

First Supplement to Memorandum 2016-59

**Relationship Between Mediation Confidentiality and Attorney Malpractice and Other Misconduct (Possible Additional Reforms to Include in the Tentative Recommendation)**

Memorandum 2016-59 discusses the possibility of including additional reforms in the tentative recommendation that the Commission is drafting, either as complements to the Commission’s proposed new mediation confidentiality exception or as possible alternatives.<sup>1</sup> The Commission did not have time to discuss that memorandum in December, so it will do so at the upcoming February meeting instead.

At that time, the Commission will also consider some pertinent comments, which were previously presented and analyzed in the First Supplement to Memorandum 2016-60. For convenient reference, the relevant material from that supplement is attached.<sup>2</sup>

Also attached is the following new communication, which addresses some of the issues raised in Memorandum 2016-59:

*Exhibit p.*

- Lee Jay Berman, Los Angeles (12/2/16) .....1

Mr. Berman’s new communication is discussed below.

COMMENTS OF LEE JAY BERMAN

In his new communication, Mr. Berman makes several points. We examine his points in the same order that we presented the corresponding issues in Memorandum 2016-59.

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. See Exhibit pp. 2-16.

### *General Input*

Mr. Berman views mediation as a unique process “whereby people (celebrities and otherwise) can come together and be assured that their conversations to settle a dispute or lawsuit will be absolutely confidential.”<sup>3</sup> Although he does not expressly urge the Commission to include multiple proposals in its tentative recommendation, he clearly would like the Commission to consider possibilities other than reducing confidentiality.<sup>4</sup>

### *Disclosure Requirements*

At pages 6-18, Memorandum 2016-59 discusses the possibility of statutorily requiring that certain information be provided to a party before the party decides whether to mediate. Mr. Berman thinks that a “disclosure document is a good idea, as it fosters informed consent.”<sup>5</sup> In his view, the “most important thing about this process is that people are clear on what the rules are before they begin.”<sup>6</sup>

With regard to the content of the required disclosure, Mr. Berman raises an idea not previously suggested. He says that the disclosure form “could/should include a box that says [the mediation parties] are waiving their right to a Confidential Mediation, and opt instead for a Non-Confidential Settlement Conference, and that the neutral shall no longer be called a Mediator, but will instead be called the Settlement Officer.”<sup>7</sup> He considers the terminology distinctions critical:

DO NOT let the non-confidential process also be called a mediation, because it is not. We need vocabularial clarity, so that people have definition around what each process is. It must also be made clear to all participants that the neutral Settlement Officer may be called to testify, as a mediator cannot be. You MUST bifurcate these processes.<sup>8</sup>

Mr. Berman also notes that “[t]iming is everything. He makes two specific points about timing:

- (1) The “disclosure document MUST be signed by all parties prior to the first communications in a mediation. That doesn’t mean 9am Monday morning, it means prior to submission of briefs, prior to pre-mediation calls with participants, etc.”<sup>9</sup>

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3. Exhibit p. 1.

4. See *id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.* (capitalization in original).

9. *Id.* (capitalization in original).

- (2) “[P]eople MUST be clear on what is and what is not confidential *before* they disclose.”<sup>10</sup> Mr. Berman explains that “[t]he problem with allowing confidentiality rules to be changed after the fact by someone making a claim of attorney malpractice, is that it contemplates letting the cat out of the bag, after that cat was put in there on the promise of confidentiality.”<sup>11</sup> In his view, “[y]ou simply cannot adopt a process that changes the rules around confidentiality AFTER one has decided to make admissions or disclosures.”<sup>12</sup> He says that “[n]othing would be worse.”<sup>13</sup>

*Ron Kelly’s “Alternative Compromise Package”*

Ron Kelly’s “Alternative Compromise Package” is discussed at pages 31-35 of Memorandum 2016-59. Among other things, that package would include a new exception to mediation confidentiality, which would differ from the one the Commission has been drafting.

In his new communication, Mr. Berman does not specifically refer to the “Alternative Compromise Package.” He does, however, express concern about revising the mediation confidentiality rules to achieve a compromise:

Please remember that while you are endeavoring to solve a problem here (allegations of malpractice in mediation), you cannot lose sight of the big picture here: That you are weighing the important benefit of public policy that overwhelmingly favors a confidential mediation process against the rare, though not absent, problem of alleged malpractice. A compromise, where people (attorneys, parties, and the mediators) aren’t sure what is confidential and what isn’t, means that people will play it safe and not share something that could come back to hurt them, meaning those cases don’t settle, and the courts are more crowded with litigation that could have been avoided if they felt safe making admissions, apologies, and other statements in a trusted confidential process.<sup>14</sup>

In other words, Mr. Berman is concerned that reducing the level of confidentiality will have a chilling effect on mediation discussions, which will undermine the effectiveness of those discussions and consequently burden the courts with disputes that might otherwise be resolved in mediation.

