

Third Supplement to Memorandum 2015-46

**Relationship Between Mediation Confidentiality and Attorney Malpractice
and Other Misconduct (Public Comment)**

The staff distributed the Second Supplement to Memorandum 2015-46¹ at the Commission meeting on October 8, 2015. The following communications to the Commission arrived too late to be incorporated into that supplement, but the staff was able to make copies and distribute them at the meeting:

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| | <i>Exhibit p.</i> |
| • Larry Doyle, Conference of California Bar Associations (10/7/15) |1 |
| • Amy Newman, Alternative Resolution Centers (10/7/15) |4 |
| • Loretta van der Pol & J. Felix De La Torre, Public Employment
Relations Board (10/7/15) |7 |

Respectfully submitted,

Barbara Gaal
Chief Deputy Counsel

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

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



Justice Through Laws

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October 7, 2015

The Hon. Chair and Members
California Law Revision Commission
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**Study K-402 - (Eggman) – Relationship Between Mediation Confidentiality
and Attorney Malpractice and Other Misconduct**

Dear Chairman King and CLRC Members and Staff:

The Conference of California Bar Associations (CCBA), a statewide organization of attorneys representing more than 30 metropolitan, regional and specialty bar associations, commends the CLRC for its excellent work to date on Study K-402 (“Relationship Between Mediation Confidentiality and Attorney Malpractice and Other Misconduct”), and particularly for its insight and courage in voting on August 7, 2015, to develop a statutory reform for California’s current inflexible mediation confidentiality statute. The CCBA was the sponsor of the original [AB 2025 of 2012](#), a bill based on [CCBA Resolution 10-06-2011](#), which proposed to create such an exception for attorneys acting in the capacity as attorneys, advising clients during the course of the mediation. The CCBA also was the sponsor of the amended version of AB 2025, which the CLRC study the issue, the provisions of which ultimately were incorporated into ACR 98, which was approved by the Legislature.

We apologize for the lateness of this letter; we had hoped to have a representative attend the October 8 meeting in person, but our only available candidate could only attend the morning session.

The CCBA strongly supports that portion of the Commission’s August 7 tentative decision that would permit the use of attorney-client communications during and relating to a mediation to be used as evidence in action for legal malpractice and State

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Bar disciplinary proceedings.¹ Not surprisingly, the CCBA strongly opposes all requests from professional mediators that it reconsider this decision; we believe it is the right decision, fully supported by the vast evidence compiled by Commission staff and the testimony of the only actual mediation clients, victims all, who have presented testimony and evidence in this study.²

The CCBA takes no position on the portion of the Commission’s tentative decision to extend the reform to attorney mediators, because the Conference has not considered or voted upon that issue. The resolution adopted by the CCBA, which was the basis for the original version of AB 2025, addressed only the issue raised in *Cassel v. Superior Court* (2011) 51 Cal.4th 113 and several other cases of the current statutory scheme shielding attorney malfeasance and incompetence, all of which have been considered by the Commission during the course of this study. The CCBA notes, however, that as the sponsor of the amended version of AB 2025 which first proposed the current study, the issue of misconduct by attorney-mediators was not part of our considerations, nor did it arise in our discussions with Assembly Judiciary Committee staff which drafted the actual language ultimately adopted in ACR 98. This subjective intent is not evidence of actual Legislative Intent, of course, but may be of value to the Commission nonetheless.

With regard to other specific questions raised in CLRC Staff Memorandum 2015-45:

Timing of Alleged Misconduct:

Because the current statute renders absolutely confidential “evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation,” as well as any writing “prepared for the purpose of, in the course of, or pursuant to” the same, the CLRC should be cautious of making the exception either too broad or too narrow. In *Lappe v. Superior Court* (2014), 232 Cal. App. 4th 774, the Court of Appeals held that declarations of disclosure prepared pursuant to Family Code §§2104 and 2105 are not documents prepared “for the purpose of” mediation, so as to fall within the ambit of mediation confidentiality. However, based on the decisions in *Cassel* and other cases, the Supreme Court may again find it has no choice but to overturn this decision and apply absolute confidentiality to all documents prepared with an understanding that they will be used in mediation, even if prepared for other purposes and/or pursuant to statute. The Commission may wish to consider how to forestall such a unreasonable result, which nonetheless seems supported by the plain language of the current statute.

Type of Proceeding in Which the Exception Would Apply

¹ This is consistent with the intent of AB 2025, which proposed to amend Evidence Code §1120 to add a new paragraph (b)(4), providing that the Chapter no longer would limit the “admissibility in an action for legal malpractice, an action for breach of fiduciary duty, or both, or in a State Bar disciplinary action, of communications directly between the client and his or her attorney during mediation if professional negligence or misconduct forms the basis of the client’s allegations against the attorney.”

