

Memorandum 2017-62

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

The Commission<sup>1</sup> received the following new communications relating to this study:

	<i>Exhibit p.</i>
• Larry Doyle, Conference of California Bar Associations (11/28/17) . . . . .	1
• Elizabeth Jones, Newport Beach (10/12/17) . . . . .	3
• Jeff Kichaven, Los Angeles (11/27/17) . . . . .	4
• Linda Klibanow, Pasadena (10/12/17) . . . . .	5
• John and Deborah Blair Porter, Manhattan Beach (11/28/17) . . . . .	6
• A. Marco Turk, <i>We All Agree on Mediation Rules As Is</i> , Daily Journal (10/20/17) . . . . .	18
• Lorraine Walsh, Walnut Creek (11/28/17) . . . . .	20

The new communications are briefly discussed below.

COMMENTS OF CCBA

The Conference of California Bar Associations (CCBA) “respectfully and strongly opposes” the concept of limiting the Commission’s proposed new mediation confidentiality exception to State Bar disciplinary proceedings.<sup>2</sup> CCBA gives a number of reasons for taking that position.<sup>3</sup>

COMMENTS OF ELIZABETH JONES

Attorney-mediator Elizabeth Jones (a new participant in this study) stresses “how very important it is to preserve client confidentiality and process

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.

3. *Id.*

confidentiality in Family Law.”<sup>4</sup> She urges the Commission to reconsider its position and warns that it is “about to irreparably damage the process of Mediation.”<sup>5</sup>

#### COMMENTS OF JEFF KICHAVEN

Mediator Jeff Kichaven says that “Memorandum 17-61 does no more than suggest useless obstacles on consumers’ paths to hearings on the merits of their claims.”<sup>6</sup> He is particularly dubious that “the State Bar might stretch the concept of ‘restitution’ to include damages awards” in the context of mediation misconduct.<sup>7</sup> He asks the Commission to “advance consumer protection and the Rule of Law so that mediation can be a profession of which we can all be proud.”<sup>8</sup>

#### COMMENTS OF LINDA KLIBANOW

Linda Klibanow (a new participant in this study) has worked in labor/employment law for over 40 years, “20+ years as a mediation participant and 20 years as a mediator practitioner.”<sup>9</sup> She says that “the unfettered exchange of information is the *sine qua non* of a successful mediation and ... such exchange, on the part of risk-averse parties, simply *will not occur* in the face of *any* statutory exceptions.”<sup>10</sup> In other words, “[c]onfidentiality is the ‘grease’ that makes the mediation wheels go round.”<sup>11</sup> She urges the Commission to “**oppose** any amendment to the Evidence Code to limit or restrict the fundamental principle of mediation confidentiality.”<sup>12</sup>

#### COMMENTS OF JOHN AND DEBORA BLAIR PORTER

John and Debora Blair Porter “strongly urge the CLRC to submit the Tentative Recommendation to the Legislature without change and oppose any changes to the Tentative Recommendation, as MM17-61 proposes, including making the proposed exception applicable only to a State Bar proceeding, which

---

4. Exhibit p. 3.

5. *Id.*

6. Exhibit p. 4.

7. *Id.*

8. *Id.*

9. Exhibit p. 5.

10. *Id.*

11. *Id.*

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

[they] believe would dilute its effect.”<sup>13</sup> They provide a lengthy explanation of their position.<sup>14</sup>

#### COMMENTS OF PROF. A. MARCO TURK

Prof. A. Marco Turk has written several articles for the *Daily Journal* regarding this study. At his request, his latest article (“*We All Agree On Mediation Rules As Is*”) is attached as Exhibit pages 18-19. In it, he summarizes some of the arguments made by stakeholders opposing the tentative recommendation. He urges readers to “inform our state legislators how strongly mediators and the public feel about preserving our current right to choose confidential mediation.”<sup>15</sup>

#### COMMENTS OF LORRAINE WALSH

Lorraine Walsh previously testified to the Commission on behalf of the State Bar Committee on Mandatory Fee Arbitration (MFA). Due to time constraints, that committee was not able to submit comments on Memorandum 2017-61, but Ms. Walsh has provided input in her individual capacity.<sup>16</sup> She writes:

I continue to urge the Commission to keep MFA disputes in the proposed statute. MFA proceedings are confidential so they provide a confidential forum where mediation malpractice allegations affecting fees, costs or both can be kept confidential. It also provides a forum where these type of cases will be kept out of Superior Court or private contractual arbitration because over 95% of fee arbitrations result in an award which is not rejected by either the client or the attorney.<sup>17</sup>

Ms. Walsh also offers a specific drafting suggestion:

Regarding the proposal on page 30 of the Memorandum to add qualifying language to the proposed Evidence Code 1120.5(a)(2)(C) — “provided the dispute raises issues of malpractice by the lawyer” I do not oppose this type of qualifier. I suggest the

---

13. Exhibit p. 6.

14. Exhibit pp. 6-17.

15. Exhibit p. 19.

16. See Exhibit p. 20.

17. *Id.*

elimination of the passive voice “by the lawyer” if it is narrowed. I suggest the following language: “provided the dispute involves allegations of attorney malpractice.”<sup>18</sup>

Respectfully submitted,

Barbara Gaal  
Chief Deputy Counsel

---

18. *Id.*



Justice Through Laws

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

November 28, 2017

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  
Opposition to Recommendation to Limit Proposed Statute to State Bar  
Disciplinary Proceedings**

Dear Chair Hallinan and CLRC Members and Staff:

The Conference of California Bar Associations (CCBA) respectfully and strongly opposes the staff suggestions in [Memorandum 2017-61](#) that any exception to the current nearly-absolute mediation confidentiality statute be limited to State Bar disciplinary proceedings, rather than to such proceedings and legal malpractice actions. Not only would such a limitation be inconsistent with [CCBA Resolution 10-06-2011](#), which was the inspiration for the study, but it is wholly inconsistent with the concept of consumer protection upon which the resolution – and the study – was based. Ultimately the change would render the current Tentative Recommendation meaningless, stripping California mediation consumers of essentially all the protection they otherwise might have received.

