

First Supplement to Memorandum 2016-39

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

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

- Exhibit p.*
- Robert Flack (7/20/16) 1
- Jeffrey Kichaven (7/20/16) 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.

Submission from Robert Flack (7/20/16), page 1

University of Missouri School of Law Scholarship Repository

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2000

Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice

Richard C. Reuben

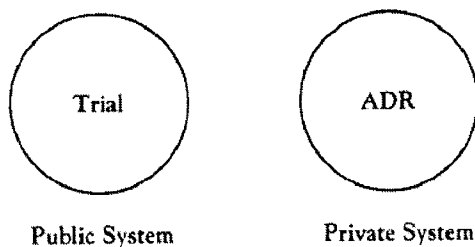
University of Missouri School of Law, reubenr@missouri.edu

Recommended Citation

Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 *UCLA L. Rev.* 949 (2000)

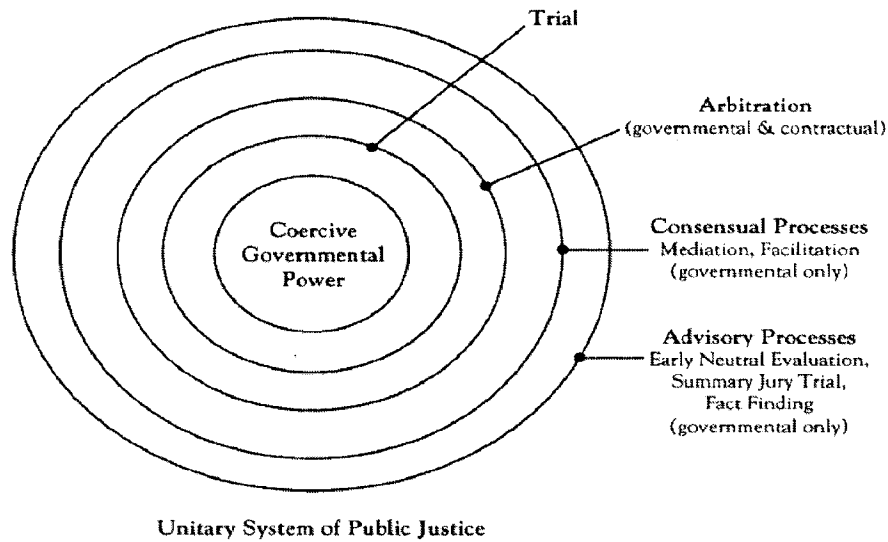
Many have come to view ADR as “privatized justice,” the devolution of public power to private authority that is a byproduct of the downsizing of government at the close of the twentieth century. This bipolar approach is the dominant view of courts, practitioners, and legal scholars.² Under this view, disputants choose between public and private systems of dispute resolution, prompting some legal scholars to suggest that the advent of modern ADR has led to a “process pluralism” of dispute resolution choices for disputants.³ This is, of course, a positive development in light of the continuing popular dissatisfaction with the public justice system that has provided the basis for the ADR movement itself.⁴

Contemporary Understanding: A Bipolar System



ADR Operates Remotely From Coercive Government Powers (Especially Mediation)

As a result, the task of constitutional integration must focus on constitutional values, take into account the differing nature and goals of the various ADR processes, and then synthesize these considerations by squaring constitutional values with ADR goals to guide the appropriate constitutional integration for each ADR process. Such an approach leads easily



to a unitary theory of ADR and public justice that recognizes constitutional force as something of a receding gravitational concept: The farther the dispute resolution process is removed from the purview of coercive governmental power, the lower the level of constitutional force, or gravity, exerted on that process.


Essential Confidentiality in ADR Proceedings As A Privacy Right

(3) The Permeability of Confidentiality


Confidentiality, like mediator impartiality, is one of the cornerstones of the mediation process. It fosters a climate that promotes the frank exchange of feelings, facts, and ideas by creating a zone of safety wherein intimate thoughts and concerns will be heard, respected, and kept private. This promise is typically one of the first matters addressed by the mediator in the first minutes of the first mediation session, to help set a tone of candor for the overall mediation effort.⁷³³

Rather, the confidentiality of an arbitration proceeding in the end is a matter of party choice, and the parties can simply assess and assume any risk in publicizing their dispute when they file the motion to confirm the award.⁶⁷³ While society may lose some value in the opinions if the parties decide against making them public, it must be remembered that it is, after all, the parties who “own” the dispute as an initial matter, not the public.⁶⁷⁴


”... after all, the parties ... own the dispute ..., not the public.”



