238 are not admissible as evidence in any subsequent adjudicatory proceeding, and may not be disclosed by the parties or the mediator in any subsequent adjudicatory proceeding.

"(2) A party may disclose confidential mediation communications or agreements in any subsequent adjudicative proceeding if all parties to the mediation agree in writing to the disclosure."

The statute means what it says. Contrary to the trial court's conclusion, mediation communications generally are not admissible evidence in any later adjudicatory proceeding, even if that proceeding is not the same proceeding in which the mediation occurred. For example, in Alfieri v. Solomon, 263 Or.App. 492, 494–503, 329 P3d 26, rev allowed, 356 Or 516 (2014), we concluded that ORS 36.222(1) barred the plaintiff in a legal malpractice case from using confidential mediation communications to prove the plaintiff's claim that the defendant lawyer had negligently mediated an employment dispute on the plaintiffs behalf. 263 Or.App. at 494–95, 501–02. We explained that, "[g]enerally, confidential mediation communications and confidential mediation agreements 'are not admissible as evidence in any subsequent adjudicatory proceeding, and may not be disclosed by the parties or the mediator in any subsequent adjudicatory proceeding.' " Id. at 497–98 (quoting ORS 36.222(1)) (emphases added). Although ORS 36.222 contains a number of exceptions to the limitations on the disclosure and admissibility of mediation communications, those exceptions, on their face, do not appear to apply here, and defendants do not suggest otherwise. See ORS 36 .222(2)-(6) (establishing exceptions to the mediation-communication privilege).

Defendants assert that the trial court's decision to admit the evidence, even if based on an erroneous understanding of ORS 36.222, can be sustained on other grounds. First, defendants argue, as they did below, that Minnesota, not Oregon, law controls the issue of whether the communications related to the OIA–Winthrop mediation of the lease dispute are admissible in a subsequent adjudicatory proceeding and that, under Minnesota law, the communications were admissible. Second, defendants argue, for the first time on appeal, that, if Oregon law governs, the communications at issue do not meet the definition of "mediation communications" under ORS 36.110(7) and, for that reason, were properly admitted into evidence by the trial court. Third, defendants contend that plaintiff waived the privilege afforded to mediation communications, both by filing this action and by disclosing the communications in discovery, making those communications admissible. For the reasons that follow, none of those arguments provides a basis for this court to sustain the trial court's decision to admit the communications at issue.

First, to the extent that defendants assert that plaintiff waived the statutory privilege afforded to mediation communications by filing this case or by disclosing the communications in discovery, the terms of ORS 36.222 foreclose that conclusion. The statute states plainly that, "[e]xcept as provided in ORS 36.220 to 36.238, mediation communications and mediation agreements that are confidential under ORS 36.220 to 36.238 are not admissible as evidence in any subsequent adjudicatory proceeding, and may not be disclosed by the parties or the mediator in any subsequent adjudicatory proceeding." ORS 36.222(1) (emphasis added). Again, we understand that provision to mean what it says: Unless one of the statutory exceptions applies, mediation communications are not admissible into evidence. We are not, through the act of judicial interpretation, permitted to expand that limited list of statutory exceptions crafted by the legislature to include new exceptions, such as unilateral waiver through a party's conduct. Crimson Trace Corp. v. Davis Wright Tremaine LLP, 355 Or 476, 496–97, 232 P3d 980 (2014) (when the statute establishing evidentiary privilege also expressly contains a list of specific exceptions, "the legislature fairly may be understood to have intended to imply that no others are to be recognized"). That is so especially in light of the legislature's explicit decision to

require that "all parties to the mediation agree in writing to the disclosure" of mediation communications in a subsequent adjudicatory proceeding, and its omission of any statutory mechanism allowing for one party to unilaterally waive that confidentiality. ORS 36.222(2) (emphasis added). As noted, defendants do not contend that the mediation communications at issue in this case are admissible under any of the express exceptions to the mediation-communication privilege crafted by the legislature, and, in any event, none of the exceptions appears to apply to the communications at issue here.

