

First Supplement to Memorandum 2016-38

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

Memorandum 2016-38 discusses two concepts for preliminary *in camera* filtering of a legal malpractice case that alleges mediation misconduct:

- (1) A mandatory pre-filing Early Neutral Evaluation Conference (“ENEC”) conducted by a private mediator; and
- (2) An approach modeled on Civil Code Section 1714.10, but conducted in a manner that would protect mediation communications from public disclosure.

In communications with the staff since the June meeting, Commissioner Victor King suggested two more approaches for the Commission’s consideration. Those additional approaches are briefly described below.

SPECIALIST CERTIFICATION REQUIREMENT

Commissioner King’s first new suggestion is to create a specialist certification requirement for a legal malpractice claim that alleges mediation misconduct. He envisions something similar to the certification requirement for an architectural malpractice claim.¹

Under Code of Civil Procedure Section 411.35, before a party serves a complaint or cross-complaint for architectural malpractice, the party’s attorney must file and serve a certificate attesting that (1) the attorney has consulted and obtained an opinion from an architect, professional engineer, or land surveyor regarding the case and the attorney has concluded that there is “reasonable and meritorious cause” for filing the claim, or (2) the attorney has not been able to obtain such an opinion for certain reasons. More specifically, the statute provides:

411.35. (a) In every action, including a cross-complaint for damages or indemnity, arising out of the professional negligence of a person holding a valid architect’s certificate issued pursuant to Chapter 3 (commencing with Section 5500) of Division 3 of the

1. Email from V. King to B. Gaal (6/17/16, #2 & #3).

Business and Professions Code, or of a person holding a valid registration as a professional engineer issued pursuant to Chapter 7 (commencing with Section 6700) of Division 3 of the Business and Professions Code, or a person holding a valid land surveyor's license issued pursuant to Chapter 15 (commencing with Section 8700) of Division 3 of the Business and Professions Code on or before the date of service of the complaint or cross-complaint on any defendant or cross-defendant, the attorney for the plaintiff or cross-complainant shall file and serve the certificate specified by subdivision (b).

(b) A certificate shall be executed by the attorney for the plaintiff or cross-complainant declaring one of the following:

(1) That the attorney has reviewed the facts of the case, that the attorney has consulted with and received an opinion from at least one architect, professional engineer, or land surveyor who is licensed to practice and practices in this state or any other state, or who teaches at an accredited college or university and is licensed to practice in this state or any other state, in the same discipline as the defendant or cross-defendant and who the attorney reasonably believes is knowledgeable in the relevant issues involved in the particular action, and that the attorney has concluded on the basis of this review and consultation that there is reasonable and meritorious cause for the filing of this action. The person consulted may not be a party to the litigation. The person consulted shall render his or her opinion that the named defendant or cross-defendant was negligent or was not negligent in the performance of the applicable professional services.

(2) That the attorney was unable to obtain the consultation required by paragraph (1) because a statute of limitations would impair the action and that the certificate required by paragraph (1) could not be obtained before the impairment of the action. If a certificate is executed pursuant to this paragraph, the certificate required by paragraph (1) shall be filed within 60 days after filing the complaint.

(3) That the attorney was unable to obtain the consultation required by paragraph (1) because the attorney had made three separate good faith attempts with three separate architects, professional engineers, or land surveyors to obtain this consultation and none of those contacted would agree to the consultation.

(c) Where a certificate is required pursuant to this section, only one certificate shall be filed, notwithstanding that multiple defendants have been named in the complaint or may be named at a later time.

(d) Where the attorney intends to rely solely on the doctrine of "res ipsa loquitur," as defined in Section 646 of the Evidence Code, or exclusively on a failure to inform of the consequences of a procedure, or both, this section shall be inapplicable. The attorney shall certify upon filing of the complaint that the attorney is solely relying on the doctrines of "res ipsa loquitur" or failure to inform of

the consequences of a procedure or both, and for that reason is not filing a certificate required by this section.

(e) For purposes of this section, and subject to Section 912 of the Evidence Code, an attorney who submits a certificate as required by paragraph (1) or (2) of subdivision (b) has a privilege to refuse to disclose the identity of the architect, professional engineer, or land surveyor consulted and the contents of the consultation. The privilege shall also be held by the architect, professional engineer, or land surveyor so consulted. If, however, the attorney makes a claim under paragraph (3) of subdivision (b) that he or she was unable to obtain the required consultation with the architect, professional engineer, or land surveyor, the court may require the attorney to divulge the names of architects, professional engineers, or land surveyors refusing the consultation.

(f) A violation of this section may constitute unprofessional conduct and be grounds for discipline against the attorney, except that the failure to file the certificate required by paragraph (1) of subdivision (b), within 60 days after filing the complaint and certificate provided for by paragraph (2) of subdivision (b), shall not be grounds for discipline against the attorney.

