Study K-402 November 25, 2015

Memorandum 2015-54

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

The Commission continues to receive an abundance of comments on its study of the relationship between mediation confidentiality and attorney malpractice and other misconduct.[1] Most of the new comments are reproduced in the attached exhibit, which includes a table of contents. One comment (from mediator Lee Blackman) pertains specifically to the use of an *in camera* screening process in creating an exception to the mediation confidentiality statutes. The staff will present that comment in Memorandum 2015-55, which will focus on that topic.

As before, the comments are quite polarized. Some commenters oppose any weakening of the existing mediation confidentiality statutes, while other commenters urge statutory revisions to promote attorney accountability for misconduct, including mediation-related misconduct. Accordingly, the staff again segregated the comments into two groups:

(1) Comments that oppose any weakening of the existing mediation confidentiality statutes.
(2) Comments urging revisions of mediation confidentiality to promote attorney accountability.

Each group of comments is discussed below.

COMMENTS THAT OPPOSE ANY WEAKENING OF THE EXISTING MEDIATION CONFIDENTIALITY STATUTES

In August, the Commission decided to prepare a tentative recommendation that would "propose an exception to the mediation confidentiality statutes (Evid.

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.

Code §§ 1115-1128) to address 'attorney malpractice and other misconduct.'"[2] That decision prompted an immediate outpouring of negative input, as well as some support.[3]

For the October meeting, the Commission received comments from about 240 individuals who emphasized the importance of mediation confidentiality and urged the Commission to leave the existing statutes intact. Almost all of the commenters were California mediators or attorneys or both; a few were former judges or judicial officers. The Commission also received similar comments from six organizations: Alternative Resolution Center,[4] California Dispute Resolution Council,[5] Choice Mediation,[6] Collaborative Attorneys and Mediators of Marin,[7] Community Boards Program,[8] and the Public Employment Relations Board.[9]

Since then, the Commission has heard from 30 more individuals who oppose any weakening of the existing mediation confidentiality statutes.[10] The Commission also received further input in this vein from six of the individuals who commented for the October meeting (plus Mr. Blackman, whose comment will be attached to Memorandum 2015-55).[11]

Another October commenter, Mark Baer, alerted the staff to two of his blogposts on the subject.[12] Mr. Baer also provided a link to a *New York Times*

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2. Minutes (Aug. 7, 2015), p. 5.
3. See Memorandum 2015-45, Exhibit pp. 8-31; Memorandum 2015-46, Exhibit pp. 1-220; First Supplement to Memorandum 2015-46, Exhibit pp. 1-57; Second Supplement to Memorandum 2015-46, Exhibit pp. 1-17; Third Supplement to Memorandum 2015-46, Exhibit pp. 1-9. One commenter said she was undecided on creation of a mediation confidentiality exception to address attorney accountability. See First Supplement to Memorandum 2015-45, Exhibit pp. 1-8 (comments of Rachel Ehrlich).
4. Third Supplement to Memorandum 2015-46, Exhibit pp. 4-6.
5. Memorandum 2015-45, Exhibit p. 8.
6. Memorandum 2015-46, Exhibit p. 3.
7. First Supplement to Memorandum 2015-46, Exhibit p. 1.
8. Memorandum 2015-46, Exhibit p. 4.
9. Third Supplement to Memorandum 2015-46, Exhibit pp. 7-9.
10. Exhibit pp. 5-11, 15-22, 24-33, 35-44, 46, 49.
11. Exhibit pp. 12-14, 23, 34, 45, 47-48.
12. See email from M. Baer to B. Gaal (10/24/15) (on file with Commission); email from M. Baer to B. Gaal (11/12/15) (on file with Commission). In one of the blogposts, Mr. Baer maintains that existing confidentiality rules should remain intact for true mediations but "evaluative mediation" (in which the mediator "helps the parties resolve their disputes by 'judging' the legal strengths and weaknesses of each party's case") is not true mediation and may not deserve such protection. See http://www.markbaeresq.com/Pasadena-Family-Law-Blog/2015/October/Confusion-of-Terminology-Is-to-Blame-for-the-Med.aspx.

In the other blogpost, Mr. Baer says that mediations promote actual justice, while litigation only promotes "legal justice," which is not always just or fair. See https://www.linkedin.com/pulse/mediation-confidentiality-issue-california-big-deal-mark-b-baer?trk=mp-reader-card. For that reason, he urges the Commission to "[s]top playing games intended to destroy mediation." *Id.*

opinion piece on doctor-patient confidentiality, which describes a pending Washington case focusing on whether a doctor had a duty to breach confidentiality to warn a third party of a threat made by the patient.[13] The piece concludes:

> Breaching doctor-patient confidentiality in such situations will likely be self-defeating. Mentally ill patients may not seek treatment, and psychiatrists, saddled with new legal liabilities, may decline to treat them. We are more likely to minimize harm if the confidence of patients at the greatest risk for violence is maintained.[14]

Mr. Baer suggested paying "VERY careful attention to this article because VERY similar reasoning applies as to why the mediation confidentiality should not be opened up as a result of an allegation of legal malpractice."[15]

Finally, two more organizations have expressed opposition to revising the protections for mediation confidentiality:

- **The Association for Dispute Resolution for Northern California ("ADRNC").**[16] This is an organization that promotes alternative dispute resolution "in the courts, the community, and broader society," which has had "hundreds of practitioners" among its membership over the years.[17]
- **Collaborative Practice California.**[18] This is "a statewide organization involved in the promotion of Collaborative Practice throughout the state."[19] It represents "hundreds of Collaborative practitioners most of whom are members of the State Bar of California."[20]

Many of the points made in the new comments described above are similar to ones made in previous comments. The staff will not discuss the new comments in greater detail in this particular memorandum. Instead, we will refer to them as appears appropriate in future memoranda relating to this study.

To avoid copyright issues, we have not reproduced Mr. Baer's blogposts in this memorandum.

13. See email from M. Baer to B. Gaal (11/19/15) (on file with Commission).
14. See http://www.nytimes.com/2015/11/19/opinion/protect-doctor-patient-confidentiality.html?smprod=nytcore-ipad&smid=nytcore-ipad-share&_r=0.

To avoid copyright issues, we have not reproduced Mr. Baer's blogposts in this memorandum.

15. Email from M. Baer to B. Gaal (11/19/15) (on file with Commission) (capitalization in original).
16. Exhibit pp. 1-2.
17. *Id.* at 1.
18. Exhibit pp. 3-4.
19. *Id* at 1.
20. *Id.*

As the staff reported in October, there is an online petition relating to this study on the Change.org website.[21] The petition says:

> Letter to
> California Law Revision Commission Barbara Gaal
> Dear Ms. Gaal,
>
> As a member of the public, I do not support allowing attorneys to legally commit malpractice against clients. Attorneys need to be held accountable for their misdeeds just like everyone else whether in mediation or any other context. No other state allows this and I do not believe California should allow it either.
>
> I would not make use of mediation if it allows my attorney to use the state statutes to commit acts against me more severe than what led to the mediation. That is the conclusion from Justice Chin's comment that an attorney can get away with anything unless they can be criminally charged. The Hadley v. Cochran case sure suggests that I have surrendered all my rights if the attorney can legally fabricate an agreement that could be very damaging to me without my knowing about it.
>
> I do not believe it was the CLRC or the California Legislatures intent to create this windfall for attorneys when it updated the mediation statutes in 1997. I urge you to correct the mistake. The attorneys who have written to support keeping the statutes the same which also keeps malpractice legal, do not represent my point of view only their own.[22]

When the Commission met in October, there were approximately 46 signatories of this petition.[23]

For the October meeting, the Commission also received comments from twelve individuals who encouraged the Commission to propose revisions of mediation confidentiality protections to promote attorney accountability.[24] In addition, the Commission received a letter from the Conference of California Bar Associations ("CCBA") expressing strong support for "that portion of the Commission's August 7 tentative decision that would permit the use of attorney-

21. See https://www.change.org/p/the-california-law-revision-commission-change-the-statutes-that-legalize-malpractice?response=b21b75d0be86&utm_source=target&utm_medium=email&utm_campaign=twenty.
22. See *id.*
23. See Second Supplement to Memorandum 2015-46, Exhibit pp. 15-17.
24. See Memorandum 2015-45, Exhibit pp. 10, 18-19; Memorandum 2015-46, Exhibit pp. 214-19; First Supplement to Memorandum 2015-46, Exhibit pp. 44-57.

client communications during and relating to a mediation to be used as evidence in action for legal malpractice and State Bar disciplinary proceedings."[25]

Since the October meeting, the number of signatories of the online petition has grown to a total of approximately 106.[26] The signatories come from many different states and even some other countries, with California most heavily represented.[27] Some of the new signatories provided supplemental comments.[28] Like the supplemental comments of some of the earlier signatories, these give a little insight into the backgrounds of the signatories. In general, it is clear that the signatories have had an unsatisfactory experience with the judicial system, but it is not clear how many of them have experience with mediation.[29]

The Commission also recently received a comment from mediator Deborah Schowalter, who "believe[s] an exception should be carved out for malpractice cases."[30] In addition, Bill Chan (who previously submitted both oral and written input) sent a message suggesting some specific statutory revisions "to encourage thinking about how mediation can better serve the public."[31]

Here again, the staff will not discuss the new comments in greater detail in this particular memorandum. Instead, we will refer to them as appears appropriate in future memoranda relating to this study.

OTHER NEW INPUT

Samson Habte, a reporter who covers legal ethics for Bloomberg BNA, alerted the staff to a recent appellate decision interpreting Arizona's mediation confidentiality statute: *Grubaugh v. Blomo*.[32] In bringing that Arizona case to the staff's attention, Mr. Habte made clear that he was simply sharing information and not submitting a formal public comment. He "do[es] not take positions on issues [he] write[s] about as a journalist."[33]

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25. See Third Supplement to Memorandum 2015-46, Exhibit pp. 1-2.
26. See Exhibit pp. 50-51; see also Exhibit pp. 57-59.
27. See Exhibit pp. 50-51; see also Exhibit pp. 57-59.
28. See Exhibit pp. 52-56.
29. See *id*.
30. Exhibit p. 61.
31. Exhibit p. 60. For earlier comments from Bill Chan, see Second Supplement to Memorandum 2015-46, Exhibit pp. 15-17; Third Supplement to Memorandum 2014-60, Exhibit pp. 1-2; First Supplement to Memorandum 2013-47. Mr. Chan also testified before the Commission in June 2014.
32. 2015 Ariz. App. LEXIS 200, 722 Ariz. Adv. Rep. 23 (Ariz. Ct. App. 2015).
33. Email from Samson Habte to Barbara Gaal (10/21/15) (on file with Commission).

Grubaugh is a legal malpractice case in which the plaintiff is seeking damages for "allegedly substandard legal advice" she received from her attorney during a family court mediation.[34] In defending against her claim, her former attorney sought to introduce some mediation communications. The Arizona trial court granted that motion in part, concluding that Arizona's mediation privilege "was waived as to all communications, including demonstrative evidence," between the mediator and the parties and between the plaintiff and her former attorney.[35] The plaintiff appealed from that ruling.

The Arizona intermediate appellate court reached a different result. It decided that Arizona's mediation privilege "was not waived when [the plaintiff] filed a malpractice action against her attorney because none of the four specific statutory exceptions … is applicable."[36] It relied on the plain language of the mediation privilege statute, the statute's legislative history, and "complementary rules of court referencing" the statute.[37]

The Arizona intermediate appellate court further stated that "a plain-language application of the statute in this case does not produce an absurd result, but is supported by sound policy."[38] It explained:

> By protecting *all* materials created, acts occurring, and communications made as a part of the mediation process, A.R.S. § 12-2238 establishes a robust policy of confidentiality of the mediation process that is consistent with Arizona's "strong public policy" of encouraging settlement rather than litigation. The statute encourages candor with the mediator throughout the mediation proceedings by alleviating parties' fears that what they disclose in mediation may be used against them in the future. The statute similarly encourages candor between attorney and client in the mediation process.
>
> Another reason confidentiality should be enforced here is that [the plaintiff] is not the only holder of the privilege. The privilege is also held by [her] former husband, the other party to the mediation. The former husband is not a party to this malpractice action and the parties before us do not claim he has waived the mediation process privilege. It is incumbent upon courts to consider and generally protect a privilege held by a non-party privilege-holder. The former husband has co-equal rights under the statute to the confidentiality of the mediation process. Although the superior court did rule that the privilege was not waived as to

34. 2015 Ariz. App. LEXIS 200, at *1.
35. *Id.* at *3.
36. *Id.* at *5.
37. See *id.* at *5-*10.
38. *Id.* at *10.