Second, to the extent that defendants assert that the communications at issue are not, in fact, "mediation communications" as defined by ORS 36.110(7), that argument does not present grounds for affirmance because defendants did not raise that argument below and, had they done so, the record may have developed differently.[5] Outdoor Media Dimensions Inc. v. State of Oregon, 331 Or 634, 659–60, 20 P3d 180 (2001) (for appellate court to affirm trial court's ruling on an alternative basis requires, among other things, "that the record materially be the same one that would have been developed had the prevailing party raised the alternative basis for affirmance below"). Specifically, if defendants had contested below whether the e-mails at issue were, in fact, mediation communications, plaintiff would have been entitled to introduce additional foundational evidence under OEC 104(1) to establish that the communications did, in fact, occur "in connection with a mediation" among parties covered by the privilege so as to render the mediation privilege applicable. See ORS 36.110(7); ORS 36.222(1). Because defendants opted not to dispute that the communications at issue were mediation communications, plaintiff did not have that opportunity. Accordingly, for purposes of our review, we (as did the trial court) treat the communications at issue as mediation communications under ORS 36.222(7).[6]

Third, and finally, defendants' choice-of-law arguments do not provide a basis for affirming the trial court's ruling. We assume without deciding that the Oregon courts would be obligated to apply Minnesota law regarding the privilege afforded to mediation communications if either party established that Minnesota law should govern this dispute.[7] Nevertheless, we decline to resolve the parties' dispute over the scope of the privilege for mediation communications under Minnesota law, because defendants have not made the threshold showing required to invoke another state's laws in the courts of this state. As the proponents of the application of Minnesota law, it is "incumbent on" defendants to demonstrate "whether there is a material difference between Oregon substantive law and the law of the other forum. If there is no material difference—if there is a 'false conflict'—Oregon law applies." Angelini v. Delaney, 156 Or.App. 293, 300, 966 P.2d 223 (1998) (citations omitted). A false conflict exists when "no substantial conflict is found to exist between the states' policies or interests" or "where the laws of two states are the same or would produce the same results." Erwin v. Thomas, 264 Or 454, 457–58, 506 P.2d 494 (1973).

Here, defendants have not demonstrated a material difference between the laws of Oregon and the laws of Minnesota. The only difference that defendants have identified is a difference in wording between the applicable Minnesota statutes and the applicable Oregon statutes. But defendants have not shown that that difference in wording amounts to a material difference between Minnesota law and Oregon law. To the contrary, the applicable Minnesota statute and rule of practice appear on their face to render mediation communications inadmissible to the same extent that Oregon law does. Minn Stat § 595.02(l)(m) states:

"A person cannot be examined as to any communication or document, including work notes, made or used in the course of or because of mediation pursuant to an agreement to mediate or a collaborative law process pursuant to an agreement to participate in collaborative law. This does not apply to the parties in the dispute in an application to a court by a party to have a mediated settlement agreement or a stipulated agreement resulting from the collaborative law process set aside or reformed. A communication or document otherwise not privileged does not become privileged because of this paragraph. This paragraph is not intended to limit the privilege accorded to communication during mediation or collaborative law by the common law."

By precluding the examination of any person regarding mediation communications or documents, the statute effectively precludes the use of such communications as evidence. If no witness can be examined about such communications, it is difficult to see how such communications or documents could be introduced into evidence; without examination, there would be no way for a litigant to lay a foundation for the admission of that evidence.

The terms of Minnesota General Rule of Practice 114.08 further indicate that mediation communications are privileged under Minnesota law in much the same way that they are under Oregon law, specifying that statements made and documents produced in an alternative dispute resolution proceeding generally are not admissible in subsequent proceedings involving any of the issues or parties to the alternative dispute resolution proceeding. It states, in relevant part:

"(a) Evidence. Without the consent of all parties and an order of the court, or except as provided in Rule 114.09(e)(4), no evidence that there has been an ADR proceeding or any fact concerning the proceeding may be admitted in a trial de novo or in any subsequent proceeding involving any of the issues or parties to the proceeding.

"(b) Inadmissibility. Subject to Minn.Stat. § 595.02 and except as provided in paragraphs (a) and (d), no statements made nor documents produced in non-binding ADR processes which are not otherwise discoverable shall be subject to discovery or other disclosure. Such evidence is inadmissible for any purpose at the trial, including impeachment."

Minn Gen R Prac 114.08.

