

## Second Supplement to Memorandum 2017-30

**Relationship Between Mediation Confidentiality and Attorney Malpractice  
and Other Misconduct (Draft Tentative Recommendation)**

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The First Supplement to Memorandum 2017-30 describes a recent *Daily Journal* column by Lisa Zonder.<sup>1</sup> At Ms. Zonder's request, a copy of that column is attached, with permission from the *Daily Journal*.

Respectfully submitted,

Barbara Gaal  
Chief Deputy Counsel

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<sup>1</sup>. 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.

FRIDAY, MAY 26, 2017

## GUEST COLUMN

## Balance needed in mediation confidentiality reform

By Lisa Zonder

Statewide, mediators report that they will quit mediating if they cannot have frank discussions off the record with mediation participants. The California Law Revision Commission's (CLRC) next draft of its Tentative Recommendation will likely protect the mediator's files from being produced. The proposed amendment to Evidence Code Section 1120.5 will expressly treat the mediator as incompetent to testify or provide written evidence consistent with Evidence Code Section 703.5. This appears on the surface to protect the mediator, but fails to protect the mediation process.

There are two huge problems that cannot be overlooked: First, written communications (even those the parties send to the mediator) are stored electronically. If these writings are stored on the client's email server the current draft will need to be written to protect these as well. Their current draft would make admissible communications or writings directly from the mediation room made by the parties even if the evidence cannot be secured directly from the mediator. Second, the CLRC appears to favor a distinction between communications made by the mediator, which would remain strictly confidential, and communications by the parties or attorneys while they are with the mediator. To participate in the process fully and without reservation, they need to know that their own communications will be equally protected. On the other side of the coin, consulting lawyers can take little comfort from a rule that leaves broad categories of potentially relevant evidence off-limits in defending against a malpractice claim.

At its last meeting, the CLRC realized that under their current

***Attorneys defending against malpractice don't want to be handcuffed from introducing evidence including communications and writings from the mediation they need in order to give context to any evidence or allegation raised by a client.***

draft, there would be no barrier to or prohibition against trial counsel issuing a subpoena to an internet provider or conducting e-discovery to secure the contents of the mediation communication generated by either of the parties. The CLRC has acknowledged this concern and promised further research on how it might be addressed. Unless this is changed, we would no longer be able to assure our mediation clients that "what happens in mediation stays in mediation." When that day comes many, if not most, of us will quit mediating. Mediators and litigators may be "white knuckling" what feels like a roller coaster ride of evolving proposed legislation on the topic of mediation confidentiality.

For nearly 19 years, mediation clients have been able to speak frankly to the mediator and off the record without creating evidence that could be later used against them in court, except for criminal matters. A rare byproduct of strict mediation confidentiality is the potential immunization of attorneys against malpractice claims. Leaving consumers with no recourse is unfair. Study K-402 by the CLRC has been underway for several years now to help carve out a malpractice exception. The CLRC's unenviable job is to balance the scales to solve this difficult equation.

Recall the child's fairy tale Goldilocks, would the bears find the porridge too hot, too cold or just right? The California Conference of Bar Associations' (CCBA) original 2011 proposal sets forth an exception to strict mediation confidentiality for communications between

a lawyer and his or her client only. The CCBA's original 2011 proposal should be revisited; with a few revisions, it remains a more palatable option than the Tentative Recommendation.

The CLRC meets again in June. The CCBA urges protection from malpractice and unethical conduct by attorneys. Attorneys defending against malpractice don't want to be handcuffed from introducing evidence including communications and writings from the mediation they need in order to give context to any evidence or allegation raised by a client. The one-way street where only the client gets evidence through the door has been labeled "unworkable." Evidence needs to be admissible to either prove or disprove allegations of malpractice.

In trying to appease all of these legitimate concerns, it's inevitable that tipping the scales in any one direction might result in unwanted repercussions. This is the case with trying to create a two-way street for admissibility of evidence to prove or disprove allegations of malpractice. The current position seems to tackle that problem. The CLRC met April 13 in Oakland and considered Memorandum 2017-19, a partial draft of a Tentative Recommendation. They also considered Memo 2017-20. The new exception would apply to mediation communications or writings if relevant to prove or disprove an allegation that a lawyer breached a professional requirement when representing a client in a mediation or mediation consultation. The evidence is to be used in connection with a State Bar

complaint, an attorney/client fee dispute arbitration conducted by the State Bar or local county bar association, or an action for malpractice.

Public CLRC documents reveal that the CCBA currently supports the CLRC's current draft as preferable to its own. To avoid shielding acts of malpractice, the CCBA Resolution 10-06-2011 originally sought to make admissible mediation "communications directly between the client and his or her attorney, only." The CCBA is ostensibly concerned about the unworkable one-way street option.

