Study K-402 January 31, 2017

First Supplement to Memorandum 2017-9

Relationship Between Mediation Confidentiality and Attorney Malpractice and Other Misconduct (Public Comment)

Attached are the following new materials for members of the Commission[1] to consider:

Those materials are discussed briefly below.

COMMENTS OF CCBA

Larry Doyle reports that the Conference of California Bar Associations ("CCBA") supports Discussion Draft #2 (the draft legislation attached to Memorandum 2017-8).[2] CCBA regards that draft as "an excellent effort to provide necessary protections for mediation participants with minimal risk to the process."[3]

CCBA "is uncertain of the merit" of the notice requirement in subdivision (d) of proposed Evidence Code Section 1120.5, "but will defer to the good judgment of the Commission's members."[4] CCBA "does recommend, however, that service not be restricted to mail only, but that personal service also be permitted."[5]

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.*
4. *Id.*
5. *Id.*

CCBA points out that personal service "serves the purpose of serving notice as well or better than any other type of service, and making it impermissible to use serves no benefit and only creates a trap for the unwary lawyer."[6]

This is a good point. To address it, **the staff recommends revising proposed Section 1120.5(d) as follows:**

> (d) Upon filing a complaint or a cross-complaint that includes a cause of action for damages against a lawyer based on alleged malpractice in the context of a mediation or a mediation consultation, the plaintiff or cross-complainant shall serve the complaint or cross-complaint ~~by mail, in compliance with Sections 1013 and 1031 of the Code of Civil Procedure,~~ on all of the mediation participants whose identities and addresses are reasonably ascertainable. Service shall be made in compliance with Chapter 5 (commencing with Section 1010) of the Code of Civil Procedure, by mail or any other means authorized in that chapter. This requirement is in addition to, not in lieu of, other requirements relating to service of the complaint or cross-complaint.

Would the Commission like to make this change?

ROBERT FLACK'S INQUIRY REGARDING UMA ENDORSEMENTS

Attached to Memorandum 2016-59 (Possible Additional Reforms to Include in the Tentative Recommendation) is the staff's *Compilation of Possible Approaches*, which includes the possibility of enacting the Uniform Mediation Act ("UMA") in California.[7] In describing that possibility, the staff pointed out that the UMA "has been endorsed by the American Arbitration Ass'n, the Judicial Arbitration & Mediation Service ("JAMS"), the CPR Institute for Dispute Resolution, and the Nat'l Arbitration Forum."[8]

In December, mediator Robert Flack informed the staff that he had tried to confirm "the assertion that AAA and JAMS have supported the UMA."[9] He said that AAA could not find any record of taking a public position on this issue.[10] He further reported that Jay Welsh of JAMS testified to the Senate Judiciary Committee in February 2016 that "JAMS never takes a public position."[11] He

6. *Id.*
7. See Memorandum 2016-59, Exhibit p. 23.
8. *Id.*
9. Email from Robert Flack to Barbara Gaal (12.12/16).
10. *Id.*
11. *Id.*

asked whether the staff had any information that would "shed light on this topic."[12]

In response, the staff referred Mr. Flack to the Uniform Law Commission's website, which states that the UMA was "Endorsed by the American Arbitration Association" and "Endorsed by the Judicial Arbitration and Mediation Service."[13] The staff also contacted the Uniform Law Commission ("ULC"), in hopes of obtaining copies of the AAA and JAMS endorsements.

The ULC has since provided a copy of the JAMS endorsement, which is dated July 23, 2001.[14] Among other things, JAMS states that "[b]ased on its review of the final draft of the Uniform Mediation Act, JAMS is pleased to express support and encourages its adoption by the National Conference of Commissioners on Uniform State Laws."[15]

The ULC has not yet given us a copy of the AAA endorsement. If we obtain it, we will share it with the Commission and the participants in this study.