The object of the State Bar discipline system is to punish bad lawyers, and to protect the public by restricting or eliminating the ability of those bad lawyers to practice law. The system is discretionary by the State Bar, and historically has focused on straightforward cases of attorney malfeasance, misappropriation and/or fraud. Cases involving issues of attorney competence, violations of the duties of loyalty or client communication, and similar, subtler matters – the kind of issues that are reflected in *Cassel* and the other cases which inspired this study - are much less likely to be prosecuted.

Moreover, the State Bar discipline process never has focused on making victimized consumers whole, and it is highly unlikely that will change any time soon. The provision of the memorandum entitled “Availability of Relief” suggesting that mediation consumers who file complaints against incompetent or fraudulent attorneys with the State Bar

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)

EX 1

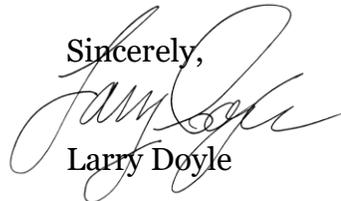
possibly MAY be able to obtain some reimbursement for expenses by order of the court, or could possibly qualify (after a very, very long process) for reimbursement from a newly-replenished Client Security Fund, is highly speculative, at best. Historically, the CSF has existed to provide relief to the clients of disbarred, suspended or deceased attorneys who are unable to reimburse the clients for money they have stolen. The changes made in SB 36 will not change this, but simply will enable the State Bar to address an existing backlog of claims against the CSF.

It is disturbing that the opponents of the Tentative Recommendation speak loudly and passionately about the need to protect mediation confidentiality or “the interests underlying mediation confidentiality” (as if confidentiality or its underlying interests could be victimized or defrauded), but almost never speak of the need to protect the individuals who participate in mediation. With very rare exceptions, the opponents invariably elevate process over people, supporting their position with broad assertions that absolutely confidentiality is essential to successful mediation, and that mediation participants expect and demand such absolute confidentiality. As has been noted time and again, there is absolutely no evidence to support these assertions. The experience in other states belies the former, and there is no evidence whatsoever that mediation consumers, if asked, would support absolute confidentiality if they understood it required they waive their right to recourse against a bad lawyer.

The CLRC has spent four years now considering how best to protect mediation consumers from incompetent and/or dishonest attorneys, and has demonstrated courage and integrity over the past few critical meetings by supporting strong, necessary consumer protection in the face of strong opposition from powerful interest groups. The CCBA very much hopes the Commission members will continue to do so.

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,

A handwritten signature in black ink, appearing to read "Larry Doyle", is written over a printed name.

Larry Doyle

**EMAIL FROM ELIZABETH JONES (10/12/17)**

I wish to express to you how very important it is to preserve client confidentiality and process confidentiality in Family Law. Our Courts are stretched to the max and access to the Courts for help is long delayed, often for many months. Those of us Attorneys that offer Mediation do so with the understanding that the process is confidential and that any documents prepared for Mediation are confidential as is everything that is said in the mediation.

It is with these assurances that couples enter in to the Mediation process. They understand that they must start over if they can settle. And that knowledge is often what inspires them to cooperate and reach agreement.

If you take that away from us, you will irreparably damage this process and our Courts will again be overburdened and families will suffer.

Please reconsider your position. You are about to irreparably damage the process of Mediation.

Elizabeth Jones, a Professional Corporation  
369 San Miguel Drive, Suite 100  
Newport Beach  
California 92660  
714-973-7904  
[ejesq@me.com](mailto:ejesq@me.com)

November 27, 2017

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

In re: Mediation Confidentiality; Memorandum 17-61

Dear Ms. Gaal:

Thank you for the opportunity to comment on Memorandum 17-61.

In reviewing the memorandum, it is important to remember why the Legislature asked the Commission to undertake this study in the first place: Consumers such as Michael Cassel could not get a hearing on the merits of their claims of legal malpractice when that claimed malpractice took place in a mediation. The Rule of Law requires that there be remedies for wrongs, at least to the extent that there is no adverse consequence from providing those remedies. The experience of the large UMA jurisdictions (Washington, Illinois, Ohio, New Jersey, DC) and New York shows that there is no evidence of any adverse consequence from allowing consumers to pursue these remedies. It's time for the Commission to look this issue squarely in the eye, say "enough is enough" to the mediation establishment, and make its Tentative Recommendation final.

One assertion in Memorandum 17-61 is so remarkable that it deserves special mention. That is the assertion that the State Bar might stretch the concept of "restitution" to include damages awards. The State Bar is not, of course, set up to act as a Superior Court. Nor, it seems, has anyone bothered to ask the State Bar whether it wants or is prepared to do so. The State Bar seems to have trouble doing the tasks already assigned to it. See, "State Bar struggling to fill positions in attorney discipline unit," Daily Journal, November 27, 2017, p. 4. It's doubtful that the State Bar is looking for further responsibilities, no matter how slight. And, there is no evidence that any other state bar, anywhere, administers remedies like this. It's a fairy tale to suggest that our State Bar should or would do so.

The rest of Memorandum 17-61 does no more than suggest useless obstacles on consumers' paths to hearings on the merits of their claims. How do we know that they are useless? Because, once again, in the large UMA states and New York, there is no evidence that mediation suffers without them.

It continues to be a pleasure to work with the Commission to advance consumer protection and the Rule of Law so that mediation can be a profession of which we can all be proud. Thank you for your kind consideration of my views.

Best regards,

Jeff Kichaven

JK:abm

## EMAIL FROM LINDA KLIBANOW (10/12/17)

### Re: Mediation Confidentiality: Opposition to Proposed Evidence Code Protection

As a 40-year labor/employment law practitioner in California, 20+ years as a mediation participant and 20 years as a mediator practitioner, I am deeply disturbed by the Commission's Tentative Recommendation to amend the Evidence Code to create several exceptions to the mediation confidentiality privilege and must add my individual voice to those questioning actual need or purpose for such amendment and warning of certain deleterious consequences to the highly constructive process of California mediation as it is currently practiced with near absolute confidentiality (sole exceptions possibly being mediator notification of imminent violent conduct, etc.)

