

First Supplement to Memorandum 2015-54

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

The Commission¹ recently received the following new comments on its study of the relationship between mediation confidentiality and attorney malpractice and other misconduct:

Exhibit p.

- Fern Topas Salka, Family Law Attorney Mediators Engaged in Study (“FLAMES”) (9/25/15)² 1
- Eileen Barker, San Rafael (12/1/15)³ 4
- Leon Bennett, Woodland Hills (11/25/15) 5
- Scott Buell, San Rafael (12/4/15) 8
- Court Commissioner Keith Clemens (ret.), Beverly Hills (11/28/15) 9
- Judge Isabel Cohen (ret.), Los Angeles (12/3/15) 16
- Court Commissioner Peter Doft, San Diego Superior Court (12/7/15) 20
- Frederick Glassman, Los Angeles (11/30/15) 21
- Kathleen Nelson, Pacifica (12/1/15) 23
- Joanne Ratinoff, Los Angeles (11/23/15) 25
- Warren Sacks, Sherman Oaks (12/7/15) 27
- Van Slatter, Los Angeles (12/7/15) 29
- Kirk Yake, San Diego (12/7/15) 30

All thirteen of these new comments oppose any weakening of California’s existing protections for mediation confidentiality. The commenters include one organization (Family Law Attorney Mediators Engaged in Study or “FLAMES”),⁴ a retired superior court judge who currently serves as a privately compensated

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

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

2. The letter from FLAMES is dated September 25, 2015. For unknown reasons, it did not reach the staff until December 4, 2015.

3. For an earlier comment from Eileen Barker, see Memorandum 2015-46, Exhibit p. 13.

4. See Exhibit pp. 1-3.

ADR neutral,⁵ a court commissioner,⁶ a retired court commissioner who now serves as a neutral in family law cases,⁷ the President Elect of the Los Angeles Collaborative Family Law Association (“LACFLA”),⁸ the past-President of Collaborative Practice California,⁹ the Chair of the ADR Section of the San Diego County Bar Association,¹⁰ a CPA who is certified in financial forensics and specializes in marital dissolution matters,¹¹ one previous commenter,¹² and four others with considerable legal and/or mediation experience.¹³ The staff will further discuss these comments at appropriate points in the Commission’s study. For now, we simply encourage Commissioners and other interested persons to read and consider them.

In addition to providing comments, Fern Topas Salka of FLAMES submitted her recent *Daily Journal* article on mediation confidentiality.¹⁴ Similarly, Jan Frankel Schau (a full-time neutral with ADR Services, Inc., in Los Angeles) submitted her recent *Daily Journal* article for the Commission’s consideration.¹⁵ Due to copyright considerations, the staff did not reproduce those articles in this supplemental memorandum and we will not be posting them to the Commission’s website. We have, however, shared those articles with the Commission, as well as several other recent *Daily Journal* articles (with varying viewpoints).¹⁶

5. See Exhibit pp. 16-19 (comments of Judge Isabel Cohen (ret.)).

6. See Exhibit p. 20 (comments of San Diego Superior Court Commissioner Peter Doft).

7. See Exhibit pp. 9-15 (comments of Court Commissioner Keith Clemens (ret.)).

8. See Exhibit pp. 5-7 (comments of Leon Bennett).

9. See Exhibit pp. 21-22 (comments of Frederick Glassman).

10. See Exhibit pp. 30-32 (comments of Kirk Yake).

11. See Exhibit pp. 27-28 (comments of Warren Sacks).

12. See Exhibit p. 4 (comments of Eileen Barker of Barker Mediation).

13. See Exhibit pp. 8 (comments of Scott Buell, who has “participated hundreds of times over the past 30 years in the mediation process as either a disputant representative or a mediator”); 23-24 (comments of Kathleen Nelson, a Director at Kaiser Permanente involved in its HealthCare Ombudsman/Mediator program), 25-26 (comments of Joanne Ratinoff, a solo family law practitioner for 35 years whose current practice focuses on mediation and collaborative law), 29 (comments of trial attorney Vann Slatter, admitted to the California Bar in 1976).

14. See Email from F. Salka to B. Gaal (12/4/15) (on file with Commission). The article submitted by Ms. Salka was: Fern Topas Salka, *Keep Mediation Fully Confidential*, Daily J. (Oct. 6, 2015).

15. See Email from J. Schau to B. Gaal (12/2/15) (on file with Commission). The article submitted by Ms. Schau was: Jan Frankel Schau, *In Defense of Mediation Confidentiality*, Daily J. (Nov. 6, 2015).

16. See Elizabeth Moreno & Larry Doyle, *New CLRC Rules Unfairly Criticized*, Daily J. (Sept. 23, 2015); Saul Sugarman, *State Commission May Protect Mediators from Liability*, Daily J. (Oct. 12, 2015); A. Marco Turk, *Mediation Confidentiality, Good News and Bad News*, Daily J. (Oct. 14, 2015); A. Marco Turk, *LETTER: Limiting Confidentiality in Mediation is a Slippery Slope*, Daily J. (Sept. 28, 2015); A. Marco Turk, *Plan Will Force Us to Desert Mediation*, Daily J. (Aug. 31, 2015); A. Marco Turk, *Relax, It Was Part of Mediation*, Daily J. (Aug. 17, 2015); Nancy Neal Yeend, *Another Viewpoint on Confidentiality in Mediation*, Daily J. (Oct. 5, 2015).

According to the Change.org website, the number of signatories of the online petition by Citizens Against Legalized Malpractice has grown to 125. The staff continues to have difficulty obtaining petitioner names directly from that website. Bill Chan has contacted Change.org about the matter but has not yet received a response.

Aside from the Change.org signatories, the Commission did not receive any other new input urging revisions of California's mediation confidentiality laws in time for inclusion in this supplement. If additional comments (of whatever viewpoint) arrive before the upcoming meeting, the staff will distribute them at the meeting.

Respectfully submitted,

Barbara Gaal
Chief Deputy Counsel

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September 25, 2015

Ms. Barbara Gaal
California Law Revision Commission
bgaal@clrc.ca.gov

Dear Ms. Gaal:

The decision of the California Law Revision Commission (CLRC) to draft legislation to provide an exception to mediation confidentiality in the event of a malpractice claim is taking California law in a seriously regrettable about-face of a policy that has served California and its families in transition well for over thirty years. It came as a shock to many in the mediation community who have only recently learned of the nearly two year study and public hearings on the topic. Moreover, the Los Angeles Daily Journal article dated September 22, 2015, claiming the concerns of hundreds of opponents of any such exception are "baseless" and accusing them of engaging in "a misleading campaign" that seeks to "mischaracterize the CLRCs decision" is itself misleading, *ad hominum*, and unfortunate.

Mediation confidentiality serves both the parties to mediation and the mediators themselves. This is why the case law and statutes, which the CLRC would have us overturn, have strongly and consistently supported a firewall against any breach of confidentiality for any reason unless the evidence is sought in a criminal trial.

