

Memorandum 2016-8

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

The Commission¹ has received the following new comments relating to its study of the relationship between mediation confidentiality and attorney malpractice and other misconduct:

	<i>Exhibit p.</i>
• Bill Chan (1/29/16)	1
• Ron Kelly, Berkeley (1/21/16)	8
• Carol A. Peters, Pasadena (12/17/15)	11
• Eric van Ginkel, Straus Institute for Dispute Resolution, Pepperdine University School of Law (12/23/15)	13
• Nancy Yeend, Silicon Valley Mediation Group (1/29/16)	14

We describe the attached comments and one other new communication below.

UPDATED LIST OF PETITIONERS FROM BILL CHAN

Bill Chan has provided an updated list of signatories to the online petition by Citizens Against Legalized Malpractice.² As of January 29, 2016, the total number of signatories was 225. Mr. Chan reports that “while some signatories are signing from other states or even countries, their comments indicate that they have been or are currently involved with litigation in California.”³

Both Mr. Chan and the staff have asked Change.org to furnish petitioner lists directly to the staff. Thus far, those efforts have been unsuccessful.

1. Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission’s website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission’s staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

2. Exhibit pp. 1-7.

3. Exhibit p. 1.

COMMENTS OF RON KELLY

Mediator Ron Kelly has submitted a letter in which he offers six suggestions for improvement of the Commission's proposed approach to this study:⁴

- (1) "The Commission can provide that only a client alleging misconduct and the lawyer defending against the claim can be subpoenaed to testify about mediation communications or turn over their documents created for mediation."⁵
- (2) The Commission could prevent disclosure of mediation statements made by persons other than the client alleging misconduct and the lawyer defending against the claim.⁶ The Commission could do either of the following:
 - (a) "[I]n accordance with the 2009 Appellate Court decision in *Cassel*, [provide] that the client and lawyer in a later misconduct dispute may obtain and submit evidence of their own mediation communications that 'contain no information of anything said or done or any admission by a party made in the course of the mediation'"⁷
 - (b) Provide that if a judge later decides to allow discovery or admission of evidence of mediation communications by other participants that evidence shall be sealed and not disclosed.⁸
- (3) "The Commission can limit the exception to apply only in cases where a client alleges misconduct by their own lawyer."⁹
- (4) "The Commission can provide that a mediator is incompetent to testify in State Bar Court as well as in a malpractice action."¹⁰
- (5) The Commission could "Establish Clear Need for Change" by requesting further data from the State Bar.¹¹ Mr. Kelly offers more specific suggestions regarding what data exist and what information to request. The State Bar is aware of Mr. Kelly's comments on this point and is preparing a response.
- (6) The Commission could explore "Options to Preserve Predictable Confidentiality."¹² In particular, Mr. Kelly suggests examining the following options from the Compilation of Possible Approaches that the staff prepared last August:¹³

4. Exhibit pp. 8-10.

5. Exhibit p. 8.

6. Exhibit p. 9.

7. *Id.* (underscore in original).

8. *Id.* (underscore in original).

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. Memorandum 2015-33, Table T-1 to T-33.

- Option A-4-a. Enact a provision implementing the approach described by the court of appeal in *Cassel v. Superior Court*, 101 Cal. Rptr. 3d 501, 509 (2009): The attorney and client would be treated as a single mediation participant, and the mediation confidentiality statute would be inapplicable to a private discussion between an attorney and client, at least if the discussion contains no information of anything said or done, or any admission by a party, in the course of the mediation.
- Option A-4-e. Create a mediation confidentiality exception for private attorney-client communications, but condition it on the right of either party to object that it would be unfair to consider their private communications without also considering the communications of other parties outside the attorney-client relationship. Consider the merits of that objection *in camera*. Allow the judge to bar the introduction of the private attorney-client communications if justice requires it. Permit introduction of mediation communications involving mediation participants other than the attorney and client, if those participants waive confidentiality as to the relevant communications, solely for purposes of the proceeding at hand.
- Option B-1-a. Allow disclosure of mediation communications when all mediation participants waive confidentiality except an attorney accused of malpractice or other misconduct.
- Option B-1-b. Add a provision to the Evidence Code that requires an attorney representing a client in a mediation to: (a) have all mediation participants complete an attendance sheet, which the attorney shall retain for two years, and (b) agree that mediation communications directly between the client and the attorney may be disclosed in any action for legal malpractice or in a State Bar disciplinary action, where professional negligence or misconduct forms the basis of the client's allegations against the attorney.
- Option C-2. Require disclosure that includes examples of malpractice.
- Option C-3. Require pre-mediation distribution and completion of disclosure form.
- Option C-4. Require mediator or attorney to make some/all of the disclosures already required of a mediator in a court-connected mediation.
- Option C-5. Require a disclosure re confidentiality like the one in a 2005 proposal by the Civil and Small Claims Advisory Committee of the Judicial Council.¹⁴

