

Memorandum 2016-27

**Relationship Between Mediation Confidentiality and Attorney Malpractice
and Other Misconduct: Preliminary *In Camera* Filtering**

At the April meeting, the Commission¹ directed the staff to “investigate and report on whether there is any constitutionally permissible method of *in camera* screening or quasi-screening that a judicial officer could use as a filter at the inception of a legal malpractice case based on mediation misconduct² In other words, the Commission was seeking “an early way to eliminate claims that have no basis and should not result in public disclosure of mediation communications.”³

This memorandum addresses that topic. It describes and explores the merits of some possible filtering approaches and similar ideas that occurred to the staff. As yet, the staff has not been able to delve as deeply into this topic as we would have liked. **We welcome additional suggestions and analysis.** Unless the Commission otherwise directs, we plan to pursue the topic further in a later memorandum.

PRELIMINARY *IN CAMERA* FILTERING OF A LEGAL MALPRACTICE CASE
THAT ALLEGES MEDIATION MISCONDUCT

Through brainstorming and research, the staff came up with a number of possible approaches for the Commission’s consideration. Some of these would involve confidential examination of the merits of a legal malpractice case that

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. Draft Minutes (April 2016), p. 5.

3. *Id.*

The Commission “did not resolve the issues on *in camera* screening that the staff presented for decision in Memorandum 2016-18.” Draft Minutes (April 2016), p. 5. The Commission might revisit those issues after considering the staff’s work on preliminary *in camera* filtering. *Id.*

alleges mediation misconduct. Others would provide special treatment at the inception of such a case, but would not involve confidential examination of the merits.

This memorandum discusses the following possible approaches, in the order listed:

- Minnesota approach.
- Pre-filing meet-and-confer requirement.
- Early Neutral Evaluation Conference (“ENEC”).
- Early case management conference, conducted *in camera*.
- Summary jury trial, conducted *in camera* at an early stage of the case.

The staff has also thought of several other possible filtering approaches that might pass constitutional muster, but we are not yet ready to present them for consideration.

Minnesota Approach

A 2012 editorial in *California Litigation* described an unusual approach to commencement of a civil case:

[I]magine that when you want to file a lawsuit, you don’t actually file it at all; and you don’t pay a court filing fee either. (That’s a savings of \$435, and perhaps \$1,000 more if the case is complex.) Instead, you draft your complaint and serve it on the defendants. The defendants then serve answers; but they too do not file them. (That’s a further savings of \$435-\$1,435 per defendant.)

And instead of being hauled into court for conferences that don’t advance the case all that much, other than to get a trial date, you simply don’t have any conferences. The savings here would include the mandatory meet-and-confer, the preparation of the case management conference statement, and attendance at the conference. Recognizing the variances in hourly rates, this probably saves several thousand dollars more. Then you go about your business, serving written discovery, taking depositions, meeting and conferring as necessary, setting up a voluntary mediation, and maybe even settling the case. *And all of this occurs without ever stepping foot in the courthouse or seeing a judge.*⁴

This unusual approach is not hypothetical. As the editorial in *California Litigation* explains:

4. Michael Geibelson, *Litigation Without Courts, and No, I’m Not Talking Arbitration*, *California Litigation*, vol. 25, no. 3, coverpage (Nov. 3, 2012) (emphasis added).

Minnesota follows what is referred to there and elsewhere as the “hip pocket” service rule. The statute of limitations is satisfied by the service of the complaint instead of the filing of the complaint.

When disputes arise in the “litigation,” judicial intervention is available to resolve them. And when presented with disputed matters, judges make all the same decisions they do in other state and federal courts: motions to compel, motions for summary judgment, etc. But until there is a conflict between the parties requiring judicial intervention, neither is required to actually file anything in the court or make an appearance.

....

By not filing the complaint in a public forum until there is a need for judicial intervention, the parties can preserve the confidentiality of their dispute If a resolution can be reached, the settlement agreement can be just another confidential business contract unexposed to public scrutiny.