Respectfully submitted,

Barbara Gaal  
Chief Deputy Counsel

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10. *Id.* (capitalization in original. italics added).

11. *Id.*

12. *Id.* (capitalization in original).

13. *Id.*

14. *Id.*

## EMAIL FROM LEE JAY BERMAN (12/2/16)

1. There exists under CA law no other process whereby people (celebrities and otherwise) can come together and be assured that their conversations to settle a dispute or lawsuit will be absolutely confidential. Removing those protections would ensure that no such place exists.
2. The most important thing about this process is that people are clear on what the rules are before they begin. This is why your disclosure document is a good idea, as it fosters informed consent. The form could/should include a box that says that they are waiving their right to a Confidential Mediation, and opt instead for a Non-Confidential Settlement Conference, and that the neutral shall no longer be called the Mediator, but will instead be called the Settlement Officer. DO NOT let the non-confidential process also be called a mediation, because it is not. We need vocabularial clarity, so that people have definition around what each process is. It must also be made clear to all participants that the neutral Settlement Officer may be called to testify, as a mediator cannot be. You MUST bifurcate these processes.
3. Timing is everything. Your disclosure document MUST be signed by all parties prior to the first communications in a mediation. That doesn't mean 9am Monday morning, it means prior to submission of briefs, prior to pre-mediation calls with participants, etc. The other aspect of timing is that people MUST be clear on what is and what is not confidential before they disclose. The problem with allowing confidentiality rules to be changed after the fact by someone making a claim of attorney malpractice, is that it contemplates letting the cat out of the bag, after that cat was put in there on the promise of confidentiality. You simply cannot adopt a process that changes the rules around confidentiality AFTER one has decided to make admissions or disclosures. Nothing would be worse.
4. Please remember that while you are endeavoring to solve a problem here (allegations of malpractice in mediation), you cannot lose sight of the big picture here: That you are weighing the important benefit of public policy that overwhelmingly favors a confidential mediation process against the rare, though not absent, problem of alleged malpractice. A compromise, where people (attorneys, parties, and the mediators) aren't sure what is confidential and what isn't, means that people will play it safe and not share something that could come back to hurt them, meaning those cases don't settle, and the courts are more crowded with litigation that could have been avoided if they felt safe making admissions, apologies, and other statements in a trusted confidential process.

Lee Jay Berman

Lee Jay Berman | Mediator, Arbitrator & Umpire  
11355 W. Olympic Blvd., Suite 111, Los Angeles, CA 90064  
O: 310-478-5600 | [leejay@mediationtools.com](mailto:leejay@mediationtools.com) | CV: <http://aiminst.com/cv/ljb>

Excerpt from First Supplement to Memorandum 2016-60  
(pp. 7-10 & Exhibit pp. 1-11)

**Memorandum 2016-59: Possible Additional Reforms to Include in the  
Tentative Recommendation**

The following input relates to Memorandum 2016-59, which discusses the possibility of including additional reforms in the Commission's tentative recommendation, either as complements to the proposed new mediation confidentiality exception or as possible alternatives.

*General Input*

CCBA "has no official position" on the ideas discussed in Memorandum 2016-59, but it "certainly does not recommend any of the recommendations in lieu of the Draft Legislation."<sup>42</sup> CCBA further states that the Commission's tentative recommendation "should include the Draft Legislation, and only such further suggestions as might supplement its effectiveness."<sup>43</sup>

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37. Exhibit p. 7 (boldface omitted).  
38. Exhibit p. 11.  
39. Memorandum 2016-58, p. 34.  
40. Exhibit p. 2.  
41. *Id.*  
42. *Id.*  
43. Exhibit p. 3.

First Supplement to Memorandum 2016-60, p. 7

Mr. Kichaven views the ideas discussed in Memorandum 2016-59 as “distractions.”<sup>44</sup> He says that in that memorandum, “the staff notes that few of these distractions have generated much interest.”<sup>45</sup> Actually, what the staff said was:

[S]ome of the options in the *Compilation of Possible Approaches* have generated considerable interest, such as the concept of requiring a pre-mediation disclosure regarding mediation confidentiality and its potential impact on a legal malpractice claim (or similar information)....