July 20, 2016



Barbara S. Gaal, Esq.
California Law Revision Commission
4000 Middlefield Road, Suite D2
Palo Alto, CA 94303



In re: Mediation Confidentiality; Memorandum 2016-38

Dear Ms. Gaal:

Thank you for your continued interest in and openness to comments on the Commission's proposed changes to California's mediation confidentiality rules. I appreciate the opportunity to contribute my views, and the respectful consideration received from you and the Commission.

The Commission continues to deserve commendation for its decision that California's Evidence Code should be amended to allow plaintiffs in legal malpractice actions to introduce evidence of alleged malpractice that occurred in connection with a mediation. While we believe that such cases will be few, they will be critically important to the consumers who bring them. The Commission's proposed reforms provide a road to justice for those consumers.


At the Commission's June 1 meeting, the Commission discussed some sort of preliminary merits-based screening of legal malpractice claims arising out of the conduct of lawyers at mediations. The Staff's further discussion is in Memorandum 2016-38.

The predicate for the contemplated screening mechanisms is a fear that, without such mechanisms, allowing these legal malpractice claims would (1) discourage people from mediating, or reduce the effectiveness of mediations, (2) result in excessive or inappropriate legal malpractice cases, or both.

The purpose of this letter is to submit new, actual evidence to the Commission to show that these fears are unfounded, and the contemplated merits-based screenings are unnecessary. They would be no more than stumbling blocks on the road to justice for aggrieved consumers, stumbling blocks of expense and delay for consumers who seek adjudications of their claims on the merits.

1. In states which allow claims of legal malpractice arising out of mediations, there is no evidence that people engage in less mediation, or that mediation is less effective.

By now, the Commission is well-familiar with the fact that, in states where the Uniform Mediation Act is the law, the privilege of that act gives way in legal malpractice cases. In UMA states, consumers can



Barbara S. Gaal, Esq.
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prosecute those cases just as they would in California under the Commission's proposed reforms. The mediation establishment has failed to produce even a peppercorn of evidence that, in UMA states, people engage in less mediation, or that mediation in those states is less effective. There is no empirical reason to impose preliminary screenings to preserve the use or effectiveness of mediation.

2. In states which allow claims of legal malpractice arising out of mediations, there is no evidence of excessive or inappropriate claims.

The question of whether a lesser standard of mediation confidentiality will lead to excessive or inappropriate legal malpractice claims is an empirical question. So, I decided to look. I posed the question to the leaders of the defense trial lawyer associations of the larger UMA jurisdictions: Washington, Illinois, Ohio, New Jersey and the District of Columbia. I figured, if a UMA-type standard led to excessive or inappropriate claims, the lawyers who have to defend those claims would know. I heard back from leaders in three states, Washington, Illinois and Ohio. Their responses were unanimous. No problems.

Erin Hammond, the President of the Washington Defense Trial Lawyers, wrote:

I haven't heard of such claims, though I admit that I am not familiar with all the legal malpractice claims that are asserted.

Mark Mifflin, the President of the Illinois Association of Defense Counsel, wrote:



I am not aware of any such claims. However, I caution that I practice in Springfield where the numbers are limited. Maybe Bill (McVisk, a partner in Johnson & Bell in Chicago, and an officer of IADC) can help?

Bill McVisk responded that he was personally not aware of any claims of legal malpractice arising out of the conduct of lawyers at mediations in Illinois. He surveyed his law partners, and then wrote:




So far, the only response I received was about *Carlson v. Fish*, 205 IL App (1st) 140526, which alleged malpractice due to failing to obtain independent appraisal of the business before mediation and permitting the plaintiff to attend the mediation without an attorney present. Case was dismissed on statute of limitations grounds.

