

## Third Supplement to Memorandum 2015-54

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

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The staff distributed the Second Supplement to Memorandum 2015-54 (public comment) and the First Supplement to Memorandum 2015-55 (*in camera* screening process)<sup>1</sup> at the Commission meeting on December 10, 2015. The following materials were submitted to the Commission at the meeting:

- |  |                   |
|--|-------------------|
|  | <i>Exhibit p.</i> |
| • Robert Flack, <i>Brief Summary of Mediation Confidentiality in California: Tempest in a Teapot</i> .....                   | 1                 |
| • Fern Topas Salka, <i>Remarks to the California Law Revision Commission (Los Angeles Hearing — December 10, 2015)</i> ..... | 19                |
| • Comments of Hon. Gretchen Taylor (ret.) .....  | 22                |

Respectfully submitted,

Barbara Gaal  
Chief Deputy Counsel

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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](http://www.clrc.ca.gov)). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

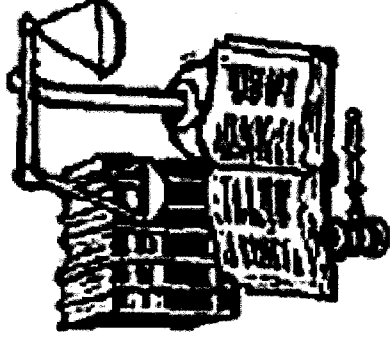
The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff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

# Brief Summary of Mediation Confidentiality in California



# Historical Precedents for Mediation Confidentiality

- Evidence Code Reaffirmed Common Law CLRC 1996 (?)
- Upheld by Numerous Supreme Court Cases
- *Casse/ Decision ALSO Upheld Confidential*
  - CONCURRING Opinion DICTA started this Review
    - CONCURRING OPINION !
    - DICTA !

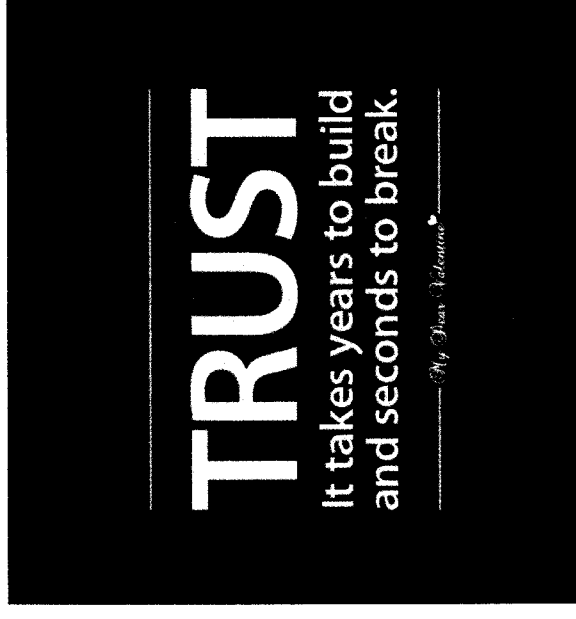


# Much Like Other Evidentiary Exclusions

## - Public Policy Purposes

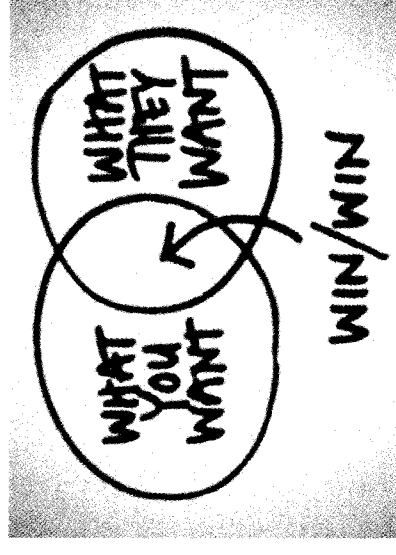
- Attorney-Client Privilege
- Spousal Immunity
- Clergy – Congregation
- Settlement Negotiations
- Mediation

