

First Supplement to Memorandum 2016-8

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

The following material was received by the Commission¹ at the meeting on February 4, 2016, in connection with Study K-402 (relationship between mediation confidentiality and attorney malpractice and other misconduct), and is attached as an Exhibit:

	<i>Exhibit p.</i>
• Robert Flack, <i>Real World Perspectives of Mediation Confidentiality</i> (2/4/16)	1
• Nancy Neal Yeend, <i>Comments Presented at CLRC Meeting</i> (2/4/16)	10
• Nancy Neal Yeend, <i>The Superheroes of Facts, Evidence and Logic Enter the Fray Over Legal Malpractice Protection in Mediation</i> , Plaintiff Magazine (Nov. 2015)	11

Please note the following:

- Mr. Flack's use of the State Seal and the Commission's name on page 3 of his materials (Exhibit p. 3) should not be construed to imply that the page has any official sanction or status.
- Ms. Yeend's article (Exhibit pp. 11-12) is attached with permission from the author and the publisher.

Respectfully submitted,

Barbara Gaal
Chief Deputy Counsel

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

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

Real World Perspectives of Mediation Confidentiality

Statement of Facts

(“Undisputed”)

- No Evidence of ANY need for ANY Changes
Nothing Has Changed Since 1996 CLRC Study
- Change.Org Information Is Fatally Flawed
(embarrassingly so – Q Wording and Sampling Errors)
- Each State Has a Different Environment; Uniform
Mediation Act Does Not Necessarily Fit California
- (Florida, Nevada, Illinois, New Jersey, Ohio, Iowa, Indiana, Washington, DC.)
- Alternatives Do More Harm than Good
- In-Camera Does Not Preserve Confidentiality

Professionals Stand to Retain Mediation Confidentiality



EX 3

December 10, 2015



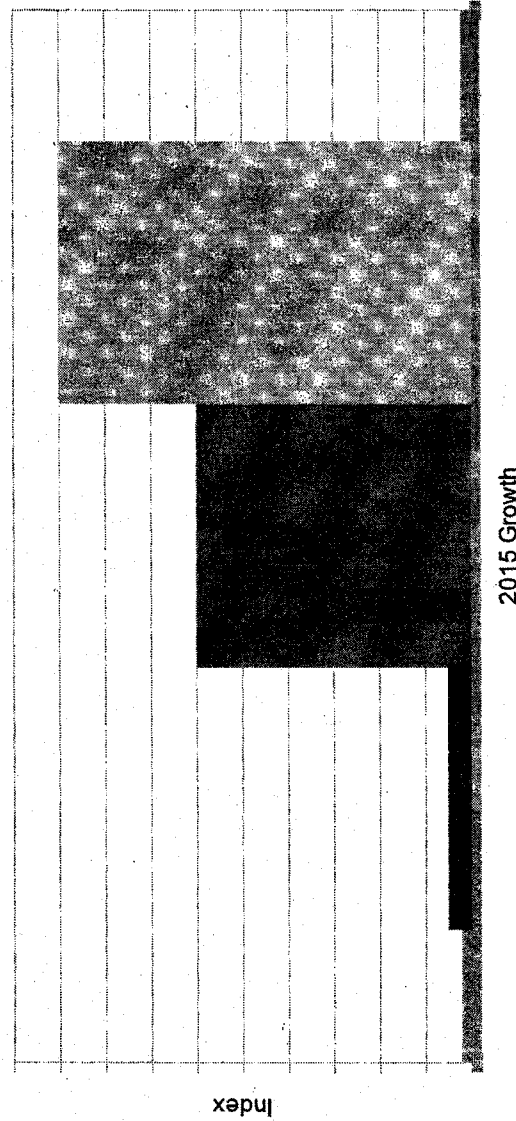
CALIFORNIA
LAW REVISION COMMISSION

Actual Comments From Actual Practitioners

- No Evidence of Misconduct – Kichaven
- Proposals Would KILL Mediation and Burden Courts
 - Judge Findlay (ret)
- Proposals Would Cripple Mediation - PERB
- Change.Org Information Is Fatally Flawed
(embarrassingly so)
 - Lady Bret Claire - PomPom
 - Bill Chan – “Economic Distress”
- Attack on Our Common Law System -Turn Us into France
Appellate Judge (Private Conversation)

Empowered Opposition to Changes in Mediation Confidentiality

Growth in Interest



- ADR Professionals
- Judges (Retired)
- Litigators
- Corporate General Counsel

CLRC Procedural Setting ?

