Study K-402 April 14, 2016

Second Supplement to Memorandum 2016-19

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

The following material was received by the Commission[1] 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:

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.

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April 13, 2016

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In re: Mediation Confidentiality; Memorandum 2016-18

Dear Ms. Gaal:

Thank you for your April 4 email with Memorandum 2016-18 concerning mediation confidentiality. Thank you, too, for giving me this opportunity to share some thoughts and reactions in writing. I am sorry that I will not be able to attend the Commission's April 14 meeting, and also that I was not able to get this letter to you sooner.

The Memorandum is the subject of yeoman effort, for which the Staff is to be commended. The Memorandum discusses possible In Camera review in connection with legal malpractice actions which arise out of mediations, Constitutional rights of public access to judicial proceedings, and related issues. The possible approaches to In Camera review and related issues described might charitably be described as cumbersome and awkward. While the Memorandum fulfills the obligation to provide the Commission with these possible approaches, it correctly bespeaks caution about going down this path at all, because of the Constitutional and practical issues involved.

But there is more to this caution than even the Memorandum addresses.

Here is the heart of the matter. There seems to be a belief that, without procedural and substantive burdens to make the prosecution of contemplated legal malpractice actions arising out of mediations take longer and cost more, (1) there will be a negative impact on people's willingness to engage in mediations, or on the effectiveness of those mediations, and (2) there will be a deluge of legal malpractice cases arising out of mediations, burdening the court system.

There is no evidence to support these beliefs. Hence, no need for the burdens.

First, a note of irony. The fears of fewer mediations and more malpractice actions cannot reasonably co-exist. If a lesser standard of confidentiality deters people from mediating at all, there will be smaller fields from which these contemplated malpractice cases might spring and grow.

More critically, though, the Memorandum describes mediation privilege and confidentiality regimes in many other states (and there is a wholly different regime under the Federal Rules of Evidence), which take many forms. Many of these statutes have been in place for years. Numbers of them have attorney malpractice exceptions to privilege or confidentiality, without any of the burdens which the Memorandum contemplates. Yet Is there any evidence, any study, any research, which finds – or even hints - that in any of these other jurisdictions, unencumbered attorney malpractice cases growing out of mediations have either (1) destroyed the utility of mediation, of (2) overwhelmed the court system? We all know the answer.

The Memorandum makes a valiant effort to support the proposition that the absence of these burdens will cause problems in California. Consider the "common sense" points on, for example, page 47. The Memorandum expresses concern about what will happen to mediation participants if potentially embarrassing information disclosed in a mediation "come(s) back to bite them." Suppose that it is possible that people may be somewhat less candid as a result. Maybe people will not say that the important incoming call is from their doctor or concerns their vasectomy (such things are really nobody's business anyway). Is there any evidence to prove that mediation will be less effective, or used less often, as a result?

And, potentially embarrassing information is revealed in litigation all the time. Life goes on, commerce continues, lawsuits are brought, settled and adjudicated. There is no evidence that these malpractice cases call for special rules simply because mediation is involved.

An even more important point, though, is the risk of relying on "common sense," in the absence of supporting evidence, to make public policy. Is it really "common sense" to abridge Constitutional rights of public access, or burden a plaintiff's ability to litigate, without actual evidence to support the case to do so?

Real common sense actually supports the conclusion that, if people are not able to seek redress for malpractice in mediation, *that* will make them less likely to use mediation in the future. And, unlike the assertion that lesser standards of confidentiality will cause people to avoid mediation, there is actual evidence to support this different conclusion. Remember Mrs. Porter. She came to the Commission to tell of her own experience in mediation, how she felt that she was the victim of malpractice, and how she tried without success to seek legal remedies. Does the Commission think that she will ever mediate again? When justice is burdened, delayed or denied, the "negative impact" on people's use of mediation will likely magnified, as the Mrs. Porters of the world tell others about their experiences. And, does the Commission think that Mrs. Porter is the only one?

For similar reasons, limitations on discovery such as those proposed on Page 68 of the Memorandum are inappropriate. There is no evidence, from the experience of any other state or from experience under the Federal Rules of Civil Procedure and Federal Rules of Evidence, that the absence of limitations on discovery have either deterred people from mediation or made malpractice cases mushroom out of control.

The same analysis applies to the "standard of admissibility" discussion on Page 73. Is there any evidence that the absence of limitations on admissibility has caused problems in any other jurisdiction, ever? If not, then what is the justification for California to depart from generally applicable rules of admissibility?

The Commission is at risk of embarking on a perilous road paved with good intentions. The burdens on malpractice litigation, as contemplated in the Memorandum, serve no purpose. There is no evidence that, in jurisdictions where malpractice cases are allowed to proceed unburdened, mediation has been deterred or courts have been overwhelmed.

The Memorandum goes as far as a staff memorandum can go to warn the Commission. The right conclusion is clear. The laws generally applicable to civil cases generally, and legal malpractice cases specifically, should apply to those few malpractice cases which will arise out of attorney conduct in mediations.

As always, Ms. Gaal, I thank you for the opportunity to comment, and for sharing this letter with the Commission. I remain available to answer any questions of provide any further input which you or the Commission might find helpful.

With best regards,

Sincerely yours,

Jeff Kichaven