

Memorandum 2017-20

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

The Commission¹ recently received the following communications in connection with this study, which are attached as exhibits:

- | | |
|---|-------------------|
| | <i>Exhibit p.</i> |
| • Joyce I. Craig, Los Angeles (2/22/17) | 1 |
| • Ron Kelly, Berkeley (4/3/17) | 2 |
| • Steve Kruis, San Diego (2/19/17) | 3 |

Also attached is the following *Daily Journal* article, which we are including with permission from the author and the *Daily Journal*:

- | | |
|--|-------------------|
| | <i>Exhibit p.</i> |
| • Lisa Zonder, <i>Mediation Confidentiality Reform</i> , S.F. Daily J. (Feb. 17, 2017) | 4 |

We discuss these materials below, along with a few other matters.

COMMUNICATIONS URGING THE COMMISSION TO FOLLOW THE CCBA APPROACH OR A VARIANT ON IT

In 2011, the Conference of California Bar Associations (“CCBA”) passed a resolution recommending the following amendment of Evidence Code Section 1120:

1120. (a) Evidence otherwise admissible or subject to discovery outside of a mediation or a mediation consultation shall not be or become inadmissible or protected from disclosure solely by reason of its introduction or use in a mediation or a mediation consultation.

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.

- (b) This chapter does not limit any of the following:
- (1) The admissibility of an agreement to mediate a dispute.
 - (2) The effect of an agreement not to take a default or an agreement to extend the time within which to act or refrain from acting in a pending civil action.
 - (3) Disclosure of the mere fact that a mediator has served, is serving, will serve, or was contacted about serving as a mediator in a dispute.
 - (4) The admissibility, in a State Bar disciplinary action, an action for legal malpractice, and/or an action for breach of fiduciary duty, of communications directly between the client and his or her attorney, only, where professional negligence or misconduct form the basis of the client's allegations against the client's attorney.

As explained in the memorandum that introduced this study, that language was soon incorporated into a bill, which generated stiff opposition and led to the legislative resolution that directed the Commission to conduct this study.²

Joyce Craig (a lawyer and a mediator) now says that “if an exception to mediation confidentiality is adopted then it should be very narrowly tailored and limited to communications between a client and his/her own lawyer as described in the original Conference of California Bar Associations 2011 proposal, Resolution 10-6-2011.”³ Similarly, Steven Kruis of ADR Services, Inc., writes that if a mediation confidentiality exception is created, “the law should be narrowly tailored as depicted in the Conference of California Bar Association’s original proposal as set forth in Resolution 10-6-2011.”⁴

Along the same lines, Lisa Zonder (a family law attorney, mediator, and collaborative divorce professional) recently wrote a *Daily Journal* article warning that the Commission’s proposed new exception “may be tantamount to opening a floodgate to the Oroville Dam” In her view, an “arguably better option was put on the table by the Conference of California Bar Associations (CCBA) in 2011 and warrants reexamination.”⁵ She would like the Commission to consider her *Daily Journal* article as a comment on the Commission’s proposal.⁶ The article is attached for the Commission’s consideration.⁷

2. See Memorandum 2013-39, pp. 29-32.

3. Exhibit p. 1.

4. Exhibit p. 3.

5. Lisa Zonder, *Mediation Confidentiality Reform*, S.F. Daily J. (Feb. 17, 2017).

6. Email from Lisa Zonder to Barbara Gaal (3/30/17).

7. See Exhibit pp. 4-5.

Mediator Ron Kelly also draws the Commission's attention back to the CCBA proposal.⁸ He urges the Commission to offer a variant on it to the Legislature as an alternative to the Commission's current approach. Specifically, he says:

Combining [CCBA's] structure with several major decisions the Commission has made, you could circulate for public comment a Tentative Recommendation proposing legislation as follows:

[Evidence Code 1120 (b) This chapter does not limit any of the following:]

(4) The admissibility, in a State Bar disciplinary action or an action for legal malpractice, only, of relevant communications directly between the client and his or her attorney, only, where breach of a professional requirement in a mediation context forms the basis of the client's allegations against the client's attorney. Admission or disclosure of evidence under this subdivision does not render the evidence, or any other mediation communication or writing, admissible or discoverable for any other purpose.⁹

Mr. Kelly offers to "actively organize support for this option"¹⁰ He gives three reasons for taking that position:

1. It's only two sentences.
2. It would not remove current protections for candid communications between the mediator and all other parties, only those directly between the client alleging attorney misconduct and the accused attorney.
3. It would not create the basis to subpoena all other parties to a) turn over their confidential briefs, offers, and other electronic communications with the mediator, not to b) repeat under oath and cross-examination their oral mediation communications.¹¹

Mr. Kelly also says that if the Commission decides to proceed with its current proposal, without offering any alternative, and that proposal receives widespread opposition, then he would like the Commission "to later reconsider the above language as an alternative recommendation."¹² In that circumstance, he would "again offer to actively organize support for it."¹³

8. Exhibit p. 2.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

UPDATE ON ONLINE PETITION

As of today (April 7, 2017), the online petition by Citizens Against Legalized Malpractice has approximately 940 signatories. There are a number of new supplemental comments, which the staff will present to the Commission when time permits.

NEW ARTICLE BY PROF. JAMES COBEN

Mediator Phyllis Pollack recently alerted the staff to a new article by Prof. James Coben (Mitchell Hamline School of Law), entitled *My Change of Mind on the Uniform Mediation Act*.¹⁴ In the article, Prof. Coben explains why he now favors the Uniform Mediation Act (“UMA”), even though he used to be sure it “was a bad idea.”¹⁵ He says that the UMA generates less litigation than California’s approach to mediation confidentiality. Among other things, he also says that there is no evidence that the UMA has “open[ed] the doors of the mediation room in potentially chilling ways” or “triggered a decline in the use of mediation.”¹⁶

Respectfully submitted,

Barbara Gaal
Chief Deputy Counsel

14. James Coben, *My Change of Mind on the Uniform Mediation Act*, *Dispute Resol. Mag.* 6 (Winter 2017).

15. *Id.* at 6.

16. *Id.* at 8.

EMAIL FROM JOYCE I. CRAIG (2/22/17)

Re: Mediation Confidentiality Legislation request to follow CCBA proposal

Dear Sir or Madam:

I am writing to express my opinion as a lawyer and mediator, that if an exception to mediation confidentiality is adopted then it should be very narrowly tailored and limited to communications between a client and his/her own lawyer as described in the original Conference of California Bar Associations 2011 proposal, Resolution 10-6-2011. It is my view that there should be opening of the cloak provided by the current protections against requiring a mediator to participate as a witness or reveal disclosures made across the table by parties/lawyers. If an exception to the mediation confidentiality status quo is adopted, then the CCBA proposal strikes me as a manageable balance between consumer concerns and mediation confidentiality. To do otherwise would seriously compromise the utility of the mediation process.

Thank you,

Joyce I. Craig, JD 1984

Please respond to sender at jcraig@swlawyers.com

Joyce I. Craig APC, of counsel
12401 Wilshire Boulevard, Second Floor
Los Angeles, CA 90025-1089
(310) 207-1555 phone

April 3, 2017

Re: Study K-402 - Offer to Organize Support for an Alternative

Dear Chairperson Lee, Commissioners, and Staff,

Commissioner Boyer-Vine again raised at your last meeting the possibility of offering more than one alternative to the Legislature. This letter proposes an alternative in response to Lisa Zonder's excellent Daily Journal article on this study (available online by scrolling down at her website <<https://zonderfamilylaw.com>>). I commend it to you. It summarizes well the strong competing public policies which the Legislature asked the Commission to balance, and urges legislation based on the Conference of California Bar Association's original 2011 resolution.

CCBA Resolution 10-06-2011 sought to make admissible mediation "**communications directly between the client and his or her attorney, only**". It sought to add a single readable additional paragraph to section 1120 as follows:

[Evidence Code 1120 (b) This chapter does not limit any of the following:...]

(4) The admissibility, in a State Bar disciplinary action, an action for legal malpractice, and/or an action for breach of fiduciary duty, of communications directly between the client and his or her attorney, only, where professional negligence or misconduct form the basis of the client's allegations against the client's attorney.

Combining this structure with several major decisions the Commission has made, you could circulate for public comment a Tentative Recommendation proposing legislation as follows:

[Evidence Code 1120 (b) This chapter does not limit any of the following:...]

