Study K-402 April 14, 2016

First Supplement to Memorandum 2016-19

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

The following new input on this study is attached for the Commission[1] to consider:

Exhibit p.

- List of new signatories to online petition by Citizens Against Legalized Malpractice (received from Bill Chan on 4/8/16) 1
- Richard Zitrin, UC Hastings College of Law (4/12/16) 5

We describe the new input briefly below.

New Signatories to the Online Petition

Bill Chan provided the staff with an updated list of the signatories to the online petition by Citizens Against Legalized Malpractice. His list was current as of April 8th.[2]

The names and locations of the new signatories appear at pages 1-4 of the attached Exhibit. The names and locations of persons who signed earlier appear at pages 2-7 of the Exhibit to Memorandum 2016-8.

Comments of Prof. Richard Zitrin

Prof. Richard Zitrin (UC Hastings College of Law) has previously expressed his view that the Legislature should revise California's mediation confidentiality statutes to create "reasonable exceptions."[3] He now writes to express concern that "a legal malpractice 'carve-out' is simply insufficient to correct the problems flowing from both the overbroad legislation and *Cassel*."[4]

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. Email from Bill Chan to Barbara Gaal (4/8/16).

3. Richard Zitrin, *Viewpoint: Mediation Confidentiality, We Need Exceptions* (Memorandum 2014-6, Exhibit pp. 16-20); see also Memorandum 2015-46, Exhibit pp. 219-20.

4. Exhibit p. 5.

In Prof. Zitrin's view, California "need[s] to preserve mediator immunity, both from lawsuit and testimony."[5] But he also believes that California "need[s] … to protect the end-users of mediation from the negligent or nefarious occurrences that third parties may insert into the mediation process, then turning around to use confidentiality and privilege more as a sword than a shield."[6]

He refers to two actual cases to illustrate his points. In the first case, the court of appeal found it unnecessary to resolve the mediation confidentiality issues.[7] Prof. Zitrin also notes that "a malpractice 'fix' might possibly address this."[8]

A Los Angeles County Superior Court just rejected the plaintiff's claims in the second case, after ruling that certain evidence was inadmissible due to mediation confidentiality. The time to appeal has not yet run.[9] To avoid interfering with pending litigation, we will not say anything further about that case at present.

If we understand him correctly, Prof. Zitrin is concerned that the Commission's proposed "legal malpractice 'carve-out'"[10] will not sufficiently protect a third party from an attorney's mediation misconduct, only a client. He says that California "need[s] a fix that is an across-the-board fix, albeit narrow, that allows parties to maintain actions against others while still preserving mediator immunity."[11] It is not clear whether Prof. Zitrin realizes that the Commission's proposed new exception will apply in a State Bar disciplinary proceeding, as well as a legal malpractice case.

Respectfully submitted,

Barbara Gaal
Chief Deputy Counsel

5. *Id.*
6. *Id.*
7. See Lofton v. Wells Fargo Home Mortgage, 230 Cal. App. 4th 1050, 1067-68, 179 Cal. Rptr. 3d 254 (2014).
8. Exhibit p. 5.
9. See Steven Crighton, *Mediator's Privilege Holds Up in "Law & Order" Dispute,* Daily J. (April 12, 2016); Ben Hancock, *"Law & Order" Divorce Suit Blocked by Mediation Privilege*, The Recorder (April 11, 2016).
10. Exhibit p. 5.
11. Exhibit p. 6.

Patty Knight	Oklahoma City	Oklahoma	73147	United States
Leann Wilson	Ceres	California	95307	United States
Jay Marose	Los Angeles	California	90046	United States
Matthew Glosser	Chandler	Arizona	85249	United States
Julie Rodenhuis	Arroyo Grande	California	93420	United States
Carey UniteWomen.org	Wellington	Florida	33414	United States
Sara Hoffman	Greer	South Carolina	29651	United States
Kimberly DuPont	Saint Paul	Minnesota	55107	United States
amy Large	High Peak		Sk23 7RS	United Kingdom
Stephen Girard			7467	Australia
Dawn DeLucia	Clarence Center	New York	14032	United States
Christy Ozuna	Huntington Beach	California	92615	United States
Kathlyn Umechukwu	Gosford nsw		2250	Australia
Kevin Allan	McMinnville	Oregon	40161	United States
Christian Sweeney	Jasper	Texas	75951	United States
Joe Q. Public	Santa Clara	California	95126	United States
Becky Blanton	Palmyra	Virginia	22963	United States
hayley marley duncan	Gawler South		5118	Australia
steve holmes	sacramento	California	96817	United States
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N O'Dwyer	Dublin			Ireland
Pól Ó Duibhir	dublin			Ireland
Graciela Narten	morganton	North Carolina	28655	United States
Mia Jane	Los Angeles	California	90046	United States
Jacqueline Casper	Vista	California	92084	United States
Ruth Nichols	Orange	California	92869	United States
Lesley pearse			3478	Australia
trudy bloomfield	Mildura		3496	Australia
Debbie Brookes			2147	Australia
Danielle Smith			2460	Australia
Melanie Nicholson	Kannapolis	North Carolina	28083	United States
Loren Gibson	Dayboro		4521	Australia
Sean Lyon	Valrico	Florida	33596	United States
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EX 1

