

Memorandum 2016-19

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

Since its February meeting, the Commission<sup>1</sup> has received the following new comments relating to its study of the relationship between mediation confidentiality and attorney malpractice and other misconduct:

- Exhibit p.*
- Carlos J. Alarcon (3/26/16) ..... 1
  - Jeff Kichaven, Los Angeles (2/11/16) ..... 2
  - David W. Long, California Judges Ass’n (3/24/16) ..... 5
  - Samuel McCargo, Detroit, Michigan (3/15/16)..... 7
  - George Stephan, Los Angeles (2/22/16) ..... 9
  - Lawrence A. Strick, Marin County Bar Ass’n (3/10/16) ..... 13
  - Supplemental comments from individuals signing the online petition by  
Citizens Against Legalized Malpractice ..... 14

This memorandum discusses those comments and some other new input.

As before, the new comments are sharply divided. Some of them urge the Commission to leave California’s existing mediation confidentiality laws intact. Other input stresses the importance of creating a mediation confidentiality exception that would make it possible to hold attorneys accountable for mediation misconduct. We discuss the two sets of input below, in the order listed.

COMMENTS URGING THE COMMISSION TO KEEP EXISTING LAW INTACT

All of the new input in this category is from sources that have not previously commented. Some of it is from organizations and some is from individuals.

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.

## Comments from Organizations

Of the new comments urging the Commission to stick with California's current approach to mediation confidentiality, two are from organizations: (1) the Marin County Bar Association and (2) the California Judges Association ("CJA").

### *Comments of Marin County Bar Association*

The comment from the Marin County Bar Association is short. The group simply urges the Commission to "recommend no weakening of mediation confidentiality protections (Evidence Code §§ 1115-1128), and to uphold current law without exceptions."<sup>2</sup>

### *Comments of CJA*

CJA's comment is longer. It was written by David Long, a retired judge who served almost 18 years on the Ventura County Superior Court and now conducts private mediations.<sup>3</sup> He serves on the Executive Board of CJA, which describes itself as follows:

The California Judges Association was established in 1929 and is the professional association representing the interests of the judiciary of the State of California. Members include judges of the Superior Courts and Courts of Appeal, Commissioners of State courts and State Bar Court judges. Judges retired from these courts are also members. CJA is governed by a democratically-elected, 25-member Executive Board. Representatives are drawn from 12 regional districts and also from the Court of Appeal, commissioners and retired bench officers.<sup>4</sup>

CJA "opposes the proposed changes as presently set forth in Study K-402."<sup>5</sup> In its view, "it is the confidentiality of the mediation process that, in large part, allows it to be successful in the settlement of cases as the comfort of candor, by counsel, disputing parties and the mediator is a major component of that process and its success."<sup>6</sup>

CJA notes that private mediation "plays a significant part in controlling the trial case load of the Superior Courts of our state."<sup>7</sup> More specifically, CJA says that private mediation "lessens the burdens of the terribly underfunded civil trial courtrooms, civil trial judges and staff by resolving cases with no economic cost to the court or the justice

---

2. Exhibit p. 13.

3. See Exhibit p. 5.

4. See <http://www.caljudges.org/aboutCJA.asp>.

5. Exhibit p. 5.

6. *Id.*

7. *Id.*

system.”<sup>8</sup> The members of CJA “believe that dynamic will substantially change for the worse if mediation confidentiality is abrogated.”<sup>9</sup>

CJA further observes that mediation is “a favored public policy” of California and federal courts.<sup>10</sup> According to CJA, it would be short-sighted to adversely affect that policy, “even in the extraordinarily rare cases of ‘legal malpractice claims’ by litigants who, most likely are suffering from post-settlement *settler’s remorse* rather than the victims of true violations of the standard of care by their counsel.”<sup>11</sup>

CJA is convinced that mediation confidentiality “is simply too valuable to the civil court system in our state as a matter of public (and effective) policy to sacrifice ....”<sup>12</sup> If the Commission nonetheless proposes to change the law, CJA says at a minimum the proposal should include the following features:

- Mediators must be statutorily deemed legally incompetent to testify in State Bar Court as well as in any civil court in legal malpractice actions against an attorney arising from a private mediation.
- Only a client alleging misconduct and the lawyer defending against the claim can be subject to subpoena to testify about mediation communications or turn over **their** documents created for mediation.
- Mediation statements made by persons other than the client alleging misconduct and the lawyer defending against the claim **must be prevented**.
- Such exceptions should apply only in cases where a client alleges misconduct by their own lawyer.<sup>13</sup>

### Comments from Individuals

Three individuals wrote in support of retaining California’s existing approach to mediation confidentiality: California mediator Carlos Alarcon, Michigan ADR supporter Samuel McCargo, and California attorney George Stephan.

#### *Comments of Carlos Alarcon*

Carlos Alarcon points out that California laws (Evid. Code §§ 1115-1128, enacted on the Commission’s recommendation) currently “offer very strong protections for all mediation participants to be candid with their mediator and with each other.”<sup>14</sup> He says

---

8. *Id.*

9. *Id.*

10. Exhibit p. 2.

11. *Id.* (emphasis in original).

12. *Id.*

13. *Id.* (boldface in original).