In contrast, some of the other options have generated little to no interest. This memorandum concentrates on suggestions that have garnered at least some degree of interest.<sup>46</sup>

#### *Disclosure Requirements*

Although CCBA has no official position on the possible disclosure requirements discussed in Memorandum 2016-59, it says that “a plain and clear warning to consumers that they well may be signing away their right to recourse against an unscrupulous or incompetent attorney if they enter into [a mediation] agreement would be far better than the current law, where the consumer only finds out when thwarted in his or her efforts to obtain justice.”<sup>47</sup> CCBA does not consider any of the disclosure examples in Memorandum 2016-59 “sufficiently clear and direct.”<sup>48</sup> The group suggests that any disclosure should be (1) mandated by statute before an agreement to mediate is enforceable, (2) in “absolutely plain terms regarding rights being signed away,” and (3) to be initialed by the consumer.<sup>49</sup>

Mr. Kichaven says that there “should be no one-size-fits-all mandatory disclosure requirements, or any such mandated requirements.”<sup>50</sup> He gives a number of reasons for taking that position.<sup>51</sup>

With regard to the “Information and Caution on Mediation Confidentiality” shown on page 11 of Memorandum 2016-59, Ron Kelly provides an important clarification. He explains that only Section 1 of that form is taken from the form circulated for public comment by the Civil and Small Claims Advisory

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44. Exhibit p. 5.

45. *Id.*

46. Memorandum 2016-59, p. 4.

47. Exhibit p. 2.

48. *Id.*

49. *Id.*

50. Exhibit p. 7.

51. *See id.*

Committee of the Judicial Council in 2005. Sections 2 and 3 of the “Information and Caution on Mediation Confidentiality” are Mr. Kelly’s “own first attempts at a draft [that] the Commission might find to be a useful stating point.”<sup>52</sup> The staff appreciates the clarification and apologizes for its mistake in describing the source of the “Information and Caution on Mediation Confidentiality” in Memorandum 2016-59.

John Warnlof “believe[s] that there is universal agreement that before parties agree to mediation, they should be fully informed as to its consequences including the inadmissibility of attorney/client communications occurring during the course of such mediation.”<sup>53</sup> He provides the following specific advice:

I urge the Commission to adopt a recommendation that the disclosures should be on a judicial council form and include the “Information and Caution on Mediation Confidentiality” ... and should also incorporate portions of the 2005 form proposed by the Civil and Small Claims Advisory Committee of the Judicial Council.... The required disclosure should be made by a party’s attorney when mediation is first suggested. In providing “a general explanation” of confidentiality, a mediator should confirm that a participant has been provided with, and has reviewed, the judicial council form.<sup>54</sup>

*Revise the Law on Waiving Mediation Confidentiality or Modifying It By Agreement*

Memorandum 2016-59 discusses some suggestions to revise the law on waiving mediation confidentiality or modifying it by agreement. Without taking an official position, CCBA says that those ideas “should be rejected for the reasons set forth by staff.”<sup>55</sup>

*Safeguards Against Attorney Misconduct in the Mediation Process*

Memorandum 2016-59 discusses some suggested safeguards against attorney misconduct in the mediation process. Without taking an official position, CCBA says that “[s]ome of these proposals may have merit on their own, but not as an alternative to the necessary reforms reflected in the Draft Legislation.”<sup>56</sup>

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52. Exhibit p. 4.  
53. Exhibit p. 11.  
54. *Id.*  
55. Exhibit p. 2.  
56. *Id.*

*Ron Kelly's "Alternative Compromise Package"*

With regard to Ron Kelly's "Alternative Compromise Package," CCBA says that the "problems with limiting the exclusion to conversations only between lawyers and clients ... are well articulated by staff and should be rejected for those reasons."<sup>57</sup> Similarly, Jeff Kichaven states that the "Alternative Compromise Package" is "not a compromise at all, and should be rejected."<sup>58</sup> He offers several arguments in support of that position.<sup>59</sup>

**Other Matters**

One more point may be worth mentioning:

- Some of the new comments refer to "California's Absolute Confidentiality rules"<sup>60</sup> or dangers posed by "absolute confidentiality" in California.<sup>61</sup> As previously noted in this study, California's mediation confidentiality statute does not provide absolute confidentiality. Rather, it is subject to a number of limitations and exceptions. Of particular note, it does not apply in a criminal case.<sup>62</sup>

Respectfully submitted,

Barbara Gaal  
Chief Deputy Counsel

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57. Exhibit p. 2.

