Study K-402 December 10, 2015

Second Supplement to Memorandum 2015-54

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

The Commission[1] recently received the following new comments on its study of the relationship between mediation confidentiality and attorney malpractice and other misconduct:

Comments That Oppose Any Weakening of the Existing Mediation Confidentiality Statutes

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

(1) Online Petition

- According to the Change.org website, the number of signatories of the online petition by Citizens Against Legalized Malpractice grew to about 130 as of December 9, 2015.[4]

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. SCMA submitted a comment opposing Assembly Bill 2025 (Wagner), as introduced on February 23, 2012. SCMA's comment on that bill was reproduced at Exhibit pages 30-31 of Memorandum 2013-39.

3. For earlier input from Mr. Baer, see Memorandum 2015-45, Exhibit p. 9; see also Memorandum 2015-54, pp. 2-3 & sources cited therein.

4. One Change.org webpage refers to "130 Supporters," but another webpage refers to "128 Supporters."

(2) Other Comments Submitted by Email

Exhibit p.

- Roger Stanard, Woodland Hills (12/7/15) 10
- Nancy Neal Yeend (12/7/15)[5] 11

The staff will refer to the above comments at appropriate points in future memoranda as the Commission's study progresses.

Respectfully submitted,

Barbara Gaal
Chief Deputy Counsel

5. Ms. Yeend's article is available at: http://www.plaintiffmagazine.com/Nov15/Yeend_The-Superheroes-of-Facts-Evidence-and-Logic-enter-the-fray-over-legal-malpractice-protection-in-mediation_Plaintiff-magazine.pdf.

For earlier input from Ms. Yeend, see Memorandum 2015-46, Exhibit p. 217; First Supplement to Memorandum 2015-46, Exhibit p. 57; Memorandum 2015-36, Exhibit pp. 12-14; First Supplement to Memorandum 2015-36, p. 1; Memorandum 2015-24, Exhibit p. 3; Memorandum 2015-13, Exhibit p. 49; Memorandum 2014-60, Exhibit p. 1; First Supplement to Memorandum 2014-36, Exhibit p. 1; Memorandum 2014-27, Exhibit pp. 7-8; Memorandum 2014-6, Exhibit pp. 14-15; Third Supplement to Memorandum 2013-47, Exhibit pp. 3-6; First Supplement to Memorandum 2013-39, Exhibit pp. 1-2; see also Memorandum 2014-14, Exhibit pp. 114-15 (reproducing article by Ms. Yeend and Stephen Gizzi). Ms. Yeend testified at the Commission meeting in October 2013. She also submitted a comment supporting Assembly Bill 2025 (Wagner), as introduced on February 23, 2012. Her comment on that bill was reproduced at Exhibit page 42 of Memorandum 2013-39.

December 7, 2015

Barbara S. Gaal, Esq.
Chief Deputy Counsel
California Law Revision Commission
4000 Middlefield Road, Room 0-1
Palo Alto, CA 94303

Re: Study K-402

Dear Ms. Gaal:

The Southern California Mediation Association, since 1989 the leading organization in Southern California supporting the practice of mediation, urges the California Law Revision Commission to recommend against any changes to the California Evidence Code that would further erode the protections of mediation confidentiality.

We start from the premise that the purpose of mediation is to teach parties a more constructive way of resolving conflict than traditional adversarial processes. That purpose would be defeated if mediation itself were to create opportunities for more litigation. Thus, any proposed revisions to the law that could give rise to renewed burdensome litigation in any case in which a party subsequently decides they are not satisfied with a settlement to which they agreed, would undermine the benefits of mediation.

Confidentiality is fundamental to fulfilling mediation's purpose. From its inception in 1965, California's Evidence Code has recognized the importance of confidentiality to the mediation process by strictly limiting the admissibility of evidence of settlement negotiations.

The current statutory protections for mediation confidentiality, set forth in Evidence Code Sections 1115-1128, have made it possible for the practice of mediation to thrive in this state. The California Supreme Court has repeatedly upheld these strong protections for mediation confidentiality. *See, e.g., Rojas v. Superior Court*, (2004) 33 Cal. 4th 407; *Simmons v. Ghaderi*, (2008) 44 Cal.4th 570; *Cassel v. Superior Court,* (2011) 51 Cal.4th 113. Carving out new exceptions to confidentiality would provide opportunities for parties to create new controversies, precisely the result parties seek to avoid when they choose mediation to resolve their disputes.

Our members attest to the importance of confidentiality in providing a safe environment for mediation to occur. Unless mediators are able to provide reliable assurances of confidentiality, participants are unlikely to place trust in the process. For these reasons, we are gratified to hear that the commission has re-considered its initial recommendation to allow an exception to confidentiality for alleged mediator misconduct.