In Ohio, Joseph Borchelt, co-chair of the Professional Liability Committee of the Ohio Association of Civil Trial Attorneys, wrote:

In practicing professional liability litigation for the last 15 years, I have never encountered a claim related to the conduct of lawyers at mediation. Perhaps David (Oberly, co-chair



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of the Professional Liability Committee of OACTA) and John (Garvey, President of OACTA) have different experiences.

Mr. Garvey then wrote:

Jeff, my experience is the same as Joe's, I am not aware of any such.

Mr. Oberly added:

I'm not aware of any claims specifically from lawyer conduct during mediations either.

(Copies of the complete email chains are attached to this letter. I did not receive any responses from defense bar leaders in New Jersey or the District of Columbia.)

The Commission should base its recommendations on evidence, not imaginings. Any fear of a deluge of malpractice claims, which might be used to justify the burdens of merits-based screening over and above the regular processes of demurrers and motions for summary judgment, is imaginary.

3. The fears of the family law mediators are unfounded.

Finally, a note about our friends, the family law mediators.

The family law mediators frequently tout, as a benefit of their process, that it can largely (if not totally) eliminate the need and expense of separate lawyers for the divorcing parties. The family law mediators often express, with pride, that they so often mediate divorces without the involvement of lawyers in the mediations.

The proposed reform to mediation confidentiality deals *only* with the ability to bring malpractice claims against lawyers.

Since so much of the family law mediators' work is done without lawyers involved, the ability to sue lawyers for malpractice committed in mediation shouldn't affect them.



Barbara S. Gaal, Esq.
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Again, I thank the Commission for its consideration of my views. I look forward to continuing to provide information and perspectives which I hope the Commission finds helpful.



Sincerely,

Jeff Kichaven

JK:abm

Att: Email chains

Jeff Kichaven

From: Erin H. Hammond <erin@ehammondlaw.com>
Sent: Monday, July 11, 2016 12:21 PM
To: Jeff Kichaven; bill.kiendl@gmail.com
Subject: RE: Question about legal malpractice claims

Hello Jeff,

I haven't heard of such claims, though I admit that I am not familiar with all the legal malpractice claims that are asserted. (thankfully, probably :)). I suppose the closest thing would be if there were a legal malpractice claim asserted alleging that there was a failure to settle in an exposure situation. I don't know of any of those specifically, but there's always that risk when you've got insufficient insurance (though if a carrier didn't settle and then the insured was hit with an excess verdict, I would think in most cases the carrier would pick up the excess to head off a bad faith claim, unless there was a really good reason to think the claim was less prior to the verdict).

Not sure if that is helpful, but that's the closest I'd come to having info related to your question.

Best,

Erin

Erin H. Hammond

Attorney at Law
5790 Soundview Drive, Ste. 201E
Gig Harbor, WA 98335
Phone (253) 237-0587
Direct (253) 649-4558
Fax (844) 308-5825

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----- Original Message -----

Subject: Question about legal malpractice claims
From: "Jeff Kichaven" <jk@jeffkichaven.com>
Date: Sun, July 10, 2016 9:22 pm
To: <bill.kiendl@gmail.com>, <erin@ehammondlaw.com>

Hello, Ms. Hammond and Mr. Kiendl. My name is Jeff Kichaven. I am a mediator based in California, and I am doing some research on legal malpractice claims arising out of the conduct of lawyers at mediations, in states which have enacted the Uniform Mediation Act (Washington is such a state). I am writing to you because I see that you are the President, and the Chair of the Professional

Jeff Kichaven

From: Mifflin, Mark <mmifflin@giffinwinning.com>
Sent: Monday, July 11, 2016 11:51 AM
To: Jeff Kichaven
Cc: mcviskw@jbltd.com
Subject: RE: Question re legal malpractice claims in Illinois

Mr. Kichaven,

I am not aware of any such claims. However, I caution that I practice in Springfield where the numbers are limited. Maybe Bill can help?

