

Third Supplement to Memorandum 2017-62

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

The following material was distributed by the Commission<sup>1</sup> at the meeting on December 1, 2017, and is attached as an Exhibit:

	<i>Exhibit p.</i>
• Jeff Kichaven, Los Angeles (11/30/17) .....	1
• Charles Pereyra-Suarez, California Dispute Resolution Council (11/30/17) .....	3

Respectfully submitted,

Barbara Gaal  
Chief Deputy Counsel

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](http://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.



November 30, 2017

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

In re: Mediation Confidentiality

Dear Ms. Gaal:

In its November 29 letter, the Judicial Council states that it is “disappointed” with the Commission’s work on mediation confidentiality. This statement has it completely backward. It is the Commission which should be disappointed with the work of the Judicial Council.

The Judicial Council’s eleventh-hour, November 29 letter just gets it wrong.


Here is the fundamental reality with which neither the mediation establishment, nor any of its elite confederates, has effectively dealt: Those who speak against amending California’s mediation confidentiality law to protect consumers have not a shred of evidence that California’s current law is necessary for mediation to flourish, or even to exist at all. They have assertions, they have theories, they have questions. Those are no basis to deprive consumers of rights. Where are the proofs, the facts, the answers? After all this time, there is still nothing. One would think that with so many jurisdictions having so many standards of confidentiality or privilege for so many years, there would be some evidence somewhere that lesser standards of confidentiality cause some problems – if, in fact, that is the case. But there is no such evidence. The Judicial Council’s latest effort might be described, to use Professor Alan Dershowitz’s term, as “remarkable.”

Indeed, the evidence of problems comes from here in California, where consumers in cases such as *Cassel* and *Wimsatt* state facts sufficient to constitute claims of legal malpractice, but can’t get a hearing on the merits.


The Judicial Council’s November 29 letter has two purported responses to these realities. The first deserves sanction. The second should just be dismissed as falderal.

First, at the top of page 2 of its November 29 letter, the Judicial Council states that “The Commission’s own tentative recommendation indicates, however, that it would be inappropriate to draw such conclusions from the fact that mediation takes place in these other jurisdictions.”


The Commission’s tentative recommendation indicates no such thing. The Commission’s tentative recommendation is that California law should change, based on a well-developed record. The “indication” to which the Judicial Council refers is the staff’s commentary on the tentative recommendation. The staff’s commentary is curiously bereft of examples of problems with the confidentiality or privilege standards of other jurisdictions. There’s a difference between the



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Commission's tentative recommendation and the staff's commentary. The Judicial Council should know that difference.



Second, later in that same paragraph on page 2, the Judicial Council "note(s) that the Commission was not able to examine any empirical evidence on the impact of *reducing* the confidentiality of mediation communications in a manner similar to that embodied in the Commission's tentative recommendation because it was not able to identify any other jurisdiction that has made such a change." (Italics mine.)

In other words, the Judicial Council fears that the tentative recommendation will plummet California into a dark abyss of "settle-and-sue" claims because we would be going into the uncharted waters of going from a more-restrictive to a less-restrictive standard of mediation confidentiality.

The odds are against it.

The mediation establishment and its confederates have been making this assertion for years. They have had ample time to furnish proof. To date, they have offered zero evidence, from any corner of Western Civilization, that any jurisdiction, under any set of circumstances, ever, has suffered the feared "settle-and-sue" deluge. There's no evidence to support the assertion that it could happen to us now.

Moreover, in the Stone Age when we Californians had only Evidence Code sections 1152 and 1154 to protect confidentiality, we didn't have a deluge of "settle-and-sue" claims, either. Or at least there is no evidence that we did. And, in the history leading up to the adoption of the current confidentiality statute, the pitch was *not* that we needed a new law to stem the "settle-and-sue" tide. That's because there was no such tide then, and there is zero evidence to support the assertion that there would be any such tide if the Commission's tentative recommendation becomes law now.

Respectfully submitted,

Jeff Kichaven

JK:abm



CALIFORNIA DISPUTE RESOLUTION COUNCIL  
YOUR VOICE FOR ADR IN SACRAMENTO

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November 30, 2017

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Dear Ms. Gaal:

The California Dispute Resolution Council appreciates very much the consideration given by the Commission to the CDRC's comments regarding the Commission's tentative recommendation.

Instead of adopting the tentative recommendation, the CDRC urges the Commission to adopt the alternative of recommending legislation that would limit the change in mediation confidentiality ~~to~~ creating an exception for State Bar disciplinary proceedings, coupled with a directive to the State Bar to track disciplinary proceedings involving complaints arising of or related to mediation and report the extent of such proceedings to the Legislature. Such an exception would address Mr. Raymond Ryan's concern about claims against a lawyer for breach of fiduciary duty and fraud in connection with mediation, as they would be covered by the disciplinary complaints.

The CDRC believes the alternative would be better than the tentative recommendation because:

- It would provide a vehicle for generating data that has not been obtainable during the study about whether the impact of mediation confidentiality on lawyer malpractice claims is significant;

### **CDRC Administration**

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- While gathering such data, it would provide a significant remedy for those who contend that mediation confidentiality has obstructed claims of lawyer malpractice; and
- While gathering such data, it would minimize the adverse impact on mediation confidentiality.

The CDRC continues to urge that the Commission not provide an exception to mediation confidentiality for lawyer-client fee disputes. The central issue in lawyer-client fee disputes is the reasonable value of the legal services provided, as to which the lawyer has the burden of proof. The CDRC believes that lawyers should not be helped to carry their burden of proof by creation of an exception to mediation confidentiality.

The CDRC continues to urge, as in its August 30 letter, that mediation participants who are not party to any malpractice dispute (a) be protected against involvement until a party to the malpractice dispute proposes to disclose a communication made by them in reliance on mediation confidentiality and (b) at that time have the opportunity to object and have their objections heard.

The CDRC agrees that, regardless of whether the Commission adopts the suggestion of Larry Doyle to include a provision allowing parties to contract around an exception to confidentiality, it should make clear that any legislation it recommends is for a public purpose.

Finally, the CDRC urges the Commission not to take any action that would detract from the legal protection against a mediator testifying about a mediation. Any testimony a mediator might give would inherently favor one party or the other. That a mediator is legally incompetent to give any such testimony is, thus, vital to preserving a mediator's neutrality. If faced with the potential of a mediator testifying about transpires in a mediation, parties would be apprehensive about mediator bias, which would jeopardize the likelihood of a successful mediation.

Very truly yours,

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Charles Pereyra-Suarez  
President