So long as the parties (and their counsel) behave, they can forestall or avoid incurring the fees and costs associated with court appearances that seldom advance the case. But once you’re on file, you’re on file. The case proceeds to trial and judgment expeditiously and as if the case were filed in the first instance. Because of the delay in the initial appearance before the court, the time between the initial filing and judgment is among the shortest in the country — regularly running between six and eight months.⁵

Perhaps California could follow a similar approach with regard to a legal malpractice case that alleges mediation misconduct. Instead of requiring the plaintiff to file a complaint to stop the running of the statute of limitations, it would be sufficient to serve such a malpractice complaint on the defendant attorney. As described above, the case would then proceed outside the public eye until a problem arises and it becomes necessary to involve the court.

This would provide a buffer period, in which the parties might be able to resolve their differences privately, without publicly disclosing any mediation communications. Once they resort to the court, the buffer period would end and the court would treat the case like any other civil case.

This type of approach seems likely to survive First Amendment scrutiny, because the private phase of the case would not involve the court. During that phase, there would be no occasion for public oversight of court action, and thus no basis for invoking the First Amendment right of access to judicial proceedings

5. *Id.* (emphasis added).

and records. The proceedings probably could remain confidential without running afoul of constitutional constraints.

Importantly, however, this type of approach might not be very effective in protecting mediation confidentiality and its underlying policy interests. The buffer period would only last until there was a problem requiring court involvement. When a client alleges that counsel engaged in mediation misconduct, bitter feelings and a low level of trust are likely. Court involvement may become necessary sooner rather than later.

As a result, the buffer period might be short to almost nonexistent in a significant percentage of cases, and its effect in those cases might be minimal. The buffer period might be more meaningful in other cases, however, especially where the defendant attorney is strongly motivated to protect his or her reputation and keep the dispute quiet.

We encourage comments on how this type of approach is likely to fare in practice.

Pre-Filing Meet-and-Confer Requirement

A second possibility would be to statutorily require a displeased mediation participant and counsel for such a participant (if any) to meet and confer with the participant's former attorney before filing a legal malpractice case alleging that the former attorney engaged in mediation misconduct. The statute could also require the putative plaintiff to provide the putative defendant with a copy of the as-yet-unfiled malpractice complaint a certain number of days before the meet-and-confer session.

This would be another means of trying to promote early resolution of such disputes, before a court gets involved and a legal malpractice case progresses to where public disclosure of mediation communications might become necessary under the First Amendment right of access. In evaluating this option, the Commission might want to consider the following points:

- Due to bitter feelings and a low level of trust, such a meet-and-confer session may be unsuccessful in a significant percentage of cases.
- In other cases, the defendant attorney may want to keep the dispute quiet for reputational reasons, and the putative plaintiff may want to prevent sensitive mediation communications from becoming public. The meet-and-confer option may lead to a mutually beneficial result.

- At the time of the meet-and-confer session, the defendant attorney may not yet have counsel.
- If the putative plaintiff is unrepresented and relatively unsophisticated in legal matters, the defendant attorney may have an advantage at the meet-and-confer session. If there were no meet-and-confer session, however, such an imbalance would continue throughout the legal malpractice case. Thus, this consideration does not seem to cut strongly for or against the meet-and-confer option.

Given these points and any other relevant pros or cons, **does the Commission have any interest in imposing a pre-filing meet-and-confer requirement for a legal malpractice case that alleges mediation misconduct?**

Early Neutral Evaluation Conference (“ENEC”)

Another possibility would be to provide an optional Early Neutral Evaluation Conference (“ENEC”) in a legal malpractice case that alleges mediation misconduct. This approach would be similar to the optional ENEC that is available in a State Bar disciplinary proceeding (hereafter, “State Bar ENEC”).