Ruby Dillon	Newport Beach	California	92660-6335	United States
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Shunna Williams	Galesburg	Illinois	61401	United States
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Deanne Upson	Washington	District of Columbia	20013	United States
Melissa Karabela	Clinton Township	Michigan	48036	United States
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Betty Wood	Atwater	California	95301	United States
Jade Taylor	Gallup	New Mexico	87301	United States
Rose Richmond	Fort Worth	Texas	76112	United States
Martha Peters	Sun City	California	92586	United States
Simon Limeburner			2324	Australia
Darryl Stoler	Pompano Beach	Florida	33067	United States
William Cormier	Lawrenceville	Georgia	30043	United States
Marilyn Villani	Saint George	Utah	84790	United States
Manny Perez	McDonough	Georgia	30253	United States
LeahAnn Simone	Gorham	New Hampshire	3581	United States
Joy Bautista	Manila			Philippines
Tina Puls	Riverside	California	92506	United States
Gilberto Gonzalez	San Francisco	California	94114	United States
Amanda Bian	Piedmont	South Carolina	29673	United States
Daniel Heins	Albany	New York	12208	United States
Pamela Houghton	Eglin Air Force Base	Florida	32542	United States
Natisha Street	Milwaukee	Wisconsin	53208	United States
Michelle Rigney	Bonaire	Georgia	31005	United States
Randall collier	Center Harbor	New Hampshire	3226	United States
joy jet	Las Vegas	Nevada	89109	United States
Julie Von Berckefeldt	Hilmar	California	95324	United States
Barbara Lilley	San Francisco	California	94107	United States
Mary Long	Hillsdale	Michigan	49242	United States
Mark Holtz	Royal Palm Beach	Florida	33411	United States
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EX 2

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Carol B	Yucaipa	California	92399 United States
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Alicia Etler	Hendersonville	North Carolina	28739 United States
Ron Rich	Fort Walton Beach	Florida	32548 United States
Lana Kitchel	Los Molinos	California	96055 United States
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Tina Po	levittown	Pennsylvania	19057 United States
Christie Zelenski	Ravenna	Ohio	44266 United States
seth nasi	oshkosh	Wisconsin	54902 United States
KT Buchholz	Grapevine	Texas	76051 United States
Keith Siniard	athens	Alabama	35611 United States
Laurie Jones	Fuquay Varina	North Carolina	27526 United States
zay xoss	South Pasadena	California	91030 United States
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Vanessa Flores	Ralls	Texas	79357 United States
Spencer M Jimerson Jr	Salamanca	New York	14779 United States
Scott Varner	Union	South Carolina	29379 United States
Garry Berkey	Keysville	Virginia	23947 United States
patrick springer	Phoenix	Arizona	85038 United States
Emily Brandt	Fresno	California	93722 United States
Doug Dante	Detroit	Michigan	48201 United States
Patrice Mykytka	St. Petersburg	Florida	33703 United States
Tanya Jones	Wichita	Kansas	67212 United States
KATHRINE LESTER	Salinas	California	93906 United States
Annie Prochera	Carlsbad	California	92011 United States
Donald Hess	Panama City Beach	Florida	32407 United States
Christie Clancy	Beverly Hills	California	90210 United States
Erica Smith	San Jose	California	95112 United States
jim edwards	Bakersfield	California	93304 United States
huma aslam	Mountain View	California	94043 United States
Daniel Rose			800 Australia
Alecia Conrad	Los Angeles	California	90004 United States
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EX 3