As a 20-year practicing mediator, I can attest that the unfettered exchange of information is the *sine qua non* of a successful mediation process and that such exchange, on the part of risk-averse parties, simply *will not occur* in the face of *any* statutory exceptions. Confidentiality is the "grease" that makes the mediation wheels go round. Should the amendment pass, mediation will no longer be the "go to" process to resolve conflicts and, in the midst of funding cuts, court case congestion, and delay of justice, will increase dramatically.

From the record I have reviewed, there is a woeful paucity of evidence to support the concerns expressed by a handful of persons/organizations propounding for amendment; moreover, proverbially, the proposed "cure" is far worse than the disease.

For the sake of the administration of justice in California, I sincerely hope that the Commission will adhere to its own Staff's admonition for "careful reexamination" and will alter its Tentative Recommendation to **oppose** any amendment to the Evidence Code to limit or restrict the fundamental principle of mediation confidentiality.

Thank you for considering my position based upon a lifetime of **real-world** professional experience in this field.

Linda S. Klibanow, Esq.  
Law Offices of Linda S. Klibanow  
595 E. Colorado Blvd., Suite 302  
Pasadena, CA 91101  
Tel: (626) 204-4000 Fax: (626) 204-4001  
Email: [lklibanow@lindaklibanow.com](mailto:lklibanow@lindaklibanow.com)  
[www.lindaklibanow.com](http://www.lindaklibanow.com)

John E. Porter  
Deborah Blair Porter

1156 5<sup>th</sup> Street, Manhattan Beach, CA 90266  
(310) 379-0386 (home) – (310) 977-5377 (cell)  
E-mail: [deborah.blair.porter@gmail.com](mailto:deborah.blair.porter@gmail.com)

---

November 28, 2017

VIA EMAIL TRANSMISSION

Barbara Gaal, Chief Deputy Counsel  
California Law Revision Commission  
4000 Middlefield Road, Room D-2  
Palo Alto, CA 94303

Re: Relationship between Mediation Confidentiality and Attorney Malpractice  
and Other Misconduct – Input re: MM17-61 and MM17-52

Dear Chief Deputy Counsel Gaal:

We write to provide input to the California Law Revision Commission’s (“CLRC”) recent Memoranda, specifically its September 27, 2017 Memorandum (MM17-52) and November 1, 2017 Memorandum (MM17-61), and CLRC’s decision “to proceed with its general approach but explore the possibility of narrowing the proposed exception (proposed Evidence Code Section 1120.5).”

We strongly urge the CLRC to submit the Tentative Recommendation to the Legislature without change and oppose any changes to the Tentative Recommendation, as MM17-61 proposes, including making the proposed exception applicable only to a State Bar proceeding, which we believe would dilute its effect. Our position is discussed below.

General Concerns

The statement at page 13 of MM17-61 regarding the significant “opposition” to the TR seems to imply “opposition” has arisen because using mediation evidence in a legal malpractice case means the “policy interests” underlying mediation confidentiality are *not* safeguarded in a court of law in a manner they potentially may be in a disciplinary proceeding. Not only is this conjecture, we have seen no evidence this is the case and believe MM17-61 itself provides information which contradicts this position.

Further, the trials in our case, *Porter v. Wyner*, demonstrate proceedings in civil court can address mediation confidentiality in a manner that provides careful examination and the necessary openness for accountability, and not “threaten” mediation, confidentiality or the rights of other mediation participants.

This same statement also gives the impression the “policy interest” in question is in maintaining *absolute mediation confidentiality* (which obviously works to the advantage/benefit of those who oppose the TR and the openness and accountability it would bring) when that should not be the case. The CLRC should consider that:

- The “amount and intensity of opposition” is from attorneys and the legal community, not the general public. As members of the general public, we believe the “policy interest” that needs safeguarding is the right of the public to participate in mediation without fear mediation confidentiality will be used as a shield behind which attorneys engage in and/or hide bad acts. Protection of the public from attorneys who misuse mediation and mediation confidentiality, no matter the forum, was the focus of the Study and still should be.
- The “amount and intensity of opposition” most likely would be the same in a disciplinary proceeding (although given the State Bar’s attitude documented in MM17-61, which views most complaints from the general public “frivolous” or “without foundation,” such “opposition” may be less intense and more muted).
- The “policy interests underlying mediation confidentiality” ***should be what works best for the mediating parties***. The way to “better safeguard” that is to focus first and foremost on what redounds to the benefit of mediating parties in their effort to achieve resolution of their dispute and the “mutually acceptable agreement” EC 1115 calls for. Secondary is what works for attorneys and non-party participants who ostensibly attend the mediation to support the mediating parties’ efforts in that regard, without regard to any “opposition,” particularly when that opposition seems to be *fighting against accountability to the mediating parties*, whom mediation confidentiality is supposed to be protecting but isn’t.
- Again, “existing mediation confidentiality protections” were enacted *not as protections for attorneys or third-party participants*, rather for the mediating parties and ***that should be the starting point of the discussion***.<sup>1</sup>

---

<sup>1</sup> “Protection of lawyers was never the intent of mediation confidentiality.” See, “Ethics Byte: High Court holds lawyers are not accountable for misconduct during mediation,” Diane Carpman, <http://www.calbarjournal.com/February2011/AttorneyDiscipline/EthicsByte>).

MM17-61's proposal to remove claims related to mediation from civil courtrooms to State Bar proceedings seems to focus on eliminating all "threat to mediation confidentiality" as if that were the ultimate goal, when it isn't. Furthermore, such a move for all practical purposes would eliminate any meaningful redress of grievances and accountability for same for the mediating parties because State Bar proceedings (run by attorneys for attorneys), do not provide the same accountability or demonstrable procedural recourse for complainants or remedies for damages resulting from malpractice, breach of fiduciary duty, etc., as can be obtained in a court of law.