58. Exhibit p. 8 (boldface omitted).

59. See Exhibit pp. 8-9.

60. Exhibit p. 5.

61. Exhibit p. 1.

62. See, e.g., Memorandum 2014-14, pp. 8-9 & sources cited therein.



*Justice Through Laws*

LARRY DOYLE, LEGISLATIVE REPRESENTATIVE  
TELEPHONE: 916-761-8959  
FACSIMILE: 916-583-7672  
EMAIL: LARRY@LARRYDOYLELAW.COM

November 28, 2016

The Hon. Chair and Members  
California Law Revision Commission  
c/o UC Davis School of Law  
400 Mrak Hall Drive  
Davis, CA 95616

**Study K-402 – Relationship Between Mediation Confidentiality and  
Attorney Malpractice and Other Misconduct  
Support for Initial Draft of Legislation (Memo 2016-58)**

Dear Chairman Lee and CLRC Members and Staff:

The Conference of California Bar Associations (CCBA), a statewide organization of attorneys representing more than 30 metropolitan, regional and specialty bar associations, strongly supports the Draft Legislation to Implement the Commission's Preliminary Decisions (11/2/2016) embodied in Memo 2016-58 of Study K-402 ("Relationship Between Mediation Confidentiality and Attorney Malpractice and Other Misconduct").

The draft legislation is fully consistent in effect with CCBA Resolution 10-06-2011 and the original AB 2025 of 2012, which were the inspiration for the provision of ACA 98 of 2012, which directed the CLRC to study the dangers absolute confidentiality posed to consumers of mediation who were victimized by incompetent or unethical attorneys. The draft legislation provides necessary recourse to those victims, while also providing essential protection to the secrets of other mediation parties.

Regarding the issues raised by staff, we offer the following:

- We believe the underlying action must be fully resolved before the malpractice action or disciplinary charges are filed. However, we further believe this restriction will be self-effectuating, and no specific language need be added to the statute.

**CONFERENCE OF CALIFORNIA BAR ASSOCIATIONS**  
340 SOUTH LEMON AVENUE, #1282 • WALNUT, CALIFORNIA 91789  
EMAIL: [INFO@CALCONFERENCE.ORG](mailto:INFO@CALCONFERENCE.ORG)  
[WWW.CALCONFERENCE.ORG](http://WWW.CALCONFERENCE.ORG)

First Supplement to Memorandum 2016-60, Exhibit p. 1

- We believe the proposed legislation should adopt the standard of the UMA. It is not enough to show that the mediation communication is relevant to such a case; the proponent must also show that “the evidence is not otherwise available.”
- There should not be a different standard for disclosure. The intent of drafting the initial resolution was to create an exception to protect clients, not to lessen the discovery standard. Having the same standard apply during discovery and admissibility at trial will promote settlements of malpractice claims prior to trial.
- Regarding potential ambiguity in the concept of “legal malpractice claims,” we suggest CLRC consider the language of Evidence Code §958, which provides the attorney-client privilege does not apply to a “communication relevant to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship.” There is no ambiguity in the concept of State Bar disciplinary proceedings.
- There should be no exceptions to the exception. If lawyers are not involved in the types of mediations listed, the statutory exception will not be relevant. If lawyers are involved, their clients should have the protections the exception provides.
- Enforcement of the amended law will remain with the trial judge, as it is currently.
- We do not believe a data collection component is necessary.

Similarly, the CCBA has no official position on the recommendations made in the Supplemental Memo 2016-59 relating to “Possible Additional Reforms to Include in the Tentative Recommendation.” Given that the Draft Legislation is similar in both intent and direction to the resolution adopted by the CCBA and the original version of AB 2025, and addresses quite effectively the issues raised in *Cassel v. Superior Court* (2011) 51 Cal.4th 113 and other cases highlighting how the current statutory scheme shields attorney malfeasance and incompetence, the CCBA certainly does not recommend any of the recommendations in lieu of the Draft Legislation.

We note, however, that the inclusion of these alternative approaches suggests either staff concerns with the courageous approach the commission has chosen to follow, the fact that any legislation to change to the current statute will be bitterly opposed by the well-organized and politically influential professional mediation industry and thus may not be enacted, or some combination of the two. We therefore offer these observations:

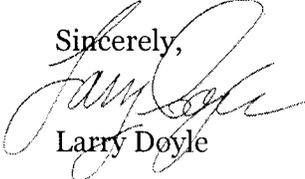
- Disclosure Requirement – Certainly, a plain and clear warning to consumers that they well may be signing away their right to recourse against an unscrupulous or incompetent attorney if they enter an arbitration agreement would be far better than the current law, where the consumer only finds out when thwarted in his or her efforts to obtain justice. However, none of the examples provided are sufficiently clear and direct, in our view; they are too much like the “informed consent” waivers given to patients prior to medical procedures which are so convoluted and complex that the baffled patient signs automatically, without really being informed of anything. If this recommendation moves forward as a supplement to (not substitution for) the Draft Legislation, any disclosure should be:
  - Mandated by statute before an agreement to mediate is enforceable.

- In absolutely plain terms regarding rights being signed away
- To be initialed by the consumer.
  