14. Exhibit p. 1.

that these laws have “protected hundreds of thousands of mediations since 1998.”<sup>15</sup> He makes the following request: “PLEASE DO NOT DO ANYTHING TO CHANGE MEDIATION CONFIDENTIALITY LAWS IN CALIFORNIA.”<sup>16</sup>

*Comments of Samuel McCargo*

Samuel McCargo describes himself as “an active proponent of ADR services in Michigan.”<sup>17</sup> Based on communications with California ADR colleagues, he understands that “California legislators and the California Law Revision Commission are being told that ‘exceptions’ to mediation/facilitation confidentiality are not harming mediation/facilitation in other states.”<sup>18</sup> In his experience, however, “this simply is not true.”<sup>19</sup> He has found that “if there is a single exception, it will and can be stretched to nullify the confidentiality protections of the process.”<sup>20</sup>

Consequently, he “now advise[s] parties going into ADR (particularly mediation/facilitation) that there is no ‘real’ confidentiality protection.”<sup>21</sup> He “firmly believe[s] that this trend of ‘exceptions’ has and will drive [hordes] of litigants away from the process because they have no assurance of real confidentiality.”<sup>22</sup>

*Comments of George Stephan*

George Stephan was counsel for the prevailing party in *Wimsatt v. Superior Court*,<sup>23</sup> a mediation malpractice case in which the court held mediation communications inadmissible and ultimately entered judgment in favor of the defendants.<sup>24</sup> In his personal opinion, “mediation is an essential alternative to continued litigation.”<sup>25</sup> He says there “is simply no way the existing system could handle the added caseload created by cases that do not presently settle through the mediation process.”<sup>26</sup>

Mr. Stephan also believes that “mediation is very important to the litigants themselves.”<sup>27</sup> In his experience, most litigants “need and want the benefits of mediation, including a prompt resolution of their dispute, money in their pocket for

---

15. *Id.*

16. *Id.* (capitalization in original).

17. Exhibit p. 7.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. 152 Cal. App. 4th 137, 61 Cal. Rptr. 3d 200 (2007).

24. See *id.*; see also *Kausch v. Wimsatt*, 2009 Cal. App. Unpub. LEXIS 8566. *Wimsatt* is discussed at pp. 2-6 of Memorandum 2015-4.

25. Exhibit p. 9.

26. *Id.*

27. *Id.*

many litigants, and an end to the emotional and economic burden of continued litigation.”<sup>28</sup>

Mr. Stephan further states that “mediation confidentiality is the cornerstone of successful mediation.”<sup>29</sup> In his view, mediation confidentiality not only permits “the frank and private discussion of the dispute and the numerous factors that lead people to reach a mediated settlement,” but it also “allows the mediation participants to have those discussions knowing that they will not be called upon to rehash those discussions and the numerous factors that led to resolution ....”<sup>30</sup>

To illustrate, he describes a mediation concerning liability for a car crash in which the two drivers were a 20-year-old “boy” and “an older man.”<sup>31</sup> Liability was “hotly disputed” and much was at stake, because the 20-year-old’s younger sister was a passenger in his car and was permanently paralyzed in the crash. During the mediation,

various factors [were] discussed by various mediation participants, including the rift between the 20 year old and his parents, and whether or not they blame the son for their daughter’s plight, and the rift between the parents, one of whom did not think the son was ready to have his own vehicle. The older man and his wife discussed both their lack of legal responsibility and the emotional blame they felt for the terrible injuries. Raw emotions were exposed and people cried at the mediation. With the input of insurance adjusters and the lawyers and the mediator and all the other mediation participants, the entire dispute was resolved.<sup>32</sup>

Although Mr. Stephan does not expressly say so, the staff assumes that this mediation is hypothetical. His point is that with mediation confidentiality, “the mediation participants can make a deal knowing that the settlement is actually the end of their involvement with the dispute.”<sup>33</sup> He cautions that “without mediation confidentiality, the mediation participants could be forced to reopen the wounds and expose their emotions.”<sup>34</sup> He explains that “[e]liminating mediation confidentiality could allow a mediation participant to threaten to and actually coerce, through a second lawsuit and the discovery allowed in a second lawsuit, mediation participants into a public forum in which confidential, sensitive factors are subject to disclosure.”<sup>35</sup> In particular, he states:

---

28. *Id.*

29. *Id.*

30. Exhibit pp. 9-10.

31. Exhibit p. 10.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

The parents could be forced to publicly address their feelings of blame and moral issues which affected the settlement but which would not be discoverable in the auto accident case. The son could be forced to publicly address his feelings about the rift between he and his family and the importance of trying to heal that rift by the mediated settlement. Moreover, this parade of horrors could be forced upon the other mediation participants by an insurer for one of the parties suing its lawyer for malpractice for making what they felt was a bad settlement.<sup>36</sup>

Mr. Stephan also sees “many other potential downsides to carving out exceptions to mediation confidentiality.”<sup>37</sup> He poses a series of questions to make that point.<sup>38</sup> He adds that “since all sides to the confidentiality debate seem to agree that the number of legal malpractice suits growing out of mediations-gone-bad is likely to continue to be very small, there is no overwhelming reason to ruin a confidential mediation system that does so much good for so many litigants and mediation participants and the public.”<sup>39</sup>

Finally, Mr. Stephan states that “there are less intrusive ways to address the relatively small number of situations where a litigant wishes to challenge a mediation outcome.”<sup>40</sup> He suggests that “MCLE could include required hours on mediation process and the duties of lawyers to their clients considering mediation.”<sup>41</sup> In particular, he raises the possibility of enacting a rule that would “require lawyers to get the informed written consent of their client(s) to mediation, which consent would mandatorily include the consequence that the client effectively cannot sue the client’s lawyer for a bad settlement outcome.”<sup>42</sup>

#### COMMENTS REQUESTING REVISIONS OF EXISTING LAW TO IMPROVE ATTORNEY ACCOUNTABILITY

In addition to the comments described above, the Commission received some new input from sources with the opposite point of view — i.e., California’s existing mediation confidentiality laws are too strict and should be loosened to improve attorney accountability for mediation misconduct.