The Study's purpose was to address how mediation confidentiality was being used by attorneys to harm the general public and to come up to a sensible solution to that problem. In the original resolution (TR-K 402 at page 4), the California Legislature asked the CLRC to study the relationship under current law between mediation confidentiality and attorney malpractice and other misconduct, and "the purposes for, and impact of, those laws on public protection, professional ethics, attorney discipline, client rights, the willingness of parties to participate in voluntary and mandatory mediation, and the effectiveness of mediation ...." The Legislature also authorized the CLRC to "make any recommendations that it deems appropriate for the revision of California law to balance the competing public interests between confidentiality and accountability."

Nothing in the Resolution directed the CLRC to absolutely protect mediation confidentiality and based on our experience, we dispute the notion that the open nature of a civil court proceeding would necessarily pose a "threat" to it. Also, presumably the Supreme Court, in handing down *Cassel* which included Justice Chin's invitation to the Legislature to take up this issue, considered the possibility there would be "opposition" by attorneys who, for the first time in thirty years since the enactment of the current evidence code, would face meaningful accountability as a result. In effect, they were speaking against the absolute confidentiality *Cassel* reflected.

Unfortunately, reading Memo MM17-61 one cannot help but get the sense it is primarily focused on how to make whatever option is eventually selected as palatable as possible to those attorneys, mediators and members of the judiciary who oppose it, many of whom seem to believe shining a little light into what is presently a dark room for accountability's sake will result in everyone being blinded, when in fact, a little light and the exposure that comes with it can be laser-focused, yet still illuminate and highlight an existing problem as well as have a healthy impact.

As Louis Brandeis said, in part, "Sunlight is the best disinfectant." That is what the TR will provide, i.e., sunlight on a wound on California's system of mediation, hopefully followed by healing and a functional and functioning system with protections for all participants, not just advantages to attorneys and non-party participants to the

significant disadvantage of the mediating parties for whom the system was ostensibly enacted in the first place.

Availability of relief in a State Bar disciplinary proceeding.

As discussed above, based on both MM17-61 as well as what we've read elsewhere, it does not appear State Bar proceedings are necessarily effective in addressing or compensating those who bring actions against an attorney. MM17-61 at page 15 notes "At the September meeting, Chairperson Hallinan expressed concern about whether a client victimized by dishonest or incompetent counsel at a mediation could be made whole in a State Bar disciplinary proceeding." Outcomes related to "discipline" alone will not help a client whose rights have been significantly damaged in a mediation and any result does not provide monetary remedies such as those which may be obtained in a civil court.

As Chairperson Hallinan further noted "[I]f such a client could not be made whole, the client might not have sufficient incentive to file a complaint with the State Bar and counsel might escape responsibility for the misconduct." Thus, the purpose of accountability the Study was seeking would be undercut.

However, there are other reasons a client or member of the general public would not have incentive to file a complaint regarding an attorney with the State Bar and that, in part, is a function of the State Bar's attitude toward the general public and their claims, which as Memo 17-61 itself notes, is not a positive one.

First, the State Bar is a public agency made up of attorneys who ostensibly police other attorneys.<sup>2</sup> It should come as no surprise the general public may question whether they will receive a fair hearing about attorney misconduct in such a forum.

More concerning are the statement and cited footnote in Memo 17-61 which are revealing with regard to the State Bar's negative views of the public and its complaints:

"At the investigation stage of a disciplinary proceeding, a relevant mediation communication might be disclosed to persons involved in the investigation, *but at least it generally would not become public*. Many State Bar complaints never proceed beyond that stage. [Footnote 31]"

---

<sup>2</sup> The State Bar Act "sets up an institution controlled and managed by the members of the profession who are public officers acting under oath without compensation and functioning as an arm or branch of this court in the matter of admissions, reinstatements and discipline of attorneys at law." (*Herron v. State Bar* (1931), 212 Cal. 196, 199 [298 P. 474], cited in *Chronicle Publishing Co. v. Superior Court*, 54 Cal. 2d 548, 567, 354 P.2d 637, 7 Cal. Rptr. 109 (1960).).

“Fn. 31 See, e.g., *Chronicle Publishing Co. v. Superior Court*, 54 Cal. 2d 548, 567, 354 P.2d 637, 7 Cal. Rptr. 109 (1960) (“*[T]he vast majority of the charges made against attorneys are by disgruntled clients and completely without foundation ...*”).” (emphasis added) <sup>3</sup>

As *Chronicle Publishing Co.* notes, the State Bar feels “This procedure acts as a safety valve for the public. It thereby is made to feel that the law profession is not a closed body which protects its members no matter how unfaithful to their trusts any might be, and which would punish a member of the public who makes an unfounded charge by disclosure of his name and his charge.” So, despite the State Bar finding the vast majority of charges against attorneys to be “completely without foundation” they feel the public is “somewhat satisfied” by having had “their day before the tribunal.”<sup>4</sup>

In other words, the State Bar indulges the general public which is “made to feel” good about a process the State Bar oversees at the same time the State Bar dismisses the “*the vast majority of the charges made against attorneys*” which from out of the gate it considers “*completely without foundation*” and filed by “*disgruntled clients.*” This sounds like nothing more than a show to convince the public they’ve been heard, when in reality they haven’t been.

This does not sound like a forum that truly welcomes the public or that will instill confidence in the public that they will get a fair hearing in front of it. This sounds more like a public agency run by and for attorneys which has predetermined outcomes, typically favoring attorneys, which do not lead to even a modicum of accountability or transparency remotely approaching what can be obtained through a court of law, as the TR would ensure.

Were members of the public to become aware they were viewed as “disgruntled clients” making claims “completely without foundation” they’d agree with Chairperson Hallinan, there is no point or any incentive to bring claims to such a dismissive body and most will simply not even bother filing a complaint, so that bad behavior by attorneys will simply continue unchecked and unaddressed.

More importantly, what has the State Bar done since *Wimsatt (2010)*, *Cassel (2011)* and *Porter (2011)* were handed down to educate or warn California attorneys about issues related to mediation confidentiality? Any official notice or directive to attorney members which requires them to give notice to client/parties who are considering mediation of the drastic effects of mediation confidentiality?