Mark

From: Jeff Kichaven [<mailto:jk@jeffkichaven.com>]
Sent: Sunday, July 10, 2016 11:30 PM
To: Mifflin, Mark
Cc: mcviskw@jbltd.com
Subject: Question re legal malpractice claims in Illinois

Hello, Mr. Mifflin. My name is Jeff Kichaven. I am a mediator based in California, and I am doing some research on legal malpractice claims arising out of the conduct of lawyers at mediations, in states which have enacted the Uniform Mediation Act (Illinois is such a state). I am writing to you because I see that you are the President of the Illinois Association of Defense Trial Counsel. (I include Bill McVisk as a cc recipient of this email because he and I are acquainted with each other through various bar activities.)

In that regard, could you please let me know whether you are aware of any excessive or inappropriate claims of legal malpractice arising out of the conduct of lawyers at mediations in your state in recent years? If you are aware of any such claims or reports of such claims, could you please direct me to them? If you are not aware of any such claims or reports of such claims, I'd appreciate knowing that, too.

Thanks in advance, I really appreciate your help.

-Jeff Kichaven.

Jeff Kichaven

From: William K. McVisk <mcviskw@jbltd.com>
Sent: Monday, July 11, 2016 2:40 PM
To: jk; Mifflin, Mark
Subject: RE: Question re legal malpractice claims in Illinois

So far, the only response I received was about Carlson v. Fish, 2015 IL App (1st) 140526, which alleged malpractice due to failing to obtain independent appraisal of the business before mediation and permitting the plaintiff to attend the mediation without an attorney present. Case was dismissed on statute of limitations grounds.

From: jk [mailto:jk@jeffkichaven.com]
Sent: Monday, July 11, 2016 4:12 PM
To: William K. McVisk; Mifflin, Mark
Subject: RE: Question re legal malpractice claims in Illinois

That would be great. Thanks again!

-- Jeff.

Sent from my Verizon, Samsung Galaxy smartphone

----- Original message -----

From: "William K. McVisk" <mcviskw@jbltd.com>
Date: 7/11/16 1:27 PM (GMT-08:00)
To: jk <jk@jeffkichaven.com>, "Mifflin, Mark" <mmifflin@giffinwinning.com>
Subject: RE: Question re legal malpractice claims in Illinois

Correct. If it would help, I can check with my partners and see whether any of them are aware of this sort of claim.

From: jk [mailto:jk@jeffkichaven.com]
Sent: Monday, July 11, 2016 3:25 PM
To: William K. McVisk; Mifflin, Mark
Subject: RE: Question re legal malpractice claims in Illinois

Thanks, Bill.

By that, do you also mean to say that you are not aware of any claims of legal malpractice arising out of the conduct of lawyers at mediations in Illinois?

Best,

-- Jeff.

Sent from my Verizon, Samsung Galaxy smartphone

----- Original message -----

From: "William K. McVisk" <meviskw@jbltd.com>

Date: 7/11/16 1:22 PM (GMT-08:00)

To: "Mifflin, Mark" <mmifflin@giffinwinning.com>, Jeff Kichaven <jk@jeffkichaven.com>

Subject: RE: Question re legal malpractice claims in Illinois

Hi Jeff and Mark – I am not aware of any legal malpractice claims arising out of the Uniform Mediation Act.

Bill

From: Mifflin, Mark [<mailto:mmifflin@giffinwinning.com>]

Sent: Monday, July 11, 2016 1:51 PM

To: Jeff Kichaven

Cc: William K. McVisk

Subject: RE: Question re legal malpractice claims in Illinois

Mr. Kichaven,

I am not aware of any such claims. However, I caution that I practice in Springfield where the numbers are limited. Maybe Bill can help?

Mark

From: Jeff Kichaven [<mailto:jk@jeffkichaven.com>]

Sent: Sunday, July 10, 2016 11:30 PM

To: Mifflin, Mark

Cc: mcviskw@jbltd.com

Subject: Question re legal malpractice claims in Illinois

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In that regard, could you please let me know whether you are aware of any excessive or inappropriate claims of legal malpractice arising out of the conduct of lawyers at mediations in your state in recent years? If you are aware of any such claims or reports of such claims, could you please direct me to them? If you are not aware of any such claims or reports of such claims, I'd appreciate knowing that, too.

Thanks in advance, I really appreciate your help.

-Jeff Kichaven.