LETTER FROM RON KELLY TO LORETTA VAN DER POL AND J. FELIX DE LA TORRE

Memorandum 2017-8 (Further Work on Draft Tentative Recommendation) discusses a letter to the Commission from Loretta Van Der Pol and J. Felix De La Torre on behalf of the Public Employment Relations Board ("PERB").[16] In response to that letter and a subsequent phone call in which the staff sought clarification of PERB's comments,[17] the staff raises the possibility of revising proposed Section 1120.5 and the corresponding Comment along the following lines:

> 1120.5. (a) A communication or a writing that is made or prepared for the purpose of, or in the course of, or pursuant to, a

12. *Id.*
13. See http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Mediation%20Act.
14. See Exhibit p. 3.
15. *Id.*
16. See Memorandum 2017-8, pp. 5-7 & Exhibit pp. 1-5.
17. The staff particularly sought clarification of PERB's reference to *proposed language* that

> goes on to describe how, in determining whether or not a plaintiff has cause to pursue a claim of misconduct, mediation documents could be unsealed and testimony in some form could be required. As one example, the proposed legislation would permit a party to compel the attendance of a PERB mediator at a deposition to provide evidence as a witness, requiring disclosure of otherwise confidential information.

Id. at 6 & Exhibit p. 1 (boldface omitted).

mediation or a mediation consultation, is not made inadmissible, or protected from disclosure, by provisions of this chapter if ….

(e) Nothing in this section is intended to affect the extent to which a mediator is, or is not, immune from liability under existing law.

(f) Nothing in this section is intended to affect the extent to which a mediator is, or is not, competent to provide evidence under Section 703.5.

Comment. Section 1120.5 is added to ….

Subdivision (e) makes clear that the enactment of this section has no impact on the state of the law relating to mediator immunity.

Subdivision (f) makes clear that the enactment of this section has no impact on the state of the law relating to a mediator's competency to provide evidence about a mediation. See Section 703.5 (in general, no mediator "shall be competent to testify, in any subsequent civil proceeding, as to any statement, conduct, decision, or ruling, occurring at or in conjunction with the prior proceeding").

See Sections 250 ("writing"), 1115(a), (c) ("mediation" and "mediation consultation"). ~~For restrictions on mediator testimony, see Section 703.5.~~ For availability of sanctions, see, e.g., Section 1127; Code Civ. Proc. §§ 128.5, 128.7.[18]

After the staff released Memorandum 2017-8, mediator Ron Kelly sent a letter to the PERB representatives about it. He copied that letter to the staff and asked the staff to present it to the Commission. We describe his letter below and then provide some analysis.

Content of Mr. Kelly's Letter

In his letter to the PERB representatives, Mr. Kelly stresses that the State Mediation and Conciliation Service (a division of PERB), has long-maintained that mediation confidentiality is important,[19] and has previously informed this Commission that "'[w]ere SMCS to lose the promise of absolute confidentiality, it risks losing its neutrality in the eyes of [its] constituents.'"[20] He goes on to say:

> In response, the Commission did make some partial amendments to their draft statute. They decided to retain our current protections against a mediator being called to testify against any party in a later malpractice action. However, … their current draft statute (see

18. See *id.* at 6-7.
19. See Exhibit pp. 4-5.
20. See *id.* at 5, *quoting* Letter from Loretta Van Der Pol and Felix De La Torre to Barbara Gaal & Commission Members (Oct. 1, 2015) (reproduced in Third Supplement to Memorandum 2015-46, Exhibit pp. 7-8).