Thus, on its face, Minnesota law appears to afford the same evidentiary privilege to mediation communication that Oregon law affords them. Defendants have not identified any decisions from the Minnesota courts suggesting that the Minnesota mediation privilege is narrower in scope than the words of Minn Stat § 595.02 indicate, and "it is not our obligation to cast around the law of [Minnesota] in quest of possible material differences." Angelini, 156 Or.App. at 300. Accordingly, defendants' arguments regarding Minnesota law, and the scope of the privilege afforded to mediation communications under it, do not provide an alternative basis for sustaining the trial court's judgment.

Having concluded that the trial court erred in denying plaintiff's motion to exclude the mediation communications at issue, we assess whether the error requires reversal. We conclude that it does. An evidentiary error is reversible only if it substantially affects a party's rights. OEC 103(1); ORS 19.415(2). Evidentiary errors substantially affect a party's rights and, therefore, require reversal "when the error has some likelihood of affecting the jury's verdict." Dew v. Bay Area Health District, 248 Or.App. 244, 258, 278 P3d 20 (2012) (citations omitted); see also Purdy v. Deere and Company, 355 Or 204, 226, 324 P3d 455 (2014) (same).

Here, our review of the record persuades us that there is "some likelihood" that the erroneously admitted evidence affected the jury's determination that defendants' conduct (which the jury found to be negligent) did not cause OIA to suffer any damages. One of defendants' central attacks on plaintiff's case for causation relied heavily on the erroneously admitted mediation communications. Defendants asserted that their negligence—if any—did not cause damages to OIA because, regardless of defendants' negligence, OIA had intended to purchase the equipment and would have had to negotiate with Winthrop to do so. Defendants argued further that the settlement amount simply represented a reasonable purchase price for the equipment and that the $25,000 value assigned to the equipment by the settling parties did not accurately represent the equipment's value. In closing argument, defendants pointed to the erroneously admitted communications as proof that the equipment value was not $25,000 but, instead, was much closer to the $325,000 settlement amount. From that evidence, defendants were able to argue that plaintiff was not damaged by any negligence by defendants because the deal reached by plaintiff was, in effect, a negotiated equipment purchase that plaintiff would have made for a similar price even absent a breach:

"Now, let's assume further that the [lease] negotiations were to take place [before any breach]. What was [plaintiff] willing to pay for that equipment? We have some evidence on that, and we know how [plaintiff] was valuing that equipment.

" * * * * *

"Let's look at Exhibit 127. Here we are in January 2010, and now the matter's in the hands of the Minnesota lawyers. Now [plaintiff's CFO] is saying to [plaintiffs President], 'I would recommend at or around [$]250[ ] to 275,000.' Reflecting the value of that equipment. And, obviously, that's what they were willing to pay then.

"[Exhibit] 135. This is the best one of all three of these in terms of the actual thinking going on [with plaintiff] about this equipment. This is later in 2010. This time [plaintiff's CFO] has asked one of the internal guys [who works for plaintiff], a fellow named * * * Wogan, Tut together an analysis of the value of that equipment.'

"Let's look at the second page. This is Mr. Wogan's analysis, January 29, 2010. Look at number 2. [Plaintiffs] value, close to $200,000. 'We are still using the assets. And this number reflects what I believe is a fair value to [plaintiff].'

"Ladies and gentleman, as we sit here today [plaintiff] has some of those assets. They are still using that software. They weren't about to give it up. They could not give it up.

" * * * * *

"As far as the $25,000 equipment residual value at settlement, it is absolutely preposterous to think that that is, to [plaintiff], the true value of that equipment. Remember the evidence?

" * * * * *

"But to suggest that the $25,000 is the actual value to [plaintiff] of that equipment, that doesn't work. Not with the kind of evidence we just showed with regard to that."

Apart from the erroneously admitted communications, the record contains little other evidence that counters plaintiffs $25,000 valuation of the equipment or suggests that the settlement payment represented a purchase of the equipment for a reasonable price.8 The only other properly admitted evidence that the equipment value approached the $325,000 settlement amount was an e-mail from Sether to defendants, sent in October 2009 while defendants still represented OIA. In that e-mail, Sether describes the "market value" of the equipment as "around $285–$325K." However, Sether minimized the accuracy of that early computation in his trial testimony, testifying that it was based on "a schedule" provided by Winthrop and that his own view was that the equipment did not have any value. The erroneously admitted e-mails—particularly the February 5, 2010, e-

mail containing an OIA employee's valuation of the equipment under different methodologies—allowed defendants to undercut Sether's testimony downplaying the October 2009 valuation. In particular, defendants employed the February 5 e-mail to demonstrate, contrary to Sether's testimony, that OIA ascribed substantial market value to the assets even when OIA performed its own independent valuation of the equipment. As noted, defendants emphasized that point in closing argument, arguing that the February 5, 2010, e-mail "is the best one of all three of these in terms of the actual thinking going on in OIA about this equipment."