(g) The failure to file a certificate in accordance with this section shall be grounds for a demurrer pursuant to Section 430.10 or a motion to strike pursuant to Section 435.

(h) Upon the favorable conclusion of the litigation with respect to any party for whom a certificate of merit was filed or for whom a certificate of merit should have been filed pursuant to this section, the trial court may, upon the motion of a party or upon the court's own motion, verify compliance with this section, by requiring the attorney for the plaintiff or cross-complainant who was required by subdivision (b) to execute the certificate to reveal the name, address, and telephone number of the person or persons consulted with pursuant to subdivision (b) that were relied upon by the attorney in preparation of the certificate of merit. The name, address, and telephone number shall be disclosed to the trial judge in an in-camera proceeding at which the moving party shall not be present. If the trial judge finds there has been a failure to comply with this section, the court may order a party, a party's attorney, or both, to pay any reasonable expenses, including attorney's fees, incurred by another party as a result of the failure to comply with this section.

(i) For purposes of this section, "action" includes a complaint or cross-complaint for equitable indemnity arising out of the rendition of professional services whether or not the complaint or cross-complaint specifically asserts or utilizes the terms "professional negligence" or "negligence."²

2. For a similar New York statute applicable to medical, dental and podiatric malpractice actions, see N.Y. C.P.L.R. 3012-a. In enacting that requirement, the New York Legislature found that "requiring certificates of merit in medical and dental malpractice actions, together with

Commissioner King suggested enacting a similar provision to fit the mediation context, which would track the language of Section 411.35 with revisions as shown in strikeout and underscore below:

(a) In every action, ~~including a cross complaint for damages or indemnity, arising out of the professional negligence of a person holding a valid architect's certificate issued pursuant to Chapter 3 (commencing with Section 5500) of Division 3 of the Business and Professions Code, or of a person holding a valid registration as a professional engineer issued pursuant to Chapter 7 (commencing with Section 6700) of Division 3 of the Business and Professions Code, or a person holding a valid land surveyor's license issued pursuant to Chapter 15 (commencing with Section 8700) of Division 3 of the Business and Professions Code~~ on or alleging attorney liability for misconduct or professional negligence in the context of a mediation, before the date of service of the complaint or cross-complaint on any defendant or cross-defendant, the attorney for the plaintiff or cross-complainant shall file and serve the certificate specified by subdivision (b).

(b) A certificate shall be executed by the attorney for the plaintiff or cross-complainant declaring one of the following:

(1) That the attorney has reviewed the facts of the case, that the attorney has consulted with and received an opinion from at least one ~~architect, professional engineer, or land surveyor~~ State Bar certified legal malpractice specialist who is licensed to practice and practices in this state or any other state, or who teaches at an accredited college or university and is licensed to practice law in this state or any other state, ~~in the same discipline as the defendant or cross-defendant~~ and who the attorney reasonably believes is knowledgeable in the relevant issues involved in the particular action, and that the attorney has concluded on the basis of this review and consultation that there is reasonable and meritorious cause for the filing of this action. The person consulted may not be a party to the litigation. The person consulted shall render his or her opinion that the named defendant or cross-defendant, in the context of a mediation, (i) had engaged or not engaged in misconduct or (ii) was negligent or was not negligent in the performance of the applicable professional services.

(2) That the attorney was unable to obtain the consultation required by paragraph (1) because a statute of limitations would impair the action and that the certificate required by paragraph (1) could not be obtained before the impairment of the action. If a certificate is executed pursuant to this paragraph, the certificate required by paragraph (1) shall be filed within 60 days after filing the complaint.

similar reforms enacted previously, will improve the quality of medical malpractice adjudications and deter the commencement of frivolous cases." N.Y. Laws 1986, ch. 266, § 1.

(3) That the attorney was unable to obtain the consultation required by paragraph (1) because the attorney had made three separate good faith attempts with three ~~separate architects, professional engineers, or land surveyors~~ certified legal malpractice specialists to obtain this consultation and none of those contacted would agree to the consultation.

(c) Where a certificate is required pursuant to this section, only one certificate shall be filed, notwithstanding that multiple defendants have been named in the complaint or may be named at a later time.

(d) Where the attorney intends to rely solely on the doctrine of “res ipsa loquitur,” as defined in Section 646 of the Evidence Code, or exclusively on a failure to inform of the consequences of a procedure, or both, this section shall be inapplicable. The attorney shall certify upon filing of the complaint that the attorney is solely relying on the doctrines of “res ipsa loquitur” or failure to inform of the consequences of a procedure or both, and for that reason is not filing a certificate required by this section.