14. See Exhibit p. 10; see also Memorandum 2015-33, Table T-1 to T-33.

CAROL A. PETERS

Attorney Carol A. Peters stresses the importance of mediation confidentiality:

Confidentiality is the key element that makes Mediation so much more appealing; not because it is faster or less expensive, as those are monetary issues.

Confidentiality appeals to the emotional element of a litigated matter: and all litigated matters have an emotional element.

Therefore, in my opinion, if Confidentiality is removed from the Mediation process, then Mediation is turned into a mere step-child of the Judicial Process¹⁵

She describes some personal experiences that have affected her view on this matter.¹⁶

COMMENTS OF ERIC VAN GINKEL

Professor Eric Van Ginkel (Straus Institute for Dispute Resolution) has previously urged the Commission to propose enactment of the Uniform Mediation Act (“UMA”) in California.¹⁷ In his latest communication, he points out some new sources of information and reiterates his position on the UMA:

[T]he UMA ... forms a well-balanced, well-thought out system of mediation confidentiality, with the necessary exceptions to the mediation privilege. The UMA has worked well in states that have adopted it, so why would California not follow suit?¹⁸

COMMENTS OF NANCY YEEND

Mediator Nancy Yeend says that any decision of the Commission in this study “must be based on facts and data, and not speculation or emotional hyperbole.”¹⁹ She notes that in “a recent missive one person suggested that the Commission consider a smorgasbord of options outlined in Memo 2015-33.”²⁰ The staff presumes that Ms. Yeend is referring to the comments from Mr. Kelly discussed above. She says that “[i]f that memo is going to be considered, then it should be done with extreme caution.”²¹

15. Exhibit pp. 11-12.

16. See *id.*

17. See Memorandum 2014-46, Exhibit pp. 4-9; Memorandum 2015-13, Exhibit p. 48.

18. Exhibit p. 13.

19. Exhibit p. 14.

20. *Id.*

21. *Id.*

Ms. Yeend goes on to point out a few options from the staff's Compilation of Possible Approaches²² that "could warrant consideration."²³ Those approaches are:

- General Approach C-2. Require disclosure that includes examples of malpractice.
- General Approach C-3. Require pre-mediation distribution and completion of disclosure form.
- General Approach C-4. Require mediator or attorney to make some/all of the disclosures already required of a mediation in a court-connected mediation.
- General Approach C-7. Require the Judicial Council to prepare an informational video on mediation confidentiality and require participants to view it before mediation.
- General Approach C-8. Require inclusion of disclosures re mediation confidentiality in the ADR informational packet that the court distributes when referring a case to ADR.
- General Approaches C-9, C-10, C-11, and C-12. Require disclosures re adjusting fees in mediation.
- General Approach D-5. Cooling-off period.²⁴

Ms. Yeend also warns that "[a]lthough some of the options in the memo may be helpful, constructing a statute by taking bits and pieces ... is an extremely high-risk way to create law."²⁵ In her view, "[u]sing existing statutes and perhaps tailoring them may not only be prudent, but also far more efficient."²⁶ She specifically suggests enactment of the UMA in California (General Approach B-2)²⁷ and implementing Florida's mediator regulation system (General Approach D-6).²⁸

Finally, Ms. Yeend offers some comments about the nature of the resistance to revising California's mediation confidentiality statutes.²⁹ She urges the Commission not to "be persuaded by those arguing against full disclosure."³⁰

22. Memorandum 2015-33, Table T-1 to T-33.

23. Exhibit p. 14.

24. See *id.*; see also Memorandum 2015-33, Table T-1 to T-33.

25. Exhibit p. 14.

26. *Id.*

27. See Exhibit p. 14.

28. Exhibit p. 15.

29. *Id.*

30. *Id.*

COMMENTS OF HANADY TAYFOUR

In addition to the above comments, the staff received a communication from Hanady Tayfour describing a mediation in which a lawyer and a mediator allegedly lied to a client and coerced the client to enter into a disadvantageous mediated settlement agreement.³¹ We have not reproduced that communication in this memorandum because it provides details about a recent mediation that appears headed towards litigation.