> Discussion Draft #2, Staff Memorandum 2017-08) will still remove our current protections against a mediator being called to testify in State Bar Court. It will still remove our current protections against a mediator being required to turn over copies of confidential mediation briefs, confidential emails to and from the parties, and other currently confidential documents in a mediator's files, both in malpractice actions and in State Bar Court proceedings.[21]

Mr. Kelly also criticizes the draft Comment shown above, particularly the sentence that says: "See Section 703.5 (in general, no mediator 'shall be competent to testify, in any subsequent civil proceeding, as to any statement, conduct, decision, or ruling, occurring at or in conjunction with the prior proceeding')." He says:

> While technically correct, this comment is misleading because it makes no mention of the many exceptions in 703.5, including exception (c) which specifically will permit requiring mediators to testify in State Bar Court if the Commission's current proposal is enacted. The State Bar Court has found that Evidence Code section 1119 makes mediation communications inadmissible in that forum. But the Commission's current draft legislation will specifically remove 1119's protections in State Bar Court, and 703.5 will not replace them.[22]

Finally, Mr. Kelly says that the Commission "declined to fully follow" PERB's requests and "has likewise largely ignored similar requests by the California Judges Association in their letter dated March 24, 2016."[23] He urges PERB to attend the upcoming Commission meeting and "directly explain again the Service's consistent position in favor of strong and predictable mediation confidentiality protections that cannot be removed on the mere allegation of attorney misconduct."[24]

Analysis of Mr. Kelly's Letter

In considering Mr. Kelly's letter, the Commission and others should keep a number of points in mind.

- Evidence Code Section 703.5 governs a mediator's competency to testify, while Evidence Code Sections 1115-1128 govern the admissibility, discoverability, and confidentiality of mediation communications.

21. Exhibit p. 5 (underlining in original).
22. *Id.* (underlining in original).
23. *Id.*
24. Exhibit p. 6.

- Section 703.5 establishes a general rule that a mediator is incompetent to testify about a mediation in a subsequent civil proceeding. It says that no mediator "shall be competent to testify, in any subsequent civil proceeding, as to any statement, conduct, decision, or ruling, occurring at or in conjunction with the prior proceeding …."
- A subpoena seeking production of documents necessarily also seeks testimony, either oral testimony or an affidavit authenticating the documents.[25] Because a mediator generally is incompetent to testify under Section 703.5, a mediator generally cannot be compelled to produce documents.
- The Commission's proposal *would not change* Section 703.5. That provision would remain entirely untouched.[26]
- It is incorrect to say that the Commission's proposal will "remove our current protections against a mediator being required to turn over copies of confidential mediation briefs, confidential emails to and from the parties, and other currently confidential documents in a mediator's files … in malpractice actions."[27] As explained above, any subpoena for such materials in a malpractice case would necessarily also require testimony, which a mediator could not be compelled to provide because a mediator will remain incompetent to testify in such a case under Section 703.5.
- It is incorrect to say that the Commission's proposal will "*remove* our current protections against a mediator being called to testify in State Bar Court."[28] The general rule of Section 703.5 *is already subject to* several exceptions, including an exception making it inapplicable to "a statement or conduct that could … (c) be the subject of investigation by the State Bar …."[29]
- The draft Comment shown above acknowledges the existence of those exceptions. It states that "*in general*, no mediator "shall be competent to testify in any subsequent civil proceeding, as to any statement, conduct, decision, or ruling, occurring at or in conjunction with the prior proceeding."[30]
- Evidence Code Section 1119 establishes a general rule making mediation communications confidential and protecting them from

25. See Evid. Code § 1561; Code Civ. Proc. § 2020.020; see generally Robert Weil & Ira Brown, Jr., California Practice Guide: Civil Procedure Before Trial (2016).
26. See Discussion Draft #2 (Memorandum 2017-8, Attachment pp. 1-3).
27. Exhibit p. 5.
28. *Id*. (emphasis added).

It is likewise incorrect to say that Evidence Code Section 703.5 "will permit requiring mediators to testify in State Bar Court *if the Commission's current proposal is enacted*." Exhibit p. 5 (underlining in original; italics added). Section 703.5 *already does* permit requiring mediators to testify in State Bar Court. For example, in a State Bar proceeding, a mediator *could already* be called to authenticate an agreement to mediate a dispute.