EX 3



# Mediations Are Not Trials!!

- No Award or Verdict
- Typically 4-10 Hours
  - Family Law May Be Longer
- An AGREEMENT Between The Parties
- Generally Voluntary Settlements
  - Non-Compulsory
    - Economic Forces or
    - Judicial Economy/Patience



# Mediations are Special

- Most Non-Compulsory of any Dispute Resolution Process
- Issues Raised are Not Traditional Legal Issues – More Personal, Private & Emotional
- Not Necessary Logical!
- Parties Without Mediators - Also



# Confidential Settlement Agreements Are Essential

Why is confidentiality so important? Confidentiality is a critical element of successful mediation. In order for the mediator, the attorneys and the clients to understand the central issues, the motivations, the pressure points and the risks of litigation, the participants must be assured the discussions cannot and will not be disclosed to others so they can talk openly. Frequently, some of the motivating forces behind lawsuits are legally irrelevant and yet exceptionally important to understanding the conflict and facilitating resolution. Frequently, clients disclose private events, perceptions or issues in mediation they would not want disclosed to anyone. Explaining their concerns and fears is often critically important to them in order to resolve the conflict. If discussions with the mediator are not confidential and privileged, the mediation process, the mediator's role and the potential for resolution are significantly diminished.

- Hon. Judith Finlay (Ret) Letter

- Cal PERB Letter



# Confidentiality Is Essential, Effective & Widely Used In Reaching Settlement

- Bakewell v Seaside Resort Development
- Pacific Digital v Confidential

**The Kick Law Firm**  
A Professional Corporation

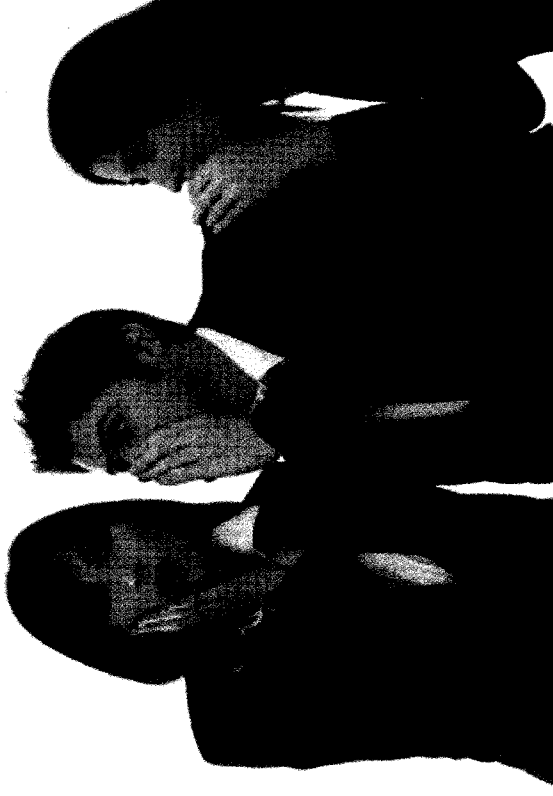
In addition to its work on behalf of consumers in class actions, The Kick Law Firm, APC has prosecuted numerous other multi-million dollar matters, including *Lampe v. General Tire*, a three month jury trial resulting in a \$55 million verdict for the plaintiff; *Bakewell v. Seaside Resort Development*, the largest real estate partnership dispute in Monterey County, CA history (resulting in a confidential settlement on behalf of plaintiff during jury selection); *Pacific Digital v. Confidential* (resulting in an \$8 million legal malpractice settlement).