William K. McVisk, Attorney at Law



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From: Jeff Kichaven [mailto:jk@jeffkichaven.com]

Sent: Monday, July 11, 2016 12:36 AM

To: jgarvey@garveyshearer.com; Joseph W. Borchelt <JBorchelt@reminger.com>; djoberly@mdwecg.com

Subject: Question about legal malpractice claims in Ohio

Hello, Messrs. Garvey, Borchelt and Oberly. My name is Jeff Kichaven. I am a mediator based in California, and I am doing some research on legal malpractice claims arising out of the conduct of lawyers at mediations, in states which have enacted the Uniform Mediation Act (Ohio is such a state). I am writing to you because I see that you are the President, and Chairs of the Professional Liability Committee, of the Ohio Association of Civil Trial Attorneys.

In that regard, could you please let me know whether you are aware of any excessive or inappropriate claims of legal malpractice arising out of the conduct of lawyers at mediations in your state in recent years? If you are aware of any such claims or reports of such claims, could you please direct me to them? If you are not aware of any such claims or reports of such claims, I'd appreciate knowing that, too.

Thanks in advance, I really appreciate your help.

-Jeff Kichaven.

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Jeff Kichaven

From: Joseph W. Borchelt <JBorchelt@reminger.com>
Sent: Monday, July 11, 2016 5:34 AM
To: Jeff Kichaven; jgarvey@garveyshearer.com; djoberly@mdwcg.com
Subject: RE: Question about legal malpractice claims in Ohio

Hi Jeff,

Thanks for your email. In practicing professional liability litigation for the last 15 years, I have never encountered a claim related to the conduct of lawyers at mediation. Perhaps David and John have different experiences. Of course, we would welcome the results of your research and we will see if any of our members have any relevant experience. Thanks,

Joe

Joseph W. Borchelt, Esq. - 513-455-4014 (direct)
Reminger Co., L.P.A.

From: Jeff Kichaven [<mailto:jk@jeffkichaven.com>]
Sent: Monday, July 11, 2016 12:36 AM
To: jgarvey@garveyshearer.com; Joseph W. Borchelt <JBorchelt@reminger.com>; djoberly@mdwcg.com
Subject: Question about legal malpractice claims in Ohio

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Thanks in advance, I really appreciate your help.

-Jeff Kichaven.

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Jeff Kichaven

From: John Garvey <jgarvey@garveyshearer.com>
Sent: Monday, July 11, 2016 6:49 AM
To: Joseph W. Borchelt
Cc: Jeff Kichaven; djoberly@mdwcg.com
Subject: Re: Question about legal malpractice claims in Ohio

Jeff, my response is the same as Joe's, I am not aware of any such.

Best wishes to you on your research into this area.

John

garveyshearernordstrom 

John J. Garvey, III Esq.
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On Mon, Jul 11, 2016 at 8:33 AM, Joseph W. Borchelt <JBorchelt@reminger.com> wrote:

Hi Jeff,

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Joe

Joseph W. Borchelt, Esq. - [513-455-4014](tel:513-455-4014) (direct)
Reminger Co., L.P.A.

Jeff Kichaven

From: Oberly, David J. <DJOberly@MDWCG.com>
Sent: Tuesday, July 12, 2016 6:53 AM
To: John Garvey; Joseph W. Borchelt
Cc: Jeff Kichaven
Subject: RE: Question about legal malpractice claims in Ohio

Jeff,

I'm not aware of any claims specifically from lawyer conduct during mediations either.

David

MARSHALL DENNEHEY WARNER COLEMAN & GOGGIN	
ATTORNEYS AT LAW	
PA NJ DE OH FL NY	
David J. Oberly <i>Attorney at Law</i> bio e-mail website	312 Elm Street Suite 1850 Cincinnati, OH 45202 Direct: (513) 372-6817 Main: (513) 372-6800 Fax: (513) 372-6801

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Cc: Jeff Kichaven; Oberly, David J.
Subject: Re: Question about legal malpractice claims in Ohio

Jeff, my response is the same as Joe's, I am not aware of any such.

Best wishes to you on your research into this area.

John

garveyshearnordstrom.com 

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