Study K-402 July 22, 2016

Second Supplement to Memorandum 2016-39

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

The Commission[1] has received the following new communications relating to its study of the relationship between mediation confidentiality and attorney malpractice and other misconduct:

Exhibit p.

- Robert Flack (7/20/16) 1
- Robert Flack (7/21/16) 4
- R. Michael Flynn (7/20/16) 7

One of the new communications requires an immediate clarification.

Specifically, in his letter dated July 20, 2016, Mr. Flack says: "The CLRC 6/22/16 update to Study K402 *suggested that a decision concerning a proposed change was imminent*."[2] Mr. Flack goes on to list various matters that he thinks "have not been adequately addressed by the Commission."[3]

The staff does not understand how Mr. Flack got the impression that the Commission's study process is close to an end. As best we can tell, nothing in the post-meeting supplement issued on June 22, 2016 (the Second Supplement to Memorandum 2016-30) indicates as much.

In this study, the Commission is following its usual study procedure, which is careful and deliberative. *The Commission will not approve a final recommendation until after it has:*

(1) Approved a tentative recommendation at a public meeting,
(2) Circulated the tentative recommendation for comment for about three months, and

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. Exhibit p. 1 (emphasis added).
3. *Id.*

(3) Considered the comments on the tentative recommendation at one or more public meetings.[4]

At present, the Commission is still in the process of providing the guidance necessary for the staff to prepare a DRAFT of a tentative recommendation in Study K-402. *The Commission is a long way from approving a final recommendation; nothing is imminent or even anywhere close to imminent.*

The other two new communications are:

- Mr. Flack's response to Mr. Kichaven's letter dated July 20, 2016.[5]
- A comment in which attorney R. Michael Flynn "voice[s] … strong support for maintaining the current state of the law protecting the mediation privilege."[6] Mr. Flynn "think[s] that if parties are informed that what they say at mediation could later be subpoenaed if one client has a problem with their attorney, that parties will not be so willing to be frank, honest, and have an open discussion of cases being mediated."[7]

Respectfully submitted,

Barbara Gaal
Chief Deputy Counsel

4. Further information on the Commission's study process is available at http://www.clrc.ca.gov/Menu5–about/process.html. See also B. Gaal, Evidence Legislation in California, 36 Sw. U. L. Rev. 561, 565-69 (2008).

5. Exhibit pp. 4-6. Mr. Kichaven's letter dated July 20, 2016, is attached to the First Supplement to Memorandum 2016-39.

6. Exhibit p. 7.

7. *Id.*

To: Barbara Gaal, CLRC
Re: Mediation Confidentiality K-402
July 20, 2016

The CLRC 6/22/16 update to Study K402 suggested that a decision concerning a proposed change was imminent.

While possibly exhausting, the K402 Study may not be completely exhaustive. It seems as if the following have not been adequately addressed by the Commission:

1. The large proportion of **mediations that occur prior to and parallel** to (and thereby independent from) traditional judicial proceedings, subject to California's Right to Privacy and not subject to Federal 1st Amendment Rights.

2. The significance of the concept of **merely "Court Affiliated ADR"** programs. Where Judicial Settlement Conferences may be subject to Federal 1st Amendment Rights, once a referral is made to an independent agency (JAMS, AAA or DRPA), the Court no longer participates. "Court Affiliated" programs are not directly supervised by judicial authority and, especially with mediation, are even more remote from the coercive powers of the state.

3. The increasing sentiment, California Judges Association, Judicate West, Independent Retired Judges, Affiliated Retired Judges, CDRC and many more supporting retaining Mediation Confidentiality.

More problems are created by a change than would be solved by a change.

5. Non-Evidence Code alternatives including **standardized Mediation Agreements** which parallel the requirements of Attorney - Consumer Contracts (B&PC 6146 et. seq.).

Education and notice concerning Mediation Confidentiality have the potential of ameliorating the identifiable suspected problems without losing the benefits from effective confidential mediation.

6. Some have sought **raw data from the State Bar Association** concerning the incidence of claims and complaints.

A. With such raw data, it would be impossible to reliably infer anything about the legitimacy of these claims. The probative value of this information is out weighed by the potential for mis-interpretation and prejudice.

B. However, Professional Analysis has reportedly been done by the **Rand Corporation** on issues relating to ADR. While copies have not been able to be obtained, those who reference this work indicate that the level of malfeaseance was imperceptible and that the overall satisfaction with efficient, confidential ADR was very high.