# Raising the Specter of Malpractice Would Kill Mediation

- Lack of Confidentiality Results in A Chilling Effect on Open Discussions
- Spanish Example Audio
  - “Fear, Surprise, Ruthless Efficiency in Execution”
- Without Mediation:
  - Costs Increase, and
  - Court Backlog Grows

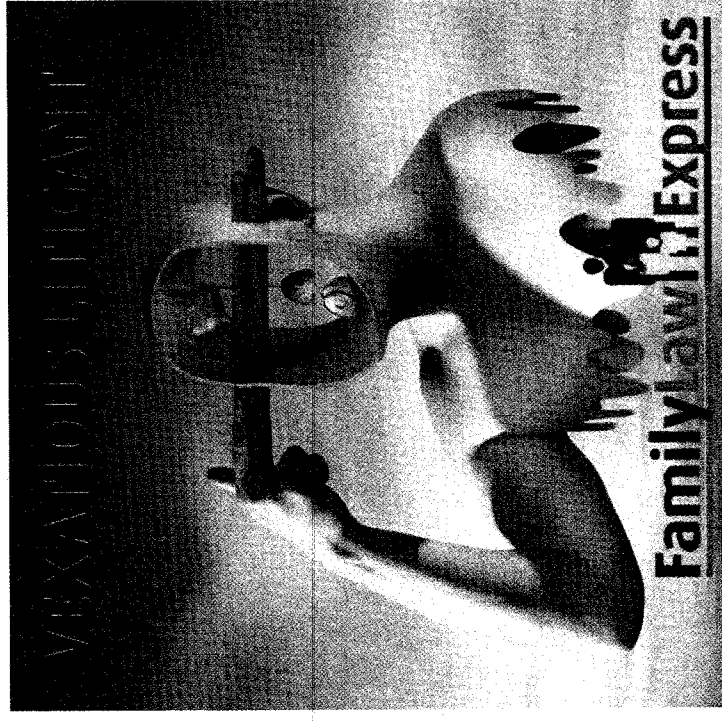
EX 8



# Vindictive Sore Losers

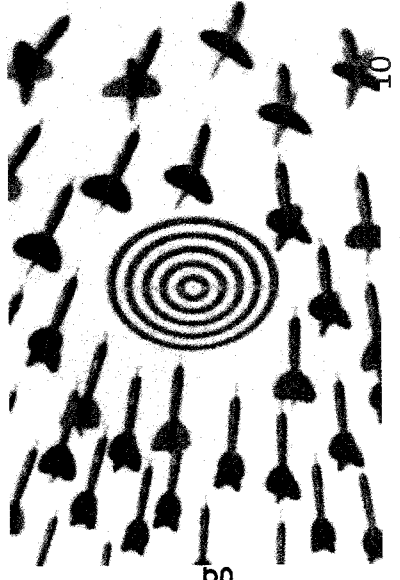
- Mediation Is a Highly Emotional Process
- Used When People Are Not Reasonable
- MIS-USE OF COMPLAINT PROCESS LIKELY
  - VINDICTIVE LITIGANTS
  - SORE LOSERS
  - DIS-ENFRANCHISED
  - Let's Say It - CRAZY

EX 9



# In Camera Issues

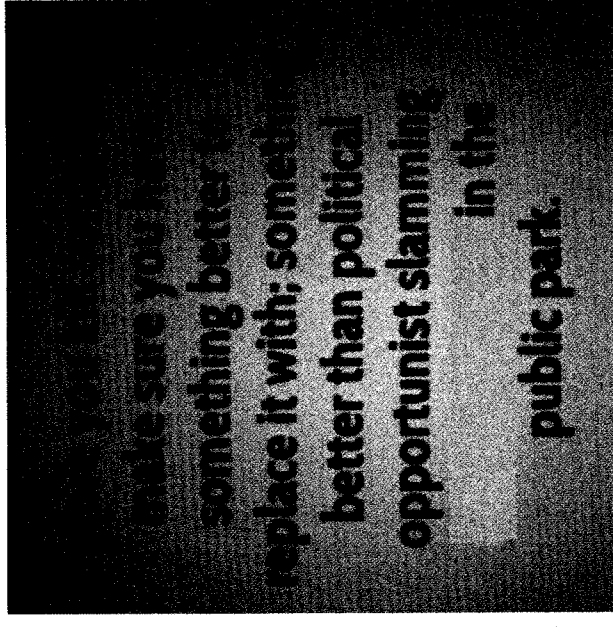
- Limited to Court Directed Mediation
- If There Were A Need, The Courts Could Have Established Local Rules – As They Did in Florida, etc.
- No Local Rules Implies No Real Need
- In Camera – Unlikely to Have The Balancing Advantage of Cross Exam
- Chilling Impact Greater Because It Would Be Easier
- Boring Law & Motion Calendar – Judges Find Mediation “The Fun Part of the Job”
- Who Is Going To Pay For It?
  - (3 hour Voluntary Mediator Called into In Camera Proceeding)



