

Second Supplement to Memorandum 2014-60

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

The Commission¹ has received the following new comment relating to its study of the relationship between mediation confidentiality and attorney malpractice and other misconduct:

Exhibit p.

- Judge Paul Aiello (ret.), Mount Shasta (2/10/15) 1

Paul Aiello is a former judge who has been “a mediator and arbitrator for 22 years, involved in both [his] own independent business as well as serving on the Commercial Panel of the American Arbitration Association.”² From that experience, he “know[s] that the only chance for successful outcomes is where all parties are able to speak freely and candidly.”³ He “urge[s] the Commission to keep the current statutory framework of mediation confidentiality protection [Evidence Code sec. 1115-1128] in place.”⁴

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.

2. Exhibit p. 1.

3. *Id.*

4. *Id.*

EMAIL FROM JUDGE PAUL AIELLO (RET.)
(2/10/15)

Re: Comment on Proposed Changes to Mediation Confidentiality — AB 2025

Dear Ms. Gaal:

I understand that you are the Commission staff attorney for the CLRC study involving proposed changes to mediation confidentiality as outlined in the proposed amendment to Evidence Code Section 1120 (AB 2025) — allowing for an exception for communications between attorney and client made during a mediation or mediation consultation, to be admitted in attorney malpractice actions.

I have been a mediator and arbitrator for 22 years, involved in both my own independent business as well as serving on the Commercial Panel of the American Arbitration Association. From that experience, I know that the only chance for successful outcomes is where all parties are able to speak freely and candidly. I simply do not believe it is in the public interest for the parties' freedom to share and communicate important information to be restricted for fear their words will become evidence. Further, any possibility that a mediator might be called to testify in subsequent proceedings affects and diminishes the vital appearance of impartiality that must be preserved if the integrity of the ADR processes is not to be compromised. The whole purpose of ADR is to have a non-threatening atmosphere within which to work in order to avoid the cost and stresses of litigation. Why would anyone now want to consider opting for mediation where these new dangers are lurking?

I urge the Commission to keep the current statutory framework of mediation confidentiality protection [Evidence Code Sec. 1115-1128] in place.

Thank you for the opportunity to express my viewpoint.

Sincerely,

Judge Paul J. Aiello (Retired)
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