The Rand Study was reportedly commissioned by the Judicial Council at substantial public expense. It would be a shame to disregard the work of such professional analysts. Further, it would also be a shame to release raw data fro the Bar Association that would likely be subject to misinterpretation and confusion.

7. The **distinction between the few UMA States and California**, where California has:

A. a Constitutional Right to Privacy,

B. much less court involvement in Mediation (ex. Florida "DRPA")

C. an aggressive litigation tradition, and

D. a diverse population.

8. **County Based DRPA Organizations** performing "community mediation" completely independent from any legal action (see attached) addressing issues as diverse as:

A. Neighbor/Neighbor Disputes

B. Victim/Offender

C. Family Disputes/Cohabitation Issues

D. Home Owners Associations

E. School Disputes

F. Many More

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Dispute Resolution

What is Mediation?
Mediation is a conflict resolution process in which a mediator guides disputants in finding an agreement that works for them.

Who Are The Mediators?
CSP Dispute Resolution Service mediators are carefully selected. Mediators represent a cross-section of people, diverse in culture, profession and background. Requirements for a mediator are: Dispute Resolution Program Act (DRPA) training, formal mediation experience, references, Program Supervisor approval, and approval from the Orange County Superior Courts Committee.

Mediation Can Be Used When...

- Communication between the parties has broken down
- Tensions, emotions or costs are escalating
- Time is a major factor
- Multiple issues have to be resolved
- Disputants want to maintain confidentiality
- An on-going relationship is desirable

Matters That Can Be Mediated Include...

- Neighbor/Neighbor
- Victim/Offender
- Family Disputes
- Association/Homeowners
- Landlord/Tenant
- Construction Disputes
- Curfew
- Employment Issues
- Cohabitation Issues
- Restitution
- Agency/Agency
- School Disputes
- Environmental
- Business Partners
- Custody Arrangements
- Consumer/Merchant
- Contract Disputes
- Insurance Settlements

How Can I Set Up A Mediation?
Call and tell us the details. We will take care of the rest. Mediations are scheduled near your home or
area of business. Appointments are available evenings, weekends and during normal business hours.

Mediation Benefits

- *High Success Rate!* Mediation helps resolve disagreements 80-90% of the time.
- *Mediation is power.* In mediation, you determine the outcome of your case, rather than having a third-party (or judge) determine it for you.
- *Problems are dealt with quickly.* Typically, mediation can be scheduled within 2-3 weeks and resolved within 3-4 hours.
- *Mediation is a voluntary process.* Any party may withdraw from the mediation at any time.
- *Mediation is low cost.* Mediation is less costly in comparison to other legal processes.
- *Mediation is confidential.* Confidentiality is required for mediators and all disputants. Parties are encouraged to speak truthfully and candidly in order to define the issues in the matter. Confidentiality is governed by the California Evidence Code, Section 1115-1128 and applied ethical standards.

EX 3

July 21, 2016

Ms. Barbara Gaal, Esq.
Re: CLRC Study K-402
Specific Response to
Jeff Kichaven's letter of July 20, 2016

Ms. Gaal and the Commissioners,

Mr. Kichaven's letter of July 20, 2016, cannot stand without challenge. In the past, in verbal testimony, I have refuted the several bizarre and outlandish assertions offered to this Commission. I have not responded directly in writing believing that the flaws in his arguments were self-evident. And, yet it continues.

I am reminded of a couple of adages:

A. If you ask the wrong question, you are likely going to get the wrong answer.
B. Statistics don't lie; but, liars try to use statistics.

To support the assertion that the loss of Mediation Confidentiality has had no impact, Mr. Kichaven asks for anecdotal reports from premier members of the defense bar. His assertions can be summarized into the following possibly testable hypothesis:

1. There is no evidence that people engage in less mediation, and
2. There is no evidence of excessive of inappropriate claims.

First, Mr. Kichhaven's respondents can be classified as a "convenience sample." Such samples are selected based on their convenient availability and not based on their representation of the community at large. In no way, can such a "convenience sample" be projected to attempt to represent anything besides this select group. While it may be nice to know what the Friends of Jeff (FOJ's) think on this subject, it cannot be projected to reflect any whole entity. These are anecdotes, much like gossip. Such a small sample has no real significance, much less statistical significance.

Second, this "Friends of Jeff" (FOJ) sample includes only senior commercial litigators. Their experience could not possibly reflect the views of the ordinary practitioner. Certainly, litigating complex commercial cases is nothing like Family Law, Probate or everyday Torts. Additionally, it is likely that these senior litigators have clients who are better educated and less emotional than what the more general practitioner might find. This sample is skewed; the analytical term for this is "sample bias."

