

First Supplement to Memorandum 2015-55

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

As reported in the Second Supplement to Memorandum 2015-54, the Commission¹ received a letter from the Southern California Mediation Association (“SCMA”) that “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.”² “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.”³

SCMA specifically points to the approach used in *Rinaker v. Superior Court*⁴ as an example of the type of protections it has in mind:

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*], 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

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. Second Supplement to Memorandum 2015-54, Exhibit p. 1.

3. *Id.* at Exhibit p. 3.

4. 62 Cal. App. 4th 155, 74 Cal. Rptr. 2d 464 (1998).

attorney malpractice, similar protections to those mandated in *Rinaker* should be a part of the law.

Respectfully submitted,

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