

First Supplement to Memorandum 2014-6

Relationship Between Mediation Confidentiality and Attorney Malpractice and Other Misconduct (Material Received at Meeting)

The following material was received by the Commission¹ at the meeting on February 6, 2014, in connection with Study K-402 on the relationship between mediation confidentiality and attorney malpractice and other misconduct, and is attached as an Exhibit:

- Exhibit p.*
- Ron Kelly, *Sample Summary of Significant Differences Between UMA and Current California Statutes* 1

Respectfully submitted,

Barbara Gaal
Chief Deputy Counsel

1. Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission’s website (www.clrc.ca.gov). 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.

Sample Summary of Significant Differences Between UMA and Current California Statutes

by Ron Kelly

Area of Significant Difference	Uniform Mediation Act	Current California Statutes
1. Structure of protection	Privilege (with 3 differing levels); UMA Section 4	Communications inadmissible Ev. C. 1119
	Parties may assert full privilege, mediator may refuse to disclose communications and block own statements, others attending may only block own statements 4	All communications inadmissible unless all participants expressly agree otherwise 1122
2. Neutrality of mediator	Optional section requiring impartiality 9(g)	Must be neutral third party 1115(a)
3. Scope	Excludes labor/management, and peer mediation in schools and youth correctional institutions 3(b)	Covers labor/management and peer mediations 1117
4. Confidentiality opt-outs	Parties can opt to make any session on-the-record 3(c)	All participants must expressly agree to remove confidentiality 1122
5. No privilege or protection:	<ul style="list-style-type: none"> - If knowingly use mediation for criminal act 5(c), 6(a)(4) - For threats to inflict bodily injury 6(a)3 - For evidence of abuse, neglect, etc. in proceedings where child or adult protective agency is a party (except if agency was in the mediation) 6(a)(7) - In mediation session open to the public 6(a)2 - For claims of mediation professional misconduct against attorney, representative, expert, or mediator 6(a)(6)&(7) 	<p>In later criminal process or trial 1119</p> <p>Covers public sessions 1117</p> <p>Mediation communications inadmissible (no exception for malpractice claims)</p>
6. After in camera hearing and necessity findings -- court, agency, etc. may admit evidence, compel testimony	<ul style="list-style-type: none"> - In proceeding for enforcement or reform of settlement agreement 6(b)2 - In criminal proceedings 6(b)1 	<p>Mediation communications not admissible in later fights over settlement agreement 1123</p> <p>No protection in criminal proceedings 1119</p>

7. Representation, support	Right to bring attorney, rape counselor, support 10	Silent (barred in Family Court "mediations")
8. Conflicts disclosure requirement	Disclosure of known conflicts 9	Silent
9. Mediator testimony	May testify, but may not be compelled in later settlement fights or professional misconduct claims 6(c)	Mediators not competent to testify in later civil proceedings except contempt 703.5
10. When mediation ends	Silent	Ends with settlement, written withdrawal, or ten days after last communication 1125
11. Wrongful subpoenas	Silent	Attorneys fees to mediator 1127
12. Wrongful references to mediation communications in later proceedings	Prejudiced person may respond 5(c)	Grounds for mistrial, vacatur of award 1128
13. General interstate uniformity	Would provide if many states adopt	California-specific
14. Predictability of legislative enactment and court interpretations	Uncertain legislative amendments and adoption Courts required to try to follow decisions of all other state courts where UMA adopted, if enacted 12	Current sections 1115-1128 adopted unanimously by Calif. Legislature - upheld by unanimous Calif. Supreme Court (Foxgate, Rojas)

Rough Summary of Differences Only - See full text © 2001-2002, Ron Kelly
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