- Public Vote to Include In-Camera Review Made:
 - Before Considering Any Analysis or Evidence
 - Before New Commissioners Were Appointed
- Specific Proposals to be Drafted & Reviewed
- Judicial Council/CJA Review
- Public Comment Period
- CLRC Recommendations to Legislature
- Legislative Review
- Governor's Veto

Judicial Council Initiative; Commission on the Future

- “We are at a pivotal moment for our financially strapped judicial system,” the Chief Justice said.
- “The commission’s charge will be to take a fresh look at legal and structural challenges to long-term efficiency and stability for the judicial branch and develop practical, achievable recommendations that may be implemented by the Judicial Council, the Legislature, or the Governor.”
- -Hon. Carol A. Corrigan

Judicial Council Initiative; Commission on the Future Goals and Potential Strategies:

- review of existing mediation systems
- providing swifter and, where possible, less contentious resolution
- providing efficient and effective early resolution tools such as online dispute resolution.
- Considering procedures that would provide litigants with simple paths to the relief they seek

ADR Community Initiatives

- CDRC Mediation Standards
- CDRC Publishing 5 Mediation Agreement Forms
- Public Service Announcements & Public Communications Programs
 - CDRC PSA's (AAA Foundation)
 - SCMA Outreach PSA's

COMMENTS PRESENTED AT CLRC MEETING

It is pointless to reiterate all the factual rebuttals of the specious arguments proffered by those attempting to shield themselves under the guise of protecting the mediation process. If the subject were not so serious, their "*Chicken Little*" predictions that the sky will fall if malpractice protections are removed would be laughable.¹

There is a simple solution, one that would significantly shorten the Commission's deliberation time—just require that all mediators and attorneys disclose, in writing and before mediation, that their misconduct and malpractice is protected.² Providing all mediation participants with a written notice could also eliminate the potential for litigation based on the fundamental principle of informed consent.³

Is the issue of informed consent limited to attorneys and mediators? One has to wonder if the issue may impact courts that maintain mediation programs. To date I have not found one court in California that provides *explicit* information in its mediation program educational materials or on their websites that specifically place the public on notice regarding the protection of attorney and mediator malpractice.⁴

How does the issue of informed consent impact the State Bar? Is failure to inform one's client that malpractice during mediation is protected a violation of attorney legal or ethical requirements?⁵ What happens when an attorney observes malpractice by another attorney during mediation? What can be done—nothing? Do the tentacles of confidentiality reach too far protecting attorney malpractice?

This entire discussion can be resolved by merely notifying all mediation participants in the Agreement to Mediate and in the Confidentiality Agreement that attorney and mediator malpractice is protected. Of course the impact of this disclosure will be huge, because for the first time, the public will become aware! I asked mediators to share with me their written disclosure statements, and no one responded.⁶ When attorneys have called me regarding mediating and I ask if they have discussed the malpractice protection with their clients, the answer is "*no*". When I indicate that I require a written statement, the conversation ends and they select a mediator who is willing to remain silent.

If the Commission wants to avoid continuing the arduous chore of developing a resource-consuming process, such as *in camera* screening, or attempting to massage existing statute, without inadvertently creating a patchwork quilt, then there is a better way: use the UMA, or ideally, follow the long-proven Florida model.

In short: either leave the statute as it is, and just require written disclosure that malpractice is protected, so people are informed and can then decide if they want to participate, or adopt a proven statute that does not continue to perpetuate fraud on the public by secretly protecting malpractice.