As discussed in a prior memorandum, the investigative stage of a State Bar disciplinary proceeding is confidential.⁶ Once the State Bar files formal charges against an attorney in the State Bar Court, the proceeding becomes public.⁷ Under Rule 5.30 of the State Bar Rules of Procedure, the parties have an opportunity to request an ENEC before the State Bar files formal charges:

Rule 5.30 Prefiling, Early Neutral Evaluation Conference

(A) Early Neutral Evaluation Conference. Prior to the filing of disciplinary charges, the Office of the Chief Trial Counsel will notify the member in writing of the right to request an Early Neutral Evaluation Conference. Either party may request an Early Neutral Evaluation Conference. A party will have 10 days from the date of service of notice to request a conference.... A State Bar Court hearing judge will conduct the conference within 15 days of the request.

(B) Judicial Evaluation. At the conference, the judge must give the parties an oral evaluation of the facts and charges and the potential for imposing discipline. If the parties then resolve the matter in a way that requires Court approval, the Office of the Chief Trial Counsel must document the resolution and submit it to the Evaluation judge for approval or rejection.

6. See Bus. & Prof. Code § 6086.1(b); see also State Bar R. Proc. 2302; Memorandum 2015-22, pp. 44-45.

7. See Bus. & Prof. Code § 6086.1(a); see also State Bar R. Proc. 5.9.

(C) Evidence. The Office of the Chief Trial Counsel must submit a copy of the draft notice of disciplinary charges, or other written summary to the judge prior to the conference. The documentation must include the rules and statutes alleged to have been violated by the member, a summary of the facts supporting each violation, and the Office of the Chief Trial Counsel's settlement position. Each party may submit documents and information to support its position.

(D) Confidentiality. The conference is confidential. A party may designate any document it submits for in camera inspection only.

(E) Trial Judge. Unless otherwise stipulated by the parties, the Early Neutral Evaluation judge cannot be the trial judge in a later proceeding involving the same facts.

The State Bar ENEC is essentially a confidential, pre-filing settlement conference with a judge of the State Bar Court who cannot later try the case, in which the disputants present materials supporting their positions and the judge provides "an oral evaluation of the facts and charges and the potential for imposing discipline."

Similarly, a statute could make an ENEC optional in a legal malpractice case that alleges mediation misconduct. Such a statute could closely track the State Bar's approach, or it could differ from that approach in some respects. For example,

- The statute could require the plaintiff in a legal malpractice case alleging mediation misconduct to lodge the complaint with the court for a certain number of days before the court would be authorized to officially file the complaint. During that time period, (1) the statute of limitations would be tolled, (2) the plaintiff would be required to serve the complaint on the defendant attorney, and (3) both parties would be entitled to request an ENEC. If a party requested an ENEC, the tolling and lodging would continue until completion of the ENEC.
- Alternatively, the statute could require the plaintiff in a legal malpractice case alleging mediation misconduct to file a "barebones" complaint — i.e., a complaint that says only that the plaintiff is suing the plaintiff's former attorney for committing legal malpractice in the context of a mediation. Upon filing and service of the barebones complaint, there would be a compulsory waiting period, during which either side could request an ENEC but no other litigation activities could occur and the time to respond to the complaint would not yet begin to run. If a party requested an ENEC, the waiting period would continue until completion of the ENEC.

- Instead of requiring a judicial officer to provide an oral evaluation of the legal malpractice case during the ENEC, the statute could make such an evaluation optional.

Such an approach would afford the parties an opportunity to attempt to resolve their dispute privately, with a judge’s assistance. They could thereby avoid public disclosure of mediation communications.

It seems likely that such an approach would survive constitutional scrutiny. As the Sixth Circuit has observed, “[s]ettlement techniques have historically been closed to the press and public.”⁸ In other words, there is no tradition of public access under the first prong of the 2-prong test for a presumptive right of access.⁹

Providing public access to a judicial settlement conference would also interfere with achievement of its objectives, which would weigh against finding a presumptive right of access under the second, utilitarian prong of the 2-prong test. As the Second Circuit has explained,

Few cases would ever be settled if the press or public were in attendance at a settlement conference or privy to settlement proposals. A settlement conference is an opportunity for the parties, with the court acting as an impartial mediator, to have a frank discussion about the value of avoiding a trial. During these colloquies the parties are often called upon to evaluate both the strengths and weaknesses of their respective cases. As the district court in this case pointed out, “At a minimum, the parties would be reticent to make any concessions at a settlement conference if they could expect that their statements would be published to the public at large.”¹⁰

The Second Circuit thus concluded that “the presumption of access to settlement negotiations, draft agreements, and [settlement] conference statements is negligible to nonexistent.”¹¹ Courts probably would reach the same result with regard to the ENEC approach described above.