² Not only are the opponents almost exclusively mediators, but it appears that well over half of the opposition letters are either duplicates of a form letter developed and circulated by one opponent with a vast network of contacts, or very slight variations thereon.

As indicated in Resolution 10-06-2011, the CCBA urges that the exception apply to both State Bar disciplinary proceedings and malpractice actions against attorneys by their clients.³ Not only was this recommended by Justice Chin in *Cassel*, but it is only fair to the victims of attorney misconduct/incompetence, since malpractice actions provide the only effective way for them to be obtain compensation for losses incurred as a result of such misconduct/incompetence. We recognize that it is more difficult to protect confidentiality in closed State Bar disciplinary proceedings than in malpractice actions, but we believe the Commission can very effectively address this issue, either employing practices adopted in other jurisdictions or on its own. The fact that limiting the exception to State Bar disciplinary hearings would be less controversial should not be a consideration; the CCBA exists to develop the best laws it can, not those which are least controversial.⁴

Likewise, we do not believe the exception should be limited to attorney-client fee disputes, for the same reasons.

Purposes for Invoking the Exception

The exception should be available on an evenhanded basis, available to both client and attorney to prove or disprove allegations, just as it is in Evidence Code §958 (Attorney-Client Privilege).

In Camera Screening Process

The CCBA has not taken a position on this issue, but has no objection.

Limitations on Extent of Disclosure of Mediation Communications

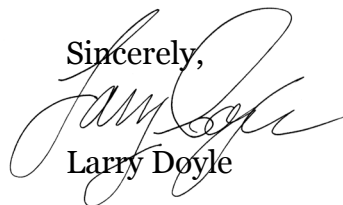
The CCBA has not taken a position on this issue, but has no objection.

Code Placement

With regard to the exception for communications between attorney and client in a mediation, the CCBA believes the Evidence Code is the proper place (see CCBA Resolution 10-06-2011).

Thank you again for your valuable efforts on this important issue. Please contact me at (916) 761-8959 or Larry@LarryDoyleLaw.com if I can be of assistance.

Sincerely,



Larry Doyle

³ Again, the CCBA has no position on whether the exception should be applied to attorney mediators.

⁴ On this point, Memorandum 2015-45 says that it is of “particular importance” that the opposition includes the California Dispute Resolution Council (CDRC), which in its self-description brags of its influence. It is true that the CDRC is a politically influential organization whose opposition in the Legislature could make enactment of any reform legislation difficult, at least. Yet the CDRC’s political influence is not a reason for the Law Revision Commission to back away from reform, any more than if the opposition came from any other powerful political player. As has happened frequently in the past, other organizations can and will step forward to help ensure that good proposals of the CLRC are enacted, eventually.

Wednesday, October 7, 2015

Barbara Sandra Gaal
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Re: CLRC Study K-402 Mediation Confidentiality

Dear Ms. Gaal;

I am writing you to strongly protest the efforts being made to adversely affect mediation confidentiality.

I am a pioneer in the ADR industry, starting at JAMS in 1987. For the last twenty-five years I have been president of Alternative Resolution Centers, ARC. I have served on the Los Angeles Superior Court ADR Committee and the State Bar ADR Committee, each for a three-year term. I am currently on the Advisory Board for USC Gould Law School for their new ADR LLM and LLP programs.

I am vigorously opposed to interfering with the shield of confidentiality that has protected the mediation process since its inception.

The proposed legislation will remove current protections whenever a mediation party alleges misconduct by their lawyer-advocate or lawyer-mediator. This proposal will destroy mediation and swamp our overburdened courts. Our current predictable protections will disappear with a mere allegation of misconduct. Few will risk being candid knowing every mediation statement and document can be discovered and become admissible evidence.

In 2010, I wrote an article for California Lawyer, on the state of the ADR market. I've attached the article to provide a historical perspective on the increasing success achieved by the introduction of mediation since 1987. Mediation continues to be an overwhelmingly popular choice for litigants

and their attorneys to resolve all types and sizes of disputes. It clearly mitigates the costs of protracted litigation. Nothing has changed since 2010, except for the increasingly dire state of the courts and the inability of the litigants to get justice in a timely manner.

Perhaps surprisingly, attorneys stand to gain the most from educating their clients in the benefits of using private ADR. This is because clients will appreciate the efforts of their lawyers when they succeed in keeping them out of court as much as possible and minimizing legal fees, as well as achieving a final resolution.

It's a known fact that few clients are ever fully satisfied with their lawyers. By offering a reliable alternative and a proven method of resolution, mediation provides a way of allowing clients to have both their day and say.

Confidentiality is the key to a successful mediation. The benefit of mediation is in the numbers: Over 90% of the mediated cases resolve; to say nothing of those that are mediated and resolved even before a case is filed. There's no support for the unfounded proposition that clients would rather assert claims for malpractice than to settle the underlying litigation and move on with their lives. Why try to change a proven method that saves time, money and provides closure to the sometimes never-ending litigation process?