# Cassel *Dicta* - *Not A Dissent* Started this Reconsideration

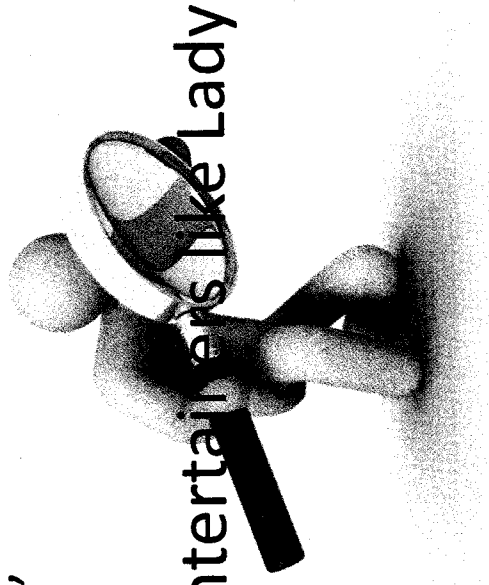
- Over Reacting to A Single Judge's Dicta
- Concurring Opinion
- Supreme Courts (of Several States) Support Maintaining Confidentiality

EX 11



# No Measureable Mediation Malfeasance

- No Reliable Method For Estimating Such Low Numbers
- Change.org “Survey” is Atrociously Biased (Sample and Q. Wording)
  - Biased Wording in Questioning
    - “allowing attorneys to legally commit malpractice against clients”
    - “held accountable for their misdeeds”
  - No Controls on Sampling
  - Likely to Attract Wackos, Malibu Entertainers Like Lady Claire and Others



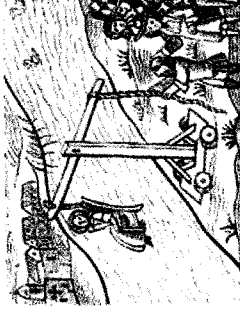
# Is There a REAL Problem?

- No! Not to Any Great Extent!
- Confidentiality Serves A Real Purpose
- Confidentiality is Essential
  - Judge Judith Finley (ret)
  - PERB
  - Many Others



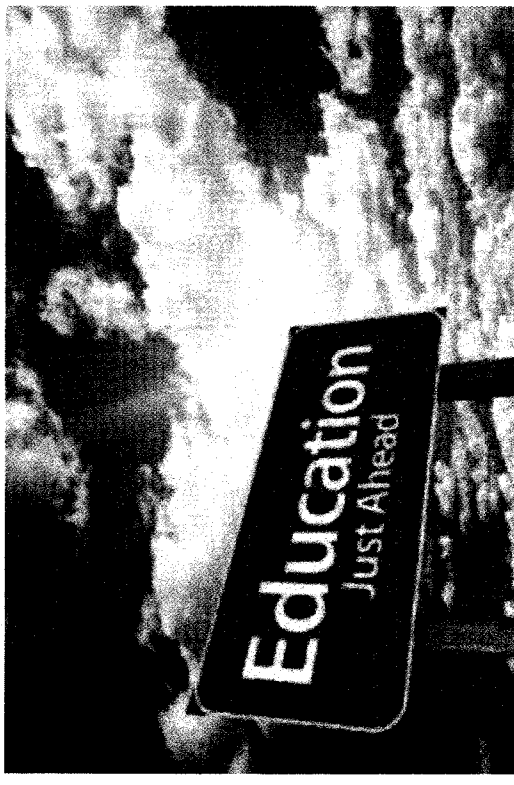
# If There is No Problem, Why Are We Here?