Respectfully submitted,

Barbara Gaal
Chief Deputy Counsel

31. Email from H. Tayfour to B. Gaal (12/13/15) (on file with Commission).

EMAIL FROM BILL CHAN (1/29/16)

Dear Ms. Gaal,

Please find attached the latest list as of today (January 29, 2016). The web site shows a slightly higher number but it takes about a day for Change.org to post new signatures to the spreadsheet.

We found from the comments that while some signatories are signing from other states or even countries, their comments indicate that they have been or are currently involved with litigation in California.

Examples found are,

Geerte Frenken, Netherlands and Julia Jones, Massachusetts.

Best regards,

Bill Chan

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 richy	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

Sheet1

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 fontenet	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

Sheet1

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 9qq	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
Debra Matheny	Hibbing	Minnesota	55746	United States	2015-11-24
kathleen clark	fayetteville	North Carolina	28314	United States	2015-11-24
Rosa Spiegel	Tempe	Arizona	85283-4446	United States	2015-11-25
Debbie Jones	Furness Vale, High Peak		SK23 7PF	United Kingdom	2015-11-26
Melissa Whitman	Brookfield	Massachusetts	1506	United States	2015-11-26
kimberly deese	Dunn	North Carolina	28334	United States	2015-11-27
Russell Corns	Palm Bay	Florida	32907	United States	2015-11-28
Sharie Meduri	Crozet	Virginia	22932	United States	2015-11-29

Sheet1

Linda Ackerman	Beverly	Massachusetts	1915 United States	2015-11-30
Brent Waller	Bonney Lake	Washington	98391 United States	2015-11-30
hussein fly	Nairobi		Kenya	2015-11-30
Alma Linda Guerrero	Las Vegas	Nevada	89101 United States	2015-12-03
angela borths	Portland	Oregon	97266 United States	2015-12-03
Donald Loper	Ava	Missouri	65608 United States	2015-12-04
gary markiewiczjr	Johnson City	New York	13790 United States	2015-12-04
elizabeth dunlop	Kula	Hawaii	96790 United States	2015-12-04
branden fike	Tulsa	Oklahoma	74107 United States	2015-12-05
Rhonda Flanagan	Amsterdam	New York	12010 United States	2015-12-05
Linda Rosch	Washington	District of Columbia	20009 United States	2015-12-05
debbie fulkerson	Sonoma	California	95476 United States	2015-12-06
Jeffrey Lewin	Amazonia	Missouri	64421 United States	2015-12-07
Kelly Miller	Philadelphia	Pennsylvania	19148 United States	2015-12-09
Lisa Elkins Goodman	Julian	California	92036 United States	2015-12-09
Christina Jackson	Fort Worth	Texas	76116 United States	2015-12-09
Margaret Romberger	Rome	New York	13440 United States	2015-12-13
Cinda Hazlewood	Lawrence	Kansas	66047 United States	2015-12-13
Leslie Hazlewood	Lawrence	Kansas	66047 United States	2015-12-13
Angela Spanos	Stockton, Ca.	California	95204 United States	2015-12-15
Tracey Allen	Crewe		CW1 3BA United Kingdom	2015-12-16
david humphreys	stockport		sk1 4hn United Kingdom	2015-12-17
Janet Starcher	Bakersfield	California	93307 United States	2015-12-17
Susan Anthony	Houston	Texas	77069 United States	2015-12-18
Maria G	San Francisco	California	94188 United States	2015-12-19
Ralph Holder	Newton	New Hampshire	3858 United States	2015-12-20
bruce farrell	Inverness		IV24TN United Kingdom	2015-12-23
Alyse Thrush	Englewood	Colorado	80110 United States	2015-12-24
john vanderslice	San Francisco	California	94127 United States	2015-12-25
Evelyn Martinez	Malibu	California	90265 United States	2015-12-25
Hildy Straightiff	Morrow	Ohio	45152 United States	2015-12-31
Lee Withers	Pasco	Washington	99301 United States	2016-01-03
Jerry Withers	Pasco	Washington	99301 United States	2016-01-03
Claire Louise Dobson	Andover		SP11 9LE United Kingdom	2016-01-03
Dennis Latham	Millbrook	Alabama	36054 United States	2016-01-06
Mary Herr	Chicago	Illinois	60629 United States	2016-01-06
Elizabeth Pallett	Carrum Downs	Victoria	3201 Australia	2016-01-07
Jamie Hunter	New hamburg		N3A 0B6 Canada	2016-01-07

