

Second Supplement to Memorandum 2016-30

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

The following letters arrived too late to be included in the First Supplement to Memorandum 2016-30:

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| | <i>Exhibit p.</i> |
| • Var Fox, Judicate West (5/31/16) | 1 |
| • Jeff Kichaven (5/31/16) | 3 |

The staff distributed copies of these letters at the meeting of the Commission¹ on June 1, 2016, in connection with Study K-402 (relationship between mediation confidentiality and attorney malpractice and other misconduct).

The letter from Mr. Kichaven twice refers to the staff’s research on empirical data relevant to this study. Those comments might create some misimpressions, particularly regarding the staff’s views on drawing comparisons across jurisdictional lines, and the neutral manner in which it approached the empirical issues. The staff’s perspective is memorialized in its memoranda, particularly in Memorandum 2015-5.

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 VAR FOX, JUDICATE WEST (5/31/16)

Re: Mediation Confidentiality — Letter to California Law Revision Committee

Dear Ms. Gaal,

Judicate West wishes to add its strenuous objection to any weakening of mediation confidentiality and privilege as currently provided by California law.

Judicate West is a California State-wide private ADR provider with a panel of over 100 highly qualified affiliated neutrals who conduct thousands of mediations each year at our six facilities around the state.

Based on our extensive experience as a provider of mediation services in California for over 20 years, we believe that presently available mediation confidentiality serves several important interests, both directly and indirectly, that must be respected and protected. We note that your Staff Memos have repeatedly recognized and documented these interests.

Complete confidentiality is one of the core factors that directly drives the high rate of success in case resolution associated with mediation. Confidentiality both allows and encourages open exchange of information and competing positions in furtherance of a realistic assessment of a case by all parties. Indirectly, mediation confidentiality positively contributes to the reduction of caseload impacts on the court system, which is well known to be overburdened and underfunded. Anything that serves to undermine the efficiency and effectiveness of mediation will adversely impact the courts, including access to and utilization of all court functions.

It is important to acknowledge the need for trust and the vital role it plays in making mediation successful. Mediation does not bind or direct parties or favor one party over another; instead, it provides a safe haven for the parties to negotiate with each other under the neutral facilitation of a mediator. Mediation is a complex and challenging human activity often performed under significant pressure and stress. Essential ingredients for success include building trust and maintaining neutrality; an absence of complete confidentiality would undermine both. Presently, mediation-related communications are protected and cannot form the basis of post-mediation disputes. Without that protection, every mediation would present the possibility of subsequent adversity, and consequently both trust and openness could be undermined from the outset.

We understand that clients of attorneys might occasionally have an interest in utilizing factual material that involves alleged attorney misconduct in the context of mediation proceedings. On the other hand, the wider public, consisting of all parties and counsel in mediation proceedings of all kinds, has a clear and compelling interest in preserving the openness in mediations that is fostered by the very strong public policy of confidentiality that traditionally and presently protects the mediation process. It is our firm and sincere

belief that the salutary benefit to the entire public in preserving the confidentiality of mediations far outweighs the potential benefit to those very few of the public that may wish to challenge the conduct of their counsel during a particular mediation.

Mediation confidentiality further serves the inter-related goals of certainty and finality. The product of a successful mediation is settlement, the hallmark of which is a certain and final outcome in the form of a mutually agreed resolution. It is important, as a matter of public and legal policy in this respect, that all mediation participants or stakeholders realize and share in the benefits of certainty and finality, including parties and their counsel. If a disgruntled party or a party with simply a change of heart can use mediation communications to open new disputes there will be no predictable or enforceable certainty and finality for the participants. A dilution of existing mediation confidentiality and privilege could swallow the rule of confidentiality and thereby threaten the integrity of the process.

The Legislature enacted Cal. Evid. Code 1115 et seq providing mediation confidentiality and privilege in 1998 for good and important reasons. The Courts that have recently addressed the subject of mediation confidentiality and privilege correctly recognized and reaffirmed their importance and justification. Rare incidents of a party alleging malfeasance on the part of their attorney during mediation would not, in our view, justify the larger widespread systemic harm that could result from undermining complete mediation confidentiality.