For those reasons, we conclude that there is "some likelihood" that the erroneously admitted e-mails affected the jury's verdict. Although we acknowledge that defendants attacked plaintiffs case on causation in one other way,9 given defendants' emphasis on OIA's valuation of the equipment as negating any inference that OIA was damaged by defendants' failure to terminate the lease, there is some likelihood that the jury relied on the erroneously admitted communications—particularly the February 5, 2010, e-mail—to find that the amount paid in settlement by OIA was simply a reasonable purchase price for the equipment, and that defendants' negligence did not, therefore, cause damage to OIA, which had planned to purchase the equipment all along. We therefore reverse and remand for a new trial.

B. Directed verdict on breach of contract claim

We next consider the trial court's grant of defendants' motion for a directed verdict on the breach of contract claim. In that claim, plaintiff alleged that OIA and defendants entered into a contract under which defendants "specifically agreed to prepare and provide notice of termination of the lease in a timely manner" and that defendants breached that contract "by failing to prepare and provide notice of termination of the lease in a timely manner." Defendants defend the trial court's ruling, arguing that, "to make out a claim for breach of contract in the attorney-client context, the plaintiff must plead and prove that a promise to accomplish a defined objective was made by the attorney. If the plaintiff fails to offer evidence that such a promise was made, the breach of contract claim must be dismissed." Defendants argue further that the record demonstrates a "failure of proof" that defendants promised to prepare the notice of lease termination "by any particular date," and that, as a result, the trial court correctly directed a verdict on the breach of contract claim.

We disagree. In general, Oregon law does not require that a client suing a lawyer for breach of contract to provide professional legal services prove that the contract between the lawyer and the client took a particular form. Rather, Oregon law long has provided that a client may sue an attorney under both contract and negligence theories. In Currey v. Butcher, 37 Or 380, 384–85, 61 P 631 (1900), the Supreme Court observed that the attorney-client relationship arises out of the existence of a contract, "either express or implied." From that contract, "the law imposes a duty to exercise reasonable care and skill." Id. If the attorney fails to perform that duty in a manner that results in injury to the client, the court noted that the client "could sue, either in [contract], for a breach of the implied promise, or in [tort], for the neglect of duty." Id. at 385 (trial court had appropriately overruled the attorney defendants' motion for an order requiring the client plaintiff to choose a remedy under either tort or contract) (emphases added). In the absence of any statute-of-limitation issues10 — and none is raised here—no special rules govern the pleading and proof of a client's claim against a lawyer for breach of contract; a client may seek to enforce an attorney's express or implied promise to perform in accordance with the general standard of care under either a negligence theory, a contract theory, or both. Metropolitan Property & Casualty v. Harper, 168 Or.App. 358, 368–69, 7 P3d 541 (2000) (explaining how statutes of limitation bear on issue of whether client can sue attorney under breach of contract theory).11

In urging us to reach a different conclusion, defendants rely on two lines of cases. Neither line of cases assists defendants. Securities–Intermountain v. Sunset Fuel, 289 Or 243, 611 P.2d 1158 (1980), exemplifies the first line of cases. It stands for the proposition that a claim for breach of a contract to provide professional services is barred by the two-year statute of limitation applicable to negligence claims unless the plaintiff pleads and proves that the defendant agreed "to perform specific contractual duties irrespective of the general standard of care" and then breached that agreement. Allen v. Lawrence, 137 Or.App. 181, 184, 903 P.2d 919 (1995) (explaining rule of law established by Securities–Intermountain); Metropolitan Property & Casualty, 168 Or.App. at 368–69 (same). This case does not present any statute-of-limitation issues. Accordingly, the standards of pleading and proof for a claim for breach of a professional services contract filed outside the two-year negligence limitation period are not applicable here. In other words, those cases provide no basis for concluding that plaintiffs proof of the existence of a contract was insufficient to withstand defendants' motion for a directed verdict.

