

Second Supplement to Memorandum 2013-39

**Relationship Between Mediation Confidentiality and
Attorney Malpractice and Other Misconduct: Comments of Kazuko Artus**

The Commission has received a letter from Kazuko Artus, Ph.D., J.D., which is attached as an Exhibit.

Ms. Artus supports the mediation confidentiality exception that was proposed in AB 2025 (Wagner). Exhibit p. 1. She “would give it ... stronger support if [an] exception for mediator malpractice were added.” *Id.*

“Going further beyond the scope of the study envisaged,” Ms. Artus urges the Commission to undertake “an empirical examination of the view that the public policy in favor of settlement of disputes without litigation requires mandatory mediation confidentiality.” *Id.* She believes that “mediation confidentiality can be made an option for the participants rather than being imposed on them.” *Id.* at 2. What she suggests would be similar to the approach that the Commission recommended in 1985, which was enacted into law but replaced with a new approach in 1993. See Memorandum 2013-39, pp. 3-6.

Respectfully submitted,

Barbara Gaal
Chief Deputy Counsel

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.

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San Francisco
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1 August 2013

California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, CA 94303-4739

Re: Memorandum 2013-39 and First Supplement

Ladies and Gentlemen:

I support AB 2025 as a step in the right direction. Like Ms. Yeend (Memorandum 2013-39, Ex. 42), I would give it a stronger support if exception for mediator malpractice were added. It would be a larger and more significant step in the right direction.

I write as a recent participant in two mediations and another settlement negotiation, all in the course of a civil action I brought against my condominium association. In the end my case was settled basically on my terms: on some causes of action I got more than I was likely to have in the trial; on one cause my counsel and I saved the trouble of explaining in the court an accounting issue that would have bored most actors there. However, the first mediation proved wasteful, to a considerable extent due to the mediator's failure to digest the issues in dispute and the background and to prepare for the case, which became apparent only after the mediation commenced.

Parties would choose their attorneys after careful reviews of their work, so that the likelihood of attorney misconduct would be small. Not so with mediators. Before my first mediation I had considered interviewing several prospective mediators to evaluate their work ethics and their ability to understand my causes of action, but gave it up on being advised that such personal contacts could cause the mediator chosen to be challenged.

Going further beyond the scope of the study envisaged, I would urge an empirical examination of the view that the public policy in favor of settlement of disputes without litigation requires mandatory mediation confidentiality. I participated in mediations not because of the confidentiality; I did so in spite of the confidentiality.

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I believe that mediation confidentiality can be made an option for the participants rather than being imposed on them. The availability of an option not to be bound by confidentiality statutes would be consistent with the public policy of promoting dispute settlements without litigation if that makes mediation more acceptable to a larger segment of the population.

Sincerely,

Kazuko K. Artus