In Rojas v. L.A. Super. Ct. (Coffin) (2004) 33 Cal.4th 407, 15 Cal.Rptr.3d 643, 93 P.3d 260, the Court stressed the importance of confidentiality assurances to the parties involved in mediation, explaining as follows:

"One of the fundamental ways the Legislature has sought to encourage mediation is by enacting several 'mediation confidentiality provisions.' (Foxgate, supra, 26 Cal.4th at p. 14.) As we have explained, 'confidentiality is essential to effective mediation' because it 'promote[s] 'a candid and informal exchange regarding events in the past This frank exchange is • achieved only if participants know that what is said in the mediation will not be used to their detriment through later court proceedings and other adjudicatory processes.' [Citations.]" (Ibid.) 'To carry out the purpose of encouraging mediation by ensuring

Fern Topas Salha

confidentiality, [our] statutory scheme . . . unqualifiedly bars disclosure of specified communications and writings associated with a mediation 'absent an express statutory exception.' (Id. at p. 15.) (*p. 416)"

The article makes light of the impact of the crack in the wall of confidentiality which the proposed CLRC direction would occasion. It implies that it is ridiculous to think unhappy divorcing persons would make spurious malpractice claims in order to open the door to depositions, subpoenas, and testimony. In so doing, it ignores the real danger that there are those who gladly would use the claim of attorney malpractice to get a second chance at continuing the battle or reaching a different settlement. This is a danger not only to the attorney but to the other party who had every right to expect that what went on in the proceeding would be confidential.

The article also refers to "alarming public comment from legal malpractice attorneys and consumers about false or misleading statements by their attorneys to induce them to settle." Many of us are certified family law specialists and mediation providers for many decades. Neither we nor the many esteemed retired family law judges and experienced family law attorneys we've spoken with have experienced a meaningful number of attorneys providing false or misleading statements to induce settlements. Mostly, the lack of perfect evidence and the uncertainty and financial and emotional cost of a litigated resolution leads to compromise, the benefit of which is highly personal. Those claiming they have been the victims of mediator malpractice are more likely to be attempting to offset fees, find a scapegoat for their personal disappointments or re-open negotiations by doing an end-run around the confidentiality which has long been recognized as crucial to the open discussions which are necessary to reach agreement. This is particularly true in the highly personal family law arena, where the settlements may take into account not only legal rights but emotional, financial, moral, or other personal needs.

It is not unreasonable to conclude that if mediators were exposed to malpractice claims, they would be discouraged from the private practice of mediation and from staffing the growing and important mediation attorney volunteer-staffed programs which operate in our massively over-burdened family law courts.

The policy of encouraging mediation has been stated clearly and consistently:

" '[i]mplementing alternatives to judicial dispute resolution has been a strong legislative policy since at least 1986.' (Foxgate Homeowners' Assn. v. Bramalea California, Inc. (2001) 26 Cal.4th 1, 14 (Foxgate).) Mediation is one of the alternatives the Legislature has sought to implement. The Legislature has expressly declared: 'In appropriate cases, mediation provides parties with a simplified and economical procedure for obtaining prompt and equitable resolution of their disputes and a greater opportunity to participate directly in

Fern Topas Salka

resolving these disputes. Mediation may also assist to reduce the backlog of cases burdening the judicial system. It is in the public interest for mediation to be encouraged and used where appropriate by the courts.' (Code Civ. Proc., §1775, subd. ©.)”

Mediation, and its limitation on any exception to confidentiality, is a voluntary process which offers clients an opportunity to engage in a different system of resolution than the traditional adversarial model. If they do not want the benefit (or burden) of confidentiality, they can hire a neutral as a voluntary settlement conference officer and provide that the proceedings shall not be deemed a mediation and thus the principles of mediation confidentiality do not apply. In mediation, clients have to accept that it may be more difficult to overturn a mediated settlement, but, that it is a cost worth bearing for the benefits of a confidential, private ordering process where they may elect to follow the law or even adjust their settlement to include emotional, moral, business, or other personal considerations.

We urge the CLRC to open up the subject to further, civilized discourse, cease demonizing those who disagree, assess whether, in fact, the actual numbers and nature of those who have expressed concern about mediation is significant and if so, to consider instead alternative, less draconian solutions, which do not expose the mediator to liability and the parties to an unwanted breach of their privacy. It is our hope that instead of the polarized campaign that has begun, we return to a cooperative problem-solving effort to address and sustain the viability of confidential mediation in California.

Fern Topas Salka,

on behalf of FLAMES(Family Law Attorney Mediators Engaged in Study)

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EMAIL FROM EILEEN BARKER (12/1/15)

Re: Mediation Confidentiality

Dear Ms. Gaal:

I am writing to express my strong opposition to any change to the Evidence Code relating to mediation confidentiality. Confidentiality is essential to the effectiveness of mediation. I am an attorney and have practice mediation for 25 years. Mediation has been a great advancement in enabling parties to resolve disputes out of the Court. Please don't tamper with this.

Sincerely,

Eileen Barker

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November 25, 2015

VIA FIRST CLASS U.S. MAIL

Barbara Gaal, Chief Deputy Counsel
California Law Revision Commission
c/o UC David School of Law
400 Mrak Hall Drive
Davis, CA 95616

Re: Study K-402

Dear Ms. Gaal:

I have been practicing Family Law as a Litigator, Mediator and most recently a Collaborator for nearly 32 years. I have served as a volunteer Judge Pro Tem to the Los Angeles Superior Court Family Law Departments and have also volunteered my time for many years to local Bar Associations, including rising to the rank of President of the San Fernando Valley Bar Association and former Trustee of the Los Angeles County Bar Association. I am currently the President Elect of LACFLA (Los Angeles Collaborative Family Law Association).

For over half of my career I have been providing Mediation services both in a formal Mediation context and in a Collaborative context. Many of our clients are persons who could not afford the costs of litigation despite the fact that their case was one in which remedies were needed that could have been litigated to a successful conclusion. However, due to financial constraints most people do not have the ability to go through the litigation process represented by counsel. This is particularly true for small business owners and couples of average means.

For those individuals who cannot afford to hire Litigators, they are frequently placed in a situation where Mediation or a Collaborative process is their only alternative to meaningful and affordable dispute resolution.

Barbara Gaal, Chief Deputy Counsel
California Law Revision Commission
Re: Study K-402
November 25, 2015
Page Two

I have provided discounted rates to Mediation and Collaborative clients for many years and have found that the other Collaborative Professionals I have worked with have also consented to lower hourly rates in order to give less economically privileged individuals access to alternate dispute resolution models.

The proposed changes to the *California Evidence Code* with respect to the Mediation Privilege would, in my humble opinion, most significantly adversely impact less economically advantaged clients.

In order to modify our practices to basically become a Litigator in a Mediator's hat, the clients will be economically disadvantaged. If every conversation and/or every meeting must be memorialized by the assistance of the presence of a Court Reporter or by subsequent confirming Declarations, Memoranda or the like, the costs of the Mediation and Collaborative process will soar.