> communications between the mediator and the former husband, waiving the privilege as to one party to the mediation may have the practical effect of waiving the privilege as to all. In order to protect the rights of the absent party, the privilege must be enforced.
>
> Accordingly, we hold that the mediation process privilege applies in this case and renders confidential all materials created, acts occurring, and communications made as a part of the mediation process, in accordance with A.R.S. § 12-2238(B).[39]

The Arizona intermediate appellate court thus vacated the trial court's waiver ruling, as the plaintiff requested. It further concluded, however, that "[a]pplication of the mediation process privilege in this case requires that [the plaintiff's] allegations dependent upon privileged information be stricken from the complaint."[40] The appellate court explained that "[s]triking from the complaint any claim founded upon confidential communications during the mediation process is the logical and necessary consequence of applying the plain language of this statutory privilege."[41] It viewed this approach as consistent with "the reasoning of the California Supreme Court"[42] in *Cassel v. Superior Court.*[43]

As best the staff can tell, the above-described appellate decision is not yet final; it might still be subject to further review. We will keep the Commission posted on this matter.

We are grateful to Mr. Habte for bringing the *Grubaugh* case to our attention. On behalf of the Commission, we would also like to thank the many commenters who have taken the time to share their views relating to this study. Such input is crucial to the Commission's work.

Respectfully submitted,

Barbara Gaal
Chief Deputy Counsel

39. *Id.* at *10-*11 (emphasis in original; citations omitted).
40. *Id.* at *14.
41. *Id.* at *15.
42. *Id.* at *14.
43. 51 Cal. 4th 113, 244 P.3d 1080, 119 Cal. Rptr. 3d 437 (2011).

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Comments That Oppose Any Weakening of the Existing Mediation Confidentiality Statutes

1. ADRNC submitted a comment opposing Assembly Bill 2025 (Wagner), as introduced on February 23, 2012. ADRNC's comment on that bill was reproduced at Exhibit pages 32-33 of Memorandum 2013-39.
2. For an earlier comment from Patrick Byrne, see Memorandum 2015-46, Exhibit p. 25.
3. For an earlier comment from Chuk Campos, see Memorandum 2015-46, Exhibit p. 27. Mr. Campos also submitted a comment opposing Assembly Bill 2025 (Wagner), as introduced on February 23, 2012. A complete set of the comments on that bill is available for downloading from the Commission's website at http://www.clrc.ca.gov/K402.html. See Memorandum 2013-39, p. 31.
4. For an earlier comment from Doug deVries, see Memorandum 2014-36, Exhibit pp. 1-2.
5. For an earlier comment from Dwight Donovan, see Memorandum 2015-46, Exhibit p. 42.

Comments Urging Revisions of the Mediation Confidentiality Statutes to Promote Attorney Accountability

Online Petition

Other Comments Submitted by Email

6. For an earlier comment from Bruce Johnsen, see First Supplement to Memorandum 2013-47, Exhibit p. 11.

7. For earlier comments from Guy Kornblum, see Memorandum 2015-46, Exhibit pp. 94, 218.

8. For an earlier comment from Ron Supancic, see Memorandum 2015-46, Exhibit p. 178.

9. For an earlier comment from Gayle Tamler, see Memorandum 2015-46, Exhibit p. 31.

10. Neil Taxy submitted a comment opposing Assembly Bill 2025 (Wagner), as introduced on February 23, 2012. A complete set of the comments on that bill is available for downloading from the Commission's website at http://www.clrc.ca.gov/K402.html. See Memorandum 2013-39, p. 31.

11. For earlier comments from Bill Chan, see Second Supplement to Memorandum 2015-46, Exhibit pp. 15-17; Third Supplement to Memorandum 2014-60, Exhibit pp. 1-2; First Supplement to Memorandum 2013-47. Mr. Chan also testified before the Commission in June 2014.

ADRNC
Association for Dispute Resolution
of Northern California
PO Box 40980 San Francisco, CA 94140-0980
650-745-3842 adr@adrnc.net adrnc.net

November 14, 2015

Barbara Gaal
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, CA 94303-4739 Mail to: bgaal@clrc.ca.gov

Re: Review of Mediation Confidentiality Provisions by the California Law Revision Commission.

Dear Ms. Gaal:

The Association for Dispute Resolution of Northern California (ADRNC) is a member based organization which promotes alternative disputes resolution in the courts, the community and the broader society. We were initially founded in 1983. Hundreds of practitioners have been among our membership over the years.

We have been requested by the Board of Directors to express our opposition to any changes in the confidentiality provisions for mediations as set forth in the California Evidence Code. We believe that the adoption of evidentiary rules making mediation confidential was an important milestone in California jurisprudence. These rules were the result of extensive discussions and involved public policy tradeoffs, and we believe these rules require protection.

We have been informed that on August 7, 2015 and again on October 8, 2015 the Commission voted to draft legislation removing current protections for mediation communications, both in malpractice actions and in State Bar Court when professional misconduct is alleged against a lawyer. This gives us great concern.

The Commission's review of these provisions are for a well-intentioned purpose: making redress possible for a person whose interests were not well served by their counsel. However, this is a case where the cure can be worse than the disease. The effect of any change to this legislation that violate the confidentiality of mediation would have a chilling effect on both the parties in mediation and their legal counsel.

If the confidentiality provisions of the Evidence Code are changed, clients represented by attorneys will participate in mediation far less frequently and mediated agreements will be more difficult to reach. Even a very competent attorney, who has nothing but the best interests of a client in mind, would then be excessively cautious about entering into mediation or working to

persuade a client of the merits of a mediated agreement; the new legislation would needlessly place the attorney at substantial risk in the event of a disagreement with the client.

As mentioned above, public policy tradeoffs are considered in the current rules. The legal system does not and cannot provide perfect redress for every wrong. Nor does changing the present provisions offer perfect redress for incompetent or unethical counsel. Changing the existing confidentiality provisions would compound the existing over-burdening of the court. And, most importantly, it is a well-known fact that a mediated agreement has a much higher compliancy rate than do court orders.

Should the commission weaken the confidentiality provisions as they presently stand, it will make it even more difficult for mediators and competent, ethical attorneys to work with clients to arrive at agreements that best serve the clients' needs—agreements achieved in consideration of *all* the circumstances. On balance, more is achieved by a larger number of individuals participating in mediation than is lost by some potential number of individuals agreeing to ill-advised resolutions.

Further, having mediated many disputes with attorneys as co-mediators, and/or with attorneys as advisors to the disputants, we have found that one of the most important considerations is disclosure. Clarity about the potential benefits, limitations, and disclaimers associated with mediation seems the path to highlight, not weaken the Confidentiality provisions of the evidentiary code. The Confidentiality provisions allow the parties to be open and transparent during negotiations without fear of later repercussions.

As a final matter, the Board of Directors feels that any changes to the Confidentiality provisions of the evidence code would be contrary to the goals set forth in the Model Rules of Conduct adopted by the AAA, ABA, as well as ACR, in that they would not foster diversity within the profession and would make mediation less accessible to the public. In particular, changes to the provisions would likely have a decidedly chilling effect on those offering services at reduced rates or Pro Bono services for those of modest means.

As the Commission carefully considers any potential changes to the existing evidentiary rule as currently written, we ask for your deep consideration of our concerns as noted above.

Should members of the Commission have questions or require further information, the Board of Directors at ADRNC would be happy to assist.

Sincerely,

Donald Proby, President

Coreal Riday-White, Esq., Volunteer Counsel

COLLABORATIVE PRACTICECALIFORNIA

October 6, 2015

California Law Revision Commission
c/o Ms. Barbara Gaal, Chief Deputy Counsel

Re: Study K-402

Dear Law Revision Commission:

I am President of Collaborative Practice California, a statewide organization involved in the promotion of Collaborative Practice throughout the state. We represent hundreds of Collaborative practitioners most of whom are members of the State Bar of California.

I would like to express on behalf of Collaborative Practice California our very strong opposition to the Commission's August 7 decision to draft legislation that removes current confidentiality protections when a mediation participant alleges lawyer misconduct. While we believe the proposed legislation is well-intended, it goes beyond the mark and dangerously jeopardizes mediation confidentiality, which has been a part of our work for decades. Removing the right to confidentiality is a radical step that we view as an existential threat to and alternate dispute resolution process in family law matters.

Family law matters hold a special place in jurisprudence in that traditional adversarial litigation is clearly harmful to families and children. Confidentiality as described in California Evidence Code Sections 1115-1128 has provided a safe forum for parties in family law cases to speak frankly and freely. Removing this protection will drive skilled mediators to abandon the practice of mediation and will leave parties without a forum for non-adversarial processes. This will expose families and children to unnecessary and harmful acrimony and crippling costs of litigation.

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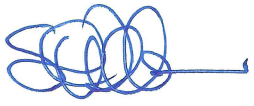
Worse, this legislation inappropriately places a target on the foreheads of mediators. Any time a party has second thoughts regarding an agreement reached in mediation, the party need only allege misconduct—even if such misconduct is unfounded.

We propose that the Commission look for less over-reaching solutions. In the *Cassel* case, which has driven most of the current concern regarding mediation confidentiality, the conversations in question took place between the lawyer and his client OUTSIDE the mediation room. While we oppose any piercing of the mediation confidentiality, a statutory exception limited to conversations outside of the mediation room will serve the Commission's purposes and will not unduly burden participants in mediation with the fear that any allegation, even if baseless, may undermine confidentiality.

In summary, any statutory exception should be limited to conversations outside of the mediation room and not extend to conversations inside the mediation room. Confidentiality is preserved when lawyers, clients AND the mediator are present TOGETHER, but any claim of malpractice could include conversations that take place with the lawyer and his/her client when they are NOT in the presence of the mediator. This would allow for parties to have the ability to bring malpractice claims against their attorneys but would protect the very important work of mediation.

To be clear, Collaborative Practice California strongly opposes any attempt to pierce the very important veil of mediation confidentiality. However, if the Commission is determined to do so, it can certainly find less intrusive and less damaging approaches than what has currently been suggested.

Sincerely yours,



Shawn Weber, J.D., CLS-F
President, Collaborative Practice California

EMAIL FROM ANGELA BISSADA (11/21/15)

Re: Study K-402

Hello Chief Deputy Counsel Gaal:

I am a child psychologist with extensive expertise in treating children of divorce, specifically those with parents whom are having trouble with co-parenting and often engaged in ongoing, costly and emotionally detrimental litigation. As a member of LACFLA, I have appreciated the benefits that a collaborative divorce affords for children and adolescents of divorce. A key component of both mediation and collaborative law is the parents' expectation that what they share will not and cannot be used against them in future legal proceedings. Although well-intentioned, the Commissions's recommendations would interfere with the parents' ability to create a collaborative plan for their families within a non-adversarial, cooperative environment. I ask that you consider my request that the Commission reconsider their proposed changes of the California Evidence Code.

Respectfully,

Dr. Angela Bissada

Angela Bissada, Psy.D.
Licensed Psychologist (PSY 15156)
16133 Ventura Blvd., Suite 1235
Encino, CA. 91436
T: 818-489-9820
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angela@bissada.net

EMAIL FROM JEFFREY BLOOM (10/12/15)

Re: K-402

California Law Revision Commission
c/o Ms. Barbara Gaal, Chief Deputy Counsel

I oppose the Commission's August 7th decision to draft recommended legislation removing our current confidentiality protections when a mediation participant alleges lawyer misconduct. I will oppose this legislation if it goes to the Legislature and will urge organizations of which I'm a member to oppose it.

For thirty years our current right to choose confidential mediation and also to opt out of it has served the people and courts of California extremely well. Removing this right is a very radical change which should require solid evidence establishing a need. Dozens of alternative solutions have been suggested to the Commission to address the alleged problem without removing our confidentiality protections. I request you pursue these instead.

I urge you not to turn your back on the Commission's own 1996 statement recommending our current statutory protections be enacted – "All persons attending a mediation, parties as well as nonparties, should be able to speak frankly, without fear of having their words turned against them."

Jeffrey C. Bloom

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EMAIL FROM MATTHEW BOOMHOWER (10/9/15)

Re: Mediation Confidentiality

California Law Revision Commission
c/o Ms. Barbara Gaal, Chief Deputy Counsel

Re Study K-402

I oppose the Commission's August 7th decision to draft recommended legislation removing our current confidentiality protections when a mediation participant alleges lawyer misconduct. I will oppose this legislation if it goes to the Legislature and will urge organizations of which I'm a member to oppose it.