---

36. *Id.*

37. *Id.*

38. See Exhibit pp. 10-11.

39. Exhibit p. 11.

40. *Id.*

41. *Id.*

42. *Id.*

## Comments from Organizations

As previously reported, there is an online petition by “Citizens Against Legalized Malpractice,” which is on the Change.org website.<sup>43</sup> The petition is directed to the Commission and its Chief Deputy Counsel. It states:

As a member of the public, I do not support allowing attorneys to legally commit malpractice against clients. Attorneys need to be held accountable for their misdeeds just like everyone else whether in mediation or any other context. No other state allows this and I do not believe California should allow it either.

I would not make use of mediation if it allows my attorney to use the state statutes to commit acts against me more severe than what led to the mediation. That is the conclusion from Justice Chin’s comment that an attorney can get away with anything unless they can be criminally charged. The *Hadley v. Cochran* case sure suggests that I have surrendered all my rights if the attorney can legally fabricate an agreement that could be very damaging to me without my knowing about it.

I do not believe it was the CLRC or the California Legislatures intent to create this windfall for attorneys when it updated the mediation statutes in 1997. I urge you to correct the mistake. The attorneys who have written to support keeping the statutes the same which also keeps malpractice legal, do not represent my point of view only their own.<sup>44</sup>

Since the Commission’s February meeting, the number of individuals signing this online petition (the group calling itself “Citizens Against Legalized Malpractice”) has grown to over 360.<sup>45</sup> The staff does not have a list of the names and locations of the new signatories. If we receive that information before the upcoming meeting, we will include it in a supplement.

Through an email message from Change.org, we obtained a few new supplemental comments that individuals submitted in connection with the online petition.<sup>46</sup> These supplemental comments stress the importance of attorney accountability and achieving justice. They do not specifically mention mediations.<sup>47</sup>

---

43. For prior discussions of this petition, see Memorandum 2015-46, Exhibit pp. 210-13; First Supplement to Memorandum 2015-46, Exhibit pp. 42-43; Second Supplement to Memorandum 2015-46, Exhibit pp. 15-17; Memorandum 2015-54, Exhibit pp. 50-56; First Supplement to Memorandum 2015-54, p. 3; Second Supplement to Memorandum 2015-54, p. 1.

44. See <https://www.change.org/p/the-california-law-revision-commission-change-the-statutes-that-legalize-malpractice>.

45. On the date of this memorandum (April 7, 2016), one webpage says there are 363 supporters (see <https://www.change.org/p/the-california-law-revision-commission-change-the-statutes-that-legalize-malpractice>). Another webpage says there are 369 supporters (see [https://www.change.org/organizations/citizens\\_against\\_legalized\\_malpractice\\_2](https://www.change.org/organizations/citizens_against_legalized_malpractice_2)).

46. See Exhibit p. 14.

47. See *id.*

## Comments From Individuals

Two individuals who previously commented in this study have provided new input in support of revising the mediation confidentiality statutes.

### *Comments of Patrick Evans*

Attorney Patrick Evans represents some clients who say they were victims of mediator misconduct. He testified to the Commission about this matter twice in 2015, provided written comments, and submitted extensive documentation from his clients' pending mediator misconduct case.<sup>48</sup> Two of his clients testified to the Commission in August 2015 and one of them (Bonnie Harris) provided written comments as well.<sup>49</sup>

Mr. Evans recently sent the staff a copy of his clients' opening brief in their pending appeal from an adverse judgment in the mediator misconduct case.<sup>50</sup> He reports that his clients "want to bring to the attention of the legislature what they believe was egregious mistreatment in 'mediation,' facilitated and made possible, they believe, by mis-use of the Mediation Evidence Code sections and cases like *Cassel*."<sup>51</sup>

Unless the Commission otherwise instructs, the staff does not plan to reproduce this brief and post it to the Commission's website. Like the other litigation materials from Mr. Evans, the appellate brief is bulky and it entails a level of detail that does not seem necessary for present purposes. Perhaps more importantly, the Commission must be careful not to interfere with pending litigation or become entangled in other legal complications (e.g., allegations of republishing defamatory material or breaching mediation confidentiality protections).

We thank Mr. Evans for keeping the Commission informed about the progress of his clients' case. Once there is a final judgment, the danger of interfering with pending litigation will disappear.