Would the Commission like to further explore the possibility of providing an ENEC option in a legal malpractice case that alleges mediation misconduct?

8. *Cincinnati Gas & Electric Co. v. General Electric Co.*, 854 F.2d 900, 903 (6th Cir. 1988).

9. For an explanation of the 2-prong test, see Memorandum 2016-18, pp. 8-11.

10. *United States v. Glens Falls Newspapers*, 160 F.3d 853, 858 (2d Cir. 1998).

11. *Id.* See also *B.H. v. McDonald*, 49 F.3d 294 (7th Cir. 1995), in which the court states:

No one doubts that lawyers for the ACLU and the DCFS could repair to a hotel room, there to hammer out their differences without the presence of [a third disputant] or anyone else. The district judge could send a mediator to that conference without constitutional objection. When the district judge himself plays the role of mediator, the principle is no different.

Id. at 303.

Early Case Management Conference, Conducted *In Camera*

Alternatively, or perhaps in addition to one or more of the above-described approaches, the Commission could propose a statute that would require a court to conduct a case management conference shortly after the inception of a legal malpractice case that alleges mediation misconduct (perhaps immediately after the filing of a barebones complaint). The primary purpose of the case management conference would be to set some ground rules regarding use and disclosure of mediation communications in the course of the litigation.

The statute could require the court to conduct the case management conference on an *in camera* basis, so as to preserve the confidentiality of any mediation communications discussed in it, at least from public disclosure. By ensuring that the court promptly establishes specific ground rules governing disclosure of mediation communications in the legal malpractice case, the case management conference would help prevent the parties from engaging in unwarranted public disclosure of mediation communications, unnecessarily leaking sensitive information without the benefit of judicial guidance.

Because the case management conference would not be open to the public, and sealing of at least parts of the transcript might be necessary to prevent disclosure of mediation communications, it is possible that the media or someone else would challenge the constitutionality of this type of approach. Given the policy interests underlying mediation confidentiality,¹² however, and the early stage of the case,¹³ it seems reasonably likely that the Commission could structure this type of approach in a manner that would have a good chance of surviving constitutional scrutiny.

It is fairly clear, for example, that there generally is no First Amendment right of access to discovery-related proceedings.¹⁴ To the extent that a case management conference involves consideration of the discovery process, there probably would not be any valid basis for a constitutional objection.

To the extent that such a conference involves assessment of the proper content of the pleadings or the potential admissibility of mediation communications, the constitutional picture may be somewhat more

12. For discussion of whether mediation confidentiality is an “overriding interest” that would support a limitation on public access, see Memorandum 2016-18, pp. 45-47.

13. The First Amendment right of access seems to increase in strength as litigation progresses to the decisionmaking phase. See Memorandum 2016-18, pp. 50-51.

14. See Memorandum 2016-18, pp. 14-15, 19-21.

complicated.¹⁵ Still, it probably would be manageable to draft a statute that would alleviate the potential constitutional concerns in some way.¹⁶

The staff will take a closer look at the constitutional considerations triggered by an early, *in camera* case management conference if the Commission decides to further explore this option. **Does the Commission wish to do so?**

Summary Jury Trial, Conducted *In Camera* at an Early Stage of the Case

Still another possibility would be to draft a statute, applicable only in a legal malpractice case that alleges mediation misconduct, which would give the parties an opportunity to request that the court conduct a “summary jury trial” on an *in camera* basis early in the litigation process. For example, the statute could direct the plaintiff in such a case to file only a barebones complaint, one that does not disclose any mediation communications. The statute could further direct the plaintiff to submit, at the time of filing the complaint, a confidential form in which the plaintiff informs the court (but not anyone else) whether the plaintiff would like to participate in a summary jury trial. The defendant would have to submit a similar confidential form before filing a responsive pleading. If both sides request a summary jury trial, the court could conduct such a proceeding before the case proceeds any further, or it could allow the parties to engage in a limited amount of discovery before the summary jury trial. In any event, the intent would be to conduct the summary jury trial before there is any extensive public disclosure of mediation communications.