Sheet1

Sean was			3175	Australia	2016-01-07
renee howard	bakersfield	California	93309	United States	2016-01-08
Shawn Armstrong	Miles City	Montana	59301	United States	2016-01-08
Steve Mack	Los Angeles	California	None	United States	2016-01-08
Gordon Mc Ardle	Dublin		94559	Ireland	2016-01-08
Ezra Levi	toronto		m9m0a5	Canada	2016-01-14
Karina Cruz	Naples	Florida	34108	United States	2016-01-14
Heyam Farell	Southgate	Michigan	48195	United States	2016-01-14
Alma Fellows	Austin	Texas	78704	United States	2016-01-14
Julia Jones	Boston	Massachusetts	2110	United States	2016-01-14
Donna Moseley			3915	Australia	2016-01-15
c j	Asheville	North Carolina	28802	United States	2016-01-16
Tiffany Aliano	Lockhart	Texas	78644	United States	2016-01-16
Brandon N Sasha Murphy	Beverly	Ohio	45715	United States	2016-01-16
Patrick O'Dea			2460	Australia	2016-01-17
Mario Jimenez	Miami	Florida	33183	United States	2016-01-17
Alexandre Ferrari	Boca Raton	Florida	33496	United States	2016-01-17
Cathy Jacobs	Melbourne		3188	Australia	2016-01-17
Mike Dubose	Austin	Texas	78704	United States	2016-01-17
Halie Wilkins	Anderson	California	96007	United States	2016-01-18
Brian Deering	Hayward	California	94541	United States	2016-01-18
James Plevick			5067	Australia	2016-01-19
douglas boggs	Novato	California	94945	United States	2016-01-19
Desiree Ortega	Santa Rosa	California	95405	United States	2016-01-19
Esther Humphries	Lake View Terrace	California	91342	United States	2016-01-21
Lori Fortin	Athol	Massachusetts	1331	United States	2016-01-21
Ioana Waite	Beaverton	Oregon	97007	United States	2016-01-21
Cate Dearstyn	Wake Forest	North Carolina	27587	United States	2016-01-21
Lisa Reathaford	Orleans	Indiana	47452	United States	2016-01-21
nat reese	Jacksonville	Florida	32216	United States	2016-01-21
REBECCA SANTANA	ROCHESTER HILLS	Michigan	48309	United States	2016-01-21
Christina Garner	Muskegon	Michigan	49442	United States	2016-01-21
Joshua Warren	Lonsdale	Minnesota	55046	United States	2016-01-21
Diane Jones	North Fort Myers	Florida	33917	United States	2016-01-22
Jeffrey Chesney	Grand Blanc	Michigan	48439	United States	2016-01-22
Sheila McClement			2151	Australia	2016-01-22
Alfa Abreu	Staten Island	New York	10314	United States	2016-01-22
Blake Taylor	Saint Petersburg	Florida	33701	United States	2016-01-22

Sheet1

Sasha Mamula	Ontario	California	91764 United States	2016-01-23
Tina McCranie	Mansfield	Texas	76063 United States	2016-01-23
Diana Sharp	Ogden	Utah	84405 United States	2016-01-23
Tara Cole	Bossier City	Louisiana	71112 United States	2016-01-23
Christine DeCarlo	Rochester	New York	14616 United States	2016-01-23
amanda Atkinson	Sacramento	California	95822 United States	2016-01-23
Karen Orozco	Magalia	California	95954 United States	2016-01-23
Clare Thackeray	Carlow	Ireland		2016-01-23
Sonya Hendren	Sacramento	California	95814 United States	2016-01-23
KRIS HOOD	Ormond Beach	Florida	32174 United States	2016-01-23
Kim Miller	Floresville	Texas	78114 United States	2016-01-24
Nicolas Mourer	Whitmore Lake	Michigan	48189 United States	2016-01-24
j@nelle terrell	Aurora	Illinois	60505 United States	2016-01-24
Leanne Mclvor	Salmon Arm	V1E 0A3 Australia		2016-01-24
John Bendele	Mount Pleasant	Michigan	48858 United States	2016-01-24
Yanula Pengenika	Milton	Florida	32534 United States	2016-01-24
christy lawson	Victorville	California	92392 United States	2016-01-24
betty schmerhorn	Richfield Springs	New York	13439 United States	2016-01-24
Olubunmi ogundokun	Richmond	Texas	77407 United States	2016-01-24
sandra robinson	Atascadero	California	93422 United States	2016-01-24
Crystal Sweeney Dixon	Baltimore	Maryland	21205 United States	2016-01-25
Kelley Smoot	San Marcos	Texas	78666 United States	2016-01-25
Isabella Nicolaides	Santa Rosa	California	95401 United States	2016-01-25
Kat Flynn	Goose Creek	South Carolina	29445 United States	2016-01-25
Teresa Maxwell	Tacoma	Washington	98448 United States	2016-01-26
Jannie Davis	Parker	Arizona	85344 United States	2016-01-26
Lisa Rotili	Manasquan	New Jersey	8736 United States	2016-01-26
kelvin lord	High Hurstwood	tn224aj United Kingdom		2016-01-26
Alexandria CM		6000 Australia		2016-01-26
Kristin Gillespie	East Warburton	3799 Australia		2016-01-26
Annastasia Arbucci		3000 Australia		2016-01-26
Aleah Holland	BROOKLYN	New York	11212 United States	2016-01-27
Casey Lopez	San Diego	California	92128 United States	2016-01-27
Albert McEvers	Gettysburg	Pennsylvania	17325 United States	2016-01-28
Phyllis Sherman	Happy Valley	Oregon	97086 United States	2016-01-28
Geerte Frenken			94930 Netherlands	2016-01-28