As to an exception for claims involving legal malpractice, we question whether it is necessary to open the door to extensive re-litigation of what occurs behind the closed doors of a mediation proceeding in order to provide effective remedies for attorney malpractice. Despite claims of parties being pressured or deceived into settlement, which in some cases may only indicate buyer's remorse, our experience reveals only rare, isolated or unusual reports of dissatisfaction with the conduct of mediation by either attorneys or mediators. To the contrary, evidence indicates much higher rates of party satisfaction with the mediation process than with litigation in general.

To the extent problems occasionally arise in mediation, those can be addressed without threatening one of the key safeguards that makes mediation successful. SCMA supports, for example, better training for mediators and advocates. SCMA has sponsored programs at local bar associations and other venues to assist attorneys with making more effective use of the mediation process. SCMA has also been in the forefront of efforts to develop voluntary standards and practices for mediators to help insure that mediators are well-qualified. Such measures do more to improve the quality of mediation practice, and reduce the potential for abuse, than would a change to the Evidence Code allowing parties to present evidence of statements made by the participants.

Moreover, such evidence may be of only marginal value in assessing whether actionable misconduct may have occurred during a mediation session. Mediation is designed to encourage participants to freely express themselves and engage in freewheeling negotiations. Any change to the law that would permit mediation behavior to be scrutinized outside that context risks chilling the creative use of the mediation process by mediators, parties and their counsel, out of fear that their statements will be later used against them.

To the extent that courts in California have allowed judicial scrutiny of events that occurred during mediation, they have done so only in very limited circumstances and applying special procedural safeguards. The leading case is *Rinaker v. Superior Court*, (1998) 62 Cal.App. 4th 155, where minors facing delinquency proceedings were permitted to introduce evidence of exculpatory comments made during mediation by the party who was making accusations of misconduct against the two boys. Even in those compelling circumstances, the court required that an in camera proceeding be conducted to determine whether the mediator's testimony was necessary to vindicate the minors' due process right to confront and cross-examine the witnesses against them, thereby maintaining the confidentiality of the mediation process. In the event the Commission decides to recommend an exception for confidentiality in cases alleging attorney malpractice, similar protections to those mandated in *Rinaker* should be a part of the law.

In summary, SCMA strongly recommends against any proposed changes to the Evidence Code. In the event the Commission decides to recommend that evidence of mediation communications should be admissible in cases alleging attorney malpractice, SCMA urges the commission to also recommend that suitable measures be adopted to protect confidentiality.

Very truly yours,

Floyd J. Siegal, President

EMAIL FROM MARK BAER (12/5/15)

Re: Mediation Confidentiality

Dear Barbara:

"ABA urges SCOTUS to review decision that 'opens the floodgates' to disclosure of work product"

The exact same thing is true with what the State Bar of California is attempting to do with the mediation confidentiality issue.

http://www.abajournal.com/news/article/aba_urges_scotus_to_review_decision_that_opens_the_floodgates_to_disclosure/?utm_source=maestro&utm_medium=email&utm_campaign=weekly_email

Sincerely,

Mark

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EMAIL FROM RUTH DENBURG (12/8/15)

Re: Mediation Confidentiality

My vote would be to please maintain mediation confidentiality. I have been practicing family law for 34 years and have been a mediator for the last ten years. I would not participate in mediation if it was possible to become embroiled in litigation, which is one of the main reasons I am now a mediator and not a litigator.

Thank you for your consideration.

Ruth Denburg, Attorney and Mediator
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EMAIL FROM DAVID LUBOFF (12/8/15)

Re: Study K-402

Dear Ms. Gaal:

I write to you in opposition to the proposal to abolish mediation confidentiality in those situations where legal malpractice or other lawyer misconduct is alleged.

I have practiced law continuously in California for 36 years and am a certified specialist in family law (Board of Legal Specialization, State Bar of California). I practice with the firm of Jaffe and Clemens in Beverly Hills, California. Our practice is devoted almost exclusively to family law.

Mediation is one of the most important tools that we, as family lawyers, have in resolving family law disputes without litigation. I estimate that the vast majority of matters that we handle are resolved by settlement. The high success rate in settling mediated cases is due in large part to mediation confidentiality. When clients and lawyers know that nothing that is divulged in mediation can be received in evidence in a court proceeding, they can be much more candid and much more forthcoming in negotiation than they otherwise would. Likewise, mediators are encouraged to serve in that capacity because they understand that they cannot be subpoenaed to testify by parties to mediation. A mediator who finds that he or she is losing time being deposed or testifying in trial is less likely to continue serving as a mediator.

The instances in which legal malpractice occurs in mediation and results in damages to a party to mediation presumably are uncommon. The number of cases in which mediation confidentiality effectively shields a lawyer from liability for malpractice is likely quite small. On the other hand, the advantages of mediation confidentiality are present in every mediation. As a matter of policy, the high value of mediation confidentiality outweighs any potential detriment that would be sustained if a few lawyers were allowed to escape liability for their acts of malpractice.