29. Evid. Code § 703.5.
30. Emphasis added.

admissibility or disclosure in a subsequent noncriminal proceeding.[31]

- Like Section 703.5, Section 1119 is already subject to various exceptions and limitations. Its protection is *not* absolute, nor does it apply in every jurisdiction where a party might subpoena a California mediator to testify.[32]
- The Commission's proposal would create a narrow new exception to Section 1119. In specified circumstances, it would make a mediation communication admissible and subject to disclosure to prove or disprove an allegation of attorney misconduct in a mediation context. *To that extent only*, "the Commission's current draft legislation will specifically remove 1119's protections …."[33]
- Because a mediator is already competent to testify in a State Bar proceeding, creation of this new exception would add one more topic to the range of topics a mediator might have to testify about in such a proceeding, which typically is kept confidential.[34]
- As discussed in Memorandum 2017-8, Loretta Van Der Pol informed the staff that PERB's big concern is the prospect of forcing a mediator to provide evidence relating to a mediation.
- The revisions suggested at pages 6-7 of Memorandum 2017-8 would underscore that the Commission's proposal will not affect the general rule that a mediator is incompetent to provide

---

31. Section 1119 provides:

> *Except as otherwise provided by this chapter:*
>
> (a) No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery, and disclosure of the evidence shall not be compelled, in any arbitration, admistrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.
>
> (b) No writing, as defined in Section 250, that is prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation, is admissible or subject to discovery, and disclosure of the writing shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.
>
> (c) All communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential.

(Emphasis added.)

32. See, e.g., Memorandum 2014-14, pp. 8-9 & sources cited therein; Memorandum 2014-58 & sources cited therein.

33. Exhibit p. 5. The same limitation applies to the statement that the Commission's proposal will "remove our current protections against a mediator being required to turn over copies of confidential mediation briefs, confidential emails to and from the parties, and other currently confidential documents in a mediator's files … in State Bar Court proceedings." *Id.*

34. With some limitations, "[a]ll disciplinary investigations are confidential until the time that formal charges are filed …." Bus. & Prof. Code § 6086.1(b); see also State Bar R. Proc. 2302. For further discussion of the extent to which a State Bar disciplinary proceeding is confidential, see Memorandum 2015-22, pp. 44-45 & sources cited therein.

evidence relating to a mediation (Section 703.5). While this would not completely eliminate any impact on mediators, the staff continues to believe that this revision is advisable and should go a long way towards addressing PERB's big concern.

- The Commission has not "largely ignored" the input of the California Judges Association ("CJA"). CJA's comments were attached to and discussed in a staff memorandum that the Commission considered in April of last year.[35] CJA's views have been further discussed on a number of occasions since then, especially when Judge David Long (ret.) of CJA testified at length to the Commission last December.

COMMENTS OF JEFF KICHAVEN

Mediator Jeff Kichaven submitted another letter for the Commission to consider, which makes some new points and reiterates a number of points he has previously made. His new points relate to two different topics.

First, he says there have been claims that the Commission's proposal "would constitute changing the confidentiality rules after the fact for participants in any particular mediation."[36] He rebuts those claims, explaining:

> Under the proposed reforms, the confidentiality rules are quite clear in advance. The mediation is confidential, as before, but confidentiality will give way in any case of legal malpractice arising out of the conduct of a lawyer representing a client at that mediation. What about this changes the rules after the fact? The condition is quite clear from the outset.[37]

Second, Mr. Kichaven criticizes the possibility (discussed at pages 5-18 of Memorandum 2016-59) of statutorily requiring that certain information be provided to a party before the party decides whether to mediate. He says:

> Some of the discussion of the proposed "confidentiality forms" would force mediators to meddle in [attorney-client communications regarding whether to mediate]. In the course of this meddling, mediators would be required to give legal advice. We all know that mediators should not do that, and certainly should not be required to do that.[38]

Obviously, this criticism would only apply if a mediator was statutorily required to help ensure compliance with a disclosure requirement.