---

<sup>3</sup> The complete case can be found at <https://socal.stanford.edu/opinion/chronicle-pub-co-v-superior-court-29844>.

<sup>4</sup> Id.

The State Bar’s website’s “About Us” states “The State Bar of California’s mission is to *protect the public* and includes the primary functions of licensing, regulation and discipline of attorneys; the advancement of the ethical and competent practice of law; and support of efforts for greater access to, and inclusion in, the legal system.”<sup>5</sup> What has the State Bar done to “protect the public”? Has it informed the public of the pitfalls they face when they decide to mediate?

The TR (page 43) also notes: “The *Wimsatt* court also suggested that given “the harsh and inequitable results of the mediation confidentiality statutes ... the parties and their attorneys should be warned of the unintended consequences of agreeing to mediate a dispute.”<sup>248</sup> *Wimsatt*, 152 Cal. App. 4th at 149-58.” What “warnings” has the State Bar issued to the public about the impact and effect of mediation confidentiality on their right to pursue claims? Our search of the State Bar’s website found nothing warning about attorneys and mediation confidentiality along the lines of what the *Wimsatt* court indicated nor any evidence the State Bar has taken steps to ensure parties have “fair warning” or notice of the “unintended consequences” of agreeing to mediate a dispute and the waiver of significant rights that can result.<sup>6</sup>

This new proposed option will take a proposed public process out of California’s courts to hide it behind the closed doors of the State Bar of California. The general public will remain in the dark about the impact of mediation confidentiality on a party’s right to redress grievances arising from mediation, as it is presently interpreted, and should they bring claims to the State Bar they will face an inherently biased and dismissive process.

Interestingly, MM17-61 states “Another potential benefit of limiting the exception to State Bar disciplinary proceedings is that it would provide an opportunity to collect empirical data about the incidence of mediation misconduct, before deciding whether to create a broader exception that applies to malpractice actions.” (MM17-61, page 20) Certainly, the State Bar was actively disciplining attorneys in the years during which *Wimsatt*, *Cassel* and *Porter* were winding their way through the courts. Wouldn’t the Bar have had an opportunity at that time were it truly concerned about such matters?

In fact, didn’t the CLRC previously ask the State Bar for empirical data, only to find the State Bar had not kept data with regard to the number of complaints related to the issue of misconduct in mediation? Now the CLRC is urged to turn the process over to the State Bar so they can collect the data they failed to collect before, essentially a monumental “do over.”

---

<sup>5</sup> “<http://www.calbar.ca.gov/About-Us>. (emphasis added)

<sup>6</sup> Our earlier input similarly noted that despite its clear authority, we were “unaware of any action by the Supreme Court to exercise its “inherent power to discipline attorneys” in light of *Cassel*, despite its being at the “apex of the disciplinary system” and “responsible for reviewing all disciplinary actions.” See, MM15-36s1, pages Exhibits 6-7.

Ironically, MM17-52 at page 12 confirms “Neither the State Bar of California nor any of its sections or committees expressed a view on the tentative recommendation. That might be due to the ongoing restructuring of that organization.” Besides being rather indulgent conjecture, this statement speaks volumes. In the midst of one of the more important legal debates in decades regarding balancing the competing interests of the legal bar as against the general public and citizens of the State of California, the State Bar decided not to provide input and MM17-61 makes excuses for such a failure.

Certainly, we know the State Bar is capable of providing such input as its Committee on Mandatory Fee Arbitration submitted a letter regarding the fee arbitration issue in response to MM16-58, a draft of the proposed legislation.<sup>7</sup> The February 15, 2017 State Bar Agenda Item regarding this letter confirms the State Bar understands the significance of the CLRC and this Study as its description notes:

The California Law Revision Commission is an independent state agency created by statute. It assists the Legislature and Governor by examining California law and recommending needed reforms. The Commission is given responsibility for the continuing substantive review of California statutory and decisional law. ***The Commission studies the law in order to discover defects and anachronisms and recommends legislation to make needed reforms.***<sup>8</sup>

So while the State Bar had notice of the draft legislation in MM16-58 and the June 2017 TR, and was clearly capable of providing input, *it chose not to do so*. Certainly the state public agency that oversees the legal bar and whose mission is “to protect the public” could have spoken to that mission through this opportunity, but did not. Perhaps if it had, that would have tipped the scales against the “opposition” laid at the CLRC’s door. The State Bar was certainly correct about one thing: “The Commission studies the law in order to discover defects and anachronisms and recommends legislation ***to make needed reforms.***” The TR provides just such “needed reform.”

While MM17-61 suggests the State Bar process has real teeth and may somehow effect change, we’ve seen no evidence this is the case. In addition to the fact that one of its own pamphlets recommends claims of malpractice NOT come to the State Bar process,<sup>9</sup> there is the tone of dismissiveness and disregard for the very public whose interests it is supposed to be protecting that is hard to ignore. That it hasn’t spoken up for those interests – or at all – doesn’t inspire confidence in this option.

---

<sup>7</sup> <http://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000017125.pdf>;  
<http://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000017126.pdf>

<sup>8</sup> Id. (emphasis added).

<sup>9</sup> [https://www.calbar.ca.gov/Portals/0/images/pamphlets/2015\\_HavingaFeeDisputeWithYourLawyer060815-web.pdf](https://www.calbar.ca.gov/Portals/0/images/pamphlets/2015_HavingaFeeDisputeWithYourLawyer060815-web.pdf)

The reason people bring claims against attorneys in civil court is because there they have the greatest opportunity of redressing the full range of grievances, particularly where an individual is seeking recourse against an attorney who has done significant legal and monetary damage to a person. Perhaps it is also because they don't view the State Bar as an impartial arbiter capable of an unbiased approach.

