

First Supplement to Memorandum 2014-36

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

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The Commission<sup>1</sup> received the following new communication relating to its study of the relationship between mediation confidentiality and attorney malpractice and other misconduct:

- Exhibit p.*
- Nancy Neal Yeend, Silicon Valley Mediation Group (9/3/14) ..... 1

Respectfully submitted,

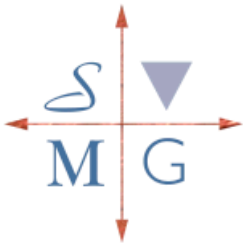
Barbara Gaal  
Chief Deputy Counsel

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1. See Memorandum 2014-14; First Supplement to Memorandum 2014-14; Memorandum 2014-24.

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](http://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.



## SILICON VALLEY MEDIATION GROUP

September 3, 2014

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

Re: Memorandum 2014-35 and 2014-36 (Study K-402)

Dear Commissioners:

The above referenced materials provided provocative reading. The following comments address topics mentioned in the Memoranda, and are based on 30 years mediation experience and having worked with courts and/or judges from all 50 states.

Florida has codified explicit confidentiality exceptions for both attorney and mediator malpractice. Therefore, the comment, "...*only refers to mediation confidentiality in passing...*" misleadingly diminishes the significance of the confidentiality exception(s). As one who is a certified mediation trainer in Florida, it is not surprising that the court did not feel it necessary to reiterate the long-standing exception.

Page 25 of Memorandum 2014-35 states: "*Of the complaints received, approximately 25% resulted in sanctions, [which were] generally relatively mild in nature.*" This statement, coupled with a preceding comment regarding complaint ratio to number of mediators, may lead some to conclude that creating exceptions to confidentiality for malpractice is not needed. One must not forget that Florida requires extensive training and certification for all mediators—California does not. Florida has a Dispute Resolution Center with an Oversight/Review Commission that regulates the practice of mediation—California does not.

Karen Mak's letter was extremely interesting, and I commend the Commission for wanting more input from the users of mediation to share their experiences and concerns. If the public is aware that attorney and mediator malpractice is protected by mediation confidentiality, will usage rates be negatively impacted? I was not shocked by the comments attributed to the Australia conference. I have heard somewhat similar comments in other regions of the US.

Perhaps the simplest solution: require that attorneys and mediators provide a written disclosure that malpractice is protected. Of course there is another option: create the exceptions.

Sincerely,

*Nancy*

Nancy Neal Yeend

nny:dlg

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<sup>1</sup> (*Vitakis—Valchine case page 16*)