Study K-402 June 5, 2017

Memorandum 2017-31

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

Since the April meeting, 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:

These communications from mediation professionals in Ventura County (hereafter, "the Ventura comments") are similar in content. We discuss them below and then provide an update regarding the online petition of Citizens Against Legalized Malpractice.

THE VENTURA COMMENTS

The Ventura Center for Dispute Settlement ("VCDS") is a 26-year-old nonprofit ADR organization that seeks to "foster the ideals, practice and awareness of mediation as an alternative to confrontational forms of dispute resolution."[2] On behalf of the organization, its president (Todd Turner), executive director (Clare Rice), and a board member (Gisele Goetz) express concern regarding the Commission's proposed approach,[3] as does attorney-mediator Russ Charvonia.[4]

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. 3.
3. Exhibit pp. 3-4.
4. Exhibit pp. 1-2.

In their nearly identical comments, they say that the Commission's proposal "would remove our current confidentiality protections if any of the parties drawn into mediation later filed a claim against their lawyer alleging misconduct during the mediation process."[5] They believe this would mean that "mediators on our panel and the participants in mediations through our programs could later be served with the party's malpractice complaint and forced to produce anything they may write and potentially testify as to what they may have said or heard said in mediation."[6]

In so-characterizing the Commission's proposal, the Ventura commenters appear to be unaware of the limitations incorporated into that proposal, which are described at pages 133-39 of the draft attached to Memorandum 2017-30. Of particular note, the Ventura commenters appear to be unaware of the provision precluding a mediator from testifying or producing documents (proposed Evidence Code Section 1120.5(e)).

The Ventura commenters go on to say that the "negative results" of the Commission's approach "far outweigh any possible benefits."[7] They explain that even if the proposed exception is not used much, "the mere fact of its existence will destroy the concept of safe and honest communications … that we … teach when we train mediators and that our mediators utilize in our programs."[8] They "recognize that important exceptions to mediation confidentiality do exist," but they do not think that the Commission's proposed new exception falls in that category.[9] They fear that "the protection disappears upon the unilateral decision of one party," and thus everyone else's confidentiality protections "are ephemeral and subject to contestation."[10]

The Ventura commenters also warn that the mediation process would be undermined by starting it with a suggestion that lawyers "routinely" behave in an "incompetent, adverse or coercive manner" towards their mediating clients, which necessitates client protection. The commenters appear to assume that if the Commission's proposed new exception is enacted, mediators and/or attorneys would necessarily describe it to mediating parties in such terms.[11] They warn that "bluntness and honesty can … be hindered by the suggestion that a

5. Exhibit pp. 1 (Charvonia), 3 (VCDS).
6. Exhibit pp. 1 (Charvonia), 3 (VCDS).
7. Exhibit pp. 1 (Charvonia), 3 (VCDS).
8. Exhibit pp. 1 (Charvonia), 3 (VCDS).
9. Exhibit pp. 1 (Charvonia), 3-4 (VCDS).
10. Exhibit pp. 1 (Charvonia), 4 (VCDS).
11. Exhibit pp. 1 (Charvonia), 4 (VCDS).

malpractice claim for bullying lies around each corner."[12] In their opinion, "the very rare claim of malpractice by an attorney during the mediation process does not justify such a gross exception to the existing statutory confidentiality of the mediation process."[13]

UPDATE ON THE ONLINE PETITION

Currently, the online petition by Citizens Against Legalized Malpractice[14] has approximately 1,025 signatories. Some of the new signatories have submitted supplemental comments.

As in the past, those supplemental comments are from many different locations, not just California. They are generally similar in nature to the supplemental comments submitted earlier.[15] The only comment that mentions mediation is from Kazuko Artus of San Francisco,[16] who wrote:

> I'm signing because I value transparency. I do not believe that mediation confidentiality makes mediation attractive to disputing parties.

The remaining comments can be viewed online.

Respectfully submitted,

Barbara Gaal
Chief Deputy Counsel

12. Exhibit pp. 1 (Charvonia), 4 (VCDS).
13. Exhibit pp. 1 (Charvonia), 4 (VCDS).
14. The online petition is available at <www.change.org>. The text of the petition is also reproduced in Memorandum 2015-46, Exhibit pp. 210-11.
15. See, e.g., Memorandum 2017-9, Exhibit pp. 1-32; First Supplement to Memorandum 2016-60, Exhibit pp. 12-29; Memorandum 2016-60, Exhibit p. 10.
16. Ms. Artus submitted more extensive comments earlier in this study. See Second Supplement to Memorandum 2013-39, Exhibit pp. 1-2.

EMAIL FROM RUSS CHARVONIA
(4/23/17)

Re: Study K-402

I am a mediator in Ventura County and am writing to convey my concerns with the potential policy implications of the Law Revision Commission study K-402. My specific concerns are focused on the proposed elimination of confidentiality protections in mediation. As I understand it, if adopted in its present framework, it would remove our current confidentiality protections if any of the parties drawn into mediation later filed a claim against their lawyer alleging misconduct during the mediation process. The result would be that the mediators on our panel and the participants in mediations through our programs could later be served with the party's malpractice complaint and forced to produce anything they may write and potentially testify as to what they may have said or heard said in mediation. The negative results of this policy far outweigh any possible benefits.

Even if this proposed "exception" is seldom used, the mere fact of its existence will destroy the concept of safe and honest communications both that we currently teach when we train mediators and that our mediators utilize in our programs. We currently teach our mediators that confidentiality is the cornerstone of mediation; that it has few and limited exceptions; and with very limited exceptions, that the courts will not allow the parties to use statements, offers and documents created in mediation in their court cases. We recognize that important exceptions to mediation confidentiality do exist but for the most part, those exceptions are for the safety of all the participants or to enforce settlements arrived at in the mediation. For example, when we say that threats of violence will not be protected, as we now do, that invokes more confidence that the mediation process will be a safe and peaceful form of dispute resolution. When we advise the parties that settlements arrived at in mediation can be made enforceable, we are furthering the cause of peaceful resolution. To the contrary, as we interpret the proposed regulations, we would now have to advise that confidentiality applies to mediation unless someone later decides to sue their lawyer. In other words, the protection disappears upon the unilateral decision of one party. This is decidedly adverse to everyone else engaged in the process who is now advised upfront that their own confidentiality protections are ephemeral and subject to contestation. This also weakens the foundation of mediation - that it is a process where both parties have equal say in the outcome. Further, unlike the mediation exception for threats of violence, the mediation process itself is undermined by starting it with the suggestion that the process of mediation is one where lawyers routinely engage in such an incompetent, adverse or coercive manner toward their clients, that clients have to be protected from them. Whereas bullying or coercion should never be countenanced, mediation is a forum where lawyers and their clients should be supported in their efforts to be honest and reflective about their cases. This encouraged bluntness and honesty can

also be hindered by the suggestion that a malpractice claim for bullying lies around each corner.

While I recognize that outlier cases do exist, bad facts should not make bad law. Because of this, we like other mediation organizations, urge the Commission to step back now and change course before crafting its recommendation within the current framework and venture down this slippery slope. In my opinion, the very rare claim of malpractice by an attorney during the mediation process does not justify such a gross exception to the existing statutory confidentiality of the mediation process.

Thank you for considering our views and this request.

Sincerely,

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Barbara Gaal, Chief Deputy Counsel
California Law Revision Commission
4000 Middlefield Road, Room D-2
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Re: Study K-402 -- Mediation Confidentiality

Dear Ms. Gaal, Chairperson Kihiczak and Commissioners:

I am writing you on behalf of the Ventura Center for Dispute Settlement, a 26-year old non-profit ADR organization, whose mission is to foster the ideals, practice and awareness of mediation as an alternative to confrontational forms of dispute resolution. We do this through training mediators, educating the public, and providing programs to make mediation accessible to the citizens of Ventura County.

We are writing to convey our concerns with the potential policy implications of the Law Revision Commission study K-402. Specifically, our concerns are focused on the proposed elimination of confidentiality protections in mediation. As we understand it, if adopted in its present framework, it would remove our current confidentiality protections if any of the parties drawn into mediation later filed a claim against their lawyer alleging misconduct during the mediation process. The result would be that the mediators on our panel and the participants in mediations through our programs could later be served with the party's malpractice complaint and forced to produce anything they may write and potentially testify as to what they may have said or heard said in mediation. The negative results of this policy far outweigh any possible benefits.

Even if this proposed "exception" is seldom used, the mere fact of its existence will destroy the concept of safe and honest communications both that we currently teach when we train mediators and that our mediators utilize in our programs. We currently teach our mediators that confidentiality is the cornerstone of mediation; that it has few and limited exceptions; and with very limited exceptions, that the courts will not allow the parties to use statements, offers and documents created in mediation in their court cases. We recognize that important exceptions to mediation confidentiality do exist but for the most part, those exceptions are for the safety of all

the participants or to enforce settlements arrived at in the mediation. For example, when we say that threats of violence will not be protected, as we now do, that invokes more confidence that the mediation process will be a safe and peaceful form of dispute resolution. When we advise the parties that settlements arrived at in mediation can be made enforceable, we are furthering the cause of peaceful resolution. To the contrary, as we interpret the proposed regulations, we would now have to advise that confidentiality applies to mediation unless someone later decides to sue their lawyer. In other words, the protection disappears upon the unilateral decision of one party. This is decidedly adverse to everyone else engaged in the process who is now advised upfront that their own confidentiality protections are ephemeral and subject to contestation. This also weakens the foundation of mediation – that it is a process where both parties have equal say in the outcome. Further, unlike the mediation exception for threats of violence, the mediation process itself is undermined by starting it with the suggestion that the process of mediation is one where lawyers routinely engage in such an incompetent, adverse or coercive manner toward their clients, that clients have to be protected from them. Whereas bullying or coercion should never be countenanced, mediation is a forum where lawyers and their clients should be supported in their efforts to be honest and reflective about their cases. This encouraged bluntness and honesty can also be hindered by the suggestion that a malpractice claim for bullying lies around each corner.

While we recognize that outlier cases do exist, bad facts should not make bad law. Because of this, we like other mediation organizations, urge the Commission to step back now and change course before crafting its recommendation within the current framework and venture down this slippery slope. The very rare claim of malpractice by an attorney during the mediation process does not justify such a gross exception to the existing statutory confidentiality of the mediation process.

Thank you for considering our views and this request.

Yours very truly,

Gisele Goetz, Esq.
Member VCDS Executive Board

Todd Turner
President, VCDS Executive Board

Clare Rice
Executive Director, VCDS