We are concerned that turning such matters over to the State Bar is something akin to the fox guarding the hen house. Our research found no evidence which would dispel this view. We hope the CLRC is as concerned about members of the public and what the State Bar calls "needed reforms" as they are about "stakeholders" from the legal community whose hue and cry has quite possibly caused the CLRC to reconsider its TR. We believe these "needed reforms" are necessary to ensure the public's protection by ensuring they have a right under the law to seek redress of their grievances regarding actions which take place in a mediation.

### Balancing Competing Considerations

While some in the legal community have spoken forcefully and articulately for the rights and interests of the general public, including the California Conference of California Bar Associations ("CCBA") (which MM17-52 notes has championed the need for an attorney misconduct exception since well before this study began) and Citizens Against Legalized Malpractice, Memo 17-61 points out these voices are but a whisper in comparison to the voices in "opposition." Few members of the general public attend meetings to speak on behalf of the public and certainly do not raise a hue and cry at meetings as the "opposition" has. This is because the public is unaware their rights are at significant risk as most, in fact, are unaware of this process at all.<sup>10</sup> We hope our input

---

<sup>10</sup> At MM17-52 page 32, CLRC staff quoted a point we made in previous input (MM-51, Exhibit 136) re: the lack of the public's involvement in the 1993 changes to the law, i.e., that "not only is mediation confidentiality presently interpreted in a manner that works to the detriment of the general public, this is due, in part, to what appears to have been a failure to involve the general public or parties/disputants in the processes undertaken in enacting past legislation, as well as a failure to consider how such legislation can impact parties/disputants and the public in general." CLRC staff then states:

The staff appreciates the Porters' praise for the process used in this study, but we would not characterize the legislative history of mediation confidentiality the same way they do. All of California's mediation confidentiality laws necessarily went through the legislative process, in which any member of the public was free to comment and participate. In addition, the laws enacted in 1985 and 1997 went through the Commission's time-tested study process (the same process used in this study) before they were introduced in the Legislature.

While it is true all California laws go through the legislative process, the public's involvement in that legislative process presumes knowledge a matter relevant to them is before the Legislature. As the general public was not considered part of the relevant "stakeholder" groups to whom notice was given or from whom input was solicited in developing the 1993 legislation, how would they even know about it? This also ignores a point consistently made in this Study, including by CLRC staff, that the general public has NOT been involved in the development of California's mediation process, which CLRC's staff itself has noted has overwhelmingly been controlled by lawyers, judges and other legal community stakeholders. Further, MM17-52 glossed over our main point regarding the 1993 changes, i.e., they not only eliminated the choice whether or not to have mediation confidentiality, but also

will in a small way help fill that void. We also ask the CLRC to stand for and speak to the rights of the general public to remedy the wrong the Study has identified.

### Defining the Discourse

We also wish to comment on language that appears throughout Memo 17-61 which we consider not only troubling, it reveals how successful the “opposition” has been in defining the terms of the discourse in this Study and bringing what was a forward progression toward a positive Tentative Recommendation that would resolve the problem the Legislature identified, to a screeching halt. We believe this is a part of the effort to turn the CLRC away from its TR to some alternative that will have no meaningful effect on the circumstances that led to this study.

For example the characterization of claims as “frivolous”:

- “But there would *at least be some significant screening of frivolous claims* before requiring any public disclosure of mediation communications.” (MM17-61, Page 15)
- “. . .such an exception would intrude less deeply on mediation confidentiality and its underlying policies than the Commission’s current proposal, and would function *as a means of filtering out frivolous claims* of mediation misconduct.” (MM17-61, Page 20).<sup>11</sup>

Essentially, the terminology, including the negative characterizations of the mediating party who seeks attorney accountability, which has pervaded the comments of those opposed to the Study and the TR, has found its way into MM17-61 as a composite description, i.e., the “disgruntled” [MM17-61, page 12, fn. 31] and “unhappy mediation participant” [MM17-61, page 14] who unnecessarily [MM17-61, page 48], at a “mere whim” [MM17-61 page 14] and “without foundation” [MM17-61 page 12, fn. 31] seeks to bring “frivolous claims” [MM17-61, pages 15, 20], “disrupting confidentiality expectations of mediation participants.” (MM17-61, Pages 7, 58).

The desired effect has been achieved for these dismissive terms are so normed they are unquestioned in CLRC’s analyses. Aside from how this language essentially mimics the tone and tenor of the State Bar’s belief the vast majority of the complaints brought to it are without foundation, its adoption in MM17-61 leads us to conclude the bias it reflects has been adopted as well.

---

the previously provided written notice, which enabled the mediating public to know their rights in mediation were being impacted. As the TR itself notes, there was no public participation beyond the legal stakeholders involved.

<sup>11</sup> Where does this notion of “frivolous claims” come from? Were the *Wimsatt, Cassel, Porter* cases, the cases which were the impetus for the study, “frivolous claims?”

Such disparaging, demeaning and demonizing negativity combined with what MM17-61 itself describes as “overwhelming opposition” has defined the discourse so much so that consideration of changing the rules of mediation confidentiality from what is presently an absolute shield of confidentiality to a system where attorneys are held accountable is considered a “political” act so risky no legislator may be willing to carry such a bill. Such power the legal community has in opposing accountability! At the same time there is no evidence any of these negative claims have any basis in fact, and they are belied by the very cases that were the impetus for the Study which led to the TR.

This explains the increasing pressure on the CLRC to turn away from the problems first identified in *Wimsatt* and made evident in *Cassel* (so much so that the Supreme Court felt compelled to vocalize its concern about what was happening to parties in mediation), despite the efforts of those who have raised their voices to expose a flaw in the system and the well-reasoned the CLRC has devised in the TR. It is a campaign based on fear-mongering of the worst sort, what Memorandum 17-61 itself identifies as an overwhelming organization of opposition to deter the Commission from its right and proper course.

We urge the CLRC – do not be deterred.

### Conclusion

MM17-52, the September 27, 2017 Analysis of Comments on Tentative Recommendation makes several statements with regard to this potential change of options which we feel require comment: (*See*, pages 33-34):

“While the Commission should not base its policy recommendations on political considerations, neither should it ignore practical reality.”