Matthew C. Boomhower
Boomhower Law, APC
858-395-8657
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www.linkedin.com/in/matthewboomhower/

EMAIL FROM KENNETH BROOKS (10/9/15)

Re: Mediation Comfidentaility

I ask you leave mediation confidentiality in tact. The uniqueness of mediation is precious to individual peace of mind and public health, welfare and safety.

Mediation is not arbitration or other judgment system. Instead, mediation is collective humility at work. Without the freedom of exploration implicit in confidential mediation, persons, associations, businesses and other ventures are limited to only reactive justice rather than self-determined judgment. Self-dtermined outcomes are the more lasting ones.

People are the source of agreement, conflict and resolution. Let us have the option of our own resources. Let us have confidential mediation.

Going forward, further law revision study of how to best prevent the conduct of unfair advantage, unethical conduct and conduct in violation of other codes of professional areas (real estate medicine) would be valuable. I volunteer to help, let me know how.

Sincerely,

Ken Brooks, also @ 858.344.0664.

EMAIL SUBMITTED BY KENNETH BROOKS (10/14/15)

☞ **Staff Note.** Reproduced below is an email message that Kenneth Brooks sent to Ron Kelly on October 14, 2015. Mr. Brooks later forwarded the message to CLRC staff and requested that we present it to the Commission for consideration.

….

The commission's revision does not protect mediation confidentiality. Their approach is similar to the judicial procedure of deleting parts of a document or conversation to avoid possible impermissible bias or prejudice as determined by someone not part of the real event (s). The procedure is imperfect because a person can deduce the deleted content from the context of what is allowed to remain and the totality of the other known facts. The result is that nothing remains truly confidential.

Truth is a path to conflict resolution our society should offer our citizens, residents and visitors. Truth between people is found in the courage of full mutual discloure so the inevitable necessary compromise(s) they reach are their own that they will more reliably abide by. A human can only do this in the structure of confidence that protects their human essence. That structure of confidence is found only in mediation.

Mediation is neither for every person nor every situation. Mediation, arbitration and the judiciary are not in conflict with each other. Conflict is in every one of us and every one of us wants the option to participate in the resolution of our conflict. Mediation is suited for and offers relatively the most flexibility of expression and presentation because of its confidentiality.

This is one of the manifestations of the nature of formal litigation as it struggles with the unavoidable consequences of the all in or all out tradition and the tradition of not allowing people to determine their own resolution of their own conflict. These traditions are part of why court often falls short of full resolution of a conflict or often what is really a bundle of conflicts. The formal judicial system in a way is sometimes dismissive of the potential of the goodness in people by defining a behavior as that of a wholly bad person(s) and thus eliminating them from the dynamics of resolution. The formal judicial system tradition also prefers to separate out aspects of human interaction as though by intellectual surgery alone a human's future behavior can be determined. Human participation is more likely to affect future behavior.

One of the benefits of confidential mediation is that everything is on the table so the actual feelings can be constructively addressed. Feelings fuel behavior leading to conflict as well as to resolution.

Sue Finlay's suggestion of a cooling off period is worth further consideration. Such a period addresses the volitility of our human nature that sometimes benefits from a waiting period.

Thank you for listenning Ron and for your efforts regarding mediation. While my paragraphs may be out of sequencial order, they are all on the table for everyone's consideration in the spirit of progress and the evolution of best practices.

Ken

EMAIL FROM DANIEL V. BURKE (11/4/15)

Re: Mediation Confidentiality

I have been both a litigator and a mediator for many of the last 38 years of my practice as an attorney. I do **not** endorse the deterioration of the mediation privilege.

I do not understand how communications which are intended and understood to be privileged and confidential when uttered lose the confidentiality if and when a participant later elects, in good faith or otherwise, to defeat his advisor's claim for fees or seeks additional recovery by alleging errors or omissions of an attorney. Disputants will be unable and unwilling to speak openly, a necessary element of effective mediation, absent the cover of confidentiality. If confidentiality becomes questionable then the process becomes ineffective and it loses the ability to assist disputants.

The courts do not have the capacity to resolve society's numerous disputes. Eliminating or adversely impacting a viable and effective method of reducing conflict through mediation does not serve the general welfare of the public.

Thank you.

If you have any questions please give us a call here at the office.

/s/ Daniel V. Burke
State Bar #74202

760.434.3330

EMAIL FROM PATRICK BYRNE (11/5/15)

Re: Comment on Mediation Confidentiality – "Keep it"

Dear Ms. Gaal,

I am a practicing Mediator in California. I have worked as a private mediator, and I have worked with various Courts to help them use Mediation as a means to help reduce overburdened court caseloads.

In my experience, the agreement of the parties to participate voluntarily in confidential mediation sessions are important factors leading to successful voluntary case resolution.

I am writing to your Commission to express my objection to the Commissions drafting of any provisions to remove the current confidentiality protections when a mediation participant alleges attorney misconduct.

I will oppose this legislation if it goes to the Legislature. In addition, I will urge organizations of which I'm a member to oppose it.

I urge you not to turn your back on the Commission's own 1996 statement recommending our current statutory protections be enacted – "All persons attending a mediation, parties as well as nonparties, should be able to speak frankly, without fear of having their words turned against them."

Mediation is a voluntary process that is successful in resolving thousands of civil actions within the state every year. The parties who mediate all agree to confidentiality. This is how mediation has always worked. Without confidentiality, cases will be very difficult, if not impossible, to resolve. The result will mean a HUGE burden of unresolved cases for the over worked Courts to resolve.

For over 30 years litigants have had the right to choose confidential mediation if they so choose. They also have the option to opt out of mediation.

Removing this right is a very radical change which should require solid evidence establishing a need.

Dozens of alternative solutions have been suggested to the Commission to address the alleged problem without removing the mediation confidentiality protections. I request you pursue these instead.

Thank you.

Patrick J. Byrne
Patrick J. Byrne, Esq.
Mediator - Attorney at Law
(650) 922-2295
Email: pjbesq@gmail.com

EMAIL FROM CHUCK CAMPOS (11/3/15)

Hello Barbara,

Confidentiality is a key part of mediation and mediation is a very practical and effective way to resolve disputes.

I've observed a number of practices called mediation that really are not mediation. They resemble process hybrids of litigation and mediation. Perhaps some of these so-called "mediation" practices need to be reexamined and controlled better. Let's do this reexamination of those practices rather than taking confidentiality out of the practice of mediation. Let's not destroy mediation itself. Mediation works very well.

Why do we have these periodic attempts to break the back of mediation? What are we trying to accomplish by taking away confidentiality in these cases? Isn't there a better way that doesn't break a cornerstone of one of the most cost effective and dispute resolving practices there is? We know there is. Dozens of alternative solutions have been suggested to the Commission to address the alleged problem without removing our confidentiality protections. I request you pursue these instead.

For thirty years our current right to choose confidential mediation and also to opt out of it has served the people and courts of California extremely well. Removing this right is a very radical change which should require solid evidence establishing a need.

How many alleged malpractice claims are made against attorneys in mediation? What percentage does this represent of the total number of mediations that occur in California? Is it worth destroying mediation for this? There's a lot of very smart people who have been looking at this problem. Handicapping Mediation by destroying confidentiality for this "alleged" reason of alleged misconduct seems to me to be an excuse for some deeper underlying reason. What might that be?

I oppose the Commission's August 7th decision to draft recommended legislation removing our current confidentiality protections when a mediation participant alleges lawyer misconduct. I will oppose this legislation if it goes to the Legislature and will urge organizations of which I'm a member to oppose it. Surely there must be a smarter solution!

Thank you for your consideration.

Sincerely,

Chuk Campos
Mediator, Arbitrator, Trusted Advisor

925.606.6185

EMAIL FROM DANIEL CASAS (10/20/15)

Re: mediation confidentiality

Dear Sir/Madam,

I urge reconsideration of any decision to dispense with confidentiality in a mediation setting. The purpose of mediation would be severely limited were confidentiality missing.

Sincerely,

Dan Casas

DANIEL L. CASAS / Lawyer
55 North 3rd Street, Campbell, CA 95008
tel 650 . 948 . 7200 / fax 650 . 948 . 7220
dcasas@legalteam.com / www.legalteam.com

EMAIL FROM DEVIN COYLE (11/5/15)

Re: Please Protect Mediation Confidentiality

Dear Chief Deputy Counsel Gaal,

Please do not do propose any changes that would weaken mediation confidentiality.

If predictable confidentiality no longer exists, parties will stop being candid for fear that a judge will someday admit everything in court.

Thank you for your time.

Devin Coyle
DEVIN COYLE LAW
70 Washington Street, Suite 325
Oakland, CA 94607-3795
Phone: 510-584-9020
Fax: 510-584-9039
Email: devin@devincoylelaw.com

EMAIL FROM BARRY DAVIS (11/5/15)

Ms. Gaal,

I am writing you regarding my significant concern about the potential exception to mediation confidentiality that is currently being considered. I feel that this would greatly harm the effectiveness of mediation, and specifically divorce mediation, in the state of California. As a mediator for over a decade I've seen the importance of clients being able to address their issues in the mediation setting without the fear of being disadvantaged by having their statements being used against them in the future. Mediation confidentiality creates an environment where the parties can address their issues in an open forum and more often than not come to a resolution that keeps them out of the court system.

I'm very passionate about the work I do and specifically about keeping children out of the middle and keeping my clients out of court. I'm certainly not going to tell you that reducing the workload of family court judges is my primary focus as it is not. However, the ability of parties to discuss their issues in a confidential/protected manner creates an environment that benefits so many different individuals and entities in so many different ways including:

1. The parties have a much more positive (or at least less negative) experience than if they went to court and battled it out.

2. The children to a divorce have parents that are actively working together and can focus on their best interest.

3. The family court judges have their docket significantly reduced so that they can focus on the cases that truly need to be litigated.

Based on the damage that creating an exception to mediation confidentiality would create, I would respectfully ask you and your committee reconsider your position on this matter.

Sincerely,

Barry Davis
Mediator/Trainer
Davis Mediation
1726 Manhattan Beach Blvd., Suite D
Manhattan Beach, CA 90266
(310) 483-3373 / (310) 333-0747 fax
bdavis@davismediation.com
www.DavisMediation.com
www.youtube.com/c/barrydavisdivorcemediation
www.facebook.com/DavisMediation

EMAIL FROM ROBIN DEVITO (11/4/15)

Re: Mediation Privilege

Dear Ms. Gaal:

My name is Robin DeVito. I am an attorney in San Diego (admitted in 1983) I practice family law in North San Diego County. I am a certified specialist in family law (in 1991). I both litigate and mediate. I also serve as a private settlement mediator for counsel and their clients in lieu of a settlement conference at court. The loss of the mediation privilege would adversely impact our ability to settle cases out of court. The open and free discussion we have because the privilege allow us to settle cases. The decision to eliminate the mediation privilege will impact the court system, driving many parties who desire mediation through the system because they have no safe arena to conduct negotiations. I ask that you work to keep the privilege.

Very Truly Yours,

Robin A. DeVito, CFLS
Law Office of Robin A. DeVito
1015 Chestnut Avenue, Suite C-2
Carlsbad, CA 92008
(760) 720-9890
Fax: (760) 720-0892
Email: robin@radevitolaw.com

EMAIL FROM DOUG DEVRIES (10/8/15)

Re: Mediation Confidentiality

Dear Ms. Gaal,

I previously submitted my general objection to creating an exception to mediation confidentiality. I write now to register my objection to the commission lumping "attorneys" and "mediators" together when considering issues related to mediation confidentiality, including use of the inaccurate and deceptive term "mediator-attorney." I ask that the commission consider a few salient points going forward, as follows:

There is no such thing as a "mediator-attorney" in law or in fact. An "attorney" is a member of the bar who practices law. See B&P Code section 6002. A "mediator" is simply "a neutral person who conducts a mediation." See Evidence Code section 1115(b). The term "mediator-attorney" is not defined or recognized in the statutory scheme, and for good reason. In point of fact, one does not have to be an attorney in order to function as a mediator, and serving as a mediator does not constitute the practice of law. When performing the neutral role of trying to help attorneys and parties negotiate with each other in mediations, mediators (including attorneys functioning solely in the role of mediator), unlike attorneys practicing law, are not engaged in an attorney-client relationship with the parties, do not represent the parties or their legal interests, do not give legal advice to the parties and do not provide "professional services" to the parties. Further, mediators do not make decisions for parties or attorneys, do not bind parties or attorneys, and do not determine outcomes. In other words, there is no basis in fact or in law to treat mediators and attorneys who are acting in their respective roles alike, and professed concerns about legal malpractice of attorneys providing legal services to clients really have no direct or corollary application to mediators or the role they play in mediations.

