

## First Supplement to Memorandum 2016-49

**Relationship Between Mediation Confidentiality and Attorney Malpractice  
and Other Misconduct: Certification Requirements**

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The Commission<sup>1</sup> received a comment from Prof. Richard Zitrin (UC Hastings College of Law) regarding specialist certification requirements, which is attached as an exhibit. Prof. Zitrin supports the creation of a new mediation confidentiality exception along the lines the Commission has been discussing (see Memorandum 2016-18). He does not think a specialist certification requirement “should be added to further narrow the exception to the privilege.” His letter clearly and succinctly explains his reasoning.

Respectfully submitted,

Barbara Gaal  
Chief Deputy Counsel

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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](http://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.



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September 20, 2016

Barbara Gaal  
Chief Deputy Counsel  
California Rules Revision Commission  
**BY EMAIL ONLY: [bgaal@clrc.ca.gov](mailto:bgaal@clrc.ca.gov)**

Re: Comment on mediation privilege

Dear Ms. Gaal:

As you may recall, in my capacity as a legal ethics professor and practitioner, I have previously published articles on this subject, and commented to staff – I believe both in writing and orally. It is now time for me to provide another comment.

The Commission devised a thoughtful and, I believe, very narrow exception to the mediation privilege in its tentative recommendation contained in Memorandum 2016-18 published in April of this year. Now, an issue has been raised whether a certification process should be added to further narrow the exception to the privilege. In short, it should not.

The MM 2016-18 analysis is excellent. The recommendation is extremely narrow, tailored to legislatively modify the Supreme Court's ruling in *Casse!*. Not only is there no need for further narrowing, but requiring a certification procedure is likely to result in a chilling effect on access to justice for unsophisticated or *in pro per* plaintiffs and similarly unsophisticated lawyers.

I am a certified specialist in legal malpractice in addition to my position on the full-time Hastings faculty. As such, I am one of those who could, if necessary, certify a proposed complaint. During the course of my career, I have examined approximately 1,500 malpractice or attorneys' fees complaints as an expert consultant or possible litigator. In reviewing these complaints, I almost never see pleadings that would not survive demurrer and even summary adjudication. Indeed, I cannot remember the last time I saw a complaint that was frivolous or that I would not be able to certify.

I can also attest to the fact that the vast, vast majority of cases, have clear factual bases for a claim of professional negligence and/or breach of fiduciary duty. The real issue in most cases is proving causation and damages. But those cases would be certifiable.

The certification process serves no beneficial purpose whatever, other than perhaps to enrich certified specialists like me who will charge for their review of the complaint. This just creates further costs to plaintiffs before they get to the courthouse. It creates a roadblock that will inhibit some from being able to adjudicate their cases in our courts. As the recent memorandum 2016-49 notes, there is a real danger of a "procedural booby trap" that "allows potentially meritorious claims to be decided on procedural grounds." That should not happen.

Respectfully yours,



Richard Zitrin