(4) The admissibility, in a State Bar disciplinary action or an action for legal malpractice, only, of relevant communications directly between the client and his or her attorney, only, where breach of a professional requirement in a mediation context forms the basis of the client's allegations against the client's attorney. Admission or disclosure of evidence under this subdivision does not render the evidence, or any other mediation communication or writing, admissible or discoverable for any other purpose.

I offer to actively organize support for this option for the following reasons.

1. It's only two sentences.
2. It would not remove current protections for candid communications between the mediator and all other parties, only those directly between the client alleging attorney misconduct and the accused attorney.
3. It would not create the basis to subpoena all other parties to a) turn over their confidential briefs, offers, and other electronic communications with the mediator, nor to b) repeat under oath and cross-examination their oral mediation communications.

If the Commission is willing to again consider offering a choice of more than one option, I strongly urge the Commission to consider the above language. If the Commission does proceed with only a single option, and receives widespread public opposition, then I urge the Commission to later reconsider the above language as an alternative recommendation. I again offer to actively organize support for it.

cc Hon. David W. Long, California Judges Association
Ms. Heather Anderson, California Judicial Council

Respectfully submitted,
Ron Kelly
2731 Webster St.
Berkeley, CA 94705
ronkelly@ronkelly.com

EMAIL FROM STEVE KRUIS (2/19/17)

Re: Mediation Confidentiality

Dear Sir or Madam:

I am a commercial mediator in San Diego, and have mediated thousands of cases throughout Southern California since 1993. Please allow me to provide my comments regarding the California Law Revision Commission's draft legislation regarding mediation confidentiality.

My experience is that mediation confidentiality is essential to effective and successful mediation. If an exception to confidentiality is established, I suggest the law should be narrowly tailored as depicted in the Conference of California Bar Association's original proposal as set forth in Resolution 10-6-2011. Specifically, to enact legislation that would make admissible mediation "communications directly between the client and his or her attorney only," not all mediation communications among all other parties and the mediator. If an exception is made to address potential attorney malpractice in mediation, this would be the best way in my opinion to address that issue while continuing to protect and foster frank discussions in mediation, an essential prerequisite to the settlement of disputes.

Thank you for the opportunity to provide my input. Please let me know if you have any questions.

Respectfully submitted,

Steven H. Kruis, Esq.
ADR Services, Inc.
225 Broadway, Suite 1400
San Diego, CA 92101

619.995.2453 Direct
619.233.1323 Case Manager
619.702.2030 Fax

www.kruismediation.com



VERDICTS & SETTLEMENTS

www.dailyjournal.com

FRIDAY, FEBRUARY 17, 2017

Mediation Confidentiality Reform

By Lisa Zonder

Those engaged in civil, family or other non-criminal mediation should beware of the California Law Revision Commission's (CLRC) draft legislation in the pipeline. It may kill your mediation practice. For more than 20 years, California has had a strict shield of confidentiality around mediation. All persons attending a mediation session can speak frankly, without fear of having their words turned against them. The draft legislation aims to create an exception to that shield in certain cases.

The "small exception" in the CLRC's current draft, however, may be tantamount to opening a floodgate to the Oroville Dam. While a sea change may be inevitable, it need not cause mediators to shutter their practices. An arguably better option was put on the table by the Conference of California Bar Associations (CCBA) in 2011 and warrants re-examination. It is more narrowly tailored and strikes the right balance between consumer concerns and mediation confidentiality.

You may recall that the Supreme Court decided *Cassel v. Superior Court*, 51 Cal. 4th 113 (2011), confirming that California's statutes provide a shield of confidentiality such that mediation communications would not be admissible in later non-criminal proceedings, including malpractice actions. This raised a serious concern for Justice Ming Chin, who concurred with the majority in *Cassel*, but expressed



Shutterstock

ambivalence about whether courts were shielding acts of attorney malpractice.

The California Legislature referred the question to the CLRC, which began a study known as "K-402." For two years, public comments were submitted to the CLRC contemplating countless approaches that would not weaken mediation confidentiality. In August 2015, the commission voted to recommend legislation removing current protections and allowing in "all relevant evidence" when anyone alleges lawyer misconduct, including the lawyer and mediator. Hundreds of opposition statements were submitted, including the California Judges Association and the state of California's own Mediation and Conciliation Service.

This debate rages on with two polarized schools of thought — maintaining our current strict protections versus adding a new malpractice exception.