While it is understandable that there are attorneys and other professionals in the Mediation process who may have committed malpractice, the changes to the Mediation Privilege presently suggested by K-402 would be simply economically stifling to the average person. I am certain that there are alternatives to the wholesale carving out of the Mediation Privilege for mere allegations of malpractice. Anyone can say anything in order to try to obtain an economic advantage. This is evidenced by the many lawsuits that are filed each year that are without merit. If this Commission is to consider an Amendment to the Mediation Confidentiality Privilege offered by the *Evidence Code*, then I strongly suggest that the Commission consider some form of vetting process with respect to any such claims of malpractice prior to opening up what otherwise would have been deemed privileged communications within the Mediation context. Furthermore, the current proposals as I understand it would only insulate the neutral Mediator from having to disclose all privileged communications even if a spurious claim of malpractice is lodged by a claimant. If the Mediation Privilege were to be modified as proposed, the effect would be the wholesale opening to discovery of all communications with Professionals who are involved in the Collaborative process in which the parties agreed to a "confidential" proceeding. Now they will have all of those confidences made public by a mere unmeritorious claim of malpractice.

Barbara Gaal, Chief Deputy Counsel
California Law Revision Commission
Re: Study K-402
November 25, 2015
Page Three

In conclusion, I strongly urge this Commission to reconsider its position with respect to the erosion of the Mediation Confidentiality Privilege. A mere claim of malpractice unsupported by substantial evidence should certainly not be the grounds upon which this Privilege falls.

Thank you for your consideration of this position.

Very truly yours,

A handwritten signature in black ink, appearing to read "Leon F. Bennett". The signature is written in a cursive style with a large initial "L" and a long, sweeping underline.

LEON F. BENNETT

LFB:vk

EMAIL FROM SCOTT BUELL (12/4/15)

Re: Opposition to Weakening of Mediation Confidentiality/K402

Dear Chief Deputy Counsel Gaal,

I send this to express my unequivocal opposition to any changes which would weaken mediation confidentiality laws that are currently being proposed, discussed and considered by the Law Revision Commission.

As someone who has participated hundreds of times over the past 30 years in the mediation process as either a disputant representative or a mediator, I know how essential mediation confidentiality is to a successful mediation process. Without the assurance of confidentiality, the parties at a mediation would not feel free to have the kind of candid, frank discussions about the case at issue that is almost always necessary to bring about a durable, binding and voluntary settlement agreement that the mediation process so often brings to the benefit not only of the particular disputants, but to the legal system and society overall. Despite (or more likely due to) my extensive trial and litigation experience over three decades, I have found mediation to be an effective time, money and anxiety saver for litigants. In my view, it would be a tremendous tragedy to weaken mediation confidentiality laws, which would result in less frank discussions about common ground interest-based resolutions, and would almost certainly result in a mediation process more akin to the kind of gamesmanship and “hide the ball” tactics that we so commonly experience and bemoan in litigation.

In my experienced view, the mediation process is nearly always a cheaper, faster and better alternative to resolving differences than litigation. We should strive to keep it that way. Please do not make any changes to weaken mediation confidentiality. I couldn't agree more with Judge Susan Finley, who advised the Law Revision Commission, “Mediation, as we know it, will not survive this change.”

Thank you for your consideration of my comments. If you have any questions or would like any additional information, please do not hesitate to contact me.

Sincerely,

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**EMAIL FROM COURT COMMISSIONER KEITH CLEMENS (RET.)
(11/28/15)**

Re: Study K-402

Dear Ms. Gaal:

I attach my comments on the Study K-402 proposal to create a large exception to mediation confidentiality to enable parties to sue their own lawyers for legal malpractice. It is problematic for the continued effectiveness of mediation in family law cases. And if passed in its current form, it creates serious problems for mediators as well. I have suggestions.

Thank you for your consideration of my letter.

Commissioner Keith M. Clemens (Ret.)
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November 28, 2015

Barbara Gaal, Chief Deputy Counsel
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Re: Study K-402.

Dear Ms. Gaal:

As explained in more detail below starting on page 2, I am a retired Los Angeles Superior Court commissioner who now works exclusively as a neutral in family law cases. Roughly half of what I do is as a mediator, half is as an adjudicator.

I have two main objections to the proposal to create an exception to mediation confidentiality for cases in which a client sues his or her own attorney for legal malpractice:

* The first objection, discussed in more detail below starting at the bottom of page 2, is that this will completely change the dynamics of family law mediation, and for the worse. The process becomes unsafe for attorneys who in turn will either not want to mediate at all or will be much less willing to work toward a settlement in the mediation. In short, creating this exception to mediation confidentiality will impair the usefulness and the success that mediation currently provides family law litigants in getting their cases settled.

* The other main objection, discussed in more detail below starting on page 6, is that the process becomes unsafe for mediators as well because it is not clear that mediators are immune from what amount to legal malpractice claims. Mediators are currently protected as a practical matter by mediation confidentiality from lawsuits by parties who feel aggrieved by their settlements reached in mediation. Mediators will not want to risk becoming the test case for whether they get quasi-judicial immunity in their role as mediator. Mediators will also not want to risk becoming a cross-defendant when an attorney sued for malpractice arising out of a settlement reached in mediation turns around and seeks indemnification or contribution from the mediator.

Who I am. I became a Los Angeles Superior Court Commissioner in 1991, more than 24 years ago. Except for a four-month temporary assignment to a felony criminal law courtroom in 1992, my entire career on the bench was spent presiding over a family law

Barbara Gaal, Chief Deputy Counsel
November 28, 2015
Page 2 of 6

courtroom. Since I retired from the Superior Court I have worked only as a neutral (privately compensated temporary judge, arbitrator, mediator, discovery referee, Code of Civil Procedure §§ 638 and 639 referee, and special master) for family law cases. Roughly half of what I do professionally is family law mediation. 100% of what I do professionally is family law.

I also serve as a volunteer family law Daily Settlement Officer several days a year in the Central District of the Los Angeles Superior Court, and annually at the family law Settle-O-Rama in the Northwest District of the Los Angeles Superior Court; volunteer lawyers and retired family law judicial officers spend three days trying to settle the most intractable cases in that district. The system has been good to me and I choose to pay it forward.

For several years I was an adjunct associate professor of law at Southwestern University School of Law, teaching community property. I was also an adjunct professor of law at University of West Los Angeles School of Law, teaching family law. I also write about family law and lecture frequently on family law.

I graduated in 1973 from the UCLA School of Law where I was an associate editor of the UCLA Law Review and was Order of the Coif. In the 17 years before I went on the bench I practiced securities law, business litigation, transactional law and administrative law, culminating with six years as a partner in a law firm called Center for Enforcement of Family Support (CEFS). CEFS is where enforcement of judgments law meets family law. All of this turns out to be useful experience to bring to adjudication of family law cases. (See d'Elia v. d'Elia (1997) 58 Cal.App.4th 415, 68 Cal.Rptr.2d 324, footnote 2, for a judicial description of just how broad family law can be.)

