

First Supplement to Memorandum 2014-60

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

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

*Exhibit p.*

- Edward Mason, San Francisco (12/20/14) ..... 1

Mr. Mason has not been a party to litigation, nor has he ever participated in a mediation.<sup>2</sup> He says that life “is a set of hard lessons because unless you are a specialist, the deck is stacked against you.”<sup>3</sup>

Mr. Mason points specifically to some of the cases discussed in Memorandum 2014-59 (*Fehr v. Kennedy*<sup>4</sup> and *Alfieri v. Solomon*<sup>5</sup>), and says he “cannot believe mediation confidentiality protects both attorney and mediator malpractice leaving me, the ‘little guy’ with no protection.”<sup>6</sup> He has “serious reservations about ever utilizing the mediation process as currently constructed” because he would not be protected from malpractice and could be “left holding the ‘empty bag.’”<sup>7</sup>

Mr. Mason thus urges the Commission to “create some level of protection for the unknowing ‘little guy’ be it a disclosure at the beginning of the mediation process or a change in the malpractice law.”<sup>8</sup> If a disclosure were to be required,

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](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.

2. Exhibit p. 1.

3. *Id.*

4. 2009 U.S. Dist. LEXIS 63748 (D. Oregon 2009), *aff’d*, 2010 U.S. App. LEXIS 16593 (9th Cir. 2010).

5. 2014 Ore. App. LEXIS 767 (Ore. Ct. App. 2014).

6. Exhibit p. 1.

7. *Id.*

8. *Id.*

he further suggests that the disclosure “should include examples of malpractice the average person can understand and recognize if it is occurring in the process.”<sup>9</sup>

Respectfully submitted,

Barbara Gaal  
Chief Deputy Counsel

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9. *Id.*

**EMAIL FROM EDWARD MASON (12/20/14)**

Dear Ms. Barbara Gaal:

I have never been a subject of a lawsuit nor required mediation services.

I realize mediation reduces the courtroom workload. Have always viewed the legal system as attempting to level the playing field much like the Americans with Disability Act providing equal access.

Life is a set of hard lessons because unless you are a specialist, the deck is stacked against you. After reading the case study K-402 of Fehr v. Kennedy and Alfieri v. Solomon, I cannot believe mediation confidentiality protects both attorney and mediator malpractice leaving me, the “little guy” with no protection. I had to read the case study several times seeking protection for the “little guy.” There is none! I have serious reservations about ever utilizing the mediation process as currently constructed because I am not protected from malpractice and I am left holding the “empty bag.”

Please create some level of protection for the unknowing “little guy” be it a disclosure at the beginning of the mediation process or a change in the malpractice law. The disclosure document should include examples of malpractice the average person can understand and recognize if it is occurring during the process.

The public expects the law to create a level field of access.

Sincerely,

Edward Mason  
1084 Church Street  
San Francisco, CA 94114