Re: Study K-402 - 6 Ways You Can Improve the Recommendation

1. Limit Subpoenas - Only Disputing Client and Lawyer
2. Prevent Disclosure of Other Parties' Statements
3. Limit Who May Complain - Only Client Against Own Attorney
4. Don't Empower Mediators to Coerce Settlements
5. Establish Clear Need for Change
6. Show that Commission Explored Options to Preserve Predictable Confidentiality

Dear Chairperson Kihiczak and Commissioners,

The Commission took its first substantive vote on direction for this study at its August 7, 2015 meeting. It voted to direct staff to draft legislation to remove current confidentiality protections and allow in all relevant evidence on an allegation of lawyer misconduct in mediation. The Commission received hundreds of written statements opposing this decision. These included opposition from organizations like the State of California's own Mediation and Conciliation Service, the California Dispute Resolution Council, the Southern California Mediation Association, the Association for Dispute Resolution of Northern California, the Contra Costa County Bar Association, and Community Boards of San Francisco, and from individual mediators from all sectors of practice ranging from the immediate past chairman of the board of JAMS to former family law bench officers (all available in "Public Comments" memos here <<http://www.clrc.ca.gov/K402.html>>).

The Commission deserves recognition and appreciation for its responsive actions at the following meeting. On October 8 it voted to narrow the proposed change in five significant ways. It voted to:

- a. Narrow the new proposed exception to malpractice and disciplinary actions against attorney-advocates only, reversing the August 7 decision to make it also apply in alleged mediator malpractice actions,
- b. Leave Evidence Code section 703.5 as is. This will retain current mediator incompetence to testify in malpractice actions, although this section will still allow mediators to testify in State Bar Court,
- c. Retain the current finality of mediated settlements,
- d. Restrict evidence of mediation communications obtained in malpractice actions from admissibility in other proceedings, such as the underlying dispute if it doesn't settle, related third party actions, etc., and to
- e. Provide an initial review by a judge in an in camera hearing as a preliminary step, and hopefully before allowing subpoenas forcing mediation participants to repeat their mediation statements under oath.

The opposition statements generally asserted that a major public benefit will be lost with the Commission's expected legislation. It seems very likely there will continue to be widespread opposition to the Commission's recommended legislation. This letter will recommend six ways the Commission can act to further improve its proposed recommendation to the Legislature.

1. Limit Subpoenas - Only Disputing Client and Lawyer. The Commission can provide that only a client alleging misconduct and the lawyer defending against the claim can be subpoenaed to testify about mediation communications or turn over their documents created for mediation. Pages 14-18 of Commission staff 's Memo 2015-55 suggest the Commission consider what staff calls the leading case from a state with an exception similar to the one proposed by the Commission. In *Avary v. Bank of America* the Texas Appellate Court reasoned "[i]t is one thing to order discovery from a party alleged to have committed a tort during the mediation process; *it is another to reach across the mediation table to parties who have settled the claims against them.*" (emphasis added by Commission staff)

2. Prevent Disclosure of Other Parties' Statements. The Commission can provide either **a)** that in accordance with the 2009 Appellate Court decision in *Cassel*, that the client and lawyer in a later misconduct dispute may obtain and submit evidence of their own mediation communications that "contain no information of anything said or done or any admission by a party made in the course of the mediation" (*Cassel v. Superior Court, 101 Cal Rptr 3d 501,509* - this option is described on pages 14-15 of staff's Memo 2015-22 - please also see below), or **b)** that if a judge later decides to allow discovery or admission of evidence of mediation communications by other participants that evidence shall be sealed and not disclosed.