Family law mediation. Family law mediation works precisely because it is safe. By “safe” I mean that I can and do expressly assure mediation participants that whatever they say or show in mediation, except for declarations of disclosure required of divorcing parties in every divorce, can't be used against them in court if we don't get their case settled and their case ultimately goes to trial or hearing before the court.¹ I give this explanation to mediation participants partly because I want participants to understand the process they're in and partly because it helps me build trust with the participants.

I don't have statistics on how much legal malpractice is committed by lawyers representing family law litigants. I know full well that there is some—I can think of at least a few cases in 24 years where I've observed it unfolding before me, and of course a lot of malpractice wouldn't occur before me—but I do not have a sense that legal malpractice is

¹ Unlike most civil cases which culminate in a single judgment, family law cases often involve both pre-trial hearings and post-judgment hearings that produce substantive court orders.)

committed in more than a small percentage of family law cases. I'm guessing claims are made in far fewer than 1% of divorce cases handled by an attorney. I do, however, have the impression that more malpractice claims are made against family law attorneys than are in fact well taken claims. Maybe malpractice insurance carriers have good statistics about that. Whether they'll disclose their claims experience or not, I have no idea.

But it isn't hard to understand why family law litigants make such claims, whether well-taken or not. Divorce is a huge, mostly negative event in the lives of people who get divorced. Emotions run high. Anger, hurt, depression, guilt, fear and anxiety, suspicion, distrust, uncertainty, confusion— and the list goes on— come with the divorce process. (Divorce needs to be appreciated as a process, not an event.) When a divorce case is over in the sense that a judgment has been entered and a party decides that his or her life is still not all right, it's not surprising that a party will look around for someone else to blame since the spouse is no longer an available target.

Divorce lawyers learn that they need to practice defensively just in case their client decides that since the spouse is no longer available to blame, it must be the lawyer who is responsible for the fact that the client's life is still not okay. That means keeping decent records and keeping the client well informed about what is going on in the client's case and well advised when the client needs to make decisions about the client's case, including settlement decisions. Specifically that means memorializing what is going on and what the attorney and client have discussed, typically in the form of letters or emails as well as notes to a client's file. The good news is practicing defensively is totally compatible with competent, proper representation of a divorcing client.

The mediation process, however, most of the time doesn't allow such memorialization. Things are said in mediation, whether (i) in the presence of all parties and the mediator, (ii) in the presence of one party, that party's lawyer (and possibly accountant or other adviser in a small minority of cases), and the mediator, and (iii) in the presence of only the client and the client's own attorney (and possibly accountant or other advisor in a small minority of cases). Documents may be presented to a party for the first time in the mediation. Memory is a crummy way to determine what was or was not said or done.

The goal of mediation is settlement, and settlement always involves risk.

* For openers, discovery is ended, and by settling the party assumes the risk that if more discovery were conducted, the party would find new information that would lead to a better outcome for that party.

* For two, litigation is expensive and parties correctly worry about the ongoing cost of litigation. The parties have to decide whether to settle now, recognizing the settlement may be less favorable than if the litigation goes on longer, and a party may feel pressured to stop the financial bleeding of continuing the litigation by settling.

* For three, settlement often involves abandoning positions on various issues in order to reach agreement. That can include abandoning positions on issues that the client and the attorney both believe are very well taken and are likely to prevail if the case goes to trial.

* For four, I have the impression that in a high proportion of successfully mediated cases the parties will have buyer's remorse. The relief that comes from settling the case will be met with subsequent feelings of "I gave too much, I got too little, I got ripped off, this is not fair or just, my lawyer sold me down the river," and the regret goes on. In a small portion of successfully mediated cases, a party will really want to get out of the settlement to the point of pursuing a variety of actions which may not succeed in undoing the settlement. Sometimes the party indeed has made a not-very-good settlement. Sometimes the settlement is objectively a fine settlement or even a truly great settlement, meaning it's better than that party could ever get in court. That's not the issue. The issue is the party's feelings.

If current California law governing mediation confidentiality is to be changed to create a large exception for malpractice claims by a party against his or her attorney, I believe that will have a major and negative impact on mediations. I do think that opening up what transpires in mediation to discovery and disclosure in cases where a party files a legal malpractice action against his or her own attorney will have a huge negative impact on what would go on within mediations.

Lawyers have to worry not only about not actually malpracticing—as well they should—but also about the possibility that the lawyer's own client will at some point in time claim malpractice even though in fact the lawyer has not malpracticed. I predict that lawyers will become much more reluctant to counsel a client to make serious compromises in order to settle that client's divorce. (Indeed, this rule change would vindicate the cynical view of a well-known family law lawyer who seldom settles cases. His expressed view is that if he settles, the client may well come back at him, while if he tries a case competently—and he is a very competent trial attorney—he is immunized from most malpractice claims because a judge decided the terms of the judgment, not the client in a settlement.)

It is easy enough for a lawyer to create a decent record of what the lawyer has done in terms of discovery, what advice is being given by the lawyer to the client throughout the litigation process, and whatever developments arise in the course of the litigation. The problem is that it is not possible to do that within a mediation. If malpractice claims arising out of what happened, or didn't happen, within the mediation, are allowed to be pursued, I think many family law lawyers will be much more reluctant to counsel their clients to settle their cases within the mediation. I would expect to see a great rise in mediations that wind up with the lawyer saying, "Okay, I understand the proposal and so does my client, but I am not willing to allow my client to sign a settlement agreement in the mediation until I can

go off and document the proposal and my entire advice to my client about the benefits and risks of the proposed settlement.” The lawyer in short wants that CYA letter to protect himself or herself. Under current law, a CYA letter is unnecessary for what goes on in mediation.

Let me tell you about what happens when parties who agree on the terms of a settlement in a family law mediation say, “Well, it’s late, we have a settlement, we’ll write this up tomorrow, and we don’t want to stay this evening while a settlement is being written up for immediate signature.” What happens is that the settlement either doesn’t happen at all or it doesn’t happen for a long time and until after considerably more attorney fees have been incurred by the parties. It’s why I’m willing to stay all night in a mediation to turn a settlement agreement into a written settlement agreement that everyone can and does sign.

(Unlike settlements in many civil cases, family law settlements are very detailed and take a lot of time to draft, even if I am using earlier marital settlement agreements as a framework. My written marital settlement agreements range in length from three single-spaced pages to ten single-spaced pages. Relatively little within my agreements are boilerplate provisions. And the reason for such detail is to avoid the inevitable disputes when someone tries to turn a skeleton outline settlement into a full-blown judgment of dissolution of marriage. My agreements almost always include a provision that makes me the arbitrator for binding arbitration to resolve those disputes, and after having drafted many hundred written settlement agreements in mediations, the parties have sought to have me resolve drafting disputes as an arbitrator in exactly one case. An ounce of prevention . . .)