Hale v. Groce, 304 Or 281, 744 P.2d 1289 (1987), and Caba v. Barker, 341 Or 534, 145 P3d 174 (2006), exemplify the second line of cases invoked by defendants. But those cases also do not stand for the proposition that plaintiff was required to plead and prove that it had an "express" contract with defendants. Instead, as we have explained, those cases "stand for the proposition that an essential element of a breach of contract or negligence claim by a nonclient plaintiff against an attorney who prepared a testamentary instrument is the existence of a promise by the attorney—either express or implied—to include specific provisions to satisfy certain objectives of the client for the benefit of the plaintiff." Deberry v. Summers, 255 Or.App. 152, 161, 296 P3d 610 (2013) (citing Frakes v. Nay, 254 Or.App. 236, 267, 295 P3d 94 (2012)) (emphases added). Those cases have no applicability under the circumstances present here.

Accordingly, the trial court erred when it concluded that plaintiff was required to demonstrate that defendants made an "express" contract with OIA to deliver the notice by the particular date. In the light of how plaintiff alleged the breach of contract claim in the complaint,[12] the trial court was required to deny defendants' motion for a directed verdict and submit the breach of contract claim to the jury if there was any evidence in the record from which a reasonable factfinder could find that defendants[13] had an express or implied contract with OIA "in which defendants specifically agreed to prepare and provide notice of termination of the lease in a timely manner, as requested by OIA," as well as evidence that defendants "breached the contract by failing to prepare and provide notice of termination of the lease in a timely manner." Viewed in the light most favorable to plaintiff, the record would permit a reasonable factfinder to find that OIA and defendants had an implied (if not an express[14]) contract under which defendants agreed to timely provide notice of termination of the lease. In an implied-in-fact contract, "the parties' agreement is inferred, in whole or in part, from their conduct." Staley v. Taylor, 165 Or.App. 256, 262, 994 P.2d 1220 (2000) (citing Restatement (Second) of Contracts § 4 comment a (1979)). "The conduct that is relevant to the inference of assent is not limited to the parties' actions at the commencement of the alleged relationship." Montez v. Roloff Farms, Inc., 175 Or.App. 532, 536–37, 28 P3d 1255 (2001). An implied-in-fact agreement arises "only where the natural and just interpretation of the acts of the parties warrants such conclusion." Owen v. Bradley, 231 Or 94, 103, 371 P.2d 966 (1962). "Frequently, implied-in-fact contracts arise because an accepted course of conduct would permit a reasonable juror to find that the parties understood that their acts were sufficient to manifest an agreement." Staley, 165 Or.App. at 262 n 6 (citations omitted).

Here, plaintiff presented evidence of the following conduct: OIA, through its CFO, Sether, notified defendants that it wanted defendants to "[p]rovide official notice of intent to Terminate the Lease." As to that goal, OIA also told defendants that the notice should occur "ASAP." OIA provided defendants with a billing code, which indicated an intention to pay defendants for their services. Defendants immediately began working on the project, with knowledge that their task was to help OIA get out of the lease "ASAP," and a promise to "follow up * * * shortly." Ultimately, defendants did, in fact, prepare the termination notice, and then billed plaintiff for that service.

From that evidence of the course of conduct between OIA and defendants, a reasonable factfinder could find that OIA and defendants had an implied contract under which defendants agreed to send a timely notice of termination of contract and that defendants breached that agreement when they did not promptly send the notice of termination. The trial court therefore erred in granting defendants' motion for a directed verdict on the breach of contract claim.

We conclude further that the error requires reversal of the dismissal of the breach of contract claim. The court's ruling "substantially affect[ed]" plaintiff's rights because it resulted in the dismissal of a claim that should have been considered by the jury. We recognize that the erroneous grant of a directed verdict on a claim does not categorically require reversal; if the verdict on claims that were submitted to the jury demonstrates that the jury necessarily would have rejected one or more elements of the claim that was taken away from it, then we will not deem the erroneous grant of a directed verdict to have "substantially affect[ed]" the plaintiff's rights under ORS 19.415(2). Piazza v. Dept. of Human Services, 261 Or.App. 425, 437–39, 323 P3d 444, rev den, 355 Or 879 (2014); A.G. v. Guitron, 238 Or.App. 223, 234, 241 P3d 1188 (2010), aff'd, 351 Or 465, 268 P3d 589 (2011). Here, however, we have concluded that the trial court's erroneous admission of mediation communications requires reversal of the jury's verdict on the one claim that was submitted to it. Under those circumstances, we are unable to conclude that the jury's verdict renders the erroneous grant of a directed verdict harmless.