- Revising the Law on Waiving Mediation Confidentiality or Modifying it by Agreement – The proposals listed all should be rejected for the reasons set forth by staff. If the law regarding waiver were to be revised, it should call for the converse of existing law – i.e., the ability of the consumer to protect him/herself must be the default. If absolute confidentiality is to be available at all, it should be only with the complete and actual informed consent of all parties.
  
- Safeguards Against Attorney Misconduct in Mediation Process – Some of these proposals may have merit on their own, but not as an alternative to the necessary reforms reflected in the Draft Legislation.
  
- Limit Exclusion to Conversations Between Lawyer and Client Only – The problems with limiting the exclusion to conversations only between lawyers and clients (i.e., codifying the appellate court's holding in *Cassel*) are well articulated by staff and should be rejected for those reasons.

At bottom, the Draft Legislation represents an excellent effort to provide necessary protections for mediation participants with minimal risk to the process, and the CCBA strongly urges the Commission to hold true to the course it decided upon over a year ago. The Tentative Recommendation ultimately issued should include the Draft Legislation, and only such further suggestions as might supplement its effectiveness.

Although the opposition to California joining with nearly all other jurisdictions to provide these protections has been vociferous, it has been wholly lacking in substance. No evidence has been provided to the Commission that the absence of absolute confidentiality has had a negative effect on mediation as a process in any other state or in the Federal courts. Not a single mediation consumer has come forward to state that he or she would not participate in mediation absent absolute confidentiality, in contrast to at least dozens of consumers who support the Commission's efforts to provide protection in those rare cases involving unscrupulous or incompetent lawyers. There is tremendous fear of change among the opponents of the Draft Legislation, but no hard evidence upon which to base that fear. For that reason, the Draft Legislation should go forward as the Commission's Tentative Recommendation.

Thank you again for your valuable efforts on this important issue. Please contact me at (916) 761-8959 or [Larry@LarryDoyleLaw.com](mailto:Larry@LarryDoyleLaw.com) if I can be of assistance.

Sincerely,  
  
Larry Doyle

**EMAIL FROM RON KELLY (11/29/16)**

**Re: Misunderstanding on Source of Proposed Informed Consent Warning in MM16-59?**

Dear Ms. Gaal,

I know you seek to be fully accurate in the memoranda you prepare for the Commission.

The wording on page 11 of your recent Memorandum 2016 - 59 might be read to indicate that the entire informed consent form on that page, which I suggested, was taken from the form circulated for public comment by the Civil and Small Claims Advisory Committee of the Judicial Council in 2005. I want to be sure you know that only section 1 is taken (word for word) from that form. Sections 2 and 3 are my own first attempts at a draft I believed you and the Commission might find to be a useful starting point.

My letter of October 11, 2013 attempted to accurately describe the derivation as follows:

The summary of current law in paragraph 1 of the proposed notice was drafted and circulated for public comment in 2005 by the Administrative Office of the Courts. The AOC originally proposed that this summary be provided to all mediation participants prior to mediation, but eventually withdrew this proposed requirement. Although withdrawn, it's an excellent summary of current law.

The specific examples of risks and possible remedies in paragraphs 2 and 3 track points raised at yesterday's Commission meeting, and prior extensive negotiations and compromises reached in the drafting of the earlier Evidence Code section 1152.5 (a)(5) in 1993 (enacted through SB 401 by Lockyer) and discussions in drafting the current section 1123 in 1996 by the Commission. Reference to these discussions is noted in the recent Commission Memorandum 2013-39, pages 5-8, and in the 1996 Commission Memorandum 96-86, Staff Draft Recommendations, Staff Notes, pages 21-22, regarding current section 1123 (at that time numbered 1128), "...if a representation made in a mediation induces assent to an agreement, the participant relying on the representation should have it incorporated into the written agreement."

I apologize for the confusion on this point. I would not want anyone to be misled on the source of sections 2 and 3.

Yours,

Ron Kelly

First Supplement to Memorandum 2016-60, Exhibit p. 4

# JEFF KICHAVEN COMMERCIAL MEDIATION

555 W. Fifth St., Suite 3100, Los Angeles, CA 90013  
310.721.5785 Direct 888.425.2520 Scheduling jk@jeffkichaven.com

November 28, 2016

Barbara S. Gaal, Esq.  
California Law Revision Commission  
4000 Middlefield Road, Suite D2  
Palo Alto, CA 94303

In Re: Mediation Confidentiality; Memoranda 2016-58 and 2016-59

Dear Ms. Gaal:

There is no evidence that confidentiality, beyond that provided in Federal Rule of Evidence 408, California Evidence Code sections 1152 and 1154, and New York Civil Practice Law and Rule 4547, is necessary for effective mediation.