So one of my fears if the law is changed to create a big exception to mediation confidentiality is that mediation will become much less valuable to family law litigants. There’s a tradeoff here, but not one that society ought to think is a good one. For every family law litigant who has a good legal malpractice claim that is barred because of mediation confidentiality, there will be hundreds (my estimate, for reasons stated earlier) of family law litigants who will not get their cases settled as early as they can now, at considerable cost to all those litigants, and maybe not get their cases settled at all. (The latter would be bad news for courts, which depend on almost all cases getting settled before trial.)

A modest proposal. Rather than overturn mediation confidentiality, perhaps the law could require that parties be advised in writing that mediation confidentiality will mean that if the party participates in mediation, that party might not be able to pursue a legal malpractice claim against their own attorney in that case. I suspect some family law lawyers won’t like this, but my focus here is on the client. The client should know what risks he or she takes in any part of the litigation process, and that would include knowing

Barbara Gaal, Chief Deputy Counsel
November 28, 2015
Page 6 of 6

that if the client agrees to mediate his or her case, that client could not pursue a malpractice claim that relates to a mediation.

Whether a Judicial Council form to be signed by the client would be appropriate as a way of assuring that the client understands what the client gives up by agreeing to mediation I leave to others to figure out. Likewise I leave to others to decide whether this form would need to be given to the client a specified number of days before the mediation.

Mediators would be put at risk if the proposed revision to mediation confidentiality is adopted. It is not clear to me that mediators, at least those operating outside of the direct purview of the court in, say, a Daily Settlement Officer program, who I think would probably enjoy quasi-judicial immunity, enjoy any immunity from what amount to malpractice claims from parties who are unhappy with the results of a settlement reached in mediation, except for the practical immunity created by mediation confidentiality.

So if the Legislature creates an exception to mediation confidentiality for pursuit of legal malpractice claims, unless that exception expressly bars claims against mediators, mediators too will have two kinds of exposure to potential claims arising out of the mediation. One would be a lawsuit from the aggrieved party. A second is a complaint from a lawyer who has been sued by his or her own client for legal malpractice. The lawyer's complaint would seek contribution or indemnification from the mediator.

Either risk is going to be problematic for most people who serve as mediators. The potential exposure for damages can be huge, in some cases for amounts greater than anyone can actually get coverage. Some marital estates have assets worth seven, eight, nine and even ten figures. (That's millions to billions.) One doesn't get to mediate those cases every day, but one doesn't get to buy malpractice insurance that covers a giant claims that will protect one for just a day either.

While I don't think the Legislature should create an exception to mediation confidentiality for legal malpractice claims, if it does so, I urge the Legislature to expressly immunize the mediator from all such claims.

Further, if the Legislature leaves mediators potentially exposed to claims, whether from parties or their attorneys, Evidence Code § 703.5 needs to be amended to allow mediators to testify in their own defense, whether or not they remain incompetent (that's the statute's word) to testify in connection with anyone else's claims.

Thank you for your consideration of my comments.

Very truly yours,



Keith M. Clemens

December 3, 2015

Via email only

Barbara Gaal
Chief Deputy Counsel
California Law Revision Commission
bgaal@clrc.ca.gov

Re: Mediation Confidentiality

Dear Ms. Gaal:

I write to oppose the weakening of mediation confidentiality protection contained in California Evidence Code, sections 1115 through 1128, by providing an exception to confidentiality in the case of alleged attorney malpractice.

I served on the bench for 20 years, including 6 of my last 7 years in family law, in the downtown Central Branch of the Los Angeles Superior Court, where I heard complex family law trials. Since my retirement in 2000 and to the present, I have served as a privately compensated neutral in alternate dispute resolution, the vast majority of which cases are family law matters.

It is the nature of the beast that settlement of family law cases requires compromise, and that the comparative rationality of the parties, their circumstances and their motivation dictate the results of mediation, including the payment of a premium where necessary to avoid litigation. It is no secret that most parties are unhappy with settlement results, that most parties in family law matters are generally not happy, and that mediation enables the courts, staggering under their present budget shortfalls (of roughly one third of prior budgets in L.A.), to process their remaining caseloads. It is well known that family lawyers are more likely to be sued in unmeritorious malpractice actions than other lawyers because they have the unhappiest clients, many of whose lives take a nosedive on dissolution of marriage, through no fault of the lawyer.

An exception to mediation confidentiality for attorney malpractice, as my colleague from San Diego, Judge Susan Finley, warned, will end mediation as we know it.

Without the candor resulting from confidentiality, the attainment of meaningful settlements will not survive. Attorneys will hazard their opinions at their peril, for all too often the unhappy party to a settlement will suffer buyer's remorse, the occupational hazard of most parties to settlement, because they walk away with a half loaf when sometimes they could have won more in trial.

The advantages of even a bad settlement, as we all know, are to the court, to the parties who avoid wear and tear on the organism, to the budget (as trial will commonly cost the price of a college education for middle class families), and most importantly, to the emotional lives of children, which most recent studies now show are wrecked by the conflict between the parents, and not by the shared parenting plans. The implications to the emotional health of children are to their developmental milestones, including their maturation and childhood and adult coping skills.

And yet, as pointed out in *Namikas v. Miller* ((2014) 225 Cal.App.4th 1574), damage, to be subject to a proper award, must be such as follows from the fact complained of as a legal certainty. It is not enough for the plaintiff to simply claim that it was possible to obtain a better settlement or a better result at trial. The mere probability that a certain event would have happened will not furnish the foundation for malpractice damages. That is, plaintiff must show that [s]he would certainly have received more money or had to pay less in settlement or at trial. (*Id.*, at p. 1582.)

The requirement that a plaintiff must prove damages to a legal certainty is difficult to meet in any case, but especially in "settle and sue" cases, which are inherently speculative. (*Id.*)

Said Justice Perren in *Namikas* (quoting)

“[T]he amount of a compromise is often 'an educated guess of the amount that can be recovered at trial and what the opponent was willing to pay or accept. Even skillful and experienced negotiators do not know whether they received the maximum settlement or paid out the minimum acceptable. Thus the goal of a lawyer is to achieve a “reasonable” settlement, a concept that involves a wide spectrum of considerations and broad discretion. [¶.] Theoretically, any settlement could be challenged as inadequate, and the result is likely to require a trial.’” (Citing *Barnard v. Langer* (2003) 109 Cal.App.4th 1453, 1462-1463, fn. 13.)

(*Id.*, at 1583.)

In *Barnard*, the court granted a nonsuit as plaintiff had only submitted evidence of speculative harm, and could not establish that, but for his attorney's negligence, he would have received a better outcome than was represented by the negotiated settlement. (*Namikas*, *supra* at p. 1583, citing *Barnard* at p. 1463.)

In *Namikas*, plaintiff alleged that his attorney had not obtained a marital standard of living analysis, and had he done so, he (husband) would never have agree to settle spousal support at the agreed \$7000 per month. Respondent's evidence to the effect

that she would have followed her attorney's advice not to settle for less was conclusive on the issue that husband could have settled for a lesser amount of spousal support, as no evidence was proffered to the contrary.