¹ To help the Commission see the shortcomings of the unfounded speculation, please read the attached informative and hopefully entertaining article.

² If the statute remains, it may be prudent to consider something like a Miranda warning.

³ Stephanie H. Klein, The Legal Intelligencer, Jan. 19, 2016 issue, comments on the failure to inform may be a violation of Model Standard VI.A.10, stating that "*mediators are duty bound*" and quotes the Rule: "*...make possible the party's capacity to comprehend, participate and exercise self-determination.*"

⁴ The Judicial Council "*referred*" the topic to a subcommittee.

⁵ It appears that the State Bar is in an awkward position: "*public protector*" and yet unable to address attorney malpractice.

⁶ One mediator facetiously suggested: "**Notice:** *If you go along with this mediation, and your lawyer or the mediator cheats you or screws up, there's nothing you can do about it. And forget about complaining to the State Bar. Tough.*"



NOVEMBER 2015

The Superheroes of Facts, Evidence and Logic enter the fray over legal malpractice protection in mediation

Laws that continue to protect attorney misconduct during mediation need to be changed

BY NANCY NEAL YEEND

It's been a tough battle, but superheroes Facts, Evidence and Logic are winning the fight against continuing to protect attorney misconduct and malpractice during mediation. The pilot for the series began four years ago with the California Supreme Court's decision that explicitly stated malpractice is protected by mediation confidentiality statutes. (*Cassel v. Superior Court* (2011) 51 Cal.4th 113, 138.)

The full-length series began a couple of years later in 2013, when the California Legislature referred the issue of attorney malpractice to the California Law Review Commission, CLRC, for study and recommendations. (*Mediation Confidentiality: A Malpractice Exception or Not*, Yeend and Gizzi, Plaintiff Magazine, October 2013).

The series has been entertaining attorneys and mediators ever since. Oh, you missed the first few episodes? Well, here is a synopsis:

Episode One

The argument to continue protecting attorney malpractice posits a change in the statute would cause mediation participants to be less candid, be less willing to share information or even reluctant to participate. Enter superhero Facts, and the fight was dramatic, as there is no evidence to support this claim



from any of the states that adopted the Uniform Mediation Act, UMA, or from any of the several dozen other states that have attorney and/or mediator malpractice exceptions.

Episode Two

Superhero Evidence enters and provides a sharp blow to the argument that there are not enough cases of malpractice to warrant changing the statute. The argument was based on the few cases that survived the long journey to the state Supreme Court. The broad umbrella of mediation confidentiality has made it impossible to determine exactly how many actual claims exist. One hair-raising example is noted in the California Law Review Commission's memo MM36-s1. (Deborah Porter's letter detailing *Porter v. Manhattan Beach Unified School District*.)

Episode Three

Superhero Logic smashed the ridiculous argument that since the law protecting malpractice has been in existence for 30 years, it should remain unchanged. Keeping laws unchanged only for reasons of longevity is not logical. Prudent legislators recognize that new information or changes in circumstances require revising laws. If laws were not changed, then



women would still not have the right to vote!

Fall Lineup

The fall season premiered in October at the CLRC meeting. The fourth episode featured superhero Informed Consent. The challenge: if judges order parties to participate in mediation, or if there are court-connected mediation programs, are those judges or courts responsible for notifying mediation participants that both attorney and mediator misconduct and malpractice are protected? Historically, mediation participants have not been notified about malpractice protection. How will Informed Consent grapple with this insidious problem?

You ask, "What about attorneys who represent their clients in mediation, and who have not explicitly informed their clients that attorney misconduct and malpractice is protected?" It is the hope of many viewers that Informed Consent will triumph along with the other superheroes: Facts, Evidence and Logic! In addition, it is anticipated that in this fourth episode Informed Consent will go head-to-head confronting the ethical question of mediators having an obligation to inform participants that both mediator and attorney misconduct and malpractice are protected. This episode promises to be a real nail biter.

Much excitement has been generated for this fall's series because of the "trailers" sponsored by those opposed to changing the rules: "The sky is falling –



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