3. Limit Who May Complain - Only Client Against Own Attorney. The Commission can be clear its proposed legislation aims to provide a client with wider remedies for alleged mediation misconduct by their own lawyer, and is not intended to provide another way that the other side can threaten or additionally pressure opposing counsel. The Commission can limit the exception to apply only in cases where a client alleges misconduct by their own lawyer.

4. Don't Empower Mediators to Coerce Settlements. The Commission has voted to maintain our current protections against a mediator coercing a settlement with threats to become a witness against any party the mediator may believe is offering too little or demanding too much. This protection helps ensure voluntary settlements. It's provided by Evidence Code Section 703.5 and makes a mediator incompetent to testify in a later civil case such as a malpractice action.

The same logic applies in disciplinary actions. "Buyer's remorse" is a common experience. A decision to accept or reject a proposed settlement can later seem to a client like it was the wrong choice. It does not serve the public interest for the Commission to create a new ability for a mediator to take an attorney aside in mediation and threaten to become a witness against that attorney in State Bar Court for advising a client to accept or reject a proposed settlement. The Commission can provide that a mediator is incompetent to testify in State Bar Court as well as in a malpractice action.

5. Establish Clear Need for Change. Commission staff has indicated that it has not been able to identify reliable data, research or other evidence to establish the frequency of lawyer misconduct in California mediations. Opponents argue that over the past thirty years hundreds of thousands and probably millions of Californians have gained the benefits of predictable mediation confidentiality, and the Commission's likely recommended legislation would remove that benefit in order to make it easier for a few clients to sue their attorneys for alleged malpractice.

The Commission has a credible means to establish whether there is in fact a need for this change using an existing database of seventy thousand recent complaints against lawyers. Over the most recent five year period for which records are available, the State Bar received 73,717 complaints against lawyers (page 13, State Bar Annual Discipline Report dated April 30, 2015). An informal email poll was already sent to all State Bar investigators and prosecutors in 2014 by the Office of the Chief Trial Counsel. Responses identified only four or five cases where our current mediation confidentiality protections had posed a significant problem for them during the previous year. A recent search for the keyword "mediation" of all published State Bar Court appellate level decisions for the period 11/19/2010 through 5/19/15 (in the Review Department Opinions published online) identified only four cases containing this term - Southwick 11-O-11334, Guzman 11-O-17734, Leonard 09-O-11175, and Weiss 09-O-10499. None referenced allegations of misconduct by lawyers in mediation.

The data exists in the State Bar's computer system evidencing how many complaints found valid by a State Bar investigator in this five year period involved clients complaining about their lawyers' mediation conduct. The California Supreme Court's 2013 decision in *Sander v. State Bar of California* states in relevant part "under the common law right of public access, [when] there is a sufficient public interest in the information contained in [its]...database...the State Bar is required to provide access to it if the information can be provided in a form that protects the privacy of [individuals] and no countervailing interest outweighs the public's interest in disclosure."

The Commission can certainly assert there is a sufficient public interest in determining whether there is a need to change current law in a way likely to affect the caseloads of every court in the state - especially since so many hours of public agency, organization and individual time has already been spent on this question and so much more will be. The Commission can request the State Bar provide the anonymized statistical information to answer this question, or alternatively can search these records for the keyword "mediation" and produce redacted copies eliminating individual identifying information.

6. Show that the Commission Explored Options to Preserve Predictable

Confidentiality. Staff's Memo 2015-33 titled "Compilation of Possible Approaches" summarizes dozens of suggestions submitted to address the problem (available at <<http://www.clrc.ca.gov/pub/2015/MM15-33.pdf>>) At the August 7 meeting, staff suggested that the Commission start by exploring those options that might both preserve predictable confidentiality and reduce the chances of clients being harmed by lawyer misconduct in mediation, such as those in categories B and C of Memo 2015-33. Commissioner King at the time argued in favor of an approach aimed at prevention rather than facilitating additional lawsuits. At the time, the Commission declined to explore or develop these other options.

