

Third Supplement to Memorandum 2014-60

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

The following new comments were presented at the Commission¹ meeting on February 12, 2015, in connection with the Commission’s study of the relationship between mediation confidentiality and attorney malpractice and other misconduct:

	<i>Exhibit p.</i>
• Bill Chan (2/11/15)	1
• Ron Kelly (2/12/15)	3

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.

EMAIL FROM BILL CHAN (2/11/15)

Re: Client input

Dear Ms. Gaal,

We applaud CLRC's efforts to gain client input but attorney's are not likely to encourage their clients to write to support legalized malpractice if they realize that even satisfied clients oppose it. There have been six clients or potential clients who have written. Three, myself, Deborah Blair Porter, and Julie Doyle describe unsatisfactory mediations. Two, Kazuko Artus (Ms. Artus is also an attorney but did not represent herself) and Karen Mak describe satisfactory mediations. Edward Mason has not been involved in litigation. None of the six supports legalized malpractice however.

It is also mentioned below that the staff is not aware that mediation clients are organized into cohesive groups. At the CLRC meeting June, 2014 in Sacramento, I suggested this might happen as a backlash to legalized malpractice. It is in fact happening. We plan to be active soon with one objective to inform every client or potential client of cases like Hadley and Cassel; that mediation legalizes malpractice. The yet unnamed case described by professor Zitrin where the attorneys went to mediation without inviting the clients, settled the case, and gave themselves most of the proceeds will also be described. Following professor Zitrin's example, I will not name the case, but another case comparable to Hadley, Cassel, etc. has reached an appeals court.

We trust CLRC will not object if we use materials like that below from the CLRC web site to ask people to write to you and encourage further discussion from the client's perspective.

Best regards,

Bill Chan

From MM14-60

When it met in September, the Commission considered a comment from Karen Mak, urging the Commission to try to obtain greater participation from mediation parties — i.e., the disputants themselves, not their representatives or the mediator.⁷ The Commission discussed the difficulties involved in generating such participation, particularly the lack of any organized group consisting of mediation parties (in contrast to the State Bar, numerous local and nationwide bar associations, and many mediation and ADR organizations).⁸

word about the study to others who might be interested in it.⁹ This memorandum constitutes that notice; the staff hereby respectfully requests that anyone reading it consider whether there is anything they can do, or the Commission can do, to effectively encourage mediation parties (as well as others) to participate in this study and share their views with the Commission, so that the Commission can properly take their views into account in making its recommendations.

If anyone has a suggestion for the staff or the Commission regarding this matter, we are eager to hear it. Suggestions and other comments can be in any format. They may be submitted to the Commission's Chief Deputy Counsel, Barbara Gaal, via email at the following address: bgaal@clrc.ca.gov

From MM14-36

While many of the comments submitted have come from lawyers and mediators, the Commission has also received some comments from clients and other laypersons, such as Ms. Mak, Jullie Doyle, Bill Chan,³² and Deborah Blair Porter.³³ Such input is relatively difficult to obtain, because mediation clients are not organized into cohesive groups (to the staff's knowledge), and mediation clients (particularly satisfied ones) might be less-motivated to invest time and energy in this matter than lawyers and mediators.

All of the materials relating to the Commission's study are publicly available on the Commission's website,³⁴ and those materials repeatedly encourage interested persons to submit comments on the Commission's study. If anyone has a suggestion about how to further encourage and obtain input from mediation clients, we would like to hear it. Obtaining comments from the full spectrum of mediation participants will help the Commission understand the nature of the issues and the concerns at stake, so that it can take those matters into account in developing an effective solution.

February 12, 2015

Chairperson Victor King,
California Law Revision Commission

IF the Commission determines that weakening our current mediation confidentiality protections is absolutely necessary, and recommends an in camera hearing process, then I respectfully suggest that the following weighing test be specified, drawn directly from section 574(a)(4)(C) of the Federal Administrative Dispute Resolution Act of 1996, with such wording as staff may recommend:

A mediation communication made inadmissible or protected from disclosure by provisions of this chapter shall not become admissible or subject to disclosure under this section unless a court first determines in an in camera hearing that this is necessary to prevent harm to the public health or safety of sufficient magnitude in the particular case to outweigh the integrity of dispute resolution proceedings in general by reducing the confidence of parties in future cases that their communications will remain confidential. [underlined text is directly from section 574]

Respectfully submitted,
Ron Kelly, Mediator