“The Commission is typically not required to decide such fundamentally political matters, which are usually left to the Legislature and Governor, as the People’s elected representatives.”

“The Commission could go forward with its proposal despite the opposition. If it decides to do so, . . . , the Commission should bear in mind that it is making a recommendation to the Legislature and the Governor, and elected officials will be understandably reluctant to do something that is firmly opposed by their constituents, as well as groups that speak for a sister branch of government (the Civil and Small Claims Advisory Committee and CJA). It might not even be possible to find a legislator willing to author a bill to implement the proposal.”

Our response is as follows:

Identifying a flaw in the legal interpretation of a statute, which has been interpreted to allow attorneys who have pushed the envelope to avoid accountability during mediation that is otherwise available outside of mediation, is not a “political consideration” nor does the fact there is vociferous opposition from those who now face accountability make it a “political” matter.

It is a matter of fairness and equity and an alignment of the law governing mediation with the laws governing attorney accountability in general. It has only become “political” because so many fear or don’t want the accountability the TR will bring or the hard work it will take to ensure its protections, and/or who will assert anything and everything – true or not, real or imagined – to oppose it.

The above statements reveal the apparent belief that *attorneys and their related stakeholder groups* are the Legislature and Governor’s “constituents,” not the citizens of the state of California, including the mediating public, whose rights are presently being denied through mediation confidentiality as it is interpreted today, but whose right to even use mediation to resolve disputes has been compromised by the misconduct of attorneys.

These statements also overlook that California’s courts as they presently interpret the Evidence Code are forced to condone such misconduct and no one in the State of California – not the State Bar, not the Supreme Court or any other organization responsible for the ethical behavior of attorneys – has had the decency to give the general public even the most basic notice about that fact, much less the *warning* the court in *Wimsatt* suggested.

Now that the TR makes it apparent attorneys will finally be held accountable in a way they never have been before, the outcry has been “overwhelming” in an effort to convince the CLRC not to proceed with the TR. In the same way a parent who is faced with disciplining a misbehaving child must not be swayed by the child’s tantrums, the CLRC must not be swayed from its purpose of protecting the public from the harmful acts of attorneys who prey upon them using the shield of mediation confidentiality.

The behavior demonstrated in opposition to the TR– the fear-mongering, the minimizing of the problem, the characterizing of complaints as frivolous, etc. – is all designed to convince the CLRC to drop the Tentative Recommendation and create a more palatable solution the legal community can control, i.e., a State Board proceeding, despite the fact that most claims are dismissed outright, hidden from view or viewed as frivolous and without foundation.

As Ron Kelly noted in his August 30, 2017 input (MM17-51, Exhibit 98), “*In one way or another, all forty million residents of our state have been affected by the millions of mediations we’ve conducted here.*” This is our point exactly and the rights of those forty million residents need the CLRC to be looking out for them in this decision. Those rights should take precedence over the very small, albeit very vocal, group opposing the TR, which in reality is only a very small part of California’s legal community. To do otherwise would be the tail wagging the dog, for the rights of the California’s citizens will be subordinated to the rights of attorneys.

Should California’s “forty million residents” decide to participate in mediation, they deserve to enjoy the same rights and protections, not to mention accountability for ethical representation, at the hands of their legal counsel *during the mediation process as they presently enjoy outside the mediation process.* The Tentative Recommendation presents some difficult issues and hard choices but it is a step in the right direction and is totally doable.

Should the CLRC wish to consider other options, we suggest it build upon the petition that Bill Chan and “Citizens Against Legalized Malpractice” developed through the Change.org petition, but instead go statewide and make the Tentative Recommendation a ballot initiative that asks California’s citizens whether they believe they should have the same right to seek redress of their grievances against attorneys *during the mediation process as they do outside the mediation process.* Somehow we believe such a ballot initiative would pass handily.

We strongly urge the CLRC to submit the Tentative Recommendation to the Legislature without change and oppose any changes to the Tentative Recommendation, as MM17-61 proposes, including making the proposed exception applicable only to a State Bar proceeding, which we believe would dilute its effect.

We appreciate the opportunity to provide this input and welcome any questions.

Most sincerely,

*Deborah Blair Porter*

Deborah Blair Porter

*John E. Porter*

John E. Porter

Daily Journal  
Oct. 20, 2017

OP-ED COLUMN

## We all agree on mediation rules as is

By A. Marco Turk

As a matter of California public policy, mediation confidentiality is protected as an evidentiary exclusion. *See Evidence Code Section 1119.* Along with the attorney-client privilege and the attorney work product immunity, mediation confidentiality encourages freedom of expression between the parties to the settlement process, their attorneys, the mediator and with each other. Protection extends to all discussions conducted *in preparation for a mediation* as well as *all related communications* that take place *during the process itself* — which may stretch beyond the physical

See Page 7 — WE

☞ The author of this article (Prof. A. Marco Turk) submitted it as public comment and requested that it be included in the formal record of the Commission. He gave his permission to reprint the article and provided written assurance that he had also obtained such permission from the publisher.

# We all agree on mediation confidentiality

Continued from page 1

proximity of the mediation, so long as settlement discussions continue. And it includes what transpires between the parties when the mediator makes a confidential settlement proposal at their request.

Mediation confidentiality allows for settlement proposals to be exchanged without fear that what transpires during the process may be used later to benefit one of the parties to the dispute. These discussions are protected from disclosure even if they do not occur in the presence of the mediator or other disputants. See *Cassel v. Superior Court*, 51 Cal. 4th 113 (2011) (holding the terms of Section 1119 “must govern, even though they may compromise petitioner’s ability to prove his claim of legal malpractice.”).

Public policy favoring mediation confidentiality in California began in 1985. So why now such a fervent campaign to eliminate this protection? A small contingent of the profession first attempted to curtail mediation confidentiality with Assembly Bill 2025 in 2012. Because of extensive public opposition, that effort was contained. The present effort proposed by the California Law Revision Commission is to enact Evidence Code Section 1120.5, creating an exception to mediation confi-

dentiality when communications are relevant in a lawsuit or fee dispute to prove an allegation of legal malpractice.