Many such options from this staff memo warrant further investigation from the Commission and staff. The author urges the Commission, for instance, to explore and further develop at least options A-4-a, A-4-e, B-1-a, B-1-b, C-2, C-3, C-4, and C-5. Once explored and discussed, the Commission could assure the Legislature it had fully explored other options before recommending the removal of the protections for candid communications in mediation that appear to have served the public reasonably well overall for thirty years.

Respectfully submitted,



Ron Kelly
2731 Webster St.
Berkeley, CA 94705

EMAIL FROM CAROL A. PETERS (12/17/15)

Re: Mediation Confidentiality

I live in the UNIVERSE of Penalty of Perjury ~ but no one ever really pursues any remedies for its breach.

I am an elder abuse litigation Attorney who spent more than \$77,xxx of her own funds fighting Freddie Mac for ELEVEN YEARS over an elder's fraudulent conveyance out of her house title to [Mr. C]: if Confidential Mediation had been possible back then (1993-2004), much of that initial money might have been saved. Case numbers available on request for Mrs. [H's] Conservatorship, civil case, probate, 5 appeals and 2 bankruptcies, both by [Mr. C].

Since then, I have served four times as a SETTLEMENT OFFICER for the SFVBA program which was adopted by the LASC Probate Dept when it had to consolidate all of its branch Courts into downtown Courtrooms, due to the Calif Legislature budget cuts of Court funding. (LA County is the LARGEST Court system in the CountRy.)

Based on that experience, I have formed the opinion that Parties Litigant greatly desire resolution, so that everyone involved has been motivated to 'talk turkey' and settle their issues, in a SELF-DIRECTED style.

Doing so at the Courthouse (with a NON-Judge) may connote "going to Court", but in reality, my other experiences in Mediation have been just as productive: the last one beginning at a Court Reporter's Office at 10:00 AM involved more Attorneys than Parties (due to Fiduciary issues, two Parties had to have 2 Attorneys each, one for themselves as a Beneficiary and one for their administration as Trustee) and after 2 adjournments for food (no libations) ended up with a signed settlement agreement signed 14 hours later at 11:58 PM at a local coffee shop, with the two camps split between the Bar and being closer to the restrooms.

Without the confidentiality element of Mediation, that settlement would never have occurred.

Without the confidentiality element of Mediation, we are hard-pressed to get our Clients to even consider using the process: having Judge (more like on TV) make the decision ala Judge Judy is much more appealing emotionally.

Confidentiality is the key element that makes Mediation so much more appealing: not because it is faster or less expensive, as those are monetary issues.

Confidentiality appears to the emotional element of a litigated matter: and all litigated matters have an emotional element.

Therefore, in my opinion, if Confidentiality is removed from the Mediation process, then Mediation is turned into a mere step-child of the Judicial Process:

The Judge has staff and a Courtroom ~ a set, if you will, ~ from which to play the drama.

The Mediator has Confidential Communications: able to deal with conscience, setting things right, and even retribution.

We are designed to serve our Clients, and to serve too their Best Interest.

Eliminating Confidentiality will too greatly minimize our ability to do so, because of cutting off our ability at their knees, for their prayers for an end to it all.

With warm regards,

/s/

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 **Staff Note.** In what might be an overabundance of caution, the staff redacted some names in the above message from Ms. Peters. The names do not appear to be necessary to effectively convey her sentiments for purposes of this study.

EMAIL FROM ERIC VAN GINKEL (12/23/15)

Re: Alfieri v. Solomon

Dear Barbara,

I am sending you a link to a discussion of a recent Oregon Supreme Court case, Alfieri v. Solomon, by Prof. Kristen Blankley: <http://www.indisputably.org/?p=7923>.

Professor Blankley observes that Oregon is not a UMA state, pointing out that the Uniform Mediation Act “makes an exception to the mediation privilege for communications offered to prove or disprove a claim of professional malpractice. UMA § 6(a)(6).” At the same time, Prof. Blankley argues in favor of the protection of pre-mediation communications.

The Oregon case and Professor Blankley’s comments show once again that California should adopt the UMA, which forms a well-balanced, well-thought out system of mediation confidentiality, with the necessary exceptions to the mediation privilege. The UMA has worked well in states that have adopted it, so why would California not follow suit?

I wish you and your staff the very best wishes for the Holiday Season, and a Happy 2016!