Proponents of strict mediation confidentiality note that until now, they could comfortably tell clients "what happens in Vegas

stays in Vegas." It has been the bedrock of mediation to get folks to the settlement table. If it does not "stay in Vegas," will clients still consider the potential benefits of mediation to be worth the risks?

Consider the assurances given by Chief Judge Sidney Thomas of the 9th U.S. Circuit Court of Appeals: "[A]lthough the mediators are court employees, they are well shielded from the rest of the court's operation. The court has enacted strict confidentiality rules and practices; all who participate in the court's mediations may be assured that what goes on in mediation stays in mediation."

Proponents of creating an exception echo Chin's concern about limiting the court's ability to consider relevant evidence in deciding malpractice and State Bar claims. Ron Kelly — an authority on mediation confidentiality who sponsored the Evidence Code sections that secure mediation confidentiality — summarizes the proponents arguments as follows: no one wants to give safe haven to attorneys committing malpractice or

State Bar violations. The statutes were not meant to immunize attorneys. Further, change is needed because lawyers cannot ethically recommend mediation if the process immunizes their own conduct.

Both sides of the debate seemingly agree that statistically there are few cases in which a malpractice exception would ever be invoked and that consumers should be protected from lawyers who are incompetent or deceptive.

This month, the commission met to discuss the proposed changes to the confidentiality rules and voted to reject all major alternative proposals which would not have significantly weakened mediation confidentiality. The staff were directed to continue drafting the tentative recommendation to allow discovery and admissibility of all mediation communication on an allegation of attorney misconduct. If this proposed legislation moves forward as is, parties will be required to produce in later discovery all confidential briefs, documents, emails and other communications with the mediator. It will make all these mediation communications admissible later if relevant to malpractice claims or defenses.

Current California Rule of Court 3.854 (b) states: "At or before the outset of the first mediation session, a mediator must provide the participants with a general explanation of the confidentiality of mediation proceedings." Kelly, a mediator for over 40 years, said in a recent interview to consider the following scenario:

"If [the CLRC's] current proposal becomes law, honest mediators will have to start their mediations as follows: 'Warning! Anything you say here you may be subpoenaed to repeat under oath if the other side later complains against their lawyer. You may have to give them any documents we create, and any texts or emails we write.'"

This would certainly affect your conduct in mediation and the advice you would give your client.

By ignoring all of the alternative proposals, it may be that the CLRC has opted to focus on the "call of the question" — i.e., whether to carve out a malpractice exception. If an exception is established, the law should be narrowly tailored — as depicted in the CCBA's original proposal, Resolution 10-6-2011. The CCBA sought with that reso-

lution to enact legislation that would make admissible mediation "communications directly between the client and his or her attorney, only," not all mediation communications among all the other parties and the mediator.

If an exception is established, the law should be narrowly tailored — as depicted in the CCBA's original proposal, Resolution 10-6-2011.

The Evidence Code would continue to shield the mediator and opposing counsel from a subpoena. It is unclear why the CLRC has not adopted this CCBA-approved resolution as its tentative recommendation.

If the CCBA's proposal were enacted, the mediator's opening statement might instead start with

"what happens in mediation stays in mediation, except that the existing rules apply to any communications directly between the client and his or her attorney, only." This opening statement should appease both sides of the debate.

Attorney-mediator Fred Glassman noted in a brief interview that mediation-consulting attorneys accept their responsibility to provide competent legal advice to their mediation clients. Adopting the CCBA's original proposal merely confirms for attorneys that we must do our jobs competently and be accountable to the client. It seems that most of the "voices" who participated in the CLRC process should be able to "live with" the CCBA's resolution.

You can voice your opinion before the CLRC votes by writing to bgaal@clrc.ca.gov.

Lisa Zonder is a family law attorney, mediator and collaborative divorce professional with offices in Westlake Village. She is president of CP Cal and former divorce talk radio show host on KVTA 1590 AM. She acknowledges Ron Kelly's time and resources for this article and Fred Glassman's support. Any opinions expressed are solely those of the author. You can reach her at lisa@zonderfamilylaw.com or (805) 777-7740.



Reprinted with permission from the *Daily Journal*. ©2017 Daily Journal Corporation. All rights reserved. Reprinted by ReprintPros 949-702-5390

ZONDER
— FAMILY LAW —