Study K-402 October 7, 2013

Second Supplement to Memorandum 2013-47

Relationship Between Mediation Confidentiality and Attorney Malpractice and Other Misconduct (Public Comment)

The Commission has received more new comments on its study of the relationship between mediation confidentiality and attorney malpractice and other misconduct:

Due to the demands of the Commission's study of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act, the staff is only able to provide brief summaries of these comments at this time. We will analyze them in greater detail as this study progresses.

The attached comments are as follows:

- Margaret Anderson is "a solo practitioner, with a practice limited to family law matters in which mediation and collaborative practice are chosen by the clients." Exhibit p. 1. She is "very concerned about the possibility of mediation confidentiality being significantly changed, or even eliminated, in California." *Id.* She suspects that attorney misconduct against a client in mediation "very rarely happens." *Id.* She suggests that "if it ain't broke, don't fix it." *Id.* She also says that the Uniform Collaborative Law Act will be introduced in the Legislature next session, which means that the Commission's study is "likely to affect a much larger segment of the dispute resolution arena than you may already have considered." *Id.*
- The Contra Costa County Bar Association urges the Commission to "recommend no weakening of mediation confidentiality protections (Evidence Code sections 1115-1128), and to uphold current law." Exhibit p. 2.
- Paul Dubow and James R. Madison have submitted a long letter on behalf of the California Dispute Resolution Council ("CDRC").

See Exhibit pp. 3-7. They begin by pointing out that "[t]he membership of the CDRC consists of individual ADR neutrals, together with community dispute resolution organizations and providers of ADR services which, taken together represent more than 15,000 mediators and arbitrators in California." *Id.* at 3. The body of the letter explains in detail why they "believe that a majority of the members of CDRC oppose any inroad into mediation confidentiality." *Id.* at 6. They caution that they have not had time to verify the views of CDRC members, but promise to advise the Commission "if our membership suggests a position other than that expressed in this letter." *Id.*

- Jerome Sapiro has practiced law in San Francisco "for several decades," has mediated many cases, and has been a mediator. Exhibit p. 8. He "urge[s] the Law Revision Commission to recommend that Evidence Code sections 1115, *et seq.*, be amended because the application of them to communications between an attorney and that attorney's client *can easily be abused by the attorney*." *Id.* (emphasis added). He provides specific examples and explains his position in detail.
- Brian Thiessen has "done mediations for some decades." Exhibit p. 10. It is his "ongoing conclusion that mediation is seldom successful unless one can guarantee confidentiality to all participants." *Id.* In his experience, "most often it is buyer's remorse, not the attorney's conduct" that causes a client to be unhappy about a settlement result. *Id.* Thus, he says, "any relaxing of confidentiality should be required to have some threshold proof of legitimacy before even that is breached." *Id.*

Respectfully submitted,

Barbara Gaal
Chief Deputy Counsel

EMAIL FROM MARGARET ANDERSON (10/1/13)

Re: Study of Mediation Confidentiality Protections

I am a solo practitioner, with a practice limited to family law matters in which mediation and collaborative practice are chosen by the clients. I moved my practice into this limitation 15 years ago after nerly 20 years of litigation.

I am very concerned about the possibility of mediation confidentiality being significantly changed, or even eliminated, in California. While I understand that some are promoting weakening of the confidentiality provisions of the Evidence Code in situation where there is misconduct alleged by a client against his/her attorney in a mediation process, I suspect that this very rarely happens. It seems fundamental to me that there be some initial investigation into whether there is really a problem in this area, before energy is spent on resolving the problem. This brings to mind the old saw about "if it ain't broke, don't fix it".

Even more troubling is the possibility that the Commission may consider a much broader weakening of the current confidentiality protections. That could potentially open an even bigger "can of worms".

My experience as a mediator, and as a collaborative attorney, is that the parties welcome the information that their discussions and negotiations will be kept within the room. Privacy is a much valued part of these processes, and I would suspect it is often the primary motivation for choosing non-court options.

You should also know that the collaborative process relies a great deal on the current mediation confidentiality statutes. It is anticipated that the Uniform Collaborative Law Act will be introduced in the legislature in its next session, and its confidentiality provisions are a very strong reason for the collaborative community's support of this uniform act. The impact of your study is thus likely to affect a much larger segment of the dispute resolution arena than you may have already considered.

In these days of court staff cutbacks, dwindling hours of operation, and judicial officers buried in dealing with the large numbers of unrepresented parties, I beg you to tread lightly in this confidentiality arena which so many people are choosing.