Indeed, there are no specific qualifications or standards for being a mediator in California; in the private sector, these are matters left solely to the discretion of the parties and attorneys who wish to utilize a mediator's services. In this regard, attorneys and parties are free to select and use anyone they wish, and for any reason. While it is expected that mediators will advise attorneys and parties of any conflicts of interest, even true conflicts are waivable, not disqualifying. In California, there is no registration, official certification or regulation of mediators and no administrative oversight of mediators, as distinguished from attorneys. The State Bar regulates its "members (attorneys)," not "mediators." While this state of affairs may or may not be desirable, and whether or not further study of the complex topic of mediator regulation may or may not be warranted, its existence provides no justification for blindly and clumsily including mediators in any exception to mediation privilege on the same terms or scope as attorneys who represent their clients in mediations.

There are attorneys still actively practicing law who also serve as mediators and there are attorneys (like myself) who are retired, no longer actively practice law and serve as "mediators" (as noted above, neither can be referred to as "mediator-attorneys" appropriately). Parenthetically, the State Bar takes a questionable and confusing approach to attorneys who serve as mediators (keeping in mind that the State Bar does not regulate mediators and "mediator-attorney" is not a bar member category). State Bar Rule 2.30(c) provides that attorneys who act as mediators for a court or other governmental agency may be inactive members; in other words, they are not practicing law or actively regulated as if they are practicing law. On the other hand, in spite of the fact that Business & Professions Code section 6006 mandates that attorneys "... who retire from practice shall be enrolled as inactive members upon request," the Bar apparently requires that before such a retired attorney is enrolled as inactive they must attest that they are not engaging in private mediation. This impediment to inactive status, which would force retired attorneys who are no longer practicing law to remain active against their will even though their occupation as mediators does not require them to be an attorney appears to lack any statutory or regulatory authorization. If this practice has not been challenged yet, I assume it soon will be.

In practice, the differences between attorneys and mediators, and their respective positions and functions in mediations, are glaring and profound. As a matter of both expectation and practice, attorneys are advocates and mediators are neutral. There are no formally adopted ethics standards or standards of practice for mediators in California, but mediator neutrality is an essential part of the mediation process and is routinely applied and followed by mediators. This is in substantial part driven by the fact that mediators are hired by all parties jointly and must therefore serve the interests of all parties in resolution of their dispute equally and neutrally. It is important to understand what neutrality actually means in practice as it directly bears on what the commission is considering. Essentially, mediator neutrality means that the mediator must refrain from saying or doing anything that would substantively assist or advance the interests of one party at the expense of another. In this regard, the mediator is a facilitator of the negotiation process, not a guarantor of, or a judge of, the participating attorneys' competence or compliance with the legal malpractice standard of care. For instance, assume that a mediator is aware of a controlling case that would make a party's case against the opposing party, and the mediator comes to realize during the mediation that the attorney for that party has missed it. Neutrality, and the mediator's ethical need to steadfastly adhere to it, prevents the mediator from informing the attorney and his client about the case, or the fact that the attorney missed it, because to do so would materially assist that party at the expense of the other. The mediator's role is to help attorneys and parties engage in the negotiation process, not to negotiate for them; that is the job of an attorney, not a mediator.

A corollary can be seen in the mediator's handling of the issues presented by the parties' dispute. Mediators are taught not to raise or introduce new issues that the parties and their attorneys have not brought to bear on their dispute themselves. The mediator's role is to help the parties and their attorneys resolve the dispute they already have, not to expand that dispute or to create new disputes. A mediator is not a legal advisor. Here again, the

mediator also cannot, in fulfilling their role as a neutral facilitator, bring new or omitted issues to one party's attention without potentially disadvantaging the opposing party.

The interactions and communications between a mediator and the parties and their attorneys during the course of mediation are invariably incomplete. In other words, while mediators may talk with attorneys in the presence of parties, and mediators may talk with both at times, rarely is a mediator in the company of parties and their attorneys when they are conferring with each other about confidential attorney-client matters such as strategy or bottom line settlement authorization. Mediations are not recorded or reported, and mediators are under no obligation to take notes, let alone preserve any record of the mediation proceedings, which after all are intended to be confidential.

In the face of these practical realities (and the extensive constraints under which mediators function) it should be obvious that mediators performing in their role as mediators, whether or not they happen to be attorneys (active or inactive), cannot be expected to comply with the standard of care otherwise applicable to attorneys practicing law; the roles and duties are completely different. This is not to say that an attorney functioning as a mediator is utterly incapable of acting in some egregious manner that could constitute a violation of the rules of professional responsibility applicable to attorneys while serving as a mediator. However, such hypothetical conduct, in addition to being exceedingly rare, could not form the basis of a legal malpractice claim because the mediator is not practicing law or engaged in an attorney-client relationship with any of the participants. Addressing such conduct, if engaged in by a practicing attorney functioning as a mediator, lies properly within the purview of State Bar regulation and discipline of attorneys, not malpractice suits.

Finally, the practical impacts on mediators and the mediation process of including mediators in an exception to mediation confidentiality are predictably negative and, as many others have observed in submissions to the commission, potentially disruptive and destructive. Mediators will naturally be concerned that every party and every attorney in every mediation might become a potential adversary in a subsequent lawsuit, whether the mediator becomes a direct target of a disgruntled or opportunistic party or routinely gets dragged into "settle and sue" lawsuits brought by disgruntled or opportunistic clients against their attorneys. How would mediators be expected to deal with this in conducting mediations? Insist on contractual waiver of the exception as a condition of providing mediator services? Explain at the outset (when one of the mediator's primary objectives is to build trust) that confidentiality will not apply in suits between the party and the mediator)? Interact only with the attorneys, and avoid interacting with the parties? Excuse themselves from the room whenever attorneys and their clients confer about anything? Etc.

Thank you for your attention and consideration of this input,

Doug deVries, Mediator
deVries Dispute Resolution
(t) 916-473-4343
(e) doug@dkdmediation.com
Please visit www.dkdmediation.com
Judicate West affiliated – Statewide – No travel charges

EMAIL FROM DWIGHT DONOVAN (11/3/15)

Re: Mediation Confidentiality

I am writing to voice my opposition to the proposed changes to the Evidence Code regarding mediation confidentiality. The process as it currently exists works, in large part, because of the confidentiality protections. The courts are already swamped. We don't need any more disincentives for parties to participate in the mediation process.

It's not broken. Don't fix it.

Thank you.

Dwight Donovan
Partner
Fox Rothschild LLP
345 California Street
Suite 2200
San Francisco, CA 94104
(415) 364-5540 (phone)
(415) 391-4436 (fax)
ddonovan@foxrothschild.com
www.foxrothschild.com

EMAIL FROM TIM ELLIOTT (11/19/15)

Re: Study K-402

Dear Chief Deputy Counsel Gaal-

I have recently become aware of the Law Revision Commission's Study K-402 and the potential for the current statutory mediation confidentiality protection to be set aside in instances where attorney misconduct is alleged by a client. I am a licensed California attorney. While the intentions here might be noble, I cannot help but think that, if adopted by the Legislature, that the law of unintended consequences would render enactment disastrous on many levels; mainly, the courts will become even more clogged with lawsuits -- malpractice claims, claims to unwind settlement agreements entered into during mediation, and perhaps even claims against mediators themselves, which would seem to be a foreseeable next step in the erosion of mediation confidentiality. Of course the ultimate result would fewer cases being settled out of court because fewer and fewer litigants are able to mediate, because it will be a real challenge to find a mediator who will be willing to take on the role of neutral at the risk of being compelled to give testimony in a subsequent malpractice action.

I volunteer several afternoons per month as a mediator in the Small Claims Court of the San Mateo County Court, as well as in the Juvenile Court Mediation program. Although the parties in such cases are generally not represented by counsel, the concern is the same: there can be no resolution to conflict unless confidentiality exists. I can tell you that the Judges and Commissioners in these courts are incredibly grateful for the role that I, and other volunteers like me, play in both reducing the trial calendar (Small Claims) and in hopefully helping a young person make a positive change (Juvenile Victim/Offender). However, without confidentiality protections, I really am not sure if I, and the others, will continue to volunteer, because we will no longer be able to do our work properly and could even become ourselves exposed to liability. I don't think my judges will be happy!

I therefore encourage the Commission to give very thoughtful consideration to the far reaching ripple effect that erosion of mediation confidentiality will have in California; I simply cannot envision an outcome that is positive. As my grandfather used to say, "If it ain't broke, don't bother fixin' it."

Thank you for your time.

Very Truly Yours,

Tim Elliott
CA State Bar #210640

EMAIL FROM DEBORAH EWING (11/3/15)

Re: Mediation Confidentiality

California Law Revision Commission
c/o Ms. Barbara Gaal, Chief Deputy Counsel

I have been a lawyer in California for almost 33 years. I have practiced Family Law the entirety of that time. I have practiced in heavy-duty litigation firms, and for the past 20 years, I have been a solo practitioner. I have been the president of the Harriett Buhai Center for Family Law, one of the most preeminent family law service providers in California, and involved with that organization for many years, as a volunteer, a board member, executive board, advisory board. I practice mediation and collaborative divorce as well as litigation, and I am the president of A Better Divorce, a prominent collaborative divorce practice group in Los Angeles County. I utilize mediators in my practice, when I represent individuals, and at other times, I serve as the mediator.

I oppose the Commission's plans for legislation removing our current confidentiality protections when a mediation participant alleges lawyer misconduct. I will oppose this legislation if it goes to the Legislature and will urge organizations of which I'm a member to oppose it.

I understand the policy to sanction lawyer misconduct. But I submit that the policy in support of mediation overrides it. Mediation only works when it's confidential. It is the confidentiality of mediation that creates the space of safety and transparency that allows real conversations to take place. Lawyer misconduct is not the only potential issue with confidentiality—to state the obvious, misconduct by the parties also goes unsanctioned. I suppose lawyer misconduct is arguably worse than client misconduct in some cases, but the reverse may also be true in other cases. Such distinctions are insignificant compared to the damage done to the entire mediation process by this proposed breach of the privilege of confidentiality. And, I submit that the incidence of claims of lawyer misconduct in mediation is a very small percentage of the mediation cases that proceed and are resolved with the protection of mediation confidentiality. The Commission's actions 'throw the baby out with the bath water', and eliminating mediation confidentiality is an unfair result for our clients.

I urge the Commission to keep mediation confidentiality!

Thank you.
Deborah Ewing
Deborah Ewing, Esq.
Law Offices of Deborah Ewing
3424 Carson Street, Ste. 570
Torrance, CA. 90503
(310) 542-3222 telephone
(310) 542-3206 facsimile
ewingesq@sobaylaw.com

EMAIL FROM GLORIA FLORES-CERUL (11/16/15)

Re: Mediation Confidentiality

Dear Ms. Gaal:

I am a Certified Family Law Specialist, Past Chair of the Santa Clara County Bar Association Family Law Section and Past President of Collaborative Practice Silicon Valley (CPSV). I am a Northern California Super Lawyer in Family Law and a 2014 recipient of the Henry B. Collada Memorial Award for Extraordinary Service and Contribution to the Santa Clara County Family Court.

I have been practicing family law for almost 20 years. After litigating family law matters for 10 years, it became very clear to me that the adversarial nature of the court process does not serve families well. Since that time, I have been primarily assisting clients in their family disputes through Mediation and Collaborative Practice.

I have seen a dramatic improvement in outcomes for families (especially children) when couples have the opportunity to resolve their own disputes in a non-adversarial setting, whether it be in mediation or collaborative practice. However, these processes rely, and in fact, are based on confidentiality and the protections afforded by CA Evidence Code Sections 1115-1128.

I am deeply concerned about any changes which might weaken in any manner the current mediation confidentiality protections.

I firmly believe that the public interest is best serve by maintaining and safeguarding mediation confidentiality.

Thank you for your consideration of my opinion in this very important matter.