---

35. See Memorandum 2016-19, pp. 2-3 & Exhibit pp. 5-6.
36. Exhibit p. 8.
37. *Id.*
38. *Id.*

Mr. Kichaven also states that if "lawyers (or mediators) are required to procure signatures on particular forms in particular ways at particular times, … [l]awyers (or mediators) would be subject to a 'gotcha' any time the required signatures were not procured in the right way, or at the right time, or in any other regard that is not completely to the letter of the rule."[39] He says that "[e]very such 'gotcha' could be the basis of a legal malpractice claim."[40] He therefore concludes that "it makes no sense for the mediation establishment to support more rules … with which the 'trigger-happy plaintiff's bar' could make lawyers (or mediators) sitting ducks."[41]

Previous input in this study suggests that many mediators view the situation differently.[42] We invite further comment on this point from both sides at the upcoming meeting.

Respectfully submitted,

Barbara Gaal
Chief Deputy Counsel

39. Exhibit p. 9.
40. *Id.*
41. *Id.*
42. See, e.g., Memorandum 2016-59, p. 6 n.17.

LARRY DOYLE, LEGISLATIVE REPRESENTATIVE
TELEPHONE: 916-761-8959
FACSIMILE: 916-583-7672
EMAIL: LARRY@LARRYDOYLELAW.COM

January 25, 2017

The Hon. Chair and Members
California Law Revision Commission
c/o UC Davis School of Law
400 Mrak Hall Drive
Davis, CA 95616

Study K-402 – Relationship Between Mediation Confidentiality and Attorney Malpractice and Other Misconduct
Support for Revised Draft of Legislation (Memo 2017-8)

Dear Chairman Lee and CLRC Members and Staff:

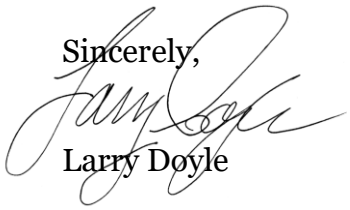
The Conference of California Bar Associations (CCBA), a statewide organization of attorneys representing more than 30 metropolitan, regional and specialty bar associations, continues to support the Revised Draft Legislation to Implement the Commission's Preliminary Decisions (1/19/2017) embodied in Memorandum 2017-8 of Study K-402 ("Relationship Between Mediation Confidentiality and Attorney Malpractice and Other Misconduct").

The CCBA is uncertain of the merit of imposing an additional notice requirement on plaintiffs or cross-complainants in any cause of action based on alleged malpractice in the context of a mediation or a mediation consultation, but will defer to the good judgment of the Commission's members. The CCBA does recommend, however, that service not be restricted to mail only, but that personal service also be permitted. Personal service serves the purpose of serving notice as well or better than any other type of service, and making it impermissible to use serves no benefit and only creates a trap for the unwary lawyer.

As noted in the CCBA's last letter in support of the original Discussion Draft, the Revised Draft Legislation represents an excellent effort to provide necessary protections for mediation participants with minimal risk to the process. The Tentative Recommendation ultimately issued should include the Draft Legislation, and only such further suggestions as might supplement its effectiveness.

Thank you again for your valuable efforts on this important issue. Please contact me at (916) 761-8959 or Larry@LarryDoyleLaw.com if I can be of assistance.

Sincerely,



Larry Doyle

Via Facsimile and First Class Mail

July 23, 2001

Professor Nancy H. Rogers
Reporter, NCCUSL Drafting Committee
Ohio State University
Office of Academic Affairs
203 Bricker Hall
190 N. Oval Mall
Columbus, Ohio 43210
FAX: (614) 292-3658

Professor Richard C. Reuben
Reporter, ABA Drafting Committee
University of Missouri Law School
Hulston Hall
Columbia, MO 65211
FAX: (573) 882-3343

Dear Professor Rogers and Professor Reuben:

For the last four years, JAMS has been an "official observer" at the meetings of the Drafting Committee for the Uniform Mediation Act. Because mediation is so central to the work of JAMS' 250 neutrals, we have appreciated having the opportunity to participate in the meetings and to comment on the many released drafts. We have also appreciated and observed, first hand, the efforts and dedication of the Drafting Committee.