- Lawyers Are Easy Targets – Big Surprise
- Clients Have Expectations
  - Some Reasonable
  - Mostly Unreasonable
- Mediations Involve High Emotional Content
  - If Clients Were Objective, Matters Would Settle
  - Mediations Deal with “Hard To Settle” Matters
    - Personal – Not Legal Issues



# Addressing the Non-Problem Problem

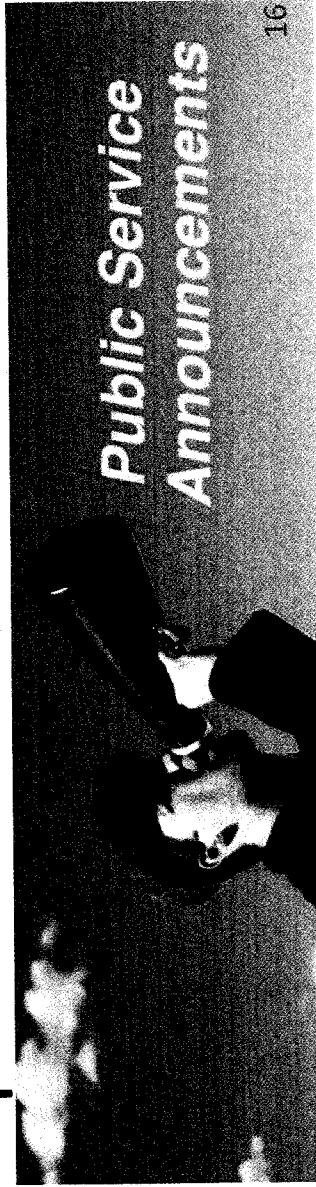
- CDRC Mediator Practice Standards
  - Widely Referenced
- CDRC Standard Mediation Agreements
  - (Not Proscriptive)
- Examples Offered by:
  - Max Factor III, Esq.
  - John Warnlof, Esq.





# PSAs & MultiMedia Campaign

- Working with the Judicial Council and Other ADR Entities, CDRC has proposed developing a Consumer/Client Targeted MultiMedia Campaign including Video on WebSites and In Courthouses
- Judicial Council Endorsement and Adoption Expected – Broad Based Steering Cmte.
- Grant Funding Expected From AAA Foundation and Others



# Mediators Think Outside the Box as a Profession

- Changing Mediation Confidentiality would encourage “Alternative Approaches”
  - Settlement Consultants Are Not Technically Mediators and are governed by other sections of the Evidence Code.
  - Clergy Confidentiality is unlikely to be attacked. It costs about \$20 to become a Pastor of the Congregation of Confidence Keepers.



# Conclusion

- No Measureable Problem
- Proposed “Cures” Worse Than the Disease
- The Proposed “Cures” Could Kill Mediation
- Killing Mediation Increases Court Costs
- In Camera Approaches:
  - Miss the Target
  - Are Just As Problematic
- If There is a Problem, Education is the Solution

Fern Topas Salka- Remarks to the California Law Revision Commission

Los Angeles Hearing- December 10, 2015

My name is Fern Topas Salka. I am a certified family law specialist who has practiced family law for 40 years. During the first thirty, I practiced in a traditional manner, trying cases, settling cases, and mediating. For the past decade, I have devoted myself exclusively to consensual dispute resolution. I am the former chair of the Los Angeles County Bar Association Family Law Section and the current co-chair of the State Bar Family Law Section Consensual Dispute Resolution Sub-Committee. I address my remarks to my field of expertise and leave it to other mediators to discuss the impact of any proposed legislative changes on other fields of mediation.

Thank you for the opportunity to bring to this meeting a sampling of the many practitioners in family law mediation who share my deep concern that the proposed exception will deprive our state's divorcing families of the very important and unique legal process which is offered by mediators. (Will those who have joined me today in opposing any exception to mediation confidentiality kindly stand up?)