### *Comments of Jeff Kichaven*

The other new comment in this category is from mediator Jeff Kichaven.<sup>52</sup> He has testified at several Commission meetings and provided some earlier written input.<sup>53</sup> His

---

48. Mr. Evans testified at the Commission meetings in June and August of 2015. For a description of the written materials he submitted, see Memorandum 2015-46, pp. 6-7. Some of those materials are reproduced in that memorandum at Exhibit pp. 229-33, with some identifying information redacted. See also Memorandum 2015-36, pp. 1-2.

49. The comments from Ms. Harris are reproduced in Memorandum 2015-46 at Exhibit pp. 234-35, with some identifying information redacted.

50. See email from Patrick Evans to Barbara Gaal (3/10/16).

51. See *id.*

52. Exhibit pp. 2-4.

most recent letter focuses on a concept advocated by Ron Kelly: the idea that if a mediation confidentiality exception is created for a legal malpractice case based on mediation misconduct (a proposal that Mr. Kelly opposes), that exception should only apply “to the testimony of the plaintiff/ client and the defendant/ attorney.”<sup>54</sup>

Mr. Kichaven says “that idea, if implemented, would frustrate Due Process, lead to unfair trials, and ought not to be adopted.”<sup>55</sup>

He explains by referring to the “paradigm situation in which a plaintiff/client charges the defendant/attorney with having given negligent advice regarding a [mediated] settlement.”<sup>56</sup> He notes that the client is likely to be able to establish a prima facie case through the client’s own testimony.<sup>57</sup>

In contrast, the attorney probably will “defend by testifying that he gave his advice based on new information learned in the mediation, either from the mediator or from the other side.”<sup>58</sup> As an example, Mr. Kichaven says “the defendant/attorney might testify, ‘I gave my client new advice because the mediator told me new facts (or opinions) X, Y, and Z, and opposing counsel told me new facts P, Q, and R, in private conversations I had with them.’”<sup>59</sup>

When the attorney so testifies, the court will either admit or exclude the testimony. In Mr. Kichaven’s view, “[b]oth outcomes are bad, unless the mediator and opposing counsel can testify as well.”<sup>60</sup>

He explains that if the attorney’s testimony is excluded and the mediator and opposing counsel are similarly precluded from testifying, then the attorney “simply has no way to prove that the advice he gave his client was reasonable in the context and situation.”<sup>61</sup> As a result, Mr. Kichaven says, “[t]he playing field will be unfairly tilted toward the client/plaintiff.”<sup>62</sup>

Mr. Kichaven further states that if the attorney’s testimony is admitted, and the testimony of the mediator and opposing counsel are excluded, “the situation is even worse.”<sup>63</sup> Mr. Kichaven observes that in that circumstance, the attorney is effectively

---

53. Mr. Kichaven testified at the Commission meetings in August 2013, August 2015, December 2015, and February 2016. For written input from Mr. Kichaven, see First Supplement to Memorandum 2015-46, Exhibit pp. 44-48; see also Memorandum 2014-14, Exhibit pp. 96-98.

54. Exhibit p. 2; see Memorandum 2016-8, Exhibit p. 8 (comments of Ron Kelly).

55. Exhibit p. 2.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. Exhibit p. 3.

62. *Id.*

63. *Id.*

“given license to say whatever he needs to say to defend the claim — whether true or not — without fear of contradiction by the mediator or opposing counsel to whom the defendant/attorney is attributing statements key to the defense.”<sup>64</sup> According to Mr. Kichaven, “[t]his unfairly tilts the playing field toward the defendant/attorney.”<sup>65</sup>

Mr. Kichaven therefore concludes that the “only fair resolution of the issue is to allow the testimony of everyone with relevant knowledge — the plaintiff/client, the defendant/attorney, and the mediator and opposing counsel.”<sup>66</sup> He acknowledges that this might “create some burden on mediators and opposing parties, none of whom has a dog in the fight of the malpractice lawsuit, and all of whom may have some privacy interests involved.”<sup>67</sup> But he believes those interests are “outweighed by the Due Process needs of the parties to the malpractice lawsuit.”<sup>68</sup>

Mr. Stephan, whose comments are discussed earlier in this memorandum, agrees with that perspective. He writes:

I agree with Jeff Kichaven that it is a bad idea to limit the supposed exception to mediation confidentiality in legal malpractice cases to the testimony of the plaintiff/client and the defendant/attorney. It would frustrate due process and impede the search for the whole truth, as testimony of the full context and entire situation will be excluded in the malpractice case.<sup>69</sup>

Respectfully submitted,

Barbara Gaal  
Chief Deputy Counsel

---

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. Exhibit p. 11.

**EMAIL FROM CARLOS J. ALARCON (3/26/16)**

**Re: Mediation Confidentiality Laws in California**

Chief Deputy Counsel Barbara Gaal,

Our current state laws offer very strong protections for all mediation participants to be candid with their mediator and with each other. The California Law Revision Commission sponsored these laws, CA Evidence Code 1115-1128.

They've protected hundreds of thousands of mediations since 1998.

PLEASE DO NOT DO ANYTHING TO CHANGE MEDIATION  
CONFIDENTIALITY LAWS IN CALIFORNIA

Thank you for your kind attention in this matter.