Best regards,
Gloria Flores-Cerul
--
Gloria Flores-Cerul, C.F.L.S.*
111 North Market Street, Suite 300
San Jose, CA 95113
Tel. (408) 418-4670
gloria@sanjosedivorce.net
www.sanjosedivorce.net

EMAIL FROM BOB FRIEDENBERG (10/9/15)

Re: Study K-402 – opposition to proposed legislation removing mediation confidentiality under certain circumstances

California Law Revision Commission
c/o Ms. Barbara Gaal, Chief Deputy Counsel

I am a full-time mediator in cases throughout California and have been doing this full-time since 2003. I oppose the Commission's August 7th decision to draft recommended legislation removing our current confidentiality protections when a mediation participant alleges lawyer misconduct. I will oppose this legislation if it goes to the Legislature and will urge organizations of which I'm a member to oppose it. The exception will swallow the rule and mediators will lose the ability to resolve cases the way we have been, quite successfully for dozens of years. I understand why the proposal was made, but we all know that bad facts make bad law. We should not let one funky result destroy a valuable mediation process.

For thirty years our current right to choose confidential mediation and also to opt out of it has served the people and courts of California extremely well. Removing this right is a very radical change which should require solid evidence establishing a need. Dozens of alternative solutions have been suggested to the Commission to address the alleged problem without removing our confidentiality protections. I request you pursue these instead.

I urge you not to turn your back on the Commission's own 1996 statement recommending our current statutory protections be enacted – "All persons attending a mediation, parties as well as nonparties, should be able to speak frankly, without fear of having their words turned against them."

Bob Friedenberg
Friedenberg Mediation
3525 Del Mar Heights Rd.
Suite 644
San Diego, CA 92130
(858) 794-7800 – office
(619) 977-2004 – cell
www.friedenberg.com

EMAIL FROM CHRISTINE GOLDSMITH (11/5/15)

Re: Mediation Confidentiality

Good Morning,

I affirm Judge Finlay's comments to the Commission regarding the need for confidentiality in mediation.

I, too, am a retired Judge (27 years) and current mediator in the family law area. The sensitive and very personal nature of family law issues are perfectly suited for confidential mediation. To allow a disgruntled or high conflict litigant to manufacture or allege misconduct or unfairness against any participant in the process would remove this valuable and far less painful tool which is so useful in resolving family law matters.

If the Commission is concerned about conflicts of interest by attorneys who represent their clients in this process, perhaps a better approach is to require attorneys to inform clients in advance of mediation of any business or familial relationships with any of the participants to the mediation. The mediation process itself should remain completely confidential.

Best regards,

Christine K. Goldsmith
Goldsmith Mediation

EMAIL FROM EDUARDO GONZALEZ (11/4/15)

Re: Proposed changes to mediation confidentiality

Dear Chief Deputy Counsel Gaal,

I am a practicing CA attorney with twenty-nine years of experience. In my humble opinion, any weakening of the rules of confidentiality in mediation proceedings would have a very chilling effect on the frank and open exchange that every party needs with a mediator to get a case resolved.

Thank you for taking the time to read this email.

Eduardo A. Gonzalez
Attorney at Law
edouardo.gonzalez95@yahoo.com
(510)325-5236

EMAIL FROM JOHN HURABIELL (11/4/15)

Re: Mediation

Do not do anything to in any way weaken the confidentiality of mediation. To do so will take away a necessary tool for the litigator. If you do so, you'd better plan on doubling the number of judges, courtrooms, and judicial staff to handle all of the cases that will go to trial for want of an alternative.

John P. Hurabiell
Huppert & Hurabiell
259 – 14th Avenue
San Francisco, CA 94118
415-387-3001
415-387-8061 fax

EMAIL FROM LORNA JAYNES (11/3/15)

Re: Study K-402

Hello,

It is my understanding that there is a study and possibly recommendations to limit mediation confidentiality. It is my strong belief that mediation confidentiality is essential to the viability and success of mediation and ask that mediation confidentiality not be limited or compromised or reduced in any way.

Thank you,

Lorna

Lorna Jaynes
Law & Mediation Office of Lorna Jaynes
110 J Street
Fremont, CA 94536
Telephone No. (510) 795-6304
Facsimile No. (510) 405-9022
Website: www.lornajaynes.com

EMAIL FROM BRUCE JOHNSEN (11/13/15)

Re: Mediation Confidentiality

Bruce Johnsen, Mediator
824 Munras Ave. Suite G
Monterey, CA 93940

November 13, 2015

California Law Revision Commission
Attn: Barbara S. Gaal, Chief Deputy Counsel

I have been practicing mediation in California as a "non-attorney" mediator for over 30 years. My experience is that the foundation for the clear and open communication needed in mediation is the existence of the confidentiality protections we have now. My concern is that if these protections are weakened for mediation participants, the process will gradually become useless, leading to more court cases and additional taxpayer costs for the various levels of government.

If it is necessary to change the statute to help control mal-practicing attorneys, please ensure that the changes are narrowly targeted in such a way that mediation confidentiality can be strong enough to ensure the mediation process will continue to be a healthy, economical and effective resource for dispute resolution.

Thank you for your efforts in keeping the mediation process one to be used often, and trusted by all participants.

Best regards

Bruce Johnsen

EMAIL FROM ENRIQUE KOENIG (11/4/15)

Re: Current legislation to marginalize or remove confidentiality from certain communication within a mediation setting…

Chief Deputy Counsel Barbara Gaal

Honorable Ms. Gaal:

It has been brought to my attention that The California Law Revision Commission might consider revising (CA Evidence Code 1115-1128), so as to limit the applicability of confidentiality under certain circumstances where there has been lawyer advocate misbehavior during the course of a matter within the purview of mediation.

As a mediation practitioner exclusively in the State of California mostly dealing with Family disputes, I would like to petition your Honor on how valuable it is to preserve confidentiality of all relevant communications disclosed by parties in a mediation setting. To modify such rules to allow the future admissibility of communications simply because an attorney advocate has acted improperly during the course of a mediation has nothing to do with the candid expression disclosed by parties during mediation that they believe will remain confidential. As you know many attorneys due use mediation simply as a discovery tool. However, this ought not to cause affectation on the ability or willingness of participants to a mediation to attempt to resolve their dispute in good faith. To modify the rules of confidentiality, or marginalize their coverage would only confuse the entire process and once again open the floodgates of litigation in our justice system.

With the outmost of respect I petition you to consider this in your overall decision and that of the Committee.

Sincerely yours,

Enrique G. Koenig
Koenig Mediation, LLC
433 N. Camden Dr., 6th Floor
Beverly Hills, CA 90210

EMAIL FROM GUY KORNBLUM (11/3/15)

Re: Mediation Confidentiality

It is my very strong view that it the current system of protecting the confidentiality of what takes place during the mediation process should be retained. Opening the door and allowing the confidentiality process to be ignored in litigation between a party and its counsel removes the incentive for a candid and open discussion of the merits of any case that it is in a mediation or the process before and after.

I have had over 40 years of private practice, and written many articles on mediation and negotiation. I also have a book, Negotiating and Settling Tort Cases: Reaching the Settlement, published by Thomson West and the American Association for Justice. Not only do I have considerable experience with the mediation process but I am a student of that process and almost daily have contact with my colleagues on issues pertaining to mediation.

While I could outline my several reasons for my view, the essential reason is that it is critical that the mediator and the parties have a full and open discussion without the fear of the exchanges being the subject of litigation. While there may be abuses in some circumstances, in my view those occasions are few, so removing this protection is not in the best interest of encouraging parties to negotiate openly and candidly in the mediation process.

My c.v. is attached which lists my publications.

☞ **Staff Note.** Mr. Kornblum's 17-page curriculum vitae is posted on the Commission's website at http://www.clrc.ca.gov/K402.html under "Additional Materials."

EMAIL FROM JESSICA LEE-MESSER (11/13/15)

Re: Proposed Revisions Regarding Mediation Confidentiality

Dear Ms. Gaal,

I am the current President of Collaborative Practice Silicon Valley and I am writing to express my opposition to the Commission's decision to draft legislation removing confidentiality protections in the situation where one participant alleges lawyer misconduct during mediation.

I have been mediating family law cases for approximately 10 years. I volunteer mediation services several times each year at the Family Law Courts in order to help alleviate the Court dockets. At the beginning of each mediation (private or pro bono), I point out to those considering participating that one of the prime hallmarks of mediation is that the process is **confidential**. I inform them that confidentiality is what opens the door to open and transparent discussions. As stated in the Commission's own 1996 statement recommending our current statutory protections of confidentiality: "All persons attending a mediation, parties as well as nonparties, should be able to speak frankly, without fear of having their words turned against them." Confidentiality is the key to persuading each participant to put all of his or her cards on the table and turn them face up. Transparency is frequently why parties have chosen the mediation process. Without confidentiality, they could not trust the process to provide the transparency they are seeking. Confidentiality is what distinguishes the mediation process from discussions aimed at resolving a litigated matter. In mediation, where everyone has committed to the precept of confidentiality, all viewpoints and arguments and factual information can be brought out fully without fear that statements will later be turned against the declarant. Confidentiality is what permits this open and frank discussion. It is what distinguishes mediation from litigation. And it is in this distinction that matters can be peacefully settled for the long term, rather than with a band-aid aimed at avoiding next week's trial, with far fewer visits to Court afterwards to enforce agreement terms, address changes in circumstances, etc. In a mediation process, the parties often can create a model for themselves for addressing future issues which may arise, and learn that they never have to resort to Court to solve their problems. My litigated cases sometimes must return to Court when inevitable changes happen. In my mediated cases, the parties are almost always able to build on their previous success and head directly back into conversation with one another, outside of Court.

Settlor's (Buyer's) remorse is a common reaction to settling a case in any model--*any* resolution in divorce means you lose half your possessions, you must have less income than you used to have, and you see your kids much less often than you wish you would. These are devastating losses, even if logic tells you your agreement is reasonable. All skilled mediators point this out to both/all participants before anyone commits to a settlement in writing. We caution those who are settling a matter that there is no going back. The proposed rule change, however, would create that "do over" opportunity--if

someone accuses a lawyer of misconduct. The accusation need not be true, complete or accurate; a false accusation might be seen by the accuser as a "bargaining chip" encouraging everyone to return to the table. The problem is that this chip comes at the expense of the lawyer who is accused, perhaps falsely, of misconduct. And there is no clear definition of misconduct; it's in the eye of the accuser. This could also lead to more false bar complaints, in order to lend credibility to the party seeking a do-over of a previously settled case.

There is a very workable solution to any perceived problem of actual professional misbehavior. Another key hallmark of mediation is that it is voluntary. If an attendee feels, sees, or believes that someone--including the mediator--is misbehaving, then the solution is for that person to withdraw from that mediation. Given that a person can walk away from mediation at any time, the solution to a perception of misconduct should not be to accuse someone else, perhaps falsely, of misbehaving. The solution should be to withdraw. They can obtain a new professional in their mediation process or they can choose a different dispute resolution process.

I believe strongly that the good done for parties and for society by the availability of mediation in its present form far outweighs the occasional disadvantage presented by the unavailability of evidence of what occurred during the mediation process due to professional misconduct: (1) It saves enormous amounts of money, (2) it prevents the stress of litigation (even settling a litigation model matter is far more stressful for the parties involved than settlement within a mediation case) -- which can preserve family relationships, reduce stress on children, and reduce future litigation, (3) it gives parties control over their outcomes and a chance to build trust between them, and (4) it keeps matters out of what are obviously enormously overtaxed Courts. Has a study been done to compare the costs and the benefits inherent in this issue? I don't know what the rate of actual professional misconduct is, but to me the outcome of any comparative study (which I presume would be done before any law should pass) should be obvious. From a monetary perspective, I would imagine that this legislation would be extremely expensive, not only because it could lead to so much litigation, but more because it would rid us of the reduction in litigation that mediation provides. I would expect many mediators would cease to offer mediation services.

Thank you for considering my viewpoint.

Best,
Jessica

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EMAIL FROM JOHN MCCABE, JR. (11/4/15)

Re: Mediation Privilege

Good afternoon. I hope the provided link is a correct one to utilize. It seems to me the desirability of mediation providing a forum for open and candid discussion and attempts at resolution will be totally eroded if the confidentiality privilege is lost or even weakened.
JMC

John J. McCabe, Jr.
Attorney at Law
136 Redwood Street
San Diego, CA 92103
(619)692-3136 phone
(619) 692-1229 fax

EMAIL FROM STEVEN G. PEARL (11/4/15)

Re: K-402: Mediation Confidentiality

Dear Ms. Gaal:

I oppose the Commission's proposals to change California's mediation privilege laws.