Margaret L. Anderson
Mediator and Collaborative Attorney
Certified Family Law Specialist, State Bar of California
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OCT 2013

October 3, 2013

Ms. Barbara S. Gaal, Staff Counsel
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, CA 94303-4739

Re: Mediation Confidentiality

Dear Ms. Gaal:

The Contra Costa County Bar Association urges the California Law Review Commission to recommend no weakening of mediation confidentiality protections (Evidence Code sections 1115-1128), and to uphold current law.

Thank you for considering our bar association's position during your deliberations.

Sincerely,

Jay Chafetz

Jay Chafetz, President

Cc: Kenneth Strongman, Chair
CCCBA's ADR Section

PAUL J. DUBOW
Arbitrator-Mediator
88 King Street #318
San Francisco, CA 94107

October 3, 2013

California Law Revision Commission
c/o Barbara S. Gaal, Esq.
Chief Deputy Counsel
4000 Middlefield Road, Room D-2
Palo Alto, CA 94303-4739

Dear Commissioners:

The undersigned are respectively the chairs of the Public Policy and Legislation Committees of the California Dispute Resolution Council (CDRC). The CDRC was organized in 1994 to advocate for fair, accessible, and effective alternative dispute resolution processes before the legislature, state administrative agencies, and the courts. The membership of the CDRC consists of individual ADR neutrals, together with community dispute resolution organizations and providers of ADR services which, taken together, represent more than 15,000 mediators and arbitrators in California. CDRC positions do not represent the views of any individual member.

This letter is concerned with the Law Revision Commission's work pursuant to the Legislature's direction by resolution in 2012 primarily "to study and report to the Legislature regarding the relationship under current law between mediation confidentiality and attorney malpractice and other misconduct, and the purposes for and impact of those laws on public protection, professional ethics, attorney discipline, client rights, the willingness of parties to participate in voluntary and mandatory mediation and the effectiveness of mediation."

The resolution directing the study was triggered by AB 2025 which proposed to modify mediation confidentiality by allowing mediation communications between an attorney and client to be admissible in a suit filed by a client alleging professional misconduct by the attorney in the course of a mediation.

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In order to determine whether the public will be better protected if an exception to the Evidence Code were drafted that would allow mediation communications between an attorney and client mediation to be admissible in a malpractice suit, the Commission needs to weigh whether it is more important to draft such an exception or whether it is more important to preserve mediation confidentiality.

There is no question but that the mediation process as we know it in California is affected by our confidentiality statute in a positive way. Mediation's value in resolving and forestalling disputes would be severely impacted by any inroad into mediation confidentiality. The assurance to mediation participants of strict confidentiality is crucial to cultivating participant trust in the mediation process and in the mediator as well. Beginning mediation with concern about the possibility of subpoenas and threats of more litigation stemming from what is said by participants in mediation is antithetical to and ultimately would be destructive of the candor that makes mediation in California so successful.

On the other hand, we doubt that instances of attorney malpractice in mediation are sufficiently frequent to justify abandoning or limiting confidentiality. In the period of more than 15 years since the current mediation confidentiality statute became law only three cases of confidentiality affecting alleged attorney malpractice in mediation have reached the appellate courts. To date we have not learned of data in any state with less restrictive confidentiality requirements than California indicating that legal malpractice claims arising out of mediation have occurred with greater frequency in the absence of mediation confidentiality.

As the three California cases were pleading cases, it was open to question whether there had been any malpractice or whether the plaintiff would have done any better in the mediation in the absence of the alleged malpractice. In short, the cases may have simply reflected the plaintiff's unwillingness to accept responsibility for agreeing to the settlement involved.

Legislative efforts to remedy the supposed problem of legal malpractice in mediation by allowing confidential mediation communications to be admitted in suits alleging legal malpractice has been deeply flawed. For example, the original version of AB 2025 permitted only the admission of mediation communications between an attorney and client. Evidence of communications between the attorney or the client and other participants in a mediation, including the mediator, remained inadmissible. This would have been demonstrably unfair to a lawyer defendant.

Section 6(a)(6) of the Uniform Mediation Act is less draconian in that it allows testimony from other participants in a mediation except for the mediator. However, it suffers from the fundamental flaw that none of the participants in a mediation can be assured of confidentiality. Instead, mediation confidentiality will be subject to destruction at the whim of a disgruntled party.