The court said that even if an inference to the contrary could be drawn (which it could not), there was no evidence as to what the settlement amount would have been. (*Id.*)

The court said:

Lawsuits often "settle for reasons not necessarily related to [their] merits." (Citation.) If wife had agreed to less spousal support, for example, she might have demanded a larger property settlement or required that [husband] pay her attorney fees. Thus, any "actual harm from respondents' [former attorneys'] conduct is only a matter of surmise, given the myriad of variables that affect settlements....'The mere probability that a certain event would have happened, upon which a claim for damages is predicated, will not support the claim or furnish the foundation of an action for such damages. [Citations.]" (Citations omitted.)

(*Id.*)

The court stated that the spousal support variables could have afforded wife a spousal support order higher than the marital standard under the prevailing law, and husband failed to show a lower spousal support order would have resulted in a better outcome, given the costs of trial and his potential liability for wife's attorney fees. He agreed to the settlement, in part because it avoided litigation expenses, imputed \$4000/month income to a long-term spouse with health issues, and resulted in substantial tax savings, not unreasonable. (*Id.*, at p. 1587.)

Evidence was not produced that without any legal malpractice occurring, husband would have received a more favorable settlement or outcome at trial. "Nor does the record as a whole support a conclusion that causation questions remain about damages, based on any argument the settlement was excessive in light of all the variables and circumstances." (*Id.*)

Such is the nature of family law that judges have enormous discretion based upon the "myriad of variables" which they must consider in the lives of the complicated families who appear before them, and which, in the context of mediation, are equally at play. The difference is that in settlement the parties make the choices in the weighing of their myriad personal values, equities, rights, obligations, benefits and burdens,

whereas the court will otherwise do so in an equally unpredictable way, while remaining in the legally required reasonable ballpark.

In any case, there is no certainty that a judge would enter a judgment more favorable than that to which a party stipulated, nor could one so establish with the certainty required to permit an award of damages. (*Id.*)

In closing, I urge the Commission to consider the harm to children and families of eroding the confidentiality protection provided by the California Evidence Code, namely increased litigation, and predictable undermining of the emotional health and financial recovery of California families in dissolution and other family law matters.

The current state of mediation confidentiality laws serve the purpose to first do no harm.

Thank you for your consideration.

Very truly yours,

A handwritten signature in cursive script that reads "Isabel R. Cohen".

Isabel R. Cohen
Judge (Ret.)

IRC/pam

cc: Karen Rosin (kgresq@krosinlaw.com)
Ron Kelly (ronkelly@ronkelly.com)
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Floyd J. Siegal (fjs@fjsmediation.com)

EMAIL FROM COURT COMMISSIONER PETER DOFT (12/7/15)

Re: Proposed Change to Mediator Confidentiality

Dear Ms. Gaal,

As a San Diego Superior Court Commissioner, and a trained mediator, I am opposed to the proposal to weaken our mediator confidentiality laws. The proposed changes in the code should be defeated.

Peter S. Doft

San Diego Superior Court Commissioner

FREDERICK J. GLASSMAN
A Professional Law Corporation

File K-402

CONCENTRATION IN
COLLABORATIVE LAW
AND MEDIATION

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November 30, 2015

VIA ELECTRONIC AND U.S. MAIL: bgaal@circ.ca.gov

Barbara Gaal, Chief Deputy Counsel
California Law Revision Commission
c/o UC Davis School of Law
400 Mrak Hall Drive
Davis, CA 94616

Re: **Study K-402 (pending) -Mediation/Confidentiality**

Dear Ms. Gaal:

Both as a family practitioner with over 40 years experience in litigation and all aspects of consensual dispute resolution, including mediation, and as a past-President of CPCal (Collaborative Practice California), the statewide organization of collaborative practice groups, I would like to prevail upon you to consider the impact such proposed exception to the mediation/confidentiality statutes would have on collaborative practice in California.

More than eight hundred practitioners, consisting of lawyers, mental health and financial professionals, have represented thousands of disputants in family law matters throughout our state. *Family Code Section 2013* (effective January, 2007), together with Superior Court rules in six major counties (Los Angeles 5.26, San Diego 5.2.2, San Francisco 11.3 & 11.17, San Mateo 5.5, Sonoma 9.5 and Contra Costa 12.5), set forth the protocol for the collaborative process. Our lawyers are engaged through limited scope representation (California Rules of Court 5.70 & 5.71).

The cornerstone for lawyers being prohibited to represent their clients in the traditional judicial system lies within existing mediation confidentiality in the Evidence Code. We adopt the provisions (Sections 1118-1125) to our Collaborative Stipulations and Participation Agreements. The result allows negotiations for resolution to be interest-based rather than positional. Assured of informed consent and decision-making clients freely and voluntarily resolve their differences with a healthier and more satisfying attitude, knowing they are safe in the collaborative process to openly express themselves. Though primarily concentrated in family law, collaborative practice has branched into civil disputes, such as estate and trust matters.

November 30, 2015
Page 2

The effect of any proposed exceptions to the existing mediation confidentiality statutes, such as permitting conversations between lawyers and their clients to be introduced into evidence for purposes of attorney malpractice, would be analogous to a dripping faucet sitting on top of a porous sink. Regardless of any attempt to limit such conversations to specific claims of attorney malfeasance there would always be contentions as to what provisions of any conversations could be extracted for such limited purposes without invading other provisions of such conversations.

As a prerequisite before initiating an independent malpractice lawsuit, imagine a panel of designated evidentiary experts tasked with the mandate to apportion pieces of conversations from collaborative or mediation sessions. Adding fuel to an already existing fire, imagine such panel trying to siphon through entire conversations to consider in whose presence, by whom, and to whom such conversations were aimed at in order to come up with criteria to earmark relevant conversations for the proposed carve-out exception. It would be a monumental task burdened with inordinate time consumption and complications. When you weigh and balance risk versus reward, it should undoubtedly always come down on the side of maintaining entire confidentiality for the sake of successful collaborative and mediated disputes.

If such anticipated legislation based upon the pending exception to the mediation confidentiality statutes is enacted I predict a devastating fallout from our collaborative community. On the horizon will be a significant decline, if not entire, elimination of collaborative practice as a viable process option for family law and other civil disputants. Collaborative lawyers more than likely would be unwilling to risk exposure by and through exercising complete transparency via the existing protocols.

In the event you or members of the Commission have comments, questions or desire further input I would be most pleased to expand accordingly. Please refer to ancillary resources such as IACP, UCLR/A and extensive writings cited on my website.

Thank you for your consideration.

Very truly yours,



FREDERICK J. GLASSMAN
FJG:mj

December 1, 2015

Barbara Gaal
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, CA 94303-4739 Mail to: bgaal@clrc.ca.gov

Re: Review of Mediation Confidentiality Provisions by the California Law Revision Commission.

Dear Ms. Gaal:

I would like to express my opposition to any changes in the confidentiality provisions for mediations as set forth in the California Evidence Code. I believe that the adoption of evidentiary rules making mediation confidential was an important milestone in California jurisprudence. These rules were the result of extensive discussions and involved public policy tradeoffs, and I believe these rules require protection.