What kind of proceeding would the “summary jury trial” be? The staff is referring to a settlement-oriented process similar to one used in Ohio, which the Sixth Circuit described as follows:

In a summary jury proceeding, attorneys present abbreviated arguments to jurors who render an informal verdict that guides the settlement of the case. Normally, six mock jurors are chosen after a brief voir dire conducted by the court. Following short opening statements, all evidence is presented in the form of a descriptive summary to the mock jury through the parties attorneys. Live witnesses do not testify, and evidentiary objections are discouraged. Thus, some of the evidence disclosed to the mock jury might be inadmissible at a real trial.

Following counsels’ presentations, the jury is given an abbreviated charge and then retires to deliberate. The jury then returns a “verdict.” To emphasize the purely settlement function of

15. See Memorandum 2016-27, pp. 7-8; Memorandum 2016-18, pp. 51-52, 55-56.

16. See Memorandum 2016-27, pp. 7-8.

the exercise, the mock jury is often asked to assess damages even if it finds no liability. Also, the court and jurors join the attorneys and parties after the “verdict” is returned in an informal discussion of the strengths and weaknesses of each side’s case.

At every turn the summary jury trial is designed to facilitate pretrial settlement of the litigation, much like a settlement conference.¹⁷

This settlement-oriented process for a summary jury trial would be significantly different from the expedited jury trial approach used in some California cases.¹⁸ Of particular importance, the result of an expedited jury trial is binding on the parties,¹⁹ whereas the result of a summary jury trial would not be binding. In addition, an expedited jury trial is a more formal proceeding than the contemplated summary jury trial.²⁰

Because a summary jury trial would serve to promote settlement and would not entail a binding adjudication, this approach is likely to withstand First Amendment scrutiny, even if the summary jury trial occurs *in camera*. As the Sixth Circuit explained in rejecting a request for public access to an Ohio summary jury trial,

A summary jury proceeding is not in the nature of a court hearing or a jury trial, but is essentially a settlement proceeding. Settlement proceedings are historically closed procedures. The summary jury trial does not present any matter for adjudication by the court, but functions to facilitate settlement. This court has found that “where a party has a legitimate interest in confidentiality, public access would be detrimental to the effectiveness of the summary jury trial in facilitating settlement.”

.... The petitioner has failed to demonstrate a right to access to the summary jury trial in this case.²¹

17. *Cincinnati Gas*, 854 F.2d at 904 (citations omitted).

18. See Code Civ. Proc. §§ 630.01-630.11 (voluntary expedited jury trials), 630.20-630.30 (mandatory expedited jury trials in limited civil cases).

19. See Code Civ. Proc. §§ 630.07 (verdict in voluntary expedited jury trial case “is binding, subject to any written high/low agreement or other stipulations concerning the amount of the award agreed upon by the parties”), 630.26 (verdict in mandatory expedited jury trial of limited civil case is “subject to any written high/low agreement or other stipulations concerning the amount of the award agreed upon by the parties”).

20. See, e.g., Code Civ. Proc. §§ 630.06(a) (“The rules of evidence apply in expedited jury trials, unless the parties stipulate otherwise.”), 630.25(a) (rules of evidence “apply to mandatory expedited jury trials conducted in limited civil cases, unless the parties stipulate otherwise”).

21. *In re Cincinnati Enquirer*, 94 F.3d 198, 199 (6th Cir. 1996) (citations omitted), quoting *Cincinnati Gas*, 854 F.2d at 904; but see *Cincinnati Gas*, 854 F. 2d at 905 (Edwards, J., concurring in part & dissenting in part) (“While I join the majority in holding that the negotiations which led to the settlement of this case could properly be conducted in camera, I do not agree that the record can appropriately continue to be sealed after a settlement has been effected.”).