Friends of Jeff (FOJ) may have an interesting perspective. However, to suggest that this type of analysis is in any way "empirical" suggests a blatantly unscrupulous intent. It's not evidence; it's merely gossip. And, it's biased gossip at that.

EX 4

Third, the questions posed by Mr. Kichaven are not even addressed by this gossip.

- Hammond: "... haven't heard of such claims ..."
- Mifflin: "... not aware of any such claims ..."
- McVisk: [personally not aware of any claims]
- Borchelt: "... never encountered a claim ..."
- Garvey: "... not aware of any such ..."
- Oberly: "... not aware of any claims ..."

These questions and answers do not address the issue being considered. They only reflect the incidence of malfeasance in mediation. It is already understood to be low, very low, and almost infinitesimal. These answers do not reflect any causal connection between the loss of mediation confidentiality and the general practice of effective dispute resolution.

Mr. Kichaven's anecdotal information (gossip) can be explained in a number of ways. Awareness, hearing and recall are complex issues. However, the more pertinent question is what does their reported experience really mean to our discussion.

A. The fact that none of these FOJs (senior commercial litigators) could recall, encounter or hear of a claim of malfeasance in mediation is irrelevant to the issues before us. Only the naive would consider the risk of malpractice the primary problem. The real risk is that someone will use the tool of claiming malfeasance to gain a tactical advantage. These answers do not shed light on this issue.

B. It has generally been accepted that the incidence of malfeasance in mediation is low (as I've stated, infinitesimal). The fundamental issue has always been whether the risk of encouraging such claims has a secondary impact on the process, whether it chills frank discussions and whether it discourages participation. Again, these answers do not shed light on this issue.

C. Are malfeasance claims used inappropriately? As I have testified, as I offered my own anecdote, YES! A sore loser, to seek tactical advantage, filed a complaint of malfeasance. This complaint required an investigation and involved substantial risk. And, after several months, it was determined to be completely bogus.

A win? No! A serious challenge posing substantial personal risk to reputation. This was a loss! And, there were no consequences to the real culprit.

This is one example. But, how many are enough? In my case, one was that one too many. Other ethical mediation practitioners should not be exposed to such vulnerability.

If parties cannot be assured that the information they reveal in mediation will be kept confidential, they will not provide that information. And, we all know that clever counsel can craft a context where malfeasance is suspected.

Certainly, this tactic can be considered a "Hail Mary" play, used infrequently but always threatened. When there are several millions of dollars at stake, extreme measures are frequently considered. Also, when emotions run high, extreme measures are often rationalized. So, where mediation can be most effective (high stakes and extremes of emotion) ,would you really suggest placing the process at risk?

It's not the frequency of use of the claim of malfeasance; it's the threat, explicit or implicit, to use the claim that matters.

So, what do we have from Mr. Kichaven's type of "empirical analysis?"

> A. The gossip collected from the FOJs suggests only that the incidence of mediation malfeasance is low.
>
> Yes. But, I think we already knew that.
>
> B. Can we determine from this gossip that mediation is less effective or less frequent?
>
> No. The wrong questions were asked and the people that were asked represented a "convenience sample." These FOJ's represent senior commercial litigators and no one else. Mr. Kichaven's sample was ridiculous (small and biased).

Finally, Mr. Kichaven dismisses the concerns of Family Law Mediators. While there are some Family Law Mediators who are not attorneys, many of them are. Attorneys are subject to liability at all times so there is no "family law safe harbor." Generally, Family Law Mediators do not prepare settlement documents; each party has their own attorney participate in the drafting. Therefore, there are enough contentious advocates and emotional parties to create quite a mess.

Mr. Kichaven's dismissal of the concerns of the Family Law Community may be a convenient ploy; but, I would hope that it fools no one. Family Law Mediators' concerns are unfounded, you say. Well, I say "Peppercorns!"

Should the Commission allow oral testimony in rebuttal, I would welcome the opportunity.

Respectfully submitted,

Robert J. Flack, Esq.
Arbitrator, Mediator and Advocate

EMAIL FROM R. MICHAEL FLYNN (7/20/16)

Re: Mediation Privilege

Hello,

I am writing to voice my strong support for maintaining the current state of the law protecting the mediation privilege. I think that if parties are informed that what they say at mediation could later be subpoenaed if one client has a problem with their attorney, that parties will not be so willing to be frank, honest, and have an open discussion of cases being mediated.

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