Accordingly, the Commission seems to be on the verge of recommending that the legislature create an exception to California's "Absolute Confidentiality" rules so that consumers can effectively seek redress and vindicate the Rule of Law if they believe that they are the victims of legal malpractice in mediation. The Commission can take this small step in favor of consumer protection and the Rule of Law without in any way hampering the effectiveness of mediation.

Yet the mediation establishment continues to pellet the Commission with a variety of suggestions – distractions, really -- which they say make California's Absolute Confidentiality rules OK. In its current memoranda, the staff notes that few of these distractions have generated much interest. Those which have generated interest are without merit, as explained below.

The Commission has the opportunity to recommend the beginnings of a more valid perspective to the Legislature, one more consistent with actual evidence, one which protects consumers and promotes the Rule of Law without damaging the effectiveness of mediation one whit. The draft legislation proposed in memorandum MM16-58 largely gets the job done. As explained below, Evidence Code section 703.5 needs amendment as well, to allow mediators to testify. A few of the more popular distractions are also discussed below. I respectfully request that the Commission end the distractions and recommend this beneficial legislation to the Legislature.

First Supplement to Memorandum 2016-60, Exhibit p. 5

Barbara S. Gaal, Esq., November 28, 2016, Page 2

**Evidence Code Section 703.5 should be amended to permit mediators to testify in legal malpractice cases arising out of mediations.**

In order for malpractice plaintiffs to have fair trials – and to allow mediators to protect their good names – Section 703.5 should be amended to allow mediators to testify in malpractice cases arising out of mediations.

In a paradigm case, a plaintiff might sue her former lawyer for malpractice, claiming that, at a mediation, the lawyer advised the client to settle too cheaply. The lawyer's defense might be that the mediator told him of new evidence against his former client, in light of which he thought that the settlement was reasonable. Even though the lawyer's testimony of what the mediator said to him is hearsay, many courts would likely admit that testimony because it is not being offered to prove the truth of the matter asserted, but rather to prove the reasonableness of the lawyer's advice, or for other collateral purposes.

In order for the plaintiff to have a fair trial, the mediator must be allowed to testify. To rebut the lawyer's hearsay testimony, the plaintiff would likely need to call the mediator to testify. Particularly if the lawyer testifies that the mediator's hearsay statements came in a private conversation between the mediator and the lawyer, there would be no other means of rebuttal. If the plaintiff is denied the mediator's testimony, it is hard to see where the plaintiff gets a fair trial. The lawyer would be at liberty to fabricate.

As unfair as this would be to the plaintiff, it is also unfair to the mediator. If the mediator is unable to testify, the lawyer (now defendant in the malpractice case) could opportunistically put any words he wants into the mediator's mouth to get himself off the hook. These might include all manner of false or foolish statements unfair to the mediator. If a lawyer ever tried to throw me under the bus this way, I would want the opportunity to set the record straight, on the record. I suspect that other mediators, if similarly demeaned, would want the same. Anything other than the ability to testify in the same proceeding or at the same trial would be too little, too late.

The mediation establishment will probably respond by arguing that this would result in mediators being endlessly drawn away from their invaluable work and into depositions and trials to testify as to long-ago mediations of which they remember little. The answer, again, is to ask whether this has become a reality in New York, in cases governed by Federal Rule of Evidence 408, or in Uniform Mediation Act states, where mediator testimony is permitted in such cases. Is there any actual evidence of this being a problem in any of those jurisdictions? If not, why believe that it would be a problem in California?

First Supplement to Memorandum 2016-60, Exhibit p. 6

Barbara S. Gaal, Esq., November 28, 2016, Page 3

**There should be no exceptions for family mediations, DRPA mediations, or other “special” cases.**

Family mediators, community mediators, and other self-proclaimed special cases assert that their mediations would be devastated if lawyers who participate in those mediations could be sued for malpractice.

Initially, there is a low risk of legal malpractice claims arising out of those special-case mediations because, as those mediators tout as a benefit of what they do, so many of their cases involve self-represented parties.

And, if a party to a special-case mediation brings a lawyer to represent him or her, why is that party any less entitled to have their lawyer live up to the standard of care?

Finally, let it be said again, let’s look at actual experience. Basic social science methodology would have us look for situations where legal malpractice cases arising out of these special-case mediations are a possibility, and see whether disaster has ensued as a result. The answer of course, is that in New York and the UMA states, such legal malpractice cases are a possibility, and no evidence has been presented that family mediation, community mediation, or any other special class of mediations has suffered disaster.

**There should be no one-size-fits-all mandatory disclosure requirements, or any such mandated requirements.**

The more the subject of “mandatory disclosure requirements” regarding mediation confidentiality is studied, the more certain it is that the proposal will collapse of its own weight.

To be accurate and comprehensive, any disclosure cannot be short and concise. The more accurate and comprehensive it gets, the harder it will be to draft, much less for a consumer to understand.