Most current mediations result in a settlement. This obviously reduces the burden on courts and also reduces the cost of litigation incurred by disputants. Reducing the number of cases that are deterred from going to mediation and the number that settle in mediation will increase the trial caseload. Allowing the admission in legal malpractice cases of evidence otherwise precluded by mediation confidentiality also holds the potential for increasing the burden on courts indirectly.

We understand that, in addition to mediation confidentiality in legal malpractice cases, the Commission has received communications urging it also to examine, among other matters, whether mediation confidentiality should be eliminated altogether, whether the incompetence of mediators to testify about mediations should be eliminated and whether the quasi-judicial immunity of mediators from civil suit for damages should be eliminated.

We recognize that the resolution calling for the Commission's confidentiality study authorizes it to study "any other issues the commission deems relevant" and thus is broad enough to include a study of the latter issues. However, we believe that these questions raise major policy issues and will divert the Commission's resources from the central focus of the study.

For one, if a mediator could be compelled contrary to Evidence Code Section 703.5 to give testimony, it would impair the mediator's assurance to mediation participants of neutrality, a prerequisite to mediation success second only to confidentiality. Mediator testimony of any sort would have the necessary effect of favoring one side or the other. For example, more than 20 years ago the undersigned James Madison was called upon to represent a mediator who had been subpoenaed to give testimony in a case pending in the United States District Court for the Northern District of California. One party was contending that a settlement agreement had been reached in mediation, but that the opposing party had refused to reduce the agreement to writing. The opposing party was disputing these contentions. The court granted the mediator's motion to quash the subpoena on the ground that efforts to elicit testimony pointing one way or other would have compromised the neutrality of the mediator. This neutrality is precisely what the provision in Evidence Code Section 703.5 making a mediator "incompetent" to give testimony about a mediation was designed to protect.

Attempting to eliminate the quasi-judicial immunity from a civil suit for damages also raises difficult and disturbing policy issues. How would the Commission deal with supposed mediator incompetence? This would require establishing standards of mediator competence. Given the wide variety of mediations, from team mediations by volunteers, which are prevalent in community mediations, to family law mediations, in which mediators may take on a significant role in framing marital settlement agreements, to the broad array of tort and contract disputes, designing criteria by which a mediator should be subject to suit for civil damages would be a monumental task. And the task would be made even more difficult by the diversity of views among mediators over the proper approach to conducting a mediation. Some argue for the so-called facilitative mode. Others say mediators should be evaluative. There are also schools of thought favoring what is called transformative mediation and narrative mediation.

Even if there were a way to determine standards of mediator incompetence, determining competence or incompetence in any particular case loops back onto mediation confidentiality, a determination that would necessitate the testimony of participants in a mediation. Thus, mediation participants could not only be forced to testify in a case where their adversary is dissatisfied with the performance of his or her attorney, they could also be forced to testify where their adversary is dissatisfied with the performance of the mediator.

Quite apart from the difficulty of establishing standards of mediator competence and of determining competence or incompetence in any given case, we note that mediators normally are selected by attorneys on the basis of experience with them or the attorneys' investigation into the experience of others. An incompetent mediator will not long survive under this system. The marketplace is a better place for weeding out incompetent mediators than any legislation or regulation.

Although we believe that a majority of the members of CDRC oppose any inroad into mediation confidentiality, we have not had the time to verify the views of our membership. We certainly will advise you if our membership suggests a position other than that expressed in this letter.

We appreciate your consideration of the points raised in this letter and, if oral presentations are to be heard at the October 10 meeting, we also ask for the opportunity to speak.

Very truly yours,
Paul J. Dubow
James R. Madison

by_____
Paul J. Dubow

cc: CDRC Directors

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JEROME SAPIRO, JR.
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SEP 19 2013

September 17, 2013

Ms. Barbara S. Gaal, Staff Counsel
California Law Revision Commission
4000 Middlefield Road
Palo Alto, CA 94303-4739

re: Relationship between Mediation Confidentiality and Attorney Malpractice and Other Misconduct

Dear Ms. Gaal:

I have been a lawyer practicing in San Francisco for several decades. I have a general practice with emphases in business litigation, estate planning, probate, trust administration, and legal ethics. I have mediated many cases, and I have been a mediator.

I write to urge the Law Revision Commission to recommend that Evidence Code sections 1115, *et seq.*, be amended because the application of them to communications between an attorney and that attorney's client can easily be abused by the attorney.