The Supreme Court has recognized again and again the high importance and value of mediation confidentiality. Mediation confidentiality has been attacked from many angles by litigants seeking to carve out exceptions, and the Supreme Court has been steadfast in guarding it from those attacks. There has been a recognition that the allowance of exceptions will encourage further erosion, which ultimately will undermine the bulwark of mediation confidentiality and impair its usefulness as a dispute resolution tool.

I believe that the current efforts to restrict mediation confidentiality, while well-intentioned, are misguided and will cause great harm. Therefore, I express my strong

opposition to the proposal to abolish mediation confidentiality in those situations where legal malpractice or other lawyer misconduct is alleged.

David M. Luboff | JAFFE AND CLEMENS
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EMAIL FROM DVORAH MARKMAN (12/9/15)

Re: K-402

Dear Ms. Gaal,

I am saddened to write this letter due to changes proposed by the California Law Revision Commission which would, if adopted, effectively result in the end of Mediation in Family Law Matters, the area in which potential litigants are most in need of non-litigious resolution of differences.

From a strong Family Law litigation practice, I transitioned to only dispute resolution; primarily mediation, fourteen years ago. From that time to this, I am proud to feel that I have assisted many, many families to resolve differences and move on to entry of Judgment in a more economical and most important, less litigious manner. Such a process has encouraged parents to respect each other and to keep their children in mind, rather than their disputes that undoubtedly led to the filing for divorce.

If any confidentiality protection afforded by the California Evidence Code is compromised by the California Law Revision Commission's proposal, the predictable result is that mediation will not be offered by attorneys as a viable alternative to litigation for families.

It is my firm belief that unpredictable confidentiality which would result from following the Commission's proposal would serve only to damage the ability of families throughout California to seek relief through mediation.

Please DO NOT remove an essential protection to deal with what is not a widespread problem, but instead the complaint of few.

Thank you for your consideration of this letter.

Sincerely submitted,

Dvorah Markman, Attorney at Law
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markmand@familylawmediation.com

EMAIL FROM KELLY CHANG RICKERT (12/7/15)

Re: Please protect mediation confidentiality

Dear Barbara:

My name is Kelly Chang Rickert. I am a Certified Family Law Specialist. I have been a litigator for over 15 years. I have seen a lot of human destruction. What these poor souls need is NOT more litigation.

With the proposed amended changes against mediation confidentiality, the end result is clear: MORE litigation. This will completely derail the entire purpose of mediation and destroy hope of resolution. People who would otherwise consider a wiser solution would refuse to because they fear litigation.

I am strongly opposed to these changes, and I urge the Commission to hear our pleas.

Sincerely,

Kelly Chang Rickert (SBN 206809)
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EMAIL FROM ROGER STANARD (12/7/15)

Re: Mediation Confidentiality

Dear Ms. Gaal:

In response to the solicitation by ARC to gather support in opposition to efforts to change mediation confidentiality, I strongly ***endorse*** elimination of mediation confidentiality for attorneys. Mediation confidentiality produces no benefit whatsoever other than protecting bad or incompetent attorneys from claims of malpractice. The public deserves better.

Attorney-client communications are already protected in the context of a mediation except for circumstances where they attorney is accused of malpractice. Honest and competent attorneys do not need the protection of mediation confidentiality.

The mediator needs the protection of mediation confidentiality, but attorneys representing clients in mediation do not. Attorneys should be liable for their negligence just as other professionals are liable. There should not be a special rule for attorneys because attorneys are already held in low regard by the public.

Also, the parties to mediation should have the right to waive confidentiality as to their own communications (and not mediator communications) without giving the mediator a veto power as now exists under Evidence Code Section 1122. Currently each "participant" which includes the mediator must consent before mediation is waived. That law should be changed.

Cordially,

Roger L. Stanard

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EMAIL FROM NANCY NEAL YEEND (12/7/15)

Re: Comments for December CLRC Meeting

Barbara,

I am unable to attend the December meeting, as I will be flying back from Pittsburgh. I have attached a copy of my article that was just published in Plaintiff Magazine. I hope you and Commission will find it informative as well as entertaining. I have had a couple of very serious articles published on the topic, but decided to write this one as if I were reviewing a TV mini-series. Actually, I do feel that many of the letters that some have sent to the CLRC resemble fiction.

The vast amount of misinformation being generated by attorneys and mediators is astounding. It appears that they are trying to protect themselves under the guise of protecting the public and the process. There is no factual basis for the scare tactics and speculation as they ruminate ad nauseam.

Most who are writing, sending petitions and generally on a misinformation mission, have never mediated outside of California, and have no direct experience with other statutes. I have mediated cases in a number of states, which have significantly different confidentiality laws, and yet the dire predictions being widely circulated have never come to pass in those other states.

I wish the the Commission would ask for specific facts from these naysayers that would back up their specious claims. What the Commission will hear is dead silence. Hopefully, the Commission will rely on facts and data and not speculation from a few who are spending their time organizing a letter writing campaign that repeats the same unfounded information.

Nancy

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