

Memorandum 2016-9

**Relationship Between Mediation Confidentiality and Attorney Malpractice
and Other Misconduct: *In Camera* Screening Process**

In this study of the relationship between mediation confidentiality and attorney malpractice and other misconduct, the Commission is in the process of preparing a tentative recommendation that would “propose an exception to the mediation confidentiality statutes (Evid. Code §§ 1115-1128) to address ‘attorney malpractice and other misconduct.’”¹ The Commission has made some key decisions about the proposed new exception, but the staff still needs further guidance before drafting proposed legislation.

Among other things, the Commission tentatively decided that the exception should utilize an *in camera* screening process.² The Commission has not yet fleshed out any details of the *in camera* screening process. A staff memorandum for the December meeting presented information on *in camera* approaches used in other jurisdictions, discussed the possibility of combining such an approach with other judicial techniques (e.g., sealing orders, protective orders, and closure orders), and raised numerous questions for the Commission’s consideration.³

At the end of that memorandum, the staff pointed out that a substantial body of case law establishes that citizens have rights to observe their courts in action and obtain access to judicial records. The staff cautioned that in considering the use of an *in camera* screening approach and similar judicial techniques, the Commission “will need to understand and take into account the case law on public access to judicial records and proceedings.”⁴

1. See Minutes (Aug. 7, 2015), p. 5; Minutes (Oct. 8, 2015, p. 4).

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. See Minutes (Aug. 7, 2015).

3. See Memorandum 2015-55.

4. *Id.* at 41.

As contemplated in December, the staff has been working hard to prepare a memorandum exploring that topic. The issues are weighty and difficult. The staff is still refining its analysis and believes it would be potentially confusing and counterproductive to release anything addressing the topic at this time. We do not plan to raise the topic for discussion at tomorrow's meeting.

Respectfully submitted,

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