

First Supplement to Memorandum 2016-30

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

The Commission¹ recently received the following new comments:

Exhibit p.

- Robert Flack, Los Angeles (5/31/16)1
- Ron Kelly, Berkeley (5/26/16)3
- Penny St. John, Los Angeles (5/27/16)5

These comments are briefly discussed below.

COMMENTS OF ROBERT FLACK

Robert Flack notes that a resolution by the Conference of California Bar Associations (“CCBA”) led to this study.² He submits a discussion draft of “a summary of a 2016 Proposition to the CCBA which would clarify the California Constitutional Basis for Mediation Confidentiality and, in effect, withdraw CCBA’s support for the continuing inquiry.”³

The discussion draft of the summary of the proposal is attached for the Commission and other interested persons to review. It is entitled “Saving Mediation Confidentiality: 2016 Proposed CCBA Resolution.”⁴

CCBA’s Conference of Delegates is next scheduled to consider proposed resolutions at a meeting in San Diego from September 30 to October 2, 2016.⁵ Some of the deadlines for preparing a CCBA resolution have already passed.⁶ It is not clear to the staff how CCBA will proceed if Mr. Flack’s discussion draft becomes a proposed resolution in the near future. It seems possible that CCBA might postpone the matter until the 2017 Conference of Delegates.

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.*; see Exhibit p. 2.

4. Exhibit p. 2.

5. See <http://calconference.org/html/schedule/>.

6. See *id.*

COMMENTS OF RON KELLY

Mr. Kelly's new comment⁷ concerns the opposition letter from the California Judges Association ("CJA"),⁸ which we described in some detail in a staff memorandum for the April meeting.⁹ Mr. Kelly reviewed the meeting recording and determined that three people mentioned CJA's letter during the meeting: Commissioner King, Lulu Wong, and himself.¹⁰ Mr. Kelly thinks the Commission should pay more attention to the letter.¹¹

COMMENTS OF PENNY ST. JOHN

Penny St. John (a Los Angeles attorney and family law mediator) "concur[s] with Judge Isabel Cohen (ret.) and Judge Susan P. Finlay (ret.) who both wrote against creating [a] new exception to mediation confidentiality particularly for families going through dissolution."¹² Ms. St. John also concurs with Lynette Berg Robe's comments on this subject, which are covered in Memorandum 2016-30.¹³

In particular, Ms. St. John urges the Commission to seek more data regarding whether there is enough of a problem to warrant creation of a new exception.¹⁴ She also encourages the Commission to consider the alternative of "educating the parties about the implications of mediation and requiring signed consent."¹⁵

She suggests the following plan of attack:

The Commission should first examine the results of further study on whether this exception is necessary, then consider if the protections proposed by Attorney Robe would resolve the issue. If the Commission insists on moving forward with a proposed legislative exception without any data to prove its necessity, I concur with Attorney Robe on the limitations she proposed.¹⁶

Respectfully submitted,

Barbara Gaal
Chief Deputy Counsel

7. Exhibit pp. 3-4.

8. Memorandum 2016-19, Exhibit pp. 5-6.

9. Memorandum 2016-19, pp. 2-3.

10. Exhibit p. 3.

11. *Id.* at 4.

12. Exhibit p. 5. For Judge Cohen's comments, see First Supplement to Memorandum 2015-54, Exhibit pp. 16-19. For Judge Finlay's comments, see First Supplement to Memorandum 2015-46, Exhibit pp. 7-8.

13. Exhibit p. 5.

14. *Id.*

15. *Id.*

16. *Id.* at 16.

EMAIL FROM ROBERT FLACK (5/31/16)

Re: 2016 CCBA Resolution, Cal Constitution and Mediation Confidentiality

Barbara,

As you may know, a CCBA Resolution began this process of reviewing Mediation Confidentiality.

Attached is a summary of a 2016 Proposition to the CCBA which would clarify the California Constitutional Basis for Mediation Confidentiality and, in effect, withdraw CCBA's support for the continuing inquiry.

While not in its final format (required for CCBA submissions), I thought that the Commission might find this interesting and useful.

Best regards,

-Bob

Saving Mediation Confidentiality 2016 Proposed CCBA Resolution*

Whereas:

- **All Confidential Communications** are broadly protected by California's Constitutional Right of Privacy, and
- **Confidential Communications in Mediation** are recognized historically, culturally and practically as essential to an effective process, and
- **Mediation** by its fundamental nature is non-deterministic and non compulsory, and
- **Confidential Communication in Mediation** is broadly supported by the California Judges Association, the California Public Employment Resolution Board, many retired judges, professional mediators, and actual parties who have extensive experience in Mediation, and
- Purported grass roots support for reducing Mediation Confidentiality is both suspicious and spurious (ex: Change.Org.-"AstroTurf" petition), and
- **Reducing Mediation Confidentiality** would likely result in greater costs to the Courts and to all of the parties in Mediation at a time of great budget stress, and
- **Mediation** is a process not actively supervised by the Courts and exists as a **parallel and separate proceeding** to a traditional Judicial proceeding (hence the names *Alternative Dispute Resolution* or *Consensual Dispute Resolution*) and the public has no "right to know;" in fact, Mediation is successful primarily because it is not Court supervised, and
- **1st Amendment "right to know" principles do not apply** to Confidential Mediation much like they do not apply to the Spousal Privilege, the Clergy-Parishioner Privilege and the Attorney-Client Privilege based on both tradition and sound public policy, and
- **No real evidence actually exists** that indicates any substantial misconduct in Mediation such that no remedy can be so narrowly tailored to address a harm that is so slight as that which might possibly appear in Mediation. The harm outweighs any potential benefit.