The Sixth Circuit addressed the matter in greater detail in an earlier case, *Cincinnati Gas & Electric Co. v. General Electric Co.*²² Among other things, the Sixth Circuit distinguished *Press Enterprise Co. v. Superior Court*²³ (often referred to as “*Press-Enterprise II*”), in which the United States Supreme Court found a First Amendment right of access to a preliminary hearing in a criminal case.²⁴ The Sixth Circuit said:

Appellants also argue that the summary jury trial should be open to the public because the facilitation of a settlement between the parties has a final and decisive effect on the outcome of the litigation. To support their argument, appellants rely on the Court’s language in [*Press-Enterprise II*] that preliminary criminal hearings must be open to the public because of their decisive effect on criminal cases. We disagree.

In contrast to the summary proceedings in this case, the proceeding at issue in *Press-Enterprise II* resulted in a binding judicial determination which directly affected the rights of the parties. *Summary jury trials do not present any matters for adjudication by the court. Thus, it is the presence of the exercise of a court’s coercive powers that is the touchstone of the recognized right to access, not the presence of a procedure that might lead the parties to voluntarily terminate the litigation. Therefore, we find appellant’s argument to be meritless.*²⁵

As the Sixth Circuit observed, it appears to be “the presence of the exercise of a court’s coercive powers that is the touchstone of the recognized right to access.” Thus, it might prove constitutionally problematic to allow the parties in a summary jury trial to stipulate that the verdict rendered in the summary jury trial is binding.²⁶ For other reasons, it might also be problematic to make a summary jury trial mandatory, at least where a case involves confidential matters and the summary jury trial would be open to the public.²⁷ If the Commission decides to pursue the concept of a summary jury trial, it probably

22. 854 F.2d 900, 903 (6th Cir. 1988).

23. 478 U.S. 1 (1986).

24. For a brief description of *Press-Enterprise II*, see Memorandum 2016-18, p. 13.

25. *Cincinnati Gas*, 854 F.2d at 905 (emphasis added).

26. See *Cincinnati Gas & Electric Co. v. General Electric Co.*, 117 F.R.D. 597, 600-01 (D. Ohio 1987), *aff’d*, 854 F. 2d 900 (6th Cir. 1988).

27. See *In re NLO*, 5 F.3d 154, 157-58 (6th Cir. 1993) (“Requiring participation in a summary jury trial, where such compulsion is not permitted by the Federal Rules, is an unwarranted extension of the judicial power.”); see also *id.* at 158 (“We do not question the proposition that summary jury trials may be valuable tools in expediting cases. However, the voluntary cooperation of the parties is required to maximize the effectiveness of such proceedings. Indeed, if such proceedings truly are valuable, voluntary cooperation will be forthcoming.”).

should avoid both of these potentially problematic ways of implementing the concept.

An optional summary jury trial of a legal malpractice case that alleges mediation misconduct, conducted *in camera* at an early stage of the case, might be an effective means to promote prompt resolution of the case and forestall widespread dissemination of confidential mediation communications. As the Sixth Circuit noted, “the summary jury trial is a highly reliable predictor of the likely trial outcome.”²⁸ Consequently, this procedural technique may be quite persuasive in guiding parties to settle on grounds that would achieve a just result. Importantly, however, the device would only have such an impact in cases where the parties opt to use it.

Is the Commission interested in pursuing this idea further?

NEXT STEPS

The staff is still exploring various other ideas for *in camera* screening or quasi-screening of a legal malpractice case that alleges mediation misconduct. Unless the Commission otherwise directs, we will continue with this work and present it at a future meeting. **It would be helpful to receive comments on the ideas discussed in this memorandum, or on other possible filtering mechanisms.**

Respectfully submitted,

Barbara Gaal
Chief Deputy Counsel

28. *Cincinnati Gas*, 854 F.2d at 904.