Given the difficulties in balancing the scales, only binary options come to mind: strict confidentiality that is ironclad vs. liberal admission of evidence both to prove and disprove such a claim. Neither of these binary options strike the right balance. With no recourse for malpractice, lawyers may be immunized from unscrupulous conduct. Providing only a one-way street for clients to introduce evidence of a malpractice claim while handcuffing the lawyer for giving context from the mediation is unworkable. Is there a middle ground? Possibly. The task before the CLRC is where to draw that line. Unfortunately, this latest attempt at compromise raises new concerns while failing to address others. Most significantly, mediation participants get virtually no reassurance from the promise that mediator statements remain confidential while their own communications are admissible. What happens in mediation no longer stays in mediation. The focus on whose statements are admissible misses the point.

There is a serious concern about having written and oral statements made in mediation by the parties admitted as evidence later in a malpractice claim against the mediation client's attorney. I interviewed

# Counting on mediation confidentiality

Berkeley Mediator Ron Kelly on this issue. In a May 12 letter to the CLRC, Kelley explains, the problem is that with emails, voice mails, texts and documents, these types of evidence exist not only in the records of the mediator. These types of evidence can possibly be subpoenaed directly from the internet service and wireless service providers. What if the mediator writes an email to the mediation clients and asks for clarification of an issue set forth in a mediation brief? Kelly's letter to the CLRC agrees with Commissioner Boyer-Vine's comment made in the April meeting — evidence that can't get in the front door should not come in through the back door.

The solution isn't to create a small exception that blows open the black box or opens the floodgates of the Oroville dam. The barrier to entry for invading confidential mediation communications must be set extraordinarily high. In a true case of malpractice or fraud, the client should be able to have his or her voice heard and get redress by a court. However, the types of evidence that can be admitted should be assessed more carefully.

All written and oral communications made either by or with a mediator should remain privileged. Perhaps the problem isn't where to draw the line rather the attempt to create any hard and fast confidentiality exception to apply in all cases. Whether these communications may be introduced as evidence should be a decision the court makes on a case-by-case basis, initially using an *in camera* review process to assess whether to open up the black box of mediation.

The CLRC might consider the following:

Adopt a culture around mediation confidentiality that is similar to the federal rules. Consider legislation based on the CCBA's original 2011 proposal with improvements to avoid a one-way street. Federal legislation has already created standards which are instructive.

1. If a client mediates confidentially with a neutral and thereafter files a claim of malpractice against



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his/ her attorney arising from the underlying mediated dispute, a mediation privilege (or statute) should prohibit disclosures between the neutral mediator and clients. This includes written and oral communications.

2. The pre-mediation preparation communications should likewise be protected. To avoid opening the floodgates to admissibility of all evidence, the mediation materials including flipcharts and photos of the poster boards, confidential questionnaires and email exchanges will be considered privileged and inadmissible.

The only exceptions should be as follows:

A. Private settlement communications and written statements between the parties will be admissible. This would be new and lifts a cloak of confidentiality not previously available.

B. Settlement discussions and written statements after mediation without the neutral mediator will be admissible.

C. Written communications and discussions between the mediation client and his/her litigation attorney will be admissible. This would be new and lifts a cloak of confidentiality not previously available.

D. This privilege does not protect from disclosure "any evidence otherwise" and independently discoverable merely because it was presented during a mediation.

E. If a court is faced with asserted mediation confidentiality (privi-

lege), but the aggrieved client or attorney is unable to prove or disprove an allegation that a lawyer breached a professional duty when representing the client proposed new legislation should allow confidential mediation statements and writings via an *in camera* inspection. The judicial officer would consider whether the asserted privilege is outweighed and that weakening our current mediation confidentiality protections is absolutely necessary. The following is suggested language drawn directly from section 574(a)(4)(C) of the Federal Administrative Dispute Resolution Act of 1996, with such wording as CLRC staff may recommend:

1. A mediation communication made inadmissible or protected from disclosure by provisions of this chapter shall not become admissible or subject to disclosure under this section unless a court first determines in an *in camera* hearing that this is necessary to prevent harm to the public health or safety of sufficient magnitude in the particular case to outweigh the integrity of dispute resolution proceedings in general by reducing the confidence of parties in future cases that their communications will remain confidential.

Consider the following from federal case law: communications to the mediator and between the parties during the mediation, are protected. Also protected are communications made to the neutral in preparation of the mediation. But,

subsequent communications between the parties are not protected: to gain that protection, the parties must return to mediation! *Folb v. Motion Picture Industry Pension and Health Plans*, 16 F. Supp. 2d 1164 (C.D. Cal 1998) (July 8, 1998), *aff'd.*, 216 F. 3d 1082 (9th Cir. 2000).

I asked Kelly why it is so important to him to protect mediation communications. He indicates that he is personally deeply committed to reducing the damage we do to each other when we fight unnecessarily. He believes strongly that the ability to talk honestly with a skillful mediator helps nearly everyone, and that most won't do so if they know they're creating new evidence that could be subpoenaed in a later trial. Mediation preserves the public's right to self-determination. Ron's dedication spans 30 years working to expand and protect mediation confidentiality.

As for the June meeting, it's unclear whether the CLRC might consider offering more than one alternative to the Legislature. We should see an additional memo about how to handle an attempt to obtain evidence of