Without belaboring what I hope is an obvious point, i.e. that mediation is extremely valuable to couples seeking to divorce or separate without further harming their families and that it is a blessing to our wildly overburdened family law courts, let me briefly address the threat to this process posed by the proposed resolution.

In order to grasp the potentially devastating effect of any exception to confidentiality, it is necessary to understand that mediation is very different than traditional settlement. Those who voluntarily participate in mediation are assured that it will be totally confidential no matter who

is trying to get the information and no matter what the reason. Mediation is, in other words, a safe haven where participants can risk sharing personal information and concerns without fear that their confidences will be repeated in open court. They can and do suggest mutually beneficial solutions instead of posturing for litigation. They look for options that take into account not only the law but their feelings, their personal responsibilities to each other and their business and tax concerns. It is a place where they can experiment to see what works for their particular situation. [They can choose to have spousal support buyouts that cannot be ordered by a court. They can try unique parenting arrangements. They can set up procedures for future conflict resolution and require mediation or counseling. They can control their divorce and their lives.]

Lawyers who consult with clients engaging in mediation are willing to participate (and earn considerably less than we did as traditional counsel) because we believe that we offer a very important service. We are willing to permit clients to weigh the emotional or financial cost to them or their families and elect not to spend countless dollars and time doing full discovery. Instead, they can choose to settle their cases with input they receive on declarations of disclosure signed under penalty of perjury. If we were at risk of being sued by unhappy clients (and believe me, people who are divorcing are often very unhappy, a feeling that sometimes spills over into rage at whomever is around), we would do what we used to do. We would once again write long, frequent and expensive CYA letters. We would spend lots of energy doing extensive formal discovery, require full reports and appraisals instead of streamlined input from financial professionals. We would tell clients to let us do the talking and thinking for them. "Mediation would be entirely transformed and for the worse."

While it is possible that there are some family law attorneys who give poor advice in consulting with mediation clients, it is not my general experience nor that of my colleagues. Moreover, it is very difficult to even assess what is bad advice when the factors which are being weighed include not only legal standards but personal considerations. The Commission must weigh the harm which would result from permitting an exception to mediation confidentiality against the ability of a client who has entered a voluntary process to sue his or her attorney.

I urge you to consider the impact of the steps you propose to take today and resist the temptation to chip away at the heart of mediation.

I urge you to make an exception to any change you make in the absolute confidentiality of mediation so that all Family Law matters that fall under the Family Code retain this privilege and protection.

The balance between confidentiality and accountability is already well thought out in Family law.

Simply put, family law matters mostly do not involve "one and done" determinations, and parties -- particularly those with children -- most continue long-term relationships with one another.

Unlike other civil matters, in which the parties generally do not owe one another fiduciary duties, in family law cases the parties are fiduciaries until all property has been divided. They must exchange Declarations of Disclosure which, under penalty of perjury, outlines each participants financial knowledge before they can settle a case.

The Court also has ongoing jurisdiction to address undisclosed assets through Family Code §2556. Mediation confidentiality in no way precludes a party from conducting discovery about Declarations of Disclosure or offering them into evidence in post-judgment set-aside litigation.

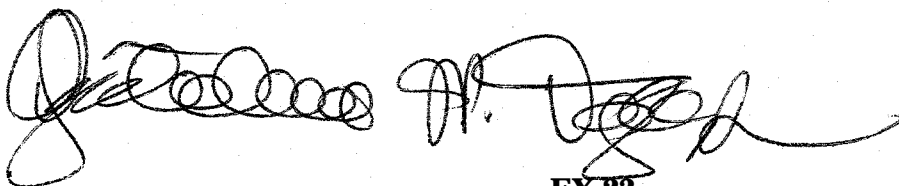
The sacrosanct nature of mediation confidentiality is vital in family law, where spouses and/or parents are often driven by emotional volatility and uncertainty. The natural human phenomena of transference has many a Family Law client blaming their lawyer for the harsh life they perceive lies ahead instead of being able to accept outcomes peacefully. Anger, grief and revenge swirl around the mediation table. Second thoughts after the settlement

is completed would allow that second bite. "It's the attorney's fault that I have so little support etc. etc. And I still owe my attorney a long-standing bill that now that the case has settled I will have to pay. How unfair!! He left me for his nurse. My lawyer is to blame for not getting all of it paid by my unfaithful spouse. " and on and on.