I am a practicing mediator who focuses on resolving employment law disputes. Success mediation requires all parties to communicate candidly with their mediator. Every day in mediation, parties provide their mediators with facts, attorney work product, and privileged communications in order to help resolve their cases. At the same time, mediators give the parties candid evaluations of the strengths and weaknesses of their cases, the likelihood of particular outcomes in litigation, and the best moves to resolve their cases. The parties and their mediators communicate candidly, knowing that their conversations will go no further than the four walls of the mediation.

Eliminating protections for these communications will chill all mediation communication, decrease the likelihood of resolution, and force parties to continue litigating matters that should be resolved. This will have a negative impact not only the parties, but also on our already over-crowded courts, further increasing dockets and straining budgets.

While a very small percentage of all mediations do lead to allegations of attorney malpractice and malfeasance, eliminating mediation confidentiality will do far more harm than good.

Steven G. Pearl
Mediator
Please note my new email address: sgpearl@gmail.com
ADR Services, Inc.
Direct: (818) 517-8422
Case Manager Haward Cho: (213) 683-1600
The Employment Law Update
The California Employment Law Blog

Law and Mediation Offices of

Lynette Berg Robe

Certified Specialist- Family Law
The State Bar of California Board of Legal Specialization

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lynette@lynettebergrobelaw.com
www.lynettebergrobelaw.com

November 6, 2015

Via email to: bgaal@clrc.ca.gov

Barbara Gaal, Chief Deputy Counsel
California Law Revision Commission

Re: Study K-402 and Mediation Confidentiality

Dear Ms. Gaal:

I am writing to add my voice to the concerns already expressed by many others as to the CLRC's proposal for the weakening of "mediation confidentiality."

When I was a law student at UCLA School of Law, in 1984, I took "Alternative Dispute Resolution" from Prof. Carrie Minkel-Meadow, when the concept of mediation was fairly new. My family law practice has always involved mediation, either my serving as a mediator or as a consulting attorney in mediation. I have also served for many years in volunteer programs with the courts where family law attorneys serve as mediators to help with cases. I currently volunteer one or two days a year to those programs in three different courthouses in Los Angeles.

I am vehemently opposed to interfering with the shield of confidentiality that has protected the mediation process since it was added to the Evidence Code. If that shield is removed, even if attorneys serving as mediators are protected, there will be no consulting attorneys involved in the process. Few attorneys will even recommend mediation to their clients. The volunteer mediations that help the overburdened family courts by resolving hundreds, if not thousands, of cases each year will also dry up. Attorneys simply will not agree to participate in those mediations.

This proposal will simply destroy mediation. Confidentiality is the key to successful mediation. Trust and candid discussions are essential to the process. If mediators can be called as witnesses in attorney malpractice cases, that will have a chilling effect on the entire process.

Mediation has been serving California litigants and families in a positive way for well over 30 years. It seems a shame to punish those who would like to participate in this process because of a tiny number of cases involving attorney malpractice. It seems it would be better to impose stricter guidelines for informing parties before they enter into the mediation process so that they are fully informed about the process before agreeing to enter into it, rather than simply destroying the entire process by removing mediation confidentiality.

I urge the CLRC to consider the many benefits that mediation has brought to our legal system, enabling litigants to control their destinies by consensual dispute resolution in a confidential, private way.

Yours truly,

Lynette Berg Robe

Lynette Berg Robe

KGR
LAW & MEDIATION OFFICES OF
KAREN ROSIN
COUNSELOR AND ATTORNEY AT LAW

November 23, 2015

Via U.S. Mail and Email to
bgaal@clrc.ca.gov

Barbara Gaal, Chief Deputy Counsel
California Law Revision Commission
c/o U.C. Davis School of Law
400 Mrak Hall Drive
Davis, California 95616

Re: MEDIATION CONFIDENTIALITY and Study K-402

Dear Ms. Gaal:

I am an attorney and mediator specializing in family law matters. I have been a member in good standing of the California State Bar, Number 101292, since 1981.

I have recently learned that the California Law Revision Commission ("CLRC") is planning to recommend that our State Legislature create an exception to mediation confidentiality when attorneys who have represented clients during mediation are later accused of malpractice.

I strongly oppose such an exception without further study, opportunity for both public comment and for research, and consideration of all possible alternatives. I believe it would be quite harmful to the people of California, both in the short term and the long run, if such an exception were created. While I understand that the CLRC is seeking to provide a remedy to those people who may have actually been harmed by attorney malpractice or misconduct during mediation, I believe the number of people so harmed is probably quite small in comparison to the population which would be and has been helped significantly by mediation, whether as parties to a specific mediation or as members of the public who benefit from the continued availability of mediation as a viable method of dispute resolution.

The public interest which is clearly stated in our Family Code, to reduce litigation and adversarial processes in family law matters, would not be met by the proposed confidentiality exception. Instead, it will create a huge disincentive for parties considering mediation versus litigation, as confidentiality allows the parties to be open and honest and creative in seeking solutions, without fear that their words will come back to haunt them. Removal of cases from our overburdened, underfunded court system is good for everyone, and decimating the all-important

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KGResq@KRosinLaw.com

confidentiality protection would make mediation a much less desirable alternative. We should be trying to expand the use of mediation, not constrict it.

I am a strong supporter of standardizing mediator certification and licensing so that well-trained, certified mediators can protect the mediation process and mitigate the type of potential harm which the proposed confidentiality exception seeks to address. I would be happy to explain further how such certification or licensing would meet the public interest in mediation without ignoring the concern about attorney misconduct.

For the record, a little about my background:

I was ranked 7th in my class at the UCLA School of Law, where I was a member of the UCLA Law Review, a Distinguished Advocate in Moot Court Competition, and a member of the Order of the Coif. Originally a transactional entertainment business lawyer, I have been practicing family law and mediation for over ten years. In April, 2015, I received the Wiley E. Manual Certificate from the State Bar for my Pro Bono Legal Services.

I am a current member of the Consensual Dispute Resolution Committee of the Family Law Section of the California State Bar, the Los Angeles County Bar Association and its Family Law Section, the American Bar Association and its Family Law Section, and the Beverly Hills Bar Association and its Family Law and Dispute Resolution Sections. I am also a member of numerous professional mediation associations and have been an active member of the Ad Hoc Committee on Voluntary Mediator Certification of the Southern California Mediation Association ("SCMA").

None of these organizations seem to have been aware of the activities or conclusions of the CLRC until recently -- which I find most curious. The progress of your study is of vital public interest and should be better publicized and widely disseminated so that those practicing in these areas, **as well as the public at large**, can provide input. I believe many of my colleagues will be in attendance at your upcoming meeting in Los Angeles on December 10th, and I hope the CLRC can and will listen to differing opinions of your proposed legislation with open minds.

Thank you very much for your consideration.

Sincerely,

Karen Green Rosin

EMAIL FROM HAROLD STANTON (11/4/15)

Re: What's wrong with mediation

I have been actively practicing law since 1965. I was a senior editor on the UCLA Law Review, and I have been a member of the American Academy of Matrimonial Lawyers since 1979.

Family Law is in the civil court system notwithstanding the extraordinary cost that imposes on parties and the abuse by attorneys who foster their client's anger in order to prolong the litigation. That is part of the reason that fewer than 25% of the cases have two lawyers.

The only rational way to deal with cases to minimize the harsh consequences of a divorce is to pursue mediation when the facts of the case are sufficiently clear. There are problems with every system and mediation is no exception. Once the Supreme Court ruled that the mediation privilege does not cover the Declarations of Disclosure, the most serious problem was solved. That leaves only the issue of whether a client was not properly advised by their own attorney. Most of the problems arise at the point where an attorney and client are in the process of trying to negotiate a settlement, whether in mediation, a mandatory settlement conference, or in a conference room before or after a hearing in court. No one really knows what is said between a lawyer and their client in those moments. Keeping the mediation privilege in place to insulate the lawyer from claims of malpractice in the mediation context is a small price to pay for the benefits that the mediation sanctuary provides to hapless couples caught up in the financial meat grinder of family law litigation.

Harold J. Stanton, Esq.

EMAIL FROM JUDITH STERLING (11/3/15)

Re: Mediation Confidentiality

Dear Barbara Gaal,

I work in the mediation and Collaborative law areas of family law mostly as a neutral financial professional.

I strongly am against the currently proposed change to protections for all participants in mediation and other out of court settlement processes to be candid in their attempts to settle their case outside of court. If protections are removed if someone **alleges (whether it be true or not)** misconduct by a lawyer advocate, I believe it will have a chilling effect on out of court settlement processes. I believe it is in the public's best interest that people are able to speak frankly in mediation, knowing their words won't become evidence.

I would be happy to discuss this further.

Regards,
Judith Sterling
www.collaborativecouncil.org
www.collaborativepracticemarin.org

EMAIL FROM JANIS STOCKS (11/4/15)

Re: Mediation Confidentiality

Ladies/Gentlemen:

I am a family law attorney and I have practiced in CA for more than 40 years. Have been handling divorce mediation for 30 of those years. Mediation is the only sensible way to resolve a divorce. Confidentiality is the cornerstone of mediation. It always for honest and frank discussions and options to be considered. If there was no confidentiality, I do not know how successful I would be getting people to make offers of settlement which are against what their lawyer might argue for.

Jan Stocks CA BAR #62420

Janis K. Stocks
Partner
STOCKS & COLBURN
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Tel.: (619) 231-2085
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e-mail: jan@stockscolburn.com

EMAIL FROM RON SUPANCIC (11/3/15)

Re: MEDIATION CONFIDENTIALITY

Please do not dilute, limit, or tamper with Mediation Confidentiality. To change the existing Rule of Law is to reduce the opportunity for litigation avoidance & play into the hands of the Advocates for "Divorce Corp." If you have not seen this timely documentary, I recommend that you take the time to watch it. People need to feel safe in Consensual Dispute Resolution. The proposed changes are not in the best interests of the public.

Ron Supancic, CFLS

Please note: This is my personal email address.

I will not respond to case related emails here.

Email regarding legal issues must be sent to ron@thelawcollaborative.com

EMAIL FROM BARRY TAGAWA (11/4/15)

Re: Erosion of confidentiality in mediations

Dear Chief Deputy Counsel Barbara,

This will state my belief that the steps that the California Law Review Commission is currently taking to erode the confidentiality in mediation proceedings will do more harm than good to the public. Among other things, it is my belief that doing so would significantly reduce the level of candor expressed before and during mediations, and will further dramatically reduce the rates of successfully settled cases during mediations, resulting in a larger number of cases which must be tried in our state courts.

If you have any questions, please feel free to e-mail or call.

Barry K. Tagawa, Esq.
The Law Office of Barry K. Tagawa
57 Post Street, Suite 900
San Francisco, CA 94104
Telephone: (415) 951-8600
Facsimile: (415) 951-8626

EMAIL FROM GAYLE TAMLER (11/22/15)

Re: Please Keep Mediations Confidential

Dear Ms. Gaal:

While I have been a practicing attorney for over 30 years, it is in the past 2 years that I have been doing Family Law Divorce Mediations. Clearly going through a divorce is a traumatic event and the mediated divorce seeks to reduce as much as possible the emotional/psychological scars for all parties involved (including the children) by making the process respectful, cooperative and peaceful. A large way this is facilitated is by explaining the confidential nature of the proceedings. The couple's financial, emotional, and private information will be confidential. No court reporters, court spectators, or judges will be involved. Only the couple, the mediator and other support personnel they desire such as a child specialist or financial advisor will be present in the room.

By taking the courtroom drama out of divorce, the matter can be processed more efficiently and in most instances with better long lasting results because the couple is making their own settlement, not a third party. Additionally, the bright line confidentiality characteristic of the mediation allows the parties to speak openly and freely about their concerns and interests, as well as the advantages and disadvantages of their legal positions, without fear that this honest conversation will harm them in court if their mediation does not reach a settlement.

Mediated divorces are not evaluative proceedings wherein the mediator directs the outcome and advises the couple what to do, they are facilitative processes. The mediator may provide for the couple the applicable law as their counsel may do, but it is up to the couple if they choose adhere to legal guidelines. This freedom to speak freely and to choose the outcome they wish without legal restraints is one of the hallmarks of successful mediations. This strongly argues for the benefit of maintaining confidentiality in this process.

In mediation agreements contracts signed prior to the commencement of the mediation, the parties are advised of the confidential nature of the process and its implications, and the fact that they cannot later sue the mediator, or the other professionals in the room. In fact, they are told that if they reach an agreed settlement and file it with the court, it will be very difficult to later overturn it if they have "buyer's remorse". On the other hand, many settlement agreements include clauses wherein the couple are welcomed back into mediation if they wish to modify any terms of their agreement.