JAMS believes that the Uniform Mediation Act represents a significant accomplishment. Although it warrants support for many reasons, three particular stengths stand out.

First, the Act provides a standard of confidentiality that could apply, uniformly, to mediations in different states. Currently, mediators and parties face multiple confidentiality statutues that vary widely from state to state; a national standard promotes simplicity and predictability.

Second, the Act recognizes both the crucial importance of confidentiality to the mediation process and the occasional need for evidence in particular cases, and strikes the right balance. We strongly support the addition of commentary to make clear that confidentiality extends to a mediator's mental impressions based on mediation communications and conduct.

Third, the Act does not create new affirmative obligations or duties that might create the potential of civil liability for unwary parties, mediators, or non-party participants.

Based on its review of the final draft of the Uniform Mediation Act, JAMS is pleased to express support and encourages its adoption by the National Conference of Commissioners on Uniform State Laws.

Sincerely,

Michael D. Young
Co-chair, Professional Standards and Public Policy Committee

MESSAGE FROM RON KELLY TO LORETTA VAN DER POL AND J. FELIX DE LA TORRE (1/25/17)

Ms. Loretta Van Der Pol
Chief, State Mediation and Conciliation Service

Mr. J. Felix De La Torre
General Counsel, Public Employment Relations Board

Re: Proposed Legislation to Remove Current Mediation Confidentiality Protections on Allegation of Lawyer Misconduct
California Law Revision Commission Study K-402

This letter is in response to your letter to the Commission dated December 1, 2016, which was made public only last week.

Consistent Position. For more than three decades, the State Mediation and Conciliation Service has consistently communicated its position on confidentiality to the Commission and the Legislature. In 1985, the Legislature was considering the Commission's recommendation to enact California's first general mediation confidentiality statute — then Evidence Code section 1152.5. The Service submitted its March 26, 1985 letter to the Legislature to emphasize the fundamental importance of predictable confidentiality. It wrote:

> "It is essential to its role that confidentiality not only be maintained, but have no reason to be questioned."

In 1997 the Commission was drafting our current general mediation confidentiality statutes — Evidence Code sections 1115-1128. The SMCS again wrote the Commission. SMCS requested they amend the new draft statutes, this time to specifically cover the SMCS, and to expand the protections under Labor Code section 65 for communications in mediations conducted by the Service. The Commission did so.

On October 1, 2015, the Service again wrote to the Commission regarding its current Study K-402. You both also appeared before the Commission. You again emphasized the importance of confidentiality to the public benefit work of the Service. You asked the Commission to amend its then current draft. You asked them to guarantee that parties in mediation could continue to have confidence that their mediator would not later become a witness against any of them. You asked them to guarantee that parties in mediation could continue to have confidence that written communications between any party and the mediator would also remain confidential. You warned:

> "Were SMCS to lose the promise of absolute confidentiality, it risks losing its neutrality in the eyes of our constituents. The result would be failed mediations and costly and disruptive labor disputes."

Partial Amendments. In response, the Commission did make some partial amendments to their draft statute. They decided to retain our current protections against a mediator being called to testify against any party in a later malpractice action. However, as you point out, their current draft statute (see Discussion Draft #2, Staff Memorandum 2017-08) will still remove our current protections against a mediator being called to testify in State Bar Court. It will still remove our current protections against a mediator being required to turn over copies of confidential mediation briefs, confidential emails to and from the parties, and other currently confidential documents in a mediator's files, both in malpractice actions and in State Bar Court proceedings.

Misleading Draft Comment. In the Service's recent letter dated December 1, 2016, you pointed out that the Commission's current draft

> "is not sufficient to protect the confidentiality of its mediation work, as the language then goes on to describe how, **in determining whether or not a plaintiff has cause to pursue a claim of misconduct,** mediation documents could be unsealed and testimony in some form could be required."