If the disclosure discusses the limitations on a client’s rights against his or her own lawyer, it may be construed as a prospective waiver of liability, which Rule 3-400, Rules of Professional Conduct, forbids. At a minimum, the client should have the opportunity to receive independent advice before agreeing to that limitation on their lawyer’s liability. Compare, Rule 3-300, Rules of Professional Conduct. Otherwise, the only advice the client receives regarding consent is from his or her own lawyer – whose interests at least potentially conflict with those of the client. If this cumbersome, time-consuming and expensive step is necessary, how will we ever get consent and actually convene a mediation?

First Supplement to Memorandum 2016-60, Exhibit p. 7

Barbara S. Gaal, Esq., November 28, 2016, Page 4

**The proposed "Alternative Compromise Package" is not a compromise at all, and should be rejected.**

A Page 31 of MM16-59, the Staff raised an "Alternative Compromise Package." Actually, it is not a compromise at all. It does not adequately protect consumers or promote the rule of law, and should be rejected.

Initially, the predicate for this supposed compromise is the familiar urban legend that absolute confidentiality is necessary for effective mediation, etc.

Of course, if that were true, then in jurisdictions which do not provide absolute confidentiality, we should be able to find evidence that mediation, or at least effective mediation, couldn't take place. To remind the Commission of what it well knows, but which cannot be repeated often enough, there are jurisdictions which do not provide absolute confidentiality, and the mediation establishment has failed to provide evidence that, in those jurisdictions, effective mediation is hampered.

Indeed, in New York, where confidentiality protection is minimal, there is evidence that much mediation takes place. JAMS lists 81 neutrals active in its New York City office. <https://www.jamsadr.com/jams-new-york>. There are about 90 in JAMS' Los Angeles office, <https://www.jamsadr.com/jams-los-angeles>, and about 100 in San Francisco, JAMS' biggest office. <https://www.jamsadr.com/jams-san-francisco>. (Although these lists do not distinguish between mediators and arbitrators, most neutrals do both. And, there is much overlap between the three lists. Still, the number of active neutrals in New York City is substantial.) So, at the high end of the market, there is evidence of much mediation activity in New York.

Additionally, there are over 300 mediators on the roster of the mediation panel for the United States District Court for the Southern District of New York (Manhattan). [http://www.nysd.uscourts.gov/docs/mediation/mediators\\_list/List%20of%20mediators.2.3.2016.pdf](http://www.nysd.uscourts.gov/docs/mediation/mediators_list/List%20of%20mediators.2.3.2016.pdf). (There are another 207 listed on the comparable panel for the Eastern District of New York [Brooklyn]. <https://www.nyed.uscourts.gov/adr/Mediation/displayAll.cfm>.) By contrast, there are 290 on the comparable panel in the Northern District of California, [http://12.130.78.145/cand\\_ver2010/ADR/Neutral2\\_Search2a.aspx](http://12.130.78.145/cand_ver2010/ADR/Neutral2_Search2a.aspx), and only 233 on the comparable panel in the Central District of California, <http://court.cacd.uscourts.gov/cacd/AttySetPan.nsf/Profiles?OpenView>. So, in other parts of the marketplace, New York again seems to have a lot of mediation activity.

The Commission may characterize this as quasi-evidence. But even if that is so, it's more than the mediation establishment has on its pan of the scale. There is no evidence of any kind to prove that

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absolute confidentiality is necessary for effective mediation. Thus, there is no reason for any so-called grand compromise to preserve that absolute confidentiality.

Moreover, this supposed "compromise" fails the essential test of acceptability. It does not provide for the admissibility of all relevant evidence in the legal malpractice cases it would permit. The fundamental rule of evidence, essential to the administration of justice and public confidence that the court system is getting cases right, is that all relevant evidence is admissible. Evidence Code section 351. Any proposal which does not permit the admissibility of all relevant evidence will not provide for fair trials, and should simply be discarded as a sideshow.

The mediation establishment is correct that, in a previous generation, California made certain policy choices regarding mediation confidentiality, which resulted in our current statute. That statute is an embarrassment. It goes farther than any logic or experience requires. It frustrates the rule of law and stands in the way of consumer protection. It has hardly proved itself a lamp unto the nation. In the decades since its enactment, not one other state has chosen to pattern its own law after our poor example. It's no wonder why. The Commission has the opportunity to recommend that the Legislature start to roll this law back. Now is the time.