Without the presence of confidentiality as it NOW stands, mediation will no longer be an effective option for divorcing couples. With the proposed standard being a "mere allegation" of malfeasance that may expose anything that was said in a mediation to public disclosure, divorce mediation will in essence be destroyed. The art of "conscious

uncoupling" will end because the protections of family harmony, emotional health and privacy will be terminated , and as a result, the courtrooms will once again be overloaded with cases that in the past parties had chosen mediate.

I hope the Committee will see the wisdom of the confidentiality of mediation as it now stands and as it has been upheld by the California Supreme Court time and time again since it was enacted.

Thank you for your time and attention,

Gayle Tamler
State Bar No. 106622
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Beverly Hills, CA 90212
(888) GTAMLER
gtamler.mediator@gmail.com
www.gayletamlermediation.com

EMAIL FROM NEIL TAXY (11/3/15)

Re: Confidentiality in Mediation

Dear Chief Deputy Counsel Gaal,

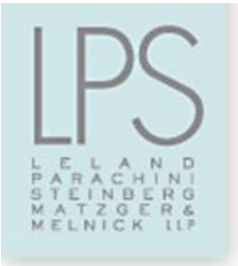
I write you as someone who has been personally involved in mediation, as an attorney who has represented parties in mediation and now as a mediator who handles primarily commercial mediation.

The current system of confidentiality as applied to mediation works well and is essential to the mediation process.

Thus, I write to voice my strongest concern over the recommendations of the Law Commission to dilute the current scope of mediation.

Thank you for your consideration in rejecting these recommendations.

Neil Taxy



Neil E. Taxy
Leland, Parachini, Steinberg, Matzger & Melnick LLP
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San Francisco, CA 94105
Telephone: 415.957.1800
Facsimile: 415.974.1520
Email: NTaxy@pslaw.com

ADDITIONAL PERSONS SIGNING THE ONLINE PETITION (AS OF 11/23/15)*

(47) Brittany Barbe, Tulsa, OK
(48) Tracy Baxter, Coquitlam BC, Canada
(49) Stacie Beck, Alpena, MI
(50) Denise Bland, Lancaster, UK
(51) Melissa Barnett, Napa, CA
(52) Elaine Burdette, Nashville, TN
(53) Donald Carter, San Antonio, TX
(54) Mary Cummins, Los Angeles, CA
(55) Pam Diz, Denver, NC
(56) Amy Duran, Beverly Hills, CA
(57) Obietta Elizondo, Oakland, CA
(58) Karen Ewart, Sunnyvale, CA
(59) Donna Farris, Greenfield, ME
(60) Linda Fontenot, Daly City, CA
(61) Helena Frangogiannis, Miami, FL
(62) Thuy Go, San Jose, CA
(63) Jasmine Guidance, Highland, MI
(64) O'Dea Hawkins, Mitchellville, MD
(65) Ginger Henderson, Concord, CA
(66) Jennie Johnson, Medina, NY
(67) Lorrie Jones, Ocean Springs, MS
(68) Elizabeth-Anne Keenan, Stockton-on-Tees, UK
(69) Victor Kowarsh, Las Vegas, NV
(70) Marcie Krueger, Winter Haven, FL
(71) Recy Kypri, Maroubra, Australia
(72) ReeDonna Landon, Owensboro, KY
(73) Judith Lasalle, Los Angeles, CA
(74) Dorothy A. Lauria, Andrews, NC
(75) Allan Lawson, Netheravon, UK
(76) Laura Lenk, North Hollywood, CA
(77) E. Leonard, Australia
(78) D'Amours Martine, Thunder Bay, Canada
(79) Deletrez Mathieu, Aniche, France
(80) April Mirdock, Anaheim, CA
(81) Barbara Monroe, Rohnert Park, CA

ADDITIONAL PERSONS SIGNING THE ONLINE PETITION (*CONT'D*)

(82) Scott Moore, San Jose, CA
(83) John O'Connor, Widnes, UK
(84) Raquel Okyay, Valrico, FL
(85) Deen On, Nome, AK
(86) Kyle Paskewitz, Lakewood, WA
(87) Maryann Petri, Girard, PA
(88) JoVon Pierce, Springport, MI
(89) Christine du Plessis, London, UK
(90) April Pollefeyt, Arlington, TX
(91) Deanne Powers, Calabasas, CA
(92) Andre Riley, Jersey City, NJ
(93) Gary Sacco, San Jose, CA
(94) Amy Shalim, New York, NY
(95) James Shin, Shaker Heights, OH
(96) Tracy Silva, Delafield, WI
(97) Evette Stark, New York, NY
(98) Francine Stevens, San Jose, CA
(99) Eileen Still, Melbourne, Australia
(100) Anna Stoufflet, Austin, TX
(101) Donald Tenn, Sacramento, CA
(102) Charles Thompson, San Jose, CA
(103) Tell Tryon, Brazil, IN
(104) Steve Valenti, State College, PA
(105) Schalena Vinent, Anaheim, CA
(106) Josephine Washington, Pond Gap, WV

*/ This list supplements the list of 46 signatories that is attached as Exhibit page 16 to the Second Supplement to Memorandum 2015-46. That list came from Bill Chan, as did the names on this list (see his spreadsheet, attached as Exhibit pages 57-59). The staff has been able to verify many, but not all, of these names on the Change.org website. We continue to have difficulty accessing information on the website. Mr. Chan receives signatory lists from Change.org in spreadsheet format, but the staff does not. Instead, Change.org sends us email messages with (1) supplemental comments and (2) a weblink that is supposed to provide access to a complete list of signatories but does not appear to work properly. Despite the glitches in the Change.org system, the staff has been able to verify enough information to have a reasonable degree of confidence in the list of names from Mr. Chan.

SUPPLEMENTAL COMMENTS OF PETITIONER JAY BEAR

Justice

SUPPLEMENTAL COMMENTS OF PETITIONER DONALD CARTER

This is something needs to be done, I will support any petition exercising amendment rights

SUPPLEMENTAL COMMENTS OF PETITIONER PAM DIZ

This lawyer's legal organized crime against people is happening in Asheville NC as well i have evidence of lawyers breaking laws and infringing oon civil rights to the point of extortion without a worry of consequence. We need help here too. Please go to unfairlaws@fb.com and help us too get some media attention or some legal support we will return the favor thank you and good luck to you all #UNFAIRlaws and #seekinghelpnow

SUPPLEMENTAL COMMENTS OF PETITIONER THUY GO

I'm signing because I believe that there is not enough oversight and checks within the legalities of the family court system. All attorneys need to be held accountable, as it affects lives and a system which encourages practice in the best interest of the attorney and judges leads to corruption, and abuse and can indirectly lead to violence when broken families are further damaged, further victimized and left with "nothing to lose" situations. It's worse than "entrapment"

SUPPLEMENTAL COMMENTS OF PETITIONER GINGER HENDERSON

I'm signing this petition because Larry Arguello california bar number 90653 in case number alameda county HF14734157 conspired with Judge Alison Tucher Dept. 507 and my ex husband Charles Roger Brady to file totally false allegations on a restraining order AND someone inside dept 507 falsified my response time to expire in 22 days when legally I have 30 days. Tip of iceberg. Search internet for my trail of breadcrumbs the word is "sickbait". Im INNOCENT.

SUPPLEMENTAL COMMENTS OF PETITIONER ELIZABETH-ANNE KEENAN

Because it is the right thing to do

SUPPLEMENTAL COMMENTS OF PETITIONER EUNICE KRAMER

I'm signing because this is wrong. I participated in educational mediation on behalf of my children, and I trusted that incompetent or fraudulent actions would have consequences. Please right this injustice.

SUPPLEMENTAL COMMENTS OF PETITIONER MARCIE KRUEGER

Because its wrong to do people this way ….

SUPPLEMENTAL COMMENTS OF PETITIONER REEDONNA LANDON

The Legalized malpractice has caused terrorism in Kentucky too and this illegal terrorising needs to be stopped by all sectors give the victimized their God given rights to justice back stop corruption of children and Families ... Hold these Judges and crooked attorneys who violate laws hand down illegal orders and are a disgrace to the public make every states tax dollars count.. Stop this illegal gtoup who join to gather to retaliate against the people who pay the saleries of every overpaid public servant and these illegal malpractice attorneys need jail not barred and need to pay the victims

SUPPLEMENTAL COMMENTS OF PETITIONER ALLAN LAWSON

Family law should work equally for both parents not just resident parents

SUPPLEMENTAL COMMENTS OF PETITIONER CRYSTAL MALONE

This is wrong and corruption needs to be addressed!

SUPPLEMENTAL COMMENTS OF PETITIONER SCOTT MOORE

Love

SUPPLEMENTAL COMMENTS OF PETITIONER APRIL MIRDOCK

I believe they falsely represent PPP. Attorneys put their feelings and opinions into cases then the person does not get due process. Also besides criminal cases like CPS or Family law in general they judge and it gets in the way in the way of their profession. So I believe if they have someone to answer to if they hurt people they may do a better job. Happened to me, w family law and lies and the woman was fresh out of law school if that had something to do w it idk. But it happened to many more families than Justine by the same women I think she was just lazy to be honest or her job was too hard. Either way that she she have to answer for and I wanted to suw her and couldn't

SUPPLEMENTAL COMMENTS OF PETITIONER JOHN O'CONNOR

This is plainly wrong.

SUPPLEMENTAL COMMENTS OF PETITIONER MARYANN PETRI

I had a similar experience that happened to me right before a custody issue and it was absolutely unfair, hurtful, and bordering on the insane on the part of the attorney that was representing me at the time.

SUPPLEMENTAL COMMENTS OF PETITIONER GARY SACCO

Attorneys will abuse this option

SUPPLEMENTAL COMMENTS OF PETITIONER JAMES SHIN

This broken system needs to be changed.

SUPPLEMENTAL COMMENTS OF PETITIONER EVETTE STARK

Class action needs to happen all over the USA for personal injury against the Judges. Sorry, they are the abusers, the head. All paperwork is signed off by them I feel like I am bleeding all the time, bleeding money, and physically exhausted. .can't sleep from back pain.... and i speak with so many people being made physically ill from the absolute stress this causes-- such huge stress bith Divorce and family court child custody. Again gang, if I did not want to Foster Care having raised twin boys I would never know the insanity of child abuse and trafficking through the Judicial system all over the USA I was just turned down by these law offices for personal injury...maybe you should all call for a personal injury class action suit.... from all over the usa!! I say call for a class action suit of injury..... Mention my name Evette Stark non payment of Con Ed bills by sociopathic personal injury attorney spouse not paid by him and his office staff intentionally for 4 months where I now need a distectomy as a result of falling in a pitch black apartment .....no work...rehab.... life stops right? etc. Say: she was turned down this morning still in a 7 yr abusive divorce. His office staff who pay bills automatically and him chose to not pay Con Edison to harm her or even inconvenience me..like other test book tactics used to shame and control like eviction or shutting off the hot water or tax liens...etc. so she fell. But the 7 yr divorce and personal injury caused by Judges and Judicial immunity is the real crime here the real perpetrators lining the pockets of experts by producing paperwork that is equally manufactured or manipulated while financially injuring all but especially damaging kids, old and young. Law Offices of Michael S. Lamonsoff New York Office Financial Square 32 Old Slip New York, NY 10005 www.msllegal.com New Jersey Office 24 Lackawanna Plaza Millburn, NJ 07041 www.msllegal.com ph: 212.962.1020. Maybe he can do a national class action suit... if not please ask who is the biggest and best to do this? WHO IS NOT SCARED OF THE TAPESTRY OF

DIABOLICAL INJUSTICE PERPETRATED BY THE COURT and all the people involved in keeping the masquerade of greed money making and trafficking to continue?

SUPPLEMENTAL COMMENTS OF PETITIONER FRANCINE STEVENS

I'm Signing because corruption here in Santa Clara County has gone on for too long and their is no accountability ..CPS, and the Juvenile dependency courts along with other courts here are too corrupt and it's gone on for far too long !!! I will not have my civil rights violated and sit around and just watch them do this to me...NO ...fight back!!!

SUPPLEMENTAL COMMENTS OF PETITIONER EILEEN STILL

I am signing because Victims need more protection in the world and perpetrators need tougher sentencing Laws not soft options like bail

SUPPLEMENTAL COMMENTS OF PETITIONER ANNA STOUFFLET

This is just wrong.

SUPPLEMENTAL COMMENTS OF PETITIONER CHARLES THOMPSON

This is wrong.