Many clients (e.g. those whose cases involve businesses with trade secrets or children with special medical or emotional needs, those fearful of identity theft, those from cultures in which familial privacy is highly valued, clients with mental health or addiction issues, and many others) may elect mediation over litigation precisely because of the confidentiality it offers.

Family lawyers, mediators, and most importantly clients need predictability with regard to the boundaries of mediation confidentiality. Any exceptions to the strictly confidential nature of this process will have major repercussions in the area of family law.

Mediation provides parties with a process that is centered around them and conducive to the long-term relationships that former spouses (especially those who co-parent) need to have with one another on into the future after their divorce. Unlike other kinds of civil actions, which focus on allocation of responsibility for past conduct, family law matters involve ongoing relationships between the parties and ongoing jurisdiction on issues ranging from child custody and support to long-term spousal support.

The block contains two handwritten signatures in black ink. The signature on the left is a cursive name, possibly "John Doe". The signature on the right is also cursive and appears to be "M. [unclear]".



**HON. GRETCHEN WELLMAN TAYLOR, RET.**  
**MEDIATOR, PRIVATE JUDGE, SPECIAL MASTER AND PARENT PLAN**  
**COORDINATOR**

**JUDICIAL APPOINTMENTS**

9/03 - 4/09 Commissioner/Judge - Los Angeles Superior Court - Central District.  
Family Law Trial Department  
9/97-9/03 Commissioner/Judge- Riverside Superior Court-Desert Judicial District,  
Indio  
Family Law Trial Court, Domestic Violence Calendar & Adoptions.

**PRIVATE NEUTRAL SERVICES**

4/2009 to present: Available throughout Southern California  
Mediation-Voluntary Settlement Conferences-Arbitration-Discovery Referee-  
Special Master-Parent Plan Coordinator-Trials-Expert-Consultant-Case  
Management

**RECENT SPECIALIZED EDUCATION**

11/15 2 Day Advanced Mediation Training "Dealing with Power Imbalances"  
8/15 5 Day Advanced Mediation Training, "Interpersonal Power and Control",  
Tassajara, Ca.  
5/15 AFCC Annual Conference, New Orleans, La. "Children in the Court  
System" 3 day Conference  
5/15 Garrison Institute, Garrison, N. Y. "Mindful Lawyering", 4 day  
Conference.  
3/14 ACFLS Spring Seminar, Rancho, Mirage, Ca. "The Intricacies of Fiduciary Duties"  
2/14 AFCC California Conference, San Francisco, Ca., "Back to the Future"  
5/13 AFCC Annual Conference, Los Angeles, Ca. "Riding the Wave of the Future"  
3/13 ACFLS Spring Seminar, Rancho Mirage, Ca. "Call your First Witness; Expert or  
Not"  
2/13 5 day Advanced Mediation Training, Conflict and Self-Reflection; Center for  
Understanding in Conflict, Mar de Jade, Chacala, Mexico  
3/12 31<sup>st</sup> Annual Family Law Refresher Course, Costa Mesa, Ca.  
3/12 ACFLS Spring Seminar, Rancho Mirage, Ca. "Show me the Money"  
2/12 The Three Amigos 21<sup>st</sup> Annual Definitive Family Law Update  
Continuing Judicial and Specialization Education 1997-present at least 60 hrs. per  
year