Respectfully submitted,

Jeff Kichaven

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JOHN S. WARNLOF  
ATTORNEY AT LAW  
2033 N. Main Street, Suite 750  
Walnut Creek, California 94596  
Telephone: (925) 937-9200 ♦ Facsimile: (925) 937-9278  
[jwarnlof@aol.com](mailto:jwarnlof@aol.com)  
November 29, 2016

Barbara Gaal  
Chief Deputy Counsel  
California Law Revision Commission  
Via email: [bgaal@clrc.ca.gov](mailto:bgaal@clrc.ca.gov)

**Re: CLRC Staff Memorandum 2016-58**

Dear Ms. Gaal:

This letter responds to the concluding statement in Memorandum 2016-58 that Staff welcomes and encourages suggestion or comments concerning the draft legislation (Proposed Evidence Code §1120.5) and certain drafting issues identified therein.

The following comments should not be construed as a departure from my personal opinion the creation of an exception to mediation confidentiality for attorney-client communications occurring during mediation is unwarranted and will adversely impact the use of mediation in dispute resolution.

**Scope of Mediation Evidence.** The proposed exception applies to all types of mediation evidence, not just communications between an attorney and a client but would extend to all mediation participants with the exception of the mediator (See, Evidence Code §703.5). In my mediations, I have asked dozens of attorneys and parties if their use of mediation would be affected if they were subject to discovery and testimony at trial. The universal reaction that I have received is that they would probably decline to use mediation if their files could be subpoenaed, if attorneys and parties could be deposed and if they could be compelled to appear as witnesses at trial. Conversely, having defended attorneys in malpractice actions, I would strongly contend that due process would be denied to the attorney accused of malpractice if he or she was unable to call mediation participants to refute a former client's allegations.

**Pending Mediations.** If a client concludes that his or her attorney has committed malpractice in the course of a mediation, whether by wrongful actions resulting in a binding settlement or preventing a settlement, the attorney/client relationship will have been terminated and a complaint filed. Accordingly, it is unlikely that under such circumstances a mediation would still be pending.

**Tolling Provision.** An essential element of a legal malpractice claim is that the former client has sustained damages. Such damages would arise only if there was a binding settlement or upon discovery by the former client that his or her attorney had prevented an otherwise favorable settlement. I am not aware of any instance where attorney has been sued for preventing a settlement. Because a cause of action does not arise until a former client has been damaged, I do not foresee the need for a tolling provision.

**Evidentiary Standard.** As noted by Staff, to be admissible at trial, evidence must relevant but to be discoverable the evidence need only be reasonably calculated to the lead to the

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discovery of admissible evidence. If the proposed exception is limited to communications only between an attorney and a client, then, the discovery standard of admissibility would be appropriate, but if the exception applies to all mediation participants, then, in the interest of protecting such participants from unfettered discovery, the standard should be one of relevance.

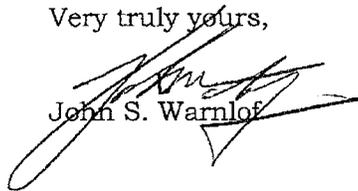
**DRPA and Family Law Mediations.** Professor Mary Culbert and representatives of the family law bar have made strong arguments that the proposed exception should not apply to DRPA and family law mediations. I am not convinced by the arguments advanced. If participants in DRPA community mediations are self-represented, then the proposed exception does not come into play. Likewise, in a family law mediation where the parties are self-represented, the proposed exception would not apply. If the Commission concludes that an exception to mediation confidentiality is warranted to make attorneys accountable for alleged malpractice occurring in the course of a mediation, then the exception should apply across the board.

**Disclosure Requirements.** California Rules of Court 3.854(b) requires that, in all court-connected mediations, "At or before the onset of the first mediation session, a mediator must provide the participants with a general explanation of the confidentiality of mediation proceedings." I believe that there is universal agreement that before parties agree to mediation, they should be fully informed as to its consequences including the inadmissibility of attorney/client communications occurring during the course of such mediation.

In answer to Staff's questions concerning what disclosures should be made, when the disclosures should be made and by whom they should be made, I urge the Commission to adopt a recommendation that the disclosures should be on a judicial council form and include the "Information and Caution on Mediation Confidentiality" set forth on Page 11 of Memorandum 2016-59 and also should incorporate portions of the 2005 form proposed by the Civil and Small Claims Advisory Committee of the Judicial Council. The disclosures should be made prior to a client's agreement to mediate. Waiting until the joint session at the commencement of the mediation is too late. The pressure to proceed with the mediation is too great. In over 500 mediations, after discussing mediation confidentiality with the participants, I have never had a participant state that confidentiality is unacceptable and decline to participate in the mediation. The required disclosure should be made by a party's attorney when mediation is first suggested. In providing "a general explanation" of confidentiality, a mediator should confirm that a participant has been provided with, and has reviewed, the judicial council form.

I hope that the foregoing comments will be of some benefit to the Committee.

Very truly yours,

  
John S. Warnlof

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