Eric

Arbitrator & Mediator
LL.M. in Dispute Resolution

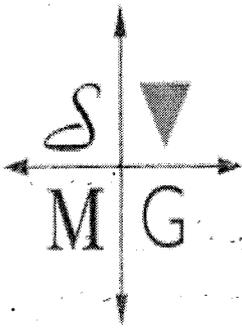
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SILICON VALLEY MEDIATION GROUP

January 29, 2016

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Re: Relationship Between Mediation Confidentiality and Attorney Malpractice (Study K-402)

Dear Commissioners:

Over the past two and a half years, you have requested comments and suggestions from the public on this study. Many people have expressed their concerns, both pro and con, regarding changing the present confidentiality statute. It is not the number of people articulating one position, or the number of times a person addresses the Commission that will determine the outcome; any decision must be based on facts and data, and not speculation or emotional hyperbole.

In a recent missive one person suggested that the Commission consider a smorgasbord of options outlined in Memo 2015-33. If that memo is going to be considered, then it should be done with extreme caution. Some sections that could warrant consideration:

- *General Approach C-2 thru 4:* Focus on disclosure, which is not presently being done in an *explicit* way stating that malpractice is protected. Supporting the principle of full disclosure are the suggestions in C-7 and 8 requiring education about the process and confidentiality prior to participating in the first session. Some mediators merely regurgitate the statute, but this *does not point out* that misconduct and malpractice are *specifically* protected. Parroting the statute affords both attorneys and mediators a cover to avoid being up-front and saying, "My malpractice is protected."
- *General Approach C-9 thru 12:* These suggestions go a long way to protect mediation participants from relying on verbal assurances when it comes to fee adjustments.
- *General Approach D-5:* Having a period of time for a person to step back from the pressures of negotiating, before signing a settlement, could also work in tandem with the previous suggestions.

Although some of the options in the memo may be helpful, constructing a statute by taking bits and pieces, such as "A" something here, and "B" something there, is an extremely high-risk way to create law. Using existing statutes and perhaps tailoring them may not only be prudent, but also far more efficient. For example:

- *General Approach B-2:* Enact the Uniform Mediation Act. It has a proven track record of working well, and there has been no decline in the use of mediation or a tsunami of malpractice litigation, as speculated by most who have contacted the CLRC; or

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- *General Approach D-6:* Use Florida's model, which has the most comprehensive rules. Mediation in California is like the "Wild West." There are no standards, no universal code of ethics, no competency requirements, and no oversight of mediators in private practice—nothing! Anyone can wake up one morning and declare, "I am a mediator!" In California if mediators are "incompetent to testify" what makes them "competent" to function as mediators?

Now that the howling from those who want to continue protecting both attorney and mediator misconduct and malpractice has inundated the Commission, it is time to assess the misguided resistance:

- *Claims:* Fear of being accused, let alone sued for professional misconduct and/or malpractice. Of course if California had a system, such as Florida's, there would be a process that would permit a confidential evaluation of malpractice claims, and if the claims had merit, a process to address it.
- *Business Reduction:* Fear that if the public learned that both attorney and mediator misconduct and malpractice were protected, no one would use the process. Concern over the potential loss of business seems to be a motivating factor for maintaining the status quo rather than protecting the public's right to know and informed consent.
- *Training:* Presently only statewide standards regulate volunteer mediators—nothing for paid "professionals." Some trainers handing out "certificates of completion" either directly say or imply that those who have taken the course are now "certified." There is no credentialing agency in California. Mediators are actually "certified" in Florida. If competency, training and education standards were implemented, then there would be a higher probability of better mediators. Florida also regulates the number of actual "instruction hours" (*breaks and lunch time are not counted as part of the training time, unlike some California trainings*). Florida requires that specific learning objectives must be included, training materials must incorporate specific items, and important topics, such as ethics, have established minimum training time requirements. Roleplays, exercises and workbooks must meet specific standards and materials are reviewed on a regular basis. In addition, Florida's Dispute Resolution Center, DRC, maintains qualification standards for all trainers.
- *Ethics:* Fear that disclosure of close working relationships between certain attorneys and mediators and other ethical violations would be compulsory. Limited disclosure requirements and a lack of supervision have the potential of becoming incubators for abuse—like failing to specifically disclose that attorney and mediator malpractice are protected.

Please do not be persuaded by those arguing against full disclosure. Every mediation participant deserves a fair and ethically managed process. Adopting the UMA or an even more comprehensive process would be simpler, more effective and less resource consuming than attempting to design a patchwork statute.

Sincerely,

Nancy Neal Yeend

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