I have been informed that on August 7, 2015 and again on October 8, 2015 the Commission voted to draft legislation removing current protections for mediation communications, both in malpractice actions and in State Bar Court when professional misconduct is alleged against a lawyer. This gives me great concern.

The Commission's review of these provisions are for a well-intentioned purpose: making redress possible for a person whose interests were not well served by their counsel. The effect of any change to this legislation that violate the confidentiality of mediation would have a chilling effect on both the parties in mediation and their legal counsel.

If the confidentiality provisions of the Evidence Code are changed, clients represented by attorneys will participate in mediation far less frequently and mediated agreements will be more difficult to reach. Even a very competent attorney, who has nothing but the best interests of a client in mind, would then be excessively cautious about entering into mediation or working to persuade a client of the merits of a mediated agreement; the new legislation would needlessly place the attorney at substantial risk in the event of a disagreement with the client.

As mentioned above, public policy tradeoffs are considered in the current rules. The legal system does not and cannot provide perfect redress for every wrong. Nor does changing the present provisions offer perfect redress for incompetent or unethical counsel. Changing the existing confidentiality provisions would compound the existing over-burdening of the court. And, most importantly, it is a well-known fact that a mediated agreement has a much higher compliancy rate than do court orders.

Should the commission weaken the confidentiality provisions as they presently stand, it will make it even more difficult for mediators and competent, ethical attorneys to work with clients to arrive at agreements that best serve the clients' needs—agreements achieved in consideration of *all* the circumstances. On balance, more is achieved by a larger number of individuals participating in mediation than is lost by some potential number of individuals agreeing to ill-advised resolutions.

Clarity about the potential benefits, limitations, and disclaimers associated with mediation seems the path to highlight, not weaken the Confidentiality provisions of the evidentiary code. The Confidentiality provisions allow the parties to be open and transparent during negotiations without fear of later repercussions.

As a final matter, I feel that any changes to the Confidentiality provisions of the evidence code would be contrary to the goals set forth in the Model Rules of Conduct adopted by the AAA, ABA, as well as ACR, in that they would not foster diversity within the profession and would make mediation less accessible to the public. In particular, changes to the provisions would likely have a decidedly chilling effect on those offering services at reduced rates or Pro Bono services for those of modest means.

As the Commission carefully considers any potential changes to the existing evidentiary rule as currently written, I ask for your deep consideration of my concerns as noted above.

Sincerely,



Kathleen M. Nelson
262 Beachview Ave. #4 Pacifica, CA
94044. (650) 224-3292



File K-402

THE RATINOFF LAW GROUP
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SUITE EIGHT TWENTY
LOS ANGELES, CALIFORNIA 90064

November 23, 2015

Barbara Gaal, Chief Deputy Counsel
California Law Revision Commission
c/o UC Davis School of Law
400 Mrak Hall Drive
Davis, California 95616

Re: Study K-402

Dear Ms. Gaal:

I am a solo family law practitioner and have been practicing family law exclusively for nearly 35 years. While I still engage in some family law litigation, I have focused my practice more towards mediation and collaborative law in recent years given the high turnover of the family law bench in Los Angeles County, the overcrowded calendars, and based on the simple fact that couples getting divorced are far more likely to abide by their own agreements when they have made their own decisions to resolve their differences. Furthermore, mediated settlements reduce the acrimony and costs, both monetary and emotional, to the divorcing couple and their families. The availability of confidential mediation is absolutely essential to resolving family law disputes.

I oppose the proposed changes to the California Evidence Code recommended by the California Law Revision Commission (CLRC) on August 7 to the mediation confidentiality provision removing the current protections when a mediation participant alleges lawyer misconduct. I believe that if such legislation is enacted, it will have a "chilling" effect on committed, experienced and well-intentioned mediators in the family law arena.

There is no doubt that there are some cases of attorney/mediators committing legal malpractice, but the desire of the CLRC to protect these relatively few victimized consumers by the proposed legislative revision will penalize and victimize all of the many thousands of parties who mediate by removing the current assurance they have knowing that their negotiations are confidential and cannot be used against them in subsequent proceedings. I neither believe that removing this safeguard for mediating parties is good legislation nor is it necessary; most certainly, if people are discouraged from mediating, the family law courts will become even more crowded than they are now with disastrous results.



JOANNE RATINOFF

Barbara Gaal, Chief Deputy Counsel

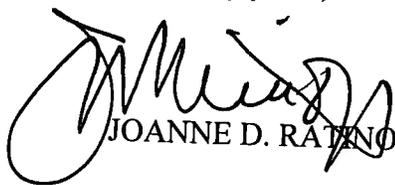
November 23, 2015

Page 2

No doubt the CLRC can fashion other means to protect consumers from legal malpractice that occurs during the course of mediation.

Your consideration of the foregoing will be most appreciated.

Very truly yours,



JOANNE D. RATINOFF

JDR:j

lt112315jdr.wpd

**White
Zuckerman
Warsavsky
Luna
Hunt LLP**

Certified Public Accountants

SENT VIA EMAIL AT bgaal@clrc.ca.gov AND US MAIL

December 7, 2015

Barbara Gaal, Chief Deputy Counsel
California Law Revision Commission
C/O UC Davis School of Law
400 Mrak Hall Drive
Davis, California 95616

Re: Study K-402

Dear Ms. Gaal:

I am a CPA and a CFF (Certified in Financial Forensics) and have been specializing my practice in the marital dissolution arena for the last 30 years. Over the first 20 years of my professional practice, I worked exclusively in providing accounting expert witness work in the litigation process. As the vast majority of my clients enjoyed high net worth, I found the litigation process to be time consuming and a very expensive cost to my clients.

In 2004 I worked on the O'Connor case (In re Marriage of O'Connor (1997) 59 Cal.App.4th 877, 69 Cal.Rptr.2d 480). In that case the professional fees exceed \$5,000,000. Each and every statement was required to be documented and supported with proof, contributing to additional fees that were already out of control. On many other cases I was involved in, material fees in excess of tens of thousands of dollars, if not hundreds of thousands of dollars, were billed to my clients in acrimonious divorce matters, in an attempt to vouch for financial transactions, support in the litigation of frivolous matters, and provide to the court analyses of unreported income.

In 2005 I began training in mediation and the collaborative process. In the collaborative and mediation processes my client's feel free to enter into transparent and honest conversations, knowing that their honesty will lead to time efficient, cost saving settlements and their statements and agreements will not be used in future court hearings. This is a trust that is inherent in the collaborative and mediation processes. Should the law change and clients are no longer protected by conditions of confidentiality in the mediation, and collaborative processes, I am very concerned that my client's may not be transparent and honest, for fear that the information they are providing will not remain confidential.

Accordingly, I urge that the proposed changes in the California Evidence Code recommended by the California Law Revision Commission (CLRC) to the mediation confidentiality provision be rejected in order to protect both the mediators, the attorneys **and all the consulting professionals** representing clients during mediation.

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EX 27

Barbara Gaal, Chief Deputy Counsel
Re: Study K-402
December 7, 2015
Page 2

Thank you for your consideration.