An example occurred between one of my clients and his then lawyer. I will not include names or case numbers in this letter but can give them to you if you wish. During a wrongful termination lawsuit, the parties agreed to mediate. Part of the matters to be settled involved a prospective worker's compensation claim. Therefore, my client's worker's compensation lawyer attended the mediation. When the parties were close to a settlement, the client complained that the net of the settlement after his attorneys' fees and expenses would be too low. Part of the agreement included a stipulation for entry of an uncontested worker's compensation award in an agreed amount. To induce the client to accept the settlement, during a breakout session the worker's compensation attorney agreed to accept a flat fee of $15,000 if the client would enter into a settlement agreement that included the stipulated worker's compensation award. The client agreed to the settlement. However, the worker's compensation attorney procrastinated confirming her fee agreement in writing. When the stipulated award was presented to the worker's compensation judge, the client's lawyer refused to seek entry of the award unless the client first agreed to increase the fee to $60,000. The client had to hire new counsel. The result was a negotiated compromise of the fee at $25,000 and entry of the previously stipulated award. The client lost $10,000 plus the fees of his new lawyer, and entry of his worker's compensation award was delayed. The client should be able to sue the lawyer

for various rights of action, including but not limited to fraud and breach of fiduciary obligations. He should be able to complain to the State Bar. However, under *Cassel v. Superior Court*, 51 Cal. 4th 113 (2011), evidence of the false representations by the worker's compensation lawyer would be barred by Evidence Code section 1119, even though the client and his other lawyers could all attest to them.

To me, the purpose of mediation confidentiality should be to encourage the parties and their lawyers to be candid with the mediator and with opponents. Mediation confidentiality is not needed to encourage candor between a lawyer and her own client. That duty of candor is inherent in the fiduciary relationship between them. The overly expansive interpretation of Evidence Code section 1119 by the Court abrogates the lawyer's fiduciary duties, discourages candor between lawyer and client, and puts the client at a disadvantage when interacting with his or her own lawyer.

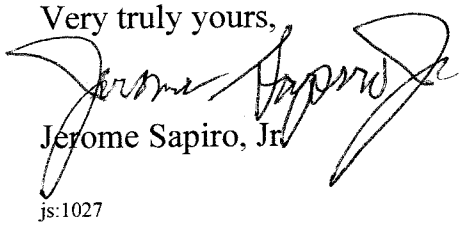
To me, mediation confidentiality also should not bar evidence of negligence by a lawyer that took place during a mediation in which the lawyer represented the client. For example, during mediation, a lawyer may tell her own client that a payment agreed in the mediation will be deductible by the client for income tax purposes. The client relies on that advice and settles. Later, the client learns that the lawyer was incorrect and that any reasonable research by the lawyer would have disclosed to the lawyer that the payment would not be deductible. The client should not be barred from testifying about the lawyer's negligent representation merely because the lawyer failed to exercise reasonable care during mediation.

During litigation between a lawyer and his or her former client, the Evidence Code should not prohibit introduction in evidence of communications between the lawyer and the lawyer's own client that took place during or in connection with mediation that occurred while the lawyer was representing the client.

Mediation should not abrogate the duties of a lawyer to her own client. To me, the only time mediation confidentiality should bar admissibility of lawyer-client communications during litigation between lawyer and former client would be if the mediation took place during a dispute between the lawyer and the then former client after the lawyer-client relationship was terminated. Otherwise, the concept of mediation confidentiality is a weapon for lawyers to defraud their own clients, or to render incompetent services, with impunity. If that is to be the law, then lawyers should be obliged to disclose to their clients that, if the client agrees to mediate, then the lawyer is immune regarding anything the lawyer does or says during or related to mediation. Lawyers should be required to discourage mediation of a dispute with a third party because the fiduciary duties of the lawyer client relationship do not apply during mediation.

Please call me if you want clarification of any of the above.

Very truly yours,



Jerome Sapiro, Jr.

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EMAIL FROM BRIAN THIESSEN (9/30/13)

Re: confidentiality of mediation

Good day

I understand the Commission is studying the confidentiality aspect of mediation. Having done mediations for some decades, it is my ongoing conclusion that mediation is seldom successful unless one can guarantee confidentiality to all participants.

We understand the issue of a client feeling s/he has been forced to a settlement by an over zealous attorney and there may be room for some restricted ability to use such evidence if some threshold test is first met in order to protect the client .. but most often it is buyer's remorse, not the attorney's conduct.. and any relaxing of confidentiality should be required to have some threshold proof of legitimacy before even that is breached.

Or so it seems from the streamside here..

Brian D Thiessen – Alamo