## **PUBLICATIONS**

Author and Editor "Family Law Financial Discovery" Cal CEB 2008; and updates  
Author "Dissolution Strategies: From Intake to Judgment" Cal CEB 2005;  
Co-Author "Family Law Receivers can solve Community Property Preservation and Protection Problems" Receivership News, Summer 2005  
Editorial Board Member: Journal of Child Custody- 2007 to Present  
CJER Author and Contributor "Family Law Bench Guide" "Child Custody and Visitation Bench Guide"

## **LECTURE AND FACULTY EXPERIENCE**

Faculty, Teacher and Lecturer for Judicial Education; 1999-2005,  
CJER New Judge Orientation;  
CJSP Faculty Member and Seminar Leader, Family Law & Domestic Violence issues.  
Faculty and Faculty Team Leader: 2002; 2003 Family Law Overview Course; CJER Continuing Judicial Studies Program  
Faculty "Domestic Violence Judicial Institute: Enhancing Judicial Skills in Domestic Violence Cases" AOC; 2004-2006  
Faculty, Family Law Institute-CJER, 2001, 2003  
Delegate; 2004 - AOC "Forum on Sexual Assault Issues "  
Numerous other presentations to Bar Associations and Community Organizations on Topics related to Family Law.

## **BAR ADMISSION AND SPECIALIZATION**

2/91 Certified Specialist in Family Law, California Board of Legal Specialization.  
11/79 Admitted to the California Bar.

## **EDUCATIONAL BACKGROUND**

1975 - 1979 Southwestern University School of Law, J.D. Los Angeles, Ca.  
1963 - 1966 Marymount College, Palos Verdes, Ca. B.A.  
Secondary School: Bredenbury St. Peters, Bromyard, Herefordshire, England  
Marymount High School, Barcelona, Spain

## **LEGAL EMPLOYMENT HISTORY**

3/96 - 9/97 Associate Attorney - Jaffe and Clemens, Beverly Hills, Ca.  
Practice limited to complex family law litigation.  
1/89-3/96 Attorney/Owner-Law Offices of Gretchen Wellman Taylor, West Los Angeles and Encino, Practice emphasis: Family Law  
1/82 -12/88 Partner - Sommers & Taylor, Encino, Ca.

General legal practice, Family Law, Civil, Probate, Real Estate, and Criminal.  
8/79 – 1/82 Associate Attorney – Law Offices of Hubert R. Sommers, Encino, Ca.

#### **OTHER EMPLOYMENT HISTORY**

12/66 – 6/79 County of Los Angeles, Department of Children's Services.  
Held positions from Supervisor of Dependency Court Officers & DPSS Operations & Shelter Care, to Supervising Children's Services Worker and Children's Services Worker in Exposition Park, Panorama City, East and West Los Angeles, Compton/Willowbrook, South Central Los Angeles and Bell Gardens/Maywood.  
5/66 – 12/66 Sales Associate – Bullock's Westwood – Bridal Department. (Returns)

#### **PERSONAL INTERESTS, MEMBERSHIPS and HONORARY POSITIONS**

1984/1990 Member, Board of Directors, Loyola Marymount Alumni Association  
1987/1988 President, Loyola Marymount Alumni Association  
2007–2009 Member, Alternate Dispute Resolution Committee, Los Angeles Superior Court  
2003–2009 Member, Family Law Committee, Los Angeles Superior Court  
2008 Annual State Bar Convention – Recipient of The Spirit of CEB award –for service to Family Law Education  
2000/2003 Member, Planning Committee, Violence against Women Education Project, Administrative Office of the Courts, Center for Families and Children

#### **American Inns of Court:**

Warren E. Slaughter Chapter, Coachella Valley, 2001–2003  
Southern California Business Litigation Inn of Court, Los Angeles, 2004–2006  
Family Law Inn of Court, Los Angeles, 2007–2015

#### **Memberships:**

Los Angeles County Bar Association  
Beverly Hills Bar Association  
Desert Bar Association  
California Judges Association  
Los Angeles County Judges Association  
Association of Family and Conciliation Courts  
Association of Certified Family Law Specialists  
Southern California Mediation Association

**Bi-lingual in the Spanish language**

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