(e) For purposes of this section, and subject to Section 912 of the Evidence Code, an attorney who submits a certificate as required by paragraph (1) or (2) of subdivision (b) has a privilege to refuse to disclose the identity of the ~~architect, professional engineer, or land surveyor consulted~~ certified legal malpractice specialist and the contents of the consultation. The privilege shall also be held by the ~~architect, professional engineer, or land surveyor~~ certified legal malpractice specialist so consulted. If, however, the attorney makes a claim under paragraph (3) of subdivision (b) that he or she was unable to obtain the required consultation with the ~~architect, professional engineer, or land surveyor~~ certified legal malpractice specialist, the court may require the attorney to divulge the names of ~~architects, professional engineers, or land surveyors~~ certified legal malpractice specialists refusing the consultation.

(f) A violation of this section may constitute unprofessional conduct and be grounds for discipline against the attorney, except that the failure to file the certificate required by paragraph (1) of subdivision (b), within 60 days after filing the complaint and certificate provided for by paragraph (2) of subdivision (b), shall not be grounds for discipline against the attorney.

(g) The failure to file a certificate in accordance with this section shall be grounds for a demurrer pursuant to Section 430.10 or a motion to strike pursuant to Section 435.

(h) Upon the favorable conclusion of the litigation with respect to any party for whom a certificate of merit was filed or for whom a certificate of merit should have been filed pursuant to this section, the trial court may, upon the motion of a party or upon the court’s own motion, verify compliance with this section, by requiring the attorney for the plaintiff or cross-complainant who was required by subdivision (b) to execute the certificate to reveal the name, address, and telephone number of the person or persons consulted

with pursuant to subdivision (b) that were relied upon by the attorney in preparation of the certificate of merit. The name, address, and telephone number shall be disclosed to the trial judge in an in-camera proceeding at which the moving party shall not be present. If the trial judge finds there has been a failure to comply with this section, the court may order a party, a party's attorney, or both, to pay any reasonable expenses, including attorney's fees, incurred by another party as a result of the failure to comply with this section.

(i) For purposes of this section, "action" includes a complaint or cross-complaint for equitable indemnity arising out of the rendition of professional services whether or not the complaint or cross-complaint specifically asserts or utilizes the terms "professional negligence" or "negligence."

(j) This section shall not be applicable to State Bar disciplinary action.³

In addition, Commissioner King suggested adding provisions to the Evidence Code to (1) permit a plaintiff to breach confidentiality for the limited purposes of obtaining the certification, and (2) extend the confidentiality requirement to bind a specialist who is consulted pursuant to the certification requirement.⁴

Would the Commission like the staff to further investigate this type of approach?

SELF-CERTIFICATION WITHOUT CONSULTING SPECIALIST

Commissioner King also suggested the possibility of a self-certification requirement, such as the following:

Any pleading alleging attorney misconduct or professional negligence in the context of mediation shall be verified and accompanied by an affidavit of the party or counsel stating that there are reasonable grounds to bring the proceeding.⁵

As compared to the preceding suggestion, this type of approach would be less burdensome for a potential plaintiff, because it would not entail consultation with a State Bar certified legal malpractice specialist.

3. Email from V. King to B. Gaal (6/18/16, #1). In the first sentence of paragraph (b)(1), the staff made a few technical revisions of Commissioner King's suggested language.

4. Email from V. King to B. Gaal (6/18/16, #5).

5. Email from V. King to B. Gaal (6/18/16, #3).

As Commissioner King put it,

“[T]he screening would not be done in camera or by a mediator. It would be self screening under some sort of penalty, to emphasize the seriousness of trying to breach mediation confidentiality.”⁶

He recognizes that such a self-certification requirement might overlap to some extent with the existing self-certification requirement under Code of Civil Procedure Section 128.7.⁷

Would the Commission like the staff to further investigate this type of approach?

COMBINATION OF IDEAS

Lastly, Commissioner King raised the possibility of a combination approach. As he stated at the June meeting, he believes that “two in camera processes (one to screen and one regarding evidence) would be too much to expect of litigants.”⁸ He considers it more reasonable, however, to combine:

- (1) A specialist certification requirement or self-certification requirement; and
- (2) An *in camera* screening process for admissibility of evidence (similar to the one in Section 6(b) of the Uniform Mediation Act).⁹

Is the Commission interested in this possibility? Would some other type of combination approach be worth investigating? We encourage comments on these points, and on any other aspect of the Commission’s study.

Respectfully submitted,

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Chief Deputy Counsel

6. Email from V. King to B. Gaal (6/17/16, #1).
7. Email from V. King to B. Gaal (6/18/16, #3).
8. Email from V. King to B. Gaal (6/18/16, #4).
9. *Id.*