Reversed and remanded.

FOOTNOTES

1. ORS 36.222 provides, in pertinent part:"(1) Except as provided in ORS 36.220 to 36.238, mediation communications and mediation agreements that are confidential under ORS 36.220 to 36.238 are not admissible as evidence in any subsequent adjudicatory proceeding, and may not be disclosed by the parties or the mediator in any subsequent adjudicatory proceeding."(2) A party may disclose confidential mediation communications or agreements in any subsequent adjudicative proceeding if all parties to the mediation agree in writing to the disclosure."

2. The original complaint alleged only a claim for legal malpractice. Plaintiff amended the complaint to add the claim for breach of contract. Defendants objected to the amendment on the ground that OIA's assignment of claims to plaintiff did not encompass the breach of contract claim, but the trial court rejected that argument. On appeal, defendants do not argue that the breach of contract claim was not within the scope of OIA's assignment to plaintiff.

3. In its opening brief, plaintiff suggests that the Mediated Settlement Agreement executed by OIA and Winthrop on February 10, 2010, also is a protected mediation communication. However, in its reply brief, plaintiff focuses on the e-mail communications. For that reason, we treat the e-mail communications as the communications at issue for purposes of our analysis.

4. ORS 36.110(7) provides, in part:" 'Mediation communications' means:"(a) All communications that are made, in the course of or in connection with a mediation, to a mediator, a mediation program or a party to, or any other person present at, the mediation proceedings; and"(b) All memoranda, work products, documents and other materials, including any draft mediation agreement, that are prepared for or submitted in the course of or in connection with a mediation or by a mediator, a mediation program or a party to, or any other person present at, mediation proceedings."

5. At the hearing on plaintiff's motion in limine to exclude mediation communications, plaintiff presented to the court (and to defendants' lawyers) a packet of e-mails that plaintiff contended were covered by the mediation-communication privilege. Although we have not been able to locate that packet in the trial court file, the discussions of the contents of that packet indicate that it contained the communications on which plaintiff predicates its arguments on appeal. Specifically, in describing the communications put at issue by the motion in limine, the parties discussed both the communications regarding valuation leading up to mediation, noting that "there is a transactional history that leads up to that mediation where the parties are communicating their thought process for assigning values to their respective positions that then formed the settlement that is now an item of damage in our case," and the post-mediation communications leading to formalization of the mediation settlement, including the e-mail requesting that the final settlement documents reflect that the equipment's residual value was $25,000.

6. In the absence of any contention by defendants that the communications were not, in fact, mediation communications, it was not unreasonable for the trial court to find that the communications were mediation communications. The communications occurred relatively close in time to the mediation and discuss what appears to be OIA's mediation strategy. Although some of the e-mails, on their face, do not compel a finding that they are, in fact, mediation communications, nothing on their face would preclude such a finding, either. And, at least one of the e-mails—the one dated February 5, 2010—states that its purpose is to provide "some good context for negotiation" in advance of the mediation the following week, which suggests that communication was made "in connection" with the pending mediation.

7. Plaintiff argues that the scope of the privilege afforded to mediation communications is a procedural issue, such that the laws of the forum state always apply. As noted, we do not address that issue in the light of our conclusion that defendants have not demonstrated a material difference between Oregon and Minnesota law regarding the scope of the evidentiary privilege afforded to mediation communications. It is not readily apparent to us that the scope of the privilege afforded to mediation communications is properly characterized as procedural for choice-of-law purposes. As Oregon's own statutes reflect, in creating a privilege for mediation communications, the legislature made a substantive policy choice regarding such communications in order to encourage parties "to resolve their dispute with the assistance of a trusted and competent third party mediator, whenever possible, rather than the dispute remaining unresolved or resulting in litigation." ORS 36.100.

8. Neither party introduced any expert valuation of the equipment, relying instead on evidence of OIA's various valuations of the equipment—both internal and external—during the course of the negotiations and mediation with Winthrop.