Thank you for considering my thoughts.



Amy Newman
President

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ADR RESOURCE GUIDE

IN THE MID EIGHTIES, CALIFORNIA'S OVERBURDENED legal system was rescued by the emergence of Alternate Dispute Resolution (ADR). In the Los Angeles Superior Court system, a five-year wait for trial was not only possible, but in some localities was becoming the norm. With the singular exception of arbitration, the legal community had made very limited use of other ADR processes, including mediation, judicial references, special master and discovery referees.

With California leading the way, private dispute resolution began to take hold in the late 1980's, revolutionizing the system by enabling litigants to cut costs and expedite access to justice. The necessity of finding an alternative to the courts in California's larger cities provided the opportunity for development of formal dispute resolution programs. Since then, ADR has grown from a cottage industry to an integral and highly regarded component of the legal system worldwide. Pro bono mediation is commonly offered in state and federal courts to at least some litigants by trained mediators who volunteer or provide services at greatly reduced rates.

Taught today even to children, dispute resolution now extends beyond the legal community, embraced by public agencies and private entities alike as a first line of action in resolving not just conflict in corporate environments but real estate, educational, interpersonal and family issues as well. The ADR industry has become entrenched and sophisticated enough that, while it is not regulated, there now exist organizations that represent the interests of dispute resolution processes and professionals, advancing and defending those interests before relevant judicial and legislative bodies. For instance, the California Dispute Resolution Council (CDRC) promulgates standards and codes of conduct for ADR professionals and seeks to bring uniformity and consistency in best practices to the industry.

Private ADR companies have partnered with courts to reduce strain on court calendars, allowing them to focus on criminal matters and other cases requiring immediate attention. These firms provide oversight and quality controls, not available in the general marketplace, which ensure the quality and integrity of services provided by their professionals. Public and private entities frequently avail themselves of the benefits of ADR firms, enabling them to free up their most valuable capital -- their time and employees -- and get back to business.

New ADR markets are created daily through evolving business practices, case law, economic realities and even legislation. The rapid growth of technology has transformed every industry, including litigation. Electronic discovery, nascent two decades ago, has exploded onto the scene, providing ease and benefits that are also financially taxing. The complex and costly nature of e-discovery is driving the expansion of more sophisticated dispute resolution. What was formerly the terrain of Special Masters and Discovery Referees now encompasses key word mediation and discovery advisors for arbitration tribunals.

With courts and litigants facing extreme budgetary constraints and growing litigation costs, our justice system can sometimes represent anything but "justice." Perhaps surprisingly, attorneys stand to gain the most from educating their clients in the benefits of using private ADR. Few clients are ever fully satisfied with their lawyers after time-consuming, laborious and costly navigation through our judicial system, even when they "win." By offering a reliable alternative way of having their "day in court," attorneys can better meet client needs and earn greater loyalty.

When asked about one of the main problems with the economy today, Warren Buffet noted that the American people have fundamentally and abruptly changed their spending habits. Many corporate CEO's are facing the need to drastically cut costs, including legal expenses. Turning to private resolution of disputes provides them with the same, if not enhanced, access to justice, while accommodating their economic concerns and putting them back in the driver's seat.

The California court system has always been a thought leader. Due to current economic realities, our access to justice is in jeopardy and expeditious outcomes in court are almost non-existent. The courts can solve this crisis just as they did 25 years ago when they embraced the experiment of private dispute resolution. Rekindling this partnership is the answer to the challenges of the changing legal landscape, and will provide widespread access to the justice of the future. As we analyze the past, we can map out the future! ■

*By Amy Newman, President
Alternative Resolution Centers, (ARC)*

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OCT 7 2015

October 1, 2015

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Re: Relationship Between Mediation Confidentiality and Attorney Malpractice and
Other Misconduct – Study K-402.

Dear Ms. Gaal and Members of the Commission:

The Public Employment Relations Board (PERB) submits the below comments in response to Study K-402, and the Commission's legislative recommendations that may follow. In particular, PERB urges the Commission to preserve the confidentiality afforded to PERB's mediators, as a weakening of mediator confidentiality will adversely affect their ability to resolve labor disputes.

As background, PERB is a quasi-judicial agency created by the Legislature to oversee public sector collective bargaining in California. PERB administers eight collective bargaining statutes, ensures their consistent implementation and application, and adjudicates disputes between the parties. Within PERB is the State Mediation and Conciliation Service (SMCS), which provides mediation services to primarily public and some private constituents. It is noteworthy that our mediators are public employees. Among other things, SMCS conducts mediations to: (1) end strikes and other severe job actions; (2) resolve collective bargaining agreement disputes; (3) resolve grievances arising from alleged violations of collective bargaining agreements; and (4) facilitate agreement regarding the conduct of representation elections. Similarly, PERB's Regional Attorneys conduct mediations, known as Informal Conferences, to resolve unfair practice charges. Thus, PERB mediators play an important role in maintaining harmonious labor-management relations in both the public and private sectors of the state.