In addition to a relevant committee of the California Judicial Council opposing the effort, the Consumer Attorneys of California and California Defense Counsel submitted a joint letter of opposition. This is rare: *Both the organized plaintiffs’ bar and the organized defense bar believe our current right to choose confidential mediation best serves their clients.* Apparently, there is general satisfaction with what most mediators are doing — even-handedly serving groups that almost always see their interests as conflicting.

Also in opposition is the statewide Consortium for Children, the National Academy of Professional Family Mediators, the Family Law Section of the Los Angeles County Bar Association, the Los Angeles County Department of Consumer and Business Affairs, and the Los Angeles Center for Conflict Resolution. These groups describe the potential damage the proposed legislation would do to children, families and the communities of limited means served by local mediation programs. And the California Dispute Resolution Council wrote in opposition on behalf of all providers of mediation services statewide.

The Conference of California Bar Associations is the *only* organization currently listed in support of the proposed legislation. Their lobbyist has been clear that his job is to continue to support this or similar legislation until and unless the conference changes course.

On Dec. 1, the California

Law Revision Commission will once again inexplicably delve into the mediation confidentiality debate, continuing to agonize over the relationship between mediation confidentiality, attorney malpractice and other misconduct. But why has the commission continued along the path leading to major alteration of mediation confidentiality? Why not leave it as is? What is the real motive of those pushing to curtail mediation confidentiality?

Currently, the focus is on lawyer malpractice. However, the way the commission is steering the discussion, *any dispute* over attorney fees would seem to permit ignoring confidentiality. Apparently, the Conference of California Bar Associations has been pushing this because of the perception that, “you should always be able to sue your lawyer.” This raises several questions that highlight the fallacy of this effort.

Why is it necessary to have a *public* waiver by statute when a *private* relinquishment would suffice in any given case? The mandate of the commission is to propose legislation that serves the *public interest*. How does this effort accomplish that? There has been no real indication of a need to make changes in the rules of confidentiality. Where is the evidence of necessity other than a gut reaction to the *Cassel* case? Why not at least limit the rule to State Bar disciplinary proceedings utilizing its Restitution Fund to compensate damaged clients?

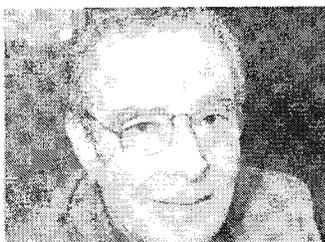
There is the difficult balance in enacting any exclusionary evidentiary rule. Millions of people have benefited by mediation confidentiality. Weigh that

against a dubious benefit for a few being better able to sue their attorneys. This requires properly balancing the public benefit versus selected individual cases of malpractice that could be handled through State Bar Disciplinary procedures, and use of the bar’s client restitution fund where justified.

We must inform our state legislators how strongly mediators and the public feel about preserving our current right to choose confidential mediation. Legislation removing confidentiality can be slipped into a “must-pass” bill at the last moment before the public becomes aware or has time to organize opposition. All concerned members of the public who want to keep confidentiality in mediation inviolate should contact their state assembly persons and senators to oppose this and be alert to any “tack-on” attempts.

From personal experience, it is difficult to convince the parties to a mediation to be completely forthcoming even with assurances the process is confidential. So why would we want to abandon what is at least the opportunity to pierce the veil of secrecy possibly standing in the way of settlement?

**A. Marco Turk** is emeritus professor and director of the Negotiation, Conflict Resolution and Peacebuilding program at CSU Dominguez Hills, and an adjunct professor of law, Straus Institute for Dispute Resolution, Pepperdine University School of Law. He is also a practicing neutral who regularly mediates for the Alternative Resolution Centers and the 2nd District California Court of Appeal.



TURK

## **EMAIL FROM LORRAINE WALSH (11/28/17)**

Dear Ms. Gaal:

As you know, the State Bar Committee on Mandatory Fee Arbitration (MFA) will not be able to submit its comments on the recent Memorandum 2017-61 dated November 14, 2017 for the reasons stated in my prior email. However, in my individual capacity as a State Bar Certified Specialist in Legal Malpractice Law I provide my own comments. I have been admitted to practice for 35 years. I have enjoyed a unique practice — I have defended attorneys sued for legal malpractice and I have also filed actions on behalf of former clients against their attorneys. I estimate I have handled over 1000 legal malpractice actions. Some of these cases involved allegations of malpractice which occurred in mediations. I have also served as a State Bar and local bar association fee arbitrator in fee disputes where the parties have raised allegations of legal malpractice occurring in mediations. Since Casell I have turned down these types of cases because of the mediation confidentiality evidence “challenges”.

In April 2017 I presented the MFA Committee’s comments to the Commission about adding mandatory fee arbitration disputes to the proposed Evidence Code exception to mediation confidentiality. The Commission voted to add these types of disputes under the proposed Evidence Code Section 1120.5 (a)(2)(C).

I continue to urge the Commission keep MFA disputes in the proposed statute. MFA proceedings are confidential so they provide a confidential forum where mediation malpractice allegations affecting fees, costs or both can be kept confidential. It also provides a forum where these type of cases will be kept out of Superior Court or private contractual arbitration because over 95% of fee arbitrations result in an award which is not rejected by either the client or the attorney. Regarding the proposal on page 30 of the Memorandum to add qualifying language to the proposed Evidence Code 1120.5(a)(2)(C) — “provided the dispute raises issues of malpractice by the lawyer” I do not oppose this type of qualifier. I suggest the elimination of the passive voice “by the lawyer” if it is narrowed. I suggest the following language: “provided the dispute involves allegations of attorney malpractice”.

Thank you for the opportunity to provide comment on Memorandum 2017-61.

Sincerely,

Lorraine M. Walsh  
State Bar Certified Specialist Legal Malpractice Law  
Law Office of Lorraine M. Walsh  
1990 North California Blvd. Suite 800  
Walnut Creek, CA. 94596  
Tel: 925-932-7014