Carlos J. Alarcon

Principal, Mediator and Negotiator

The Alarcon Group, LLC

(O) (707) 553-2607

(M) (707) 319-2113

[cjalarcon@thealarcongroup.com](mailto:cjalarcon@thealarcongroup.com)

<http://www.thealarcongroup.com/>



February 11, 2016



Barbara S. Gaal, Esq.  
California Law Revision Commission  
4000 Middlefield Road, Suite D2  
Palo Alto, CA 94303



In Re: Mediation Confidentiality

Dear Ms. Gaal:

Thank you once again for the opportunity to share my views with the Commission. I appreciate the carefulness and respect which the Commission continues to show.

Today, I am writing to follow up on one idea expressed at last Thursday's meeting. That idea involves limiting testimony in legal malpractice cases to the testimony of the plaintiff/client and the defendant/attorney. In my view, that idea, if implemented, would frustrate Due Process, lead to unfair trials, and ought not to be adopted.

The paradigm situation is one in which a plaintiff/client charges the defendant/attorney with having given negligent advice regarding a settlement. The plaintiff/client can likely make a Prima Facie case using her own testimony. The question then becomes, how can the defendant/attorney defend, consistent with Due Process?

The defendant/attorney is likely to defend by testifying that he gave his advice based on new information learned in the mediation, either from the mediator or from the other side. Sometimes, the defendant/attorney will have learned that information in a private caucusing conversation with the mediator or opposing counsel (or both), in which his client did not participate. For example, the defendant/attorney might testify, "I gave my client new advice because the mediator told me new facts (or opinions) X, Y and Z, and opposing counsel told me new facts P, Q and R, in private conversations I had with them."

When the defendant/attorney so testifies, the testimony will either be excluded (as hearsay), or admitted. Both outcomes are bad, unless the mediator and opposing counsel can testify as well.



Barbara S. Gaal, Esq.

February 11, 2016

Page 2

If the defendant/attorney's testimony is **excluded**, and the testimony of the mediator and opposing counsel are excluded as well, the defendant/attorney is not able to defend the case. The defendant/attorney simply has no way to prove that the advice he gave his client was reasonable in the context and situation. No testimony of the context and situation will be admitted. The playing field will be unfairly tilted toward the client/plaintiff.

If the defendant/attorney's testimony is **admitted**, and the testimony of the mediator and opposing counsel are excluded, the situation is even worse. The defendant/attorney is thereby given license to say whatever he needs to say to defend the claim – whether true or not – without fear of contradiction by the mediator or opposing counsel to whom the defendant/attorney is attributing statements key to the defense. This unfairly tilts the playing field toward the defendant/attorney.

The only fair resolution of the issue is to allow the testimony of everyone with relevant knowledge – the plaintiff/client, the defendant/attorney, and the mediator and opposing counsel.

Does this create some burden on mediators and opposing parties, none of whom has a dog in the fight of the malpractice lawsuit, and all of whom may have some privacy interests involved? Yes. Are those interests outweighed by the Due Process needs of the parties to the malpractice lawsuit? Again, yes.

First, nobody likes being subpoenaed as a third-party witness in somebody else's lawsuit. But Due Process generally recognizes Compulsory Process, the right to secure evidence in one's favor through the issuance of subpoenas to third-party witnesses. That's the general rule applicable to all civil (and criminal) lawsuits. Witnesses in these legal malpractice lawsuits should be subject to, not exempt from, this general rule.

Moreover, since all sides to the confidentiality debate seem to agree that the number of legal malpractice suits growing out of mediations-gone-bad is likely to continue to be very small, the burdens on the mediators and opposing counsels of the world are likely to be minimal. But the Due Process impact on those legal malpractice lawsuits which do arise will be profound. It's really not possible to try those lawsuits fairly unless the testimony of all involved is admissible.



Barbara S. Gaal, Esq.



February 11, 2016

Page 3


Therefore, the Commission's recommendations should provide that, in legal malpractice suits arising out of mediations-gone-bad, the parties may subpoena third-party witnesses to testify, including mediators, opposing counsel, and other mediation participants.

Thank you again for your kind consideration of my ideas. I am happy to provide any further information or elaboration which the Commission might desire.

Sincerely,

Jeff Kichaven

JK:abm



# CALIFORNIA JUDGES ASSOCIATION

*The Voice of the Judiciary*

2520 VENTURE OAKS WAY  
SUITE 150  
SACRAMENTO CA 95833  
PHONE: 916-239-4068  
TOLL FREE: 1-866-432-1CJA  
FAX: 916-924-7323  
WEB: WWW.CALJUDGES.ORG

March 24, 2016

MAR 28 2016

Barbara Gaal, Chief Deputy Counsel  
California Law Revision Commission  
4000 Middlefield Road, Room D-2  
Palo Alto, CA 94303

## EXECUTIVE BOARD

HON. ERIC C. TAYLOR  
*PRESIDENT*

HON. C. TODD BOTTKE  
*VICE PRESIDENT*

HON. GARY L. PADEN  
*VICE PRESIDENT*

HON. MARY ANN MURPHY  
*SECRETARY / TREASURER*

HON. JOAN P. WEBER  
*IMMEDIATE PAST PRESIDENT*

HON. DONALD J. AYOOB

HON. PAUL L. BEEMAN

HON. VICTOR E. BIANCHINI

HON. MICHAEL D. CARTER

HON. STANLEY L. ELLER

HON. GEORGE C. ESKIN

HON. MICHAEL S. GROCH

HON. TERESA GUERRERO-DALEY

HON. SHEILA F. HANSON

HON. SCOTT P. HARMAN

HON. DENNIS J. LANDIN

HON. DAVID W. LONG

HON. SUSAN M. MATCHAM

HON. LOUIS MAURO

HON. KIRK H. NAKAMURA

HON. GILBERT G. OCHOA

HON. YVETTE M. PALAZUELOS

HON. ALAN G. PERKINS

HON. IOANA PETROU

HON. STUART M. RICE

HON. STEPHANIE SONTAG

STANLEY S. BISSEY  
*EXECUTIVE DIRECTOR & CEO*

Re: Study K-402 – Mediation Confidentiality

Dear Ms. Gaal:

I have been authorized to write to you by the Executive Board of the California Judges Association. I am a retired judge member of that board and am in the 2<sup>nd</sup> year of a three year term. In an earlier lifetime, before retirement in May 2011, I spent just shy of 18 years on the Ventura County Superior Court, 10 ½ of those years as Supervising Civil Judge where my primary daily diet was 4 to 6 Mandatory Settlement Conferences (*mediations on steroids!*) per day. Before retirement I presided over or conducted more than 9,500 of such settlement of which an estimated 85% to 90% were successfully settled.

Since retiring I have engaged in a private ADR practice in my own firm, not affiliated with any of the “corporate” ADR providers and have conducted over 250 private mediations.

The California Judges Association opposes the proposed changes as presently set forth in Study K-402. It is our belief that it is the confidentiality of the mediation process that, in large part, allows it to be successful in the settlement of cases as the comfort of candor, by counsel, disputing parties and the mediator is a major component of that process and its success.

Private mediation also plays a significant part in controlling the trial case load of the Superior Courts of our state. It lessens the burdens of the terribly underfunded civil trial courtrooms, civil trial judges and staff by resolving cases with no economic cost to the court or the justice system. Unfortunately, we see no short or medium term likelihood of significant increases in funding for the civil trial departments of our courts whose cases loads are significantly relieved by the private settlement of cases where *unfettered private civil mediation* is available. We believe that dynamic will substantially change for the worse if mediation confidentiality is abrogated.

Mediation is a favored public policy of the California Courts and the same is true in the federal courts. To adversely impact that favored public policy, even in the extraordinarily rare cases of “legal malpractice claims” by litigants who, most likely are suffering from post-settlement *settler’s remorse* rather than the victims of true violations of the standard of care by their counsel, would be short sighted and should be (we would argue **must be**) avoided.

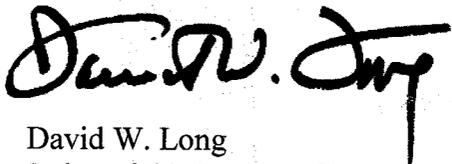
At the very least, if the statutory confidentiality of the private mediation process is going to be invaded, certain exceptions to that invasion must be preserved. To wit:

- Mediators must be statutorily deemed legally incompetent to testify in State Bar Court as well as in any civil court in legal malpractice actions against an attorney arising from a private mediation.
- Only a client alleging misconduct and the lawyer defending against the claim can be subject to subpoena to testify about mediation communications or turn over **their** documents created for mediation.
- Mediation statements made by persons other than the client alleging misconduct and the lawyer defending against the claim **must be prevented**.
- Such exceptions should apply only in cases where a client alleges misconduct by their own lawyer.

I reiterate, however, that it is the California Judges Association position that there exist no valid reasons, including the very rare claim of malpractice by an attorney during the mediation process, to justify an abrogation of the existing statutory confidentiality of the mediation process. It is simply too valuable to the civil court system in our state as a matter of public (and effective) policy to sacrifice that confidentiality.

Thank you for considering our views.

Yours very truly,



David W. Long  
Judge of the Superior Court (Ret.)  
Member CJA Executive Board

**EMAIL FROM SAMUEL MCCARGO (3/15/16)**

**Re: Comments on ADR “Exceptions” — Study K-402 — Mediation Confidentiality  
[c/o Chief Deputy Counsel Barbara Sandra Gaal]**

Dear Commissioners,

I am a long-time ADR supporter; and an active proponent of ADR services in Michigan. Over the past few months, I have exchanged comments, thoughts and observations about California ADR with my ADR colleagues and friends of like mind in California. As a result, it is my understanding that California legislators and the California Law Revision Commission are being told that “exceptions” to mediation/facilitation confidentiality are not harming mediation/facilitation in other states. Based on my experiences, this simply is not true. I hope my observations and comments below will provide a thought provoking and persuasive alternative perspective.

This topic is quite a “hot button”. Effectively, these “little” exceptions to the confidentiality protections have all but eroded it from the process. Every idiosyncratic needle plunged into the heart of the confidentiality protection of the process undermines its efficacy.

When these well-meaning exceptions are imposed on the ADR process, Judges and others are left with a variety of “interpretation” options to evade and avoid the confidentiality assurance. And, they do so whenever their personal bent leads them down that path. They have used the “criminal acts” exceptions to bastardize the ADR confidentiality protection by relying upon actual, perceived or potential “criminality” to pull down the cloak of confidentiality.

So, I would ask — as to this proposed exception, what is “lawyer misconduct”? Is “actual” — “perceived” — “potential” misconduct required? Who (when & how) will make these determinations? My experience has taught me that the devil is in the details, and the details are left to the whim of those who have the authority to “interpret and apply” the exceptions. In my experience, if there is a single exception, it will and can be stretched to nullify the confidentiality protections of the process.