Yvonne Neyland	New Orleans	Louisiana	70116	United States
Dama Foege	Naples	Florida	34110	United States
Elizabeth Steele	Victorville	California	92392	United States
catrina York	Reno	Nevada	89502	United States
Karen Padavan	Wilkes Barre	Pennsylvania	18702	United States
Cindy Calkins	Descanso	California	91916	United States
P. Lopez	Chula Vista	California	91910	United States
Douglas Waldroop	Landover	Maryland	20785	United States
Jessica Brown	Portland	Maine	4101	United States
djuan collins	New York	New York	10453	United States
Barbara Rodak	valley grove	West Virginia	26060	United States
Susan Estilow	West Des Moines	Iowa	50265	United States
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tabatha potts	reynoldsburg	Ohio	43068	United States
Amy Rosier	Holley	New York	14470	United States
jessica O'Donnell	Wildomar	California	92595	United States
Sharon Proudfoot	Carrollton	Ohio	44615	United States
nancy friesner	Lima	Ohio	45801	United States
Gail Schuler	Melbourne	Florida	32901-4469	United States
andrew bonney			3324	Australia
Mike Daskaluk	Las Vegas	Nevada	89183	United States
Alvin Schlangen	Freeport	Minnesota	56331	United States

EX 4

EMAIL FROM PROF. RICHARD ZITRIN (4/12/16)

Re: Mediation Confidentiality — CLRC Staff Memo re *In Camera* Screening Process

Dear LRC staff …

I received an email from mediator Rachel Ehrlich sent to many people regarding mediation privilege. As you may know, I've written about the need for reform; I include that article … for easy reference.

The Ehrlich email encloses a CLRC report regarding a "carve-out" and *in camera* post that I am concerned is too narrow. I submit these thoughts for your consideration.

I am concerned that a legal malpractice "carve-out" is simply insufficient to correct the problems flowing from both the overbroad legislation and *Cassel*. As a trained mediator and a member of AA's mediation panel for several years, I appreciate the need for mediation confidentiality. But our statute, far broader than in any other jurisdiction, has too many unintended effects, as shown in the excerpt of an article, below, from today's SF Recorder.

We need to preserve mediator immunity, both from lawsuit and testimony. But we need also to protect the end-users of mediation from the negligent or nefarious occurrences that third parties may insert into the mediation process, then turning around to use confidentiality and privilege more as a sword than a shield. For example, in my case, *Lofton v. Wells Fargo Home Mortgage*, 231 Cal.App.4th 549 (2014), the defendants used a mediation privilege claim to attempt to keep out a damning document — a proposed settlement agreement between Wells and the lawyers themselves which excluded the lawyers' own clients — by claiming a continuing mediation between Wells and the law firm, although the law firm was not a party and only arguably a "participant." (This did not affect the result; the trial judge kept the document out but there was so much other supporting evidence in our favor that she still disgorged all of the law firm's $5.4 million fees.)

While a malpractice "fix" might possibly address this, here the law firm argued that it itself was a party to a mediation with Wells.

In the case today, there are third parties who are not law firms who are non-suited. See below. The question arises on what basis this was a mediation rather than a settlement discussion facilitated by Mr. Wolf's "people." (The article is silent as to what agreement Ms. Wolf may have signed.)

We need a fix that is an across-the-board fix, albeit narrow, that allows parties to maintain actions against others while still preserving mediator immunity.

Best,

Richard

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☞ **Staff Note.** The article that Prof. Zitrin refers to in the first paragraph of this email is attached as Exhibit pp. 16-20 to Memorandum 2014-6.

In the second paragraph of this email, Prof. Zitrin refers to "a CLRC report regarding a 'carve-out' and *in camera* post." Rachel Ehrlich apparently distributed that document to various persons along with a short note encouraging them to read the document. Based on her email (which Mr. Zitrin forwarded along with his comments), the document in question was Memorandum 2016-18.

In the third paragraph of his email, Prof. Zitrin refers to the following article:

> Ben Hancock, *"Law & Order" Divorce Suit Blocked by Mediation Privilege*, The Recorder (April 11, 2016).

We have not reproduced the excerpt he provided from that article, because of copyright concerns. The article reports that a Los Angeles Superior Court judge recently "tossed out" a case relating to the "Law & Order" fortune because certain evidence was inadmissible under California's mediation confidentiality statutes. Another article about the same case was published in *The Daily Journal*. See Steven Crighton, *Mediator's Privilege Holds Up in "Law & Order" Dispute,* Daily J. (April 12, 2016).

In the fourth paragraph of his email, Prof. Zitrin refers to a case called *Lofton v. Wells Fargo Home Mortgage*. The citation he provided is incorrect; we presume that he meant to refer to the mediation confidentiality discussion in the following opinion:

> *Lofton v. Wells Fargo Home Mortgage,* 230 Cal. App. 4th 1050, 1067-68, 179 Cal. Rptr. 3d 254 (2014).