9. As noted, defendants also argued that their failure to give timely notice of termination did not damage OIA because OIA had sold some of the equipment covered by the lease, making it likely that the lease would renew even if OIA had given timely notice of termination, in light of the lease provision specifying that OIA's failure to return the equipment within 10 days of the date that the lease ended would trigger an automatic renewal. However, plaintiff countered that line of defense by pointing to expert testimony opining that, had the lease been timely terminated, the lease would not have renewed and OIA "wouldn't have had to pay to the additional liability for the year and you would have negotiated some amounts for the equipment." Those arguments and evidence increase the likelihood that the jury's assessment of the value of the equipment played a central role in its causation determination, because they increase the likelihood that the jury assessed causation by trying to determine what OIA would have paid for the equipment if the lease had been terminated in a timely manner.

10. By contrast, a client seeking to pursue a breach of contract claim against an attorney outside of the two-year-limitation period applicable to negligence claims, but within the six-year statute of limitation applicable to contract claims, must plead and prove that the attorney contracted with the client "to perform specific contractual duties irrespective of the general standard of care." Allen v. Lawrence, 137 Or.App. 181, 184, 903 P.2d 919 (1995). Otherwise, "[i]f the alleged contract merely incorporates by reference or by implication a general standard of skill and care to which the defendant would be bound independent of the contract, and the alleged breach would also be a breach of this noncontractual duty," then the tort statute of limitation applies. Id. (quoting Securities–Intermountain v. Sunset Fuel Co., 289 Or 243, 259, 611 P.2d 1158 (1980) (quoting Georgetown Realty v. The Home Ins. Co., 313 Or 97, 106, 831 P.2d 7 (1992))).

11. Oregon's approach is consistent with the Restatement approach. It provides that "[a] lawyer is subject to liability to a client for injury caused by breach of contract in the circumstances and to the extent provided by contract law." Restatement (Third) of Law Governing Lawyers § 55(1) (2000). Comment c to section 55 further provides that"[a] client's claims for legal malpractice * * * can be considered either as tort claims for negligence or breach of fiduciary duty or as contract claims for breach of implied terms in a client-lawyer agreement. Ordinarily, a plaintiff may cast a legal-malpractice claim as a tort claim, a contract claim, or both and often also as a claim for breach of fiduciary duty. * * * The choice of theory may, however, affect what statute of limitations applies[.]"

12. Plaintiff alleged, in relevant part:"OIA and defendants entered into a contract in which defendants specifically agreed to prepare and provide notice of termination of the lease in a timely manner, as requested by OIA. The parties exchanged mutual promises in consideration of the contract." * * * * *"Under the contract, OIA has performed all conditions precedent on its part to be performed, or performance is excused." * * * * *"Defendants breached the contract by failing to prepare and provide notice of termination of the lease in a timely manner." * * * * *"As a result of defendants' breach, OIA (and [plaintiff] as OIA's assignee) has been damaged in the amount of $402,552, which it would not have paid to [Winthrop] had defendants performed their obligation under the contract, and in the amount of $34,965.42, which OIA reasonably and necessarily paid to Minnesota counsel for attorney fees and costs to settle the dispute caused by defendants' breach."Although, as we explained earlier, this case does not involve any statute-of-limitation issues that required plaintiff to satisfy the Securities–Intermountain standards for pursuing a breach of contract claim, we note that plaintiff did allege that defendants contracted with plaintiff to perform a specific task—the timely filing of the notice of lease termination—that is "irrespective of the general standard of care."

13. We note that plaintiff alleged the breach of contract claim against both defendant attorney and defendant law firm. Before this court, the parties have not argued that we should analyze the directed verdict on the breach of contract claim differently for each defendant; accordingly, for purposes of this appeal, we treat both defendants as if they are in an identical position with respect to the breach of contract claim. In so doing, we do not intend to foreclose any arguments on remand as to whether both defendants are truly proper defendants on the breach of contract claim; it is not readily apparent that plaintiff had a contract with both the individual defendant and with the law firm.

14. An express contract is no different in legal effect from an implied-in-fact contract. Staley v. Taylor, 165 Or.App. 256, 262, 994 P.2d 1220 (2000) (citing Restatement (Second) of Contracts § 4 comment a (1979)). "The only difference between them is the means by which the parties manifest their agreement." Staley, 165 Or.App. at 262. "In an express contract, the parties manifest their agreement by their words, whether written or spoken." Id. Accordingly, based on the e-mail correspondence alone between plaintiff and defendants, a reasonable factfinder potentially also could have found the existence of an express contract.

LAGESEN, J.