I now advise parties going into ADR (particularly mediation/facilitation) that there is no “real” confidentiality protection. I firmly believe that this trend of “exceptions” has and will drive hoards of litigants away from the process because they have no assurance of real confidentiality.

This issue requires a fundamental determination of where our legal system stands on ADR — it’s like the basic criminal principle that it is better that 12 guilty citizens go free than one innocent citizen be convicted. Will we — should we — protect confidentiality so that we cause 12 resolvable disputes to enter into a viable ADR settlement process

rather than adopting a series of “exceptions” that encourage only 1 out of every potential 12 to enter ADR?

SEM

**SAMUEL E. MCCARGO**

Lewis & Munday, P.C.

2300 Buhl Bldg.

535 Griswold Street

Detroit, MI 48226

Phone: (313) 961-4167 (Direct)

Phone: (313) 961-2550 (Main)

Fax: (313) 961-1270

February 22, 2016

FEB 22 2016

Barbara S. Gaal, Esq.  
California Law Revision Commission  
4000 Middlefield Rd., Ste. D2  
Palo Alto, CA 94303

Re: Mediation Confidentiality

Dear Ms. Gaal:

I understand that you are receiving comments concerning mediation confidentiality and the possibility of changing the well-established law to eliminate mediation confidentiality. I write to express my personal views (and my views may or may not be shared by my law firm). While I was the attorney of record for the prevailing party defendants in the *Wimsatt v. Superior Court* matter, these are my personal views (and my views may or may not be shared by my clients in that matter).

First and foremost, mediation is an essential alternative to continued litigation. Without mediation, and the massive number of cases that are resolved through mediation, the current judicial system (at least in the Southern California counties of LA, Orange, Riverside, and San Bernardino in which most of my cases were filed) would grind to a stop. There is simply no way the existing system could handle the added caseload created by cases that do not presently settle through the mediation process.

Second, mediation is very important to the litigants themselves. Most litigants need and want the benefits of mediation, including a prompt resolution of their dispute, money in their pocket for many litigants, and an end to the emotional and economic burden of continued litigation.

Thus, the public generally and the litigants themselves need and benefit from the mediated resolution of disputes.

Third, mediation confidentiality is the cornerstone of successful mediation. Not only does mediation confidentiality allow the frank and private discussion of the dispute and the numerous factors that lead people to reach a mediated settlement, it allows the

mediation participants to have those discussions knowing that they will not be called upon to rehash those discussions and the numerous factors that led to resolution, which in many cases involves the loss or injury to loved ones, blame for failed business deals and failed personal relationships, and the like. Importantly, the mediation participants can make a deal knowing that the settlement is actually the end of their involvement with the dispute. Eliminating mediation confidentiality could allow a mediation participant to threaten to and actually coerce, through a second lawsuit and the discovery allowed in a second lawsuit, mediation participants into a public forum in which confidential, sensitive factors are subject to disclosure. This will adversely impact not only the neutral mediator, but also the litigants and non-litigants, such as family and organization members who come to mediations to support the litigants.

One example. A 20 year old boy is driving his new car with his younger sister to the store to get groceries for the family. On the way, there is a terrible accident with another vehicle driven by an older man accompanied by his spouse; and the 20 year olds' younger sister is permanently paralyzed. Liability is hotly disputed, with the older gentleman (who was also injured) alleging the 20 year old was driving badly and caused the accident. The 20 year old says he was being as careful as possible and that the older gentleman caused the accident. The parents of the 20 year old are non-litigants but come to the mediation to support their son and the guardian ad litem for their injured daughter. During the mediation, various factors are discussed by various mediation participants, including the rift between the 20 year old and his parents, and whether or not they blame the son for their daughter's plight, and the rift between the parents, one of whom did not think the son was ready to have his own vehicle. The older man and his wife discussed both their lack of legal responsibility and the emotional blame they felt for the terrible injuries. Raw emotions were exposed and people cried at the mediation. With the input of insurance adjusters and the lawyers and the mediator and all the other mediation participants, the entire dispute was resolved. Without mediation confidentiality, the mediation participants could be forced to reopen the wounds and expose their emotions. The parents could be forced to publicly address their feelings of blame and moral issues which affected the settlement but which would not be discoverable in the auto accident case. The son could be forced to publicly address his feelings about the rift between he and his family and the importance of trying to heal that rift by the mediated settlement. Moreover, this parade of horrors could be forced upon the other mediation participants by an insurer for one of the parties suing its lawyer for malpractice for making what they felt was a bad settlement.

The foregoing does not address the many other potential downsides to carving out exceptions to mediation confidentiality. For example, if there is not confidentiality, will lawyers or mediation participants be remiss in failing to record or have a court reporter at

the mediation, lest there be a dispute about what was said and by whom at the mediation. Should mediation participants be told that their participation in what has been a confidential process is no longer confidential and may result in the depositions of the mediation participants? Can a lawyer sued by his client for a bad mediated settlement then cross-claim for implied equitable indemnity against non-litigant mediation participants (such as the 20 year olds' parents in the above example) who advocated for the settlement? If the lawyer is to be blamed, can the lawyer require that the non-party mediator be listed as a joint tort-feasor on the verdict form that resolves the malpractice case against the lawyer? If mediation confidentiality is to be partly eliminated to facilitate an attack on the lawyer, is a possible by-product that litigants may use the elimination of confidentiality to attack the settlement itself, to seek to set it aside. Will mediation participants (who were not litigants) be able to sue over what was said or done at the mediation or in response to the threats to expose their confidential feelings and factors that bore on their settlement advocacy during the mediation? The result of an abandonment of mediation confidentiality is that there will be more lawsuits and more economic and emotional losses to litigants and an entire class of potential litigants or witnesses will be created (mediation participants who were not litigants before).