Sincerely,



Warren R. Sacks, CPA, CFF

EMAIL FROM VANN SLATTER, LOS ANGELES (12/7/15)

Re: Eliminating Confidentiality

Dear Ms. Gaal:

As a trial attorney I am opposed to eliminating any attorney-advocate confidentiality. It will serve to stymie the entire mediation process and make attorneys afraid that what might be said in confidence will in fact be subject to discovery in a subsequent action.

Bad law, bad policy.

Very truly yours,

Vann H. Slatter, Esq.
A Professional Law Corporation

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EMAIL FROM KIRK YAKE (12/7/15)

Comments Re: CLRC Study K-402

Dear Ms. Gaal:

I am offering the following comments for the Commission's consideration regarding Study K-402; the relationship between mediation confidentiality, attorney malpractice, and other misconduct. I have been fortunate to serve on the executive committee of Alternative Dispute Resolution Section of the San Diego County Bar Association for several years, on which I currently serve as Chair. In that position, I have had the opportunity to discuss and monitor mediator and attorney feedback since the Cassell decision with many in San Diego's mediation community. All mediators that have offered input have expressed concern that erosion of the confidentiality that California's statutory scheme currently provides would negatively impact both the use and the success of mediation practice. While I am offering these comments solely under my name at this time, I will be circulating this email to the San Diego mediator community for comment and concurrence.

With respect to the draft minutes on this study of the Commission's most recent meeting on October 8, some specific comments are respectfully offered for consideration:

Exception to Not Apply to Alleged Misconduct of Attorney-Mediators

The October 8 reconsideration, to not apply an exception for alleged misconduct by a mediator-attorney, is encouraging. With court resources continuing to be strained by the last fiscal crisis, the entry of qualified attorneys in mediation practice on all levels, including volunteering for mediation of small claims court and limited jurisdiction matters, could be reduced due to the increased liability and malpractice insurance requirements that would otherwise result by subjecting attorney mediators to a new liability. Attorneys wanting to ultimately include mediation into their practice area would consider any such risks into their decision, and a decline of new mediators would likely result. Existing mediators would have to decide how to adapt their mediation practices to manage this new risk, how to pass this cost to their mediation clients, and how to limit their potential risk of a claim. None of these new considerations would be helpful to mediation practice. We are unaware of any claims of mediator misconduct that harmed the public, other than a mediation with an unsuccessful outcome (no settlement reached). Hopefully, no further consideration of extending a confidentiality limitation to attorneys serving as mediators will be proposed or reconsidered.

Exception to Not Apply in Proceeding to Enforce Mediated Settlement Agreement

The Commission's decision that a confidentiality exception should not apply "in a proceeding relating to the enforcement of a mediated settlement agreement" is

encouraging as well. Divulging the otherwise confidential communications made in the development and creation of a mediated settlement agreement could negatively affect the party not challenging the mediated agreement (and most likely defending the enforceability of the mediated settlement). A exception to the current confidentiality would have a punitive effect upon the party other than the one challenging the agreement, making such an exception unfair and unreasonable in its application. The very potential that a party that entered into what he believed was a good-faith, negotiated settlement agreement in mediation could later lose the confidentiality under which he made the concessions leading to agreement could significantly reduce the use of mediation, especially in the many cases in which confidentiality is a key incentive to the agreement to mediate.

Study to Apply Mediation Exception to Address "Attorney Malpractice and Other Misconduct"

This exception, which would apply to disciplinary proceedings or malpractice claims against an attorney, appears to be the continuing focus of the Commission's inquiry. In our legal community, this potential exception to mediation confidentiality pits the unanimous opposition of the mediators who I have heard from against one individual attorney member of our section, who expressed a strong opinion that she had witnessed misconduct by adverse parties' attorneys in mediations. From the point of view of the mediators, many of whom have extensive mediation experience, this exception would have several significant effects on the current practice of mediation that outweigh anecdotal claims of misconduct: (1) uncertainty, (2) increased risk and liability to all participants, and (3) decrease in the effectiveness and use of mediation. I'll address these in turn.

1. Uncertainty. The proposed exception would result in uncertainty that would inhibit the free exchange of information that is usually critical to resolution. Regardless of the care of drafting, any such exception would likely be the subject of review by the higher courts. In the meantime (possibly thereafter as well), this uncertainty would stymie the use and effectiveness of mediation. In practice, the proposed exception, by its very existence, would inhibit parties from divulging confidential information, since some [unknown] part of it could be subject to disclosure in the litigation brought by the other side against his attorney. The scope, extent and effect of in camera review is also an unknown, again likely to be subject to appellate review, and likely to be as indeterminate, subject to the facts alleged and the trial court's determination. In practice, this underscores the fundamental issue presented by an exception — does the anecdotal evidence of attorney misconduct outweigh the innocent parties' interest in maintaining the confidence of their mediation communications?

2. Risk/Liability. The very possibility of disclosure of otherwise confidential information dramatically increases the perceived and actual risk of such disclosure. This will inhibit the free flow of information necessary to mediation. Likewise, the incurrence of a new liability, and all possible outcomes inherent in increased risk and liability will impede mediation, increasing the cost of mediation, and reducing effectiveness. The exception is

likely to have an adverse effect on the availability, affordability, effectiveness, and desirability of mediation as a means of dispute resolution. This may have an unintended widespread, negative impact far beyond the few anecdotal allegations of attorney misconduct in the course of mediation that have been claimed by the proponents of the exception.

3. Decrease in Effectiveness. One of the principal hallmarks of mediation practice and effectiveness is the ability of parties to freely and candidly communicate, bargain, express and evaluate options, and negotiate a settlement to their dispute. An exception to confidentiality is to markedly alter the practice of mediation in California. It is unknown how the proposed exception will reverberate in the mediation community, but all mediators agree that it will be a significant change to their practice.

Alternatives to Eroding Mediation Confidentiality. From the input I have received, overwhelmingly, no mediator would want to conduct a mediation in a manner in which a party later believes that the mediator failed to conduct mediation properly, or that the process resulted in a coerced or improper settlement agreement. Likewise, no mediator would knowingly enable an attorney to deceive his client in a mediation in order to obtain a improper settlement or otherwise engage in misconduct to injure his client in a mediation. The ethical and practical aspects of these concerns are perennially the subject of educational programs offered to our section members. Alternatives to confidentiality exceptions exist, however, which might afford an effective way to resolve the concern of a coerced or deceptive mediation settlement agreement. One of these was raised in the October 2 email sent by mediator Judge Susan P. Finlay (Ret'd), who proposed consideration of a 5-day "cooling-off" period following the mediated settlement agreement. This, combined with the opportunity for review by other [independent] counsel, might address this concern. We encourage exploration of alternatives to the proposed confidentiality exception that would serve to protect the public from the perceived threat of misconduct in mediation.

Thank you for the opportunity to provide comment. I welcome any inquiry and hope to offer constructive comment in the future regarding your ongoing study.

Sincerely,

Kirk Yake, Esq.
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