For a mediator and the participants to understand the central issues, the motivations, and the risks of not resolving their dispute, the parties must be assured that the mediator will not divulge their confidential disclosures. Trust and candid discussions are essential to opening constructive and creative dialogue and to enabling parties to discover ways to resolve their disputes independent of a more formal process such as arbitration or the judicial system. While confidentiality serves the important role of fostering candid dialogue between the parties and the mediator, it is also a critical element for maintaining a mediator's impartiality. Thus, impartiality and confidentiality walk hand-in-hand. Were SMCS to lose the promise of

absolute confidentiality, it risks losing its neutrality in the eyes of our constituents. The result would be failed mediations and costly and disruptive labor disputes.

PERB recognizes that mediator confidentiality may deprive a future litigant of needed evidence, but as explained in *NLRB v. Joseph Macaluso, Inc.* (9th Cir. 1980) 618 F.2d 51 (*Macaluso*), the public interest protected by the confidentiality rules—as applied to mediators—is substantial and outweighs those rare instances where a litigant may need evidence from a mediator. In *Macaluso*, the court was asked to decide whether the National Labor Relations Board (NLRB) erred in disallowing, through the revocation of a subpoena, the testimony of a Federal Mediation and Conciliation Service (FMCS) mediator as to a crucial fact occurring in his presence. The court first acknowledged that the NLRB's revocation of the mediator's subpoena conflicted with “the fundamental principle of Anglo-American law that the public is entitled to every person's evidence.” (*Id.* at p. 54, citing to *Branzburg v. Hayes* (1972) 408 U.S. 665, 688.) The court further explained that:

The public interest protected by revocation must be substantial if it is to cause us to “concede that the evidence in question has all the probative value that can be required, and yet exclude it because its admission would injure some other cause more than it would help the cause of truth, and because the avoidance of that injury is considered of more consequence than the possible harm to the cause of truth.” (*Id.* citing to 1 Wigmore, Evidence § 11, at 296 (1940).)

The court—in holding that the need for absolute confidentiality in mediation outweighed a litigant's need for evidence—relied in large part on the important role the NLRB played in maintaining labor harmony. In particular, the court stated that “federal mediation has become a substantial contributor to industrial peace in the United States.” (*Id.* at p. 55.) The court further determined that “[a]ny activity that would significantly decrease the effectiveness of this mediation service could threaten the industrial stability of the nation.” (*Id.*)

PERB is the California public sector NLRB equivalent and shares the same important mission as to our state's public entities. Likewise, SMCS mediators serve the same vital role and function as their federal counterparts. Therefore, the conclusions reached by the court in *Macaluso*, that the loss of mediation confidentiality would inevitably impair or destroy the usefulness of FMCS in future proceedings and threaten industrial stability, are equally applicable to the mediations conducted by PERB.

Professor Ellen E. Deason described the problem of removing mediator confidentiality as follows:

A mediator who testifies will inevitably be seen as acting contrary to the interests of one of the parties, which necessarily destroys her neutrality. It is true that this departure from neutrality is not personal or intentional when a mediator is compelled to testify under subpoena. Nonetheless, if a mediator

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can be converted into the opposing party's weapon in court, then her neutrality is only temporary and illusory.

(Deason, *The Quest for Uniformity in Mediation Confidentiality: Foolish Consistency or Crucial Predictability?* (2001) 85 Marquette L.Rev. 79.)

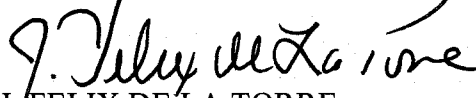
In the context of PERB's mediations, the damage to a mediator's neutrality is exacerbated because our mediators routinely work with many of the same labor attorneys and/or representatives for labor and management. It is common for these advocates to participate in multiple mediations each year on behalf of their clients. Accordingly, the perceived loss of neutrality in one labor dispute will have a ripple effect that may harm mediation efforts statewide in future cases.

Presently, PERB mediators enjoy absolute confidentiality through California Evidence Code, sections 703.5, 958, and 1119. These statutes are crucial to PERB's ability to resolve labor disputes. Accordingly, PERB urges the Commission to consider the unique and important role that our mediators play in resolving the state's labor disputes, and the damage that may ensue if mediator confidentiality is eliminated or diminished.

Sincerely,



LORETTA VAN DER POL
Chief, State Mediation and Conciliation Service
Public Employment Relations Board



J. FELIX DE LA TORRE
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