Therefore,

- The Evidence Code should be amended to reinforce, clarify and unequivocally protect California's Right to Confidentiality in Mediation based on fundamental California Constitutional Principles guaranteeing all Californians the right to privacy in the management of their personal affairs.
- Specifically, all Communications prepared for mediation and all conduct or Communications of the mediation process are Confidential and protected from disclosure by the **California Constitutional Right to Privacy**.
- Solutions to the concern over this issue may properly come from **education, awareness and notice** language such as that appearing in several popular Pre-Mediation Agreements.

EMAIL FROM RON KELLY (5/26/16)

Re: "Discussion" of CJA Letter? CLRC Study K-402

Ms. Barbara Gaal
Chief Deputy Counsel
California Law Revision Commission

Ms. Lynette Berg Robe
Law and Mediation Offices of Lynette Berg Robe

Dear Ms. Gaal and Ms. Robe,

I recently reviewed Law Revision Commission Staff Memorandum 2016-30 dated May 24, 2016. I know you both make every effort to ensure your statements are accurate.

In her May 17, 2016 letter to the Commission, Ms. Robe referenced the letter of opposition from the California Judge's Association dated March 24, 2016. Ms. Robe stated "To not even have a discussion of CJA's letter is a strange omission."

Ms. Gaal responded that "Contrary to Ms. Robe's assertions, CJA's letter **was** specifically discussed at the meeting." (Emphasis in original.) Perhaps the two of you are using the term "discussed" in different ways.

I carefully reviewed the portion of the audio record of the April 14, 2016 meeting in which Study K-402 was discussed. Commissioner King makes a brief reference to the existence of the CJA opposition statement at approximately 47 minutes into the record of this agenda item. No Commissioner responds to his reference or discusses any element of the CJA letter.

In our later oral remarks at the hearing, Ms. Wong and I both reference the CJA letter. No Commissioner responds to these references either, or discusses any element of the CJA letter.

Other than Commissioner King's reference to its existence, I was not able to locate any evidence in the audio record that the Commissioners acknowledged receiving it or talked about its contents in any way.

CJA's opposition is certainly being discussed in the wider public sphere, including the legal press. The Association's letter makes a number of points, and concludes in summary that "it is the California Judges Association position that there exist no valid reasons, including the very rare claim of malpractice by an attorney during the mediation process, to justify an abrogation of the existing statutory confidentiality of the mediation

process. It is simply too valuable to the civil court system in our state as a matter of public (and effective) policy to sacrifice that confidentiality.”

Like Ms. Robe, I believe CJA’s letter deserves an actual conversation on the public record among all Commissioners about its content. After reviewing the audio record, I must conclude this has not yet happened and is in fact “a strange omission”.

Yours,

Ron Kelly

EMAIL FROM PENNY ST. JOHN (5/27/16)

Re: Opposition to Mediation Confidentiality Exception

Dear Attorney Gaal,

I concur with Judge Isabel Cohen (ret) and Judge Susan P. Finley (ret.) who both wrote against creating new exception to mediation confidentiality particularly for families going through dissolution. I also concur with the comments by Lynette Berg Robe on this subject.

One of Attorney Robe's objections to the promulgation of this legislative exception to the mediation confidentiality is that there is not enough research showing there is even a problem to be solved. The Commission's response in the Memorandum 2016-30 confirms that this is true. Why is the Commission insisting on moving forward with this legislative change which judges and mediation practitioners with vast experience have testified will be devastating to the efficacy of mediation in family law when there is no data showing that such a change is necessary in California? The Commission should at least wait to see what results are received from Mr. Kelly's request and present the statistics for public discussion. If his request does not produce the information we need, the commission should focus on conducting a professional study and gather as much data as possible.

Mr. Berman and Attorney Pollack and others have provided sound alternatives to the exception. They have proposed educating the parties about the implications of mediation and requiring signed consent. I concur with Mr. Berman that a key element of mediation is the self-determination of the parties. In family law the mediating parties make decisions based on factors that involve all aspects of family life, not just the ones that can be assigned a value by the State and put into legislation. These can be addressed in a forum that the participants are certain will be kept private.

The Commission should first examine the results of further study on whether this exception is necessary, then consider if the protections proposed by Attorney Robe would resolve the issue. If the Commission insists on moving forward with a proposed legislative exception without any data to prove its necessity, I concur with Attorney Robe on the limitations she proposed..

Sincerely,

Penny St. John, Esq.

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Mediator / Attorney

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