SUPPLEMENTAL COMMENTS OF PETITIONER LINDA TILLOTSON

Because of my last attorney putting up NO DEFENSE at my trial I received a 14 year sentence. They are just as bad as the prosecutors and judges.

SUPPLEMENTAL COMMENTS OF PETITIONER TELL TRYON

This must be the way it is in Indiana. We have no way to redress grievances or deal with attorney or state supreme court, or vast corruption on many levels in this state, primarily college towns controlled by fascism, censorship, no media integrity/honesty. Kill a white man here, it will not make the news to protect mafia styled cliques and corruption. Disability from the military or SS is not considered as exempt even though the law says they are. Communist and thugs will not report or take stands against our loss of rights or free speech due to the deeply ingrained corruption from the local levels to the feds.

SUPPLEMENTAL COMMENTS OF PETITIONER SCHALENA VINENT

My family court appointed attorney lied to me & didn't stop things that never should have happened. It cost me my children. There is no price that could compensate me for my loss. The American bar association isn't doing their job either.

SUPPLEMENTAL COMMENTS OF PETITIONER JOSEPHINE WASHINGTON

We shouldn't have leagalized malpractice. It is just plain wrong.

SUPPLEMENTAL COMMENTS OF PETITIONER PEGGY WEATHERS

I have gone through many times and been put through hell by attorneys and judges, and even told by state law, there is no justice anymore in AMERICA, caused by those that put into law to make sure truth is not told and questions not asked in court to prove , NOT GUILTY , CORRUPTION, ORGANIZED MURDERS!

Sheet1

Citizens Against Legalized Malpractice				United States	2015-07-14
Janelle Moore	Livermore	California	94550	United States	2015-07-23
Deborah Blair Porter	Manhattan Beach	California	90266	United States	2015-07-23
Eunice Kramer	Redondo Beach	California	90277	United States	2015-07-23
Evelyn Moore	Los Angeles	California	90045	United States	2015-07-23
Debra Berman	Manhattan Beach	California	90266	United States	2015-07-23
R. Andrew Murray	Sacramento	California	95816	United States	2015-07-24
Jo-Anne Kennedy	Santa Rosa	California	95409	United States	2015-07-24
Laura Murray	Sacramento	California	95818	United States	2015-07-24
Jay Bear	Lone Pine	California	93545	United States	2015-07-25
Jason Halle	Fort Lauderdale	Florida	33311	United States	2015-07-28
John Amis	Culver City	California	90230	United States	2015-07-30
Jullie Moseley-Doyle	Lomita	California	90717	United States	2015-08-02
Dieter Scherer	San Lorenzo	California	94580	United States	2015-08-07
Barbara Bates	Port Saint Lucie	Florida	34986	United States	2015-08-10
Chip Reuben	Redondo	California	90278	United States	2015-08-13
Lauren Corna	Keller	Texas	76248	United States	2015-08-15
Cecilia Sparks	Seymour	Indiana	47274	United States	2015-08-16
S Nixon	Urbana	Illinois	61802	United States	2015-08-16
Bret Crain	Malibu	California	90265	United States	2015-08-17
Trish Many	Tarrytown	New York	10591	United States	2015-08-26
Anthony Portelli	Perth		6163	Australia	2015-08-29
Karen Kline	Santa Fe	New Mexico	87507	United States	2015-08-29
jon and allene laney	new port richey	Florida	34655	United States	2015-08-30
5 > = 8 4 5 @ 3 0 ; 5 2	Chelyabinsk		454092	Russian Federation	2015-09-03
shanna moyer	bradenton	Florida	334205	United States	2015-09-03
Suzannah B. Troy	NYC	New York	10012	United States	2015-09-03
eva maria uhl	dreieich		63303	Germany	2015-09-13
JUDY GREAVES	Warwick	Rhode Island	2886	United States	2015-09-13
ELIZABETH MORENO	Los Angeles	California	90066	United States	2015-09-14
Michelle Martinez	Modesto	California	95355	United States	2015-09-16
Laura Kaplan	Denham Springs	Louisiana	70706	United States	2015-09-22
Maria Eke	Worcester	Massachusetts	1602	United States	2015-09-23
John Waldorf	Washington Crossing	Pennsylvania	18977	United States	2015-09-23
George Parker	Raleigh	North Carolina	27616	United States	2015-09-23
James Cause	Beverly	Massachusetts	1915	United States	2015-09-25
Ali Van Zee	Oakland	California	94610	United States	2015-09-29
Kathy Johnson	St.Paul Park	Minnesota	55071	United States	2015-09-29

EX 57

James Smith	Yucaipa		California	92399	United States	2015-09-30
Abel Bachelier	Lomita		California	90717	United States	2015-10-01
Crystal Malone		87301	New Mexico	*/301	United States	2015-10-03
Peggy Weathers	Dyersburg		Tennessee	38024	United States	2015-10-04
francis ripp	fairhope		Alabama	36532	United States	2015-10-04
Pat Pickren	Winter Haven		Florida	33880	United States	2015-10-04
Ernie Otto	west allis		Wisconsin	53227	United States	2015-10-05
Linda Tillotson	Westminster		California	92683	United States	2015-10-05
Thuy Go	San Jose		California	95133	United States	2015-10-07
JoVon Pierce	Springport		Michigan	49284	United States	2015-10-07
Pam Diz	Denver		North Carolina	28037	United States	2015-10-07
Mary Cummins	Los Angeles		California	90015	United States	2015-10-09
melissa Barnett	Napa		California	94558	United States	2015-10-10
Donald Tenn	Sacramento		California	95827	United States	2015-10-11
Elaine Burdette	Nashville		Tennessee	37211	United States	2015-10-12
Recy Kypri	Maroubra			2261	Australia	2015-10-12
Lorrie Jones	Ocean Springs		Mississippi	39564	United States	2015-10-13
Laura Lenk	North Hollywood		California	91606	United States	2015-10-13
Donna Farris	Greenfield		Maine	4418	United States	2015-10-14
Steve Valenti	State College		Pennsylvania	16801-7274	United States	2015-10-15
linda fontenot	daly city		California	94015	United States	2015-10-17
Obietta Elizondo	Oakland		California	94619	United States	2015-10-17
Tell Tryon	Brazil		Indiana	47806	United States	2015-10-17
Dorothy A Lauria	Andrews		North Carolina	28901	United States	2015-10-24
Amy Duran	Beverly Hills		California	90211	United States	2015-10-24
Jennie Johnson	Medina		New York	14103	United States	2015-10-24
gary sacco	San Jose		California	95117	United States	2015-10-24
O'Dea Hawkins	mitchellville		Maryland	20850	United States	2015-10-26
Charles Thompson	San Jose		California	95113	United States	2015-10-28
GINGER HENDERSON	Concord		California	94520	United States	2015-10-28
Francine stevens	San Jose		California	95113	United States	2015-11-01
Karen Ewart	Sunnyvale		California	94089	United States	2015-11-01
Judith Lasalle	Los Angeles		California	90037	United States	2015-11-01
Brittany Barbe	Tulsa		Oklahoma	74107	United States	2015-11-02
ReeDonna Landon	owensboro		Kentucky	42301	United States	2015-11-03
Victor Kowarsh	Las Vegas		Nevada	89110	United States	2015-11-03
Barbara Monroe	Rohnert Park		California	94928	United States	2015-11-03
Christine du Plessis	London			ec3r 6af	United Kingdom	2015-11-04

EX 58

John O'Connor	Widnes		WA8 7NB	United Kingdom	2015-11-05
Scott Moore	San Jose	California	95124	United States	2015-11-05
Anna Stoufflet	Austin	Texas	78759	United States	2015-11-08
eileen Still	Melbourne		3942	Australia	2015-11-09
April Pollefeyt	Arlington	Texas	76018	United States	2015-11-10
schalena vinent	Anaheim	California	92805	United States	2015-11-10
James Shin	Shaker Heights	Ohio	44122	United States	2015-11-10
April Mirdock	Anaheim	California	92804	United States	2015-11-10
D'AMOURS MARTINE	Thunder Bay		P7C 1G9	Canada	2015-11-10
Helena Frangogiannis	Miami	Florida	33131	United States	2015-11-13
Jasmine Guidance	Highland	Michigan	48356	United States	2015-11-13
Donald carter	San Antonio	Texas	78228	United States	2015-11-14
Elizabeth -Anne Keenan	Stockton-on-Tees		Ts175bb	United Kingdom	2015-11-15
Tracy Baxter	Coquitlam BC		V3H 3M3	Canada	2015-11-16
Deen On	Nome	Alaska	99762	United States	2015-11-17
Raquel Okyay	Valrico	Florida	33596	United States	2015-11-18
Allan Lawson	Netheravon		Sp4 9qg	United Kingdom	2015-11-18
Josephine Washington	Pond Gap	West Virginia	25160	United States	2015-11-19
evette stark	New York	New York	10011	United States	2015-11-19
Marcie Krueger	Winter Haven	Florida	33881	United States	2015-11-19
tracy silva	Delafield	Wisconsin	53018	United States	2015-11-20
Andre Riley	Jersey City	New Jersey	7306	United States	2015-11-20
Maryann Petri	Girard	Pennsylvania	16417	United States	2015-11-21
Stacie Beck	Alpena	Michigan	49707	United States	2015-11-21
Kyle Paskewitz	Lakewood	Washington	98498	United States	2015-11-22
amy shalim	ny	New York	10029	United States	2015-11-22
Deanne Powers	Calabasas	California	91302	United States	2015-11-22
E Leonard			7325	Australia	2015-11-22
deletrez mathieu	Aniche		59580	France	2015-11-22
denise bland	Lancaster		La1 5jq	United Kingdom	2015-11-23

EX 59

EMAIL FROM BILL CHAN (10/9/15)

Re: Suggestion for a change in the statutes

Dear Ms. Gaal,

From section 1122 of the current statutes,

> (b) For purposes of subdivision (a), if the neutral person who conducts a mediation expressly agrees to disclosure, that agreement also binds any other person described in subdivision (b) of Section 1115.

I suggest changing the wording to,

> (a), if a party to the mediation expressly agrees to disclosure, that agreement also binds any other person described in subdivision (b) of Section 1115.

From section 1115,

> (b) "Mediator" means a neutral person who conducts a mediation. "Mediator" includes any person designated by a mediator either to assist in the mediation or to communicate with the participants in preparation for a mediation.

change to,

> "Party" means a plaintiff or defendant who participates in a mediation. "Party" includes any person designated by a party either to assist in the mediation or to communicate with the participants in preparation for a mediation.

It appears 1122(b) protects the mediator from misconduct by assistants when it should be the clients who should have the protection.

This suggestion is meant to encourage thinking about how mediation can better serve the public.

Best regards,

Bill Chan

EMAIL FROM DEBORAH SCHOWALTER (11/4/15)

Re: Mediation Confidentiality

Re confidentiality in mediation, see thread in San Diego's family law forum started by Skillin

I mediate cases but I don't let the clients do something that isn't relatively in line with the fair provisions of family law and the tax codes. So I guess it isn't really "mediation". By the time I've worked thru the imbalance of power issues and those relating to discovery I end up with the type of information that the courts would need in a good trial. I am massaging the clients into understanding the laws involved and the consequences of not using them as boundaries for their settlement. I loose clients but not much sleep.

So if I had a situation where an attorney was committing malpractice by not knowing something I would have probably sidestepped the potential problem by taking that person aside and saying "hey, look out for this, you don't want to be hanging yourself out for a claim against you" long before it was settled. I remember at least one huge case when I was trying family law matters where I pulled the attorneys up to the bench quickly as they wanted to submit a case saying "not so fast, neither of you introduced evidence on this prong of the matter regarding this asset, I've been sitting up here going "hell no!" for hours.". I told then continued the case for three weeks, blaming the continuance on my calendar so the lawyers didn't look anything other than very good in front of their clients (as they were very good, I just had more time to stay up on appellate law since my job had short hours).

That said, I'm not sure I would remember much regarding individual mediations anyway, but I would like to be allowed, as a mediator, to have input when a particular lawyer has done something that seems unconscionable to me. I mediate in successive meetings so sometimes I can subtly show that a lawyer needs to be replaced as well. I think it is my job to avoid this sort of mess. If there is a reason to say mediation is not confidential it should be vis a vis narrow portions of it, not all, but that is already covered by evidence's rules of relevance, prejudice vs. probative and the like.

Okay, with all that I'd say I believe an exception should be carved out for malpractice cases. I'd post it to the commission's board but don't have a simple link to do so. Perhaps you can, Skillin?

Deborah Schowalter, Esq.
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