Thank you for your attention and consideration. Should you need any additional input or clarification, please feel free to contact the undersigned.

Sincerely,

Judicate West

By: Var Fox

Thank you,

VAR FOX



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May 31, 2016



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California Law Revision Commission
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In Re: Mediation Confidentiality

Dear Ms. Gaal:

Thank you for the opportunity to comment on the current issues before the Commission with respect to proposed changes in the Mediation Confidentiality Statute.

The Commission, wisely, seems inclined to recommend that the Legislature change the statute to allow the introduction of certain mediation-related evidence in legal malpractice cases, at least where the evidence comes from the mediation in which the malpractice is alleged to have taken place. This would be an important step toward ensuring consumer protection and the Rule of Law in California mediations, and the Commission is to be commended for this.

The question now before the Commission is whether to engraft some sort of special *in camera* review upon evidence to be proffered under this contemplated exception to mediation confidentiality. The answer should be, "no." There is no reason to do so.

In addition to my comments to the Commission in previous correspondence, please let me add the following, briefly.

The underpinning for this inquiry is the hypothesis that the proposed exception to mediation confidentiality, without *in camera* review, would result in less mediation, or less effective mediation, or some other problem.

How can we test this hypothesis?

A common social science response would be to look for places where the exception exists, without the accompanying *in camera* review, and see whether there is any evidence that the hypothesized problems exist in those places.

Of course, there are such places. And, in those places, there are no such problems. The places are the states where the Uniform Mediation Act is the law. According to Memorandum 2016-28, Pages 1-2, in



Barbara S. Gaal, Esq.

May 31, 2016

Page 2

those UMA states, there is no *in camera* review akin to what the Commission is considering. There is no evidence that those states suffer from less mediation, or less effective mediation, or any other problem, as a result. In memorandum after memorandum, the Staff has begged readers for actual evidence of adverse consequences of lesser levels of mediation confidentiality. None has been delivered.

At this point, the Commission should also be cautious of the kind of evidence it considers. Late in the game, someone might troll around UMA states and, through suggestive and leading questioning, try to generate anecdotal evidence of problems with the UMA's lesser standard of confidentiality. This kind of evidence – pseudo-evidence, really – is worthless, and the Commission should be on guard against it. The true question in UMA states is whether there is any spontaneous, unrehearsed evidence of problems. None has been reported.

It's time for the Commission to conclude that there is no actual evidence of problems with lesser standards of mediation confidentiality, and abandon the idea that, if consumers are allowed to pursue these legal malpractice actions, the overall effectiveness of mediation will somehow need to be rescued by *in camera* review.

In Memorandum 2016-29, at Page 9, the Staff concludes that the benefits of mediation confidentiality are "inherently difficult to prove, much less to quantify." Yet the mediation establishment continues to insist, uninhibited by the absence of actual evidence to support their proposition, that absolute confidentiality is "essential to effective mediation." The actual evidence, though, is on the other side. The true reason that the benefits of absolute confidentiality are "inherently difficult to prove, much less to quantify," is that they do not exist. The persistence of effective mediation in UMA states proves the point.

In camera review, in any of its proposed incarnations, would, for no good reason, make the few legal malpractice cases which may arise out of mediations more complicated, longer, and more expensive. It would unduly burden and delay plaintiffs who seek adjudications on the merits. It would unduly consume scarce judicial resources. Courts have the tools they need to weed out meritless claims, through summary judgment proceedings, and otherwise.

The administration of justice would best be served by legislation which allows these few legal malpractice claims to go forth unencumbered by *in camera* review.



Barbara S. Gaal, Esq.

May 31, 2016

Page 3



As always, I thank the Commission and its staff for their consideration of my views. I am happy to provide any further information which I may have, which the Commission or its staff may find helpful.



Respectfully,

Jeff Kichaven

JK:abm