I agree with Jeff Kichaven that it is a bad idea to limit the supposed exception to mediation confidentiality in legal malpractice cases to the testimony of the plaintiff/client and the defendant/attorney. It would frustrate due process and impede the search for the whole truth, as testimony of the full context and entire situation will be excluded in the malpractice case.

Moreover, since all sides to the confidentiality debate seem to agree that the number of legal malpractice suits growing out of mediations-gone-bad is likely to continue to be very small, there is no overwhelming reason to ruin a confidential mediation system that does so much good for so many litigants and mediation participants and the public.

Additionally, there are less intrusive ways to address the relatively small number of situations where a litigant wishes to challenge a mediation outcome. For example, MCLE could include required hours on mediation process and the duties of lawyers to their clients considering mediation. For example, a rule could be enacted to require lawyers to get the informed written consent of their client(s) to mediation, which consent would mandatorily include the consequence that the client effectively cannot sue client's lawyer for a bad settlement outcome.

In conclusion, there are overwhelming public policy reasons to continue mediation confidentiality in place, for the benefit of the judicial system and for the benefit of the

BuchalterNemer

Barbara S. Gaal, Esq.

February 22, 2016

Page 4

litigants and non-litigant mediation participants. There are substantial downsides to attempting to carve our exceptions to confidentiality.

Thank you for your kind consideration of my ideas. I am happy to provide any further information or elaboration which the Commission might desire.

Very truly yours,

BUCHALTER NEMER  
A Professional Corporation

By



George J. Stephan

GJS:bc



**MARIN COUNTY BAR ASSOCIATION**

101 Lucas Valley Road TEL 415.499.1314  
San Rafael CA 94903 FAX 415.499.1614

[www.marinbar.org](http://www.marinbar.org)

**OFFICERS**

- Lawrence Strick  
*President*
- Dorothy C. Proudfoot  
*President Elect*
- Jessica Stuart Pliner  
*Treasurer*
- Thomas Brown  
*Secretary*
- Randy Wallace  
*Past President*
- Lawrence Baskin  
*5 Year Past President*

**MAR 18 2016**

March 10, 2016

Ms. Barbara S. Gaal, Staff Counsel  
California Law Revision Commission  
4000 Middlefield Road, Room D-2  
Palo Alto, CA 94303-4739

Re: Mediation Confidentiality

- Mee Mee Wong  
*Executive Director*
- Scott Lueders  
*Client Relations Chair*

Dear Ms. Gaal:

**DIRECTORS**

- 2016
- The Hon. Michael Dufficy (Ret.)
- Caroline Joachim
- Shelley A. Kramer
- Patricia Medina
- 2017
- Patricia Conway
- Rodrigo Dias
- Dotty LeMieux
- James Sell
- Romy Taubman
- 2018
- Alan Brayton
- Nicole Cabalette
- Damon Connolly
- Charles Dresow
- Susan Feder
- Christian Martinez

The Marin County Bar Association urges the California Law Revision Commission to recommend no weakening of mediation confidentiality protections (Evidence Code §1115-1128), and to uphold current law without exceptions.

Thank you for considering our bar association's position during your deliberations.

Sincerely,



Lawrence A. Strick

President, Marin County Bar Association

**SUPPLEMENTAL COMMENTS OF PETITIONER YULIANA  
RAGHAVENDRA (LEVITTOWN, NY — 3/7/16)**

I've been struggling with attorney malpractice for years in NY. Neither Federal nor State court judges, read papers, look at the evidence, dare making decisions against bribed, corrupt attorneys. I guess they share the same brotherhood. Any judge is actually a former attorney so they understand each other better than the rest of the citizens who still believe in the fairytale of "Justice for All" promoted by school and Hollywood. Ten years of the law suit are their to confirm that Legalizing Attorney Malpractice will only make unofficial things official. It's a shame!!

**SUPPLEMENTAL COMMENTS OF PETITIONER MARK HOLTZ (ROYAL  
PALM BEACH, FL — 3/6/16)**

We must start stopping the corruption that is what the law profession has become.  
READ, <http://www.calneva.com/money/lawsuit3.htm>

**SUPPLEMENTAL COMMENTS OF PETITIONER MARY LONG  
(HILLSDALE, MI — 3/5/16)**

This is abuse of power by attorneys & doesn't give the best legal counsel or protection to the public.

**SUPPLEMENTAL COMMENTS OF PETITIONER JULIE VON  
BERCKEFELDT (HILMAR, CA — 3/4/16)**

I hate injustice and especially within the justice system!

**SUPPLEMENTAL COMMENTS OF PETITIONER JOY JET (LAS VEGAS,  
NV — 3/4/16)**

I want justice.