Your statement is correct. In Memorandum 2017-8 however, Commission staff responds expressing confusion about why the Service continues to request that our current protections remain in place for the mediators and attorneys who work for the Service and for all other California public departments and agencies with formal mediation programs. In response staff proposes to add an unfortunately misleading comment. The comment would read in relevant part:

> "See Section 703.5 (in general, no mediator 'shall be competent to testify, in any subsequent civil proceeding, as to any statement, conduct, decision, or ruling, occurring at or in conjunction with the prior proceeding')." (MM 17-08 page 7)

While technically correct, this comment is misleading because it makes no mention of the many exceptions in 703.5, including exception (c) which specifically will permit requiring mediators to testify in State Bar Court if the Commission's current proposal is enacted. The State Bar Court has found that Evidence Code section 1119 makes mediation communications inadmissible in that forum. But the Commission's current draft legislation will specifically remove 1119's protections in State Bar Court, and 703.5 will not replace them.

Similar CJA Requests Ignored. The Commission has so far declined to fully follow the requests by the Service noted above. It has likewise largely ignored similar requests by the California Judges Association in their letter dated March 24, 2016. The CJA also asserted the importance of mediation confidentiality, and opposed entirely the

Commission's current proposal to remove confidentiality protections. The CJA also asked that the Commission, at the very least, keep current protections against mediators being required to testify in all forums, including State Bar Court, keep current protections against mediators being required to turn over their files, and maintain mediators' ability to communicate privately by email with the parties.

I respectfully urge you to attend the Commission's upcoming meeting on February 2, 2017 and to directly explain again the Service's consistent position in favor of strong and predictable mediation confidentiality protections that cannot be removed on the mere allegation of attorney misconduct.

Yours,

Ron Kelly, Mediator
2731 Webster St.
Berkeley, CA 94705
ronkelly@roneklly.com

cc Ms. Barbara Sandra Gaal, Chief Deputy Counsel, California Law Revision Commission

PS to Mr. Gaal — Please consider this email to be formally submitted to the Commission as public comment and convey it to the Commission. Thank you. RK

JEFF KICHAVEN
COMMERCIAL MEDIATION

555 W. Fifth St., Suite 3100, Los Angeles, CA 90013
310.721.5785 Direct 888.425.2520 Scheduling jk@jeffkichaven.com

January 26, 2017

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

In Re: Mediation Confidentiality

Dear Ms. Gaal:

The Commission continues to entertain cries of wolf from the mediation establishment that "reducing the level of confidentiality will have a chilling effect on mediation discussions, which will undermine the effectiveness of those discussions and consequently burden the courts with disputes that might otherwise be resolved in mediation." (MM16-59s1, p. 3.) The mediation establishment continues to fail to present actual evidence of such problems where a lesser level of confidentiality is the law (District of Columbia, Illinois, New Jersey, New York, Ohio, Washington). Every month, it seems that a different member of the mediation establishment is the crier. In the absence of actual evidence to support these cries of wolf, though, the repetition adds nothing to those cries' lack of merit.

Two pillars of the Rule of Law, though, continue to have merit:

> "For every wrong there is a remedy." (Civ. C. sec. 3523)
>
> "… (A)ll relevant evidence is admissible." (Ev. C. sec. 351)

The admissibility of all relevant evidence is an important guarantor that judges and juries will get decisions right, and achieve the essential goal of providing a remedy for every wrong.

The proposed reforms before the Commission would move California's mediation confidentiality rules toward the mainstream of American law, without any demonstrable harm to the mediation process. The Commission has been at this task for a long time. I hope that the Commission soon forwards its final recommendations to the legislature, so that the process can move to its next stage.

This month, there are two cries of wolf to be addressed. One suggests that the proposed reforms would constitute changing the confidentiality rules after the fact for participants in any particular mediation. The other would require the distribution and signature of sundry forms before any particular mediation begins. Both of these cries deserve to be ignored.

The proposed reforms do not change confidentiality rules after the fact

Under the proposed reforms, the confidentiality rules are quite clear in advance. The mediation is confidential, as before, but confidentiality will give way in any case of legal malpractice arising out of the conduct of a lawyer representing a client at that mediation. What about this changes the rules after the fact? The condition is quite clear from the outset.

And, importantly, there is zero actual evidence that a rule of this type will cause any problems. This rule is the law in the UMA jurisdictions (District of Columbia, Illinois, New Jersey, Ohio, Washington), and there is no actual evidence that it has caused any problems in any of those places. An even lesser standard of confidentiality applies in New York, and there is no actual evidence of any problems there, either.

The proposed new "confidentiality forms" would cause new problems

The mediation establishment suggests that parties be required to sign various forms regarding confidentiality before any particular mediation begins. Though good intentions pave the road to these forms, they are a bad idea.

Lawyers already have a professional responsibility to advise clients as to how candid they should or should not be at a mediation, and as to whether they should pick a "mediation" over a "settlement conference," based on applicable law. That's legal advice, and giving it is within a lawyer's standard of care.

Some of the discussion of the proposed "confidentiality forms" would force mediators to meddle in these attorney-client communications. (First Supplement to Memorandum 2016-60, p.9.) In the course of this meddling, mediators would be required to give legal advice. We all know that mediators should not do that, and certainly should not be required to do that.

Moreover, this would make mediators condition their service on participants signing forms. But mediation is supposed to be a flexible process, and we would sacrifice some of that flexibility if we hamstring mediation with a requirement of producing forms and procuring signatures on them.

There does not seem to be any problem with the current situation, in which lawyers are responsible for advising clients as to degrees of candor and the selection of particular dispute resolution processes. Although we use the phrase "absolute confidentiality" to describe our current rules, we all know that mediation confidentiality is not absolutely absolute, as you correctly note on page 10 of the First Supplement to Memorandum 2016-60. So there are already things for lawyers to explain to clients about mediation confidentiality. The absence of any actual evidence of problems in connection with this state of affairs supports the conclusion that in fact there are no problems. The proposed solution to this non-problem is a lot of rigamarole for no good reason.

Worse, the proposed rigamarole is risky and dangerous. Currently, the obligation to advise the client as to these matters is part of a lawyer's standard of care. The question of whether a *standard* is met in any particular case is answered flexibly, depending on all of the facts and circumstances. If instead lawyers (or mediators) are required to procure signatures on particular forms in particular ways at particular times, lawyer (or mediator) conduct in this area would no longer be governed by a *standard*, but rather by a *rule*. Lawyers (or mediators) would be subject to a "gotcha" any time the required signatures were not procured in the right way, or at the right time, or in any other regard that is not completely to the letter of the rule. Every such "gotcha" could be the basis of a legal malpractice claim. And, the failure to follow a rule faithfully is easier to prove than a failure to meet a contextual standard. That's an important difference between standard and a rule.

Please recall, the mediation establishment has already told the Commission that they believe California's consumer attorneys to be trigger-happy when it comes to legal malpractice claims. The mediation establishment has opposed the proposed changes to mediation confidentiality because they assert that those changes would result in more legal malpractice litigation – and they profess an interest in keeping legal malpractice claims down. So it makes no sense for the mediation establishment to support more rules – and unnecessary rules, at that -- with which the "trigger-happy plaintiff's bar" could make lawyers (or mediators!) sitting ducks.

The Commission should recommend changes to Evidence Code Section 703.5 to allow mediators to testify

The Commission would make a serious mistake if it does not recommend changes to Evidence Code section 703.5 to allow mediators to testify. Such a change is important to the conduct of fair trials of the trials of the (rare) legal malpractice claims which the proposed changes would allow. I have described the need for this change in previous correspondence.

As always, I thank the Commission for its generous consideration of my views, and for its commitment to consumer protection and the Rule of Law. I plan to attend the February 2 meeting in Sacramento, and will be happy to provide any further information or answer any questions the Commission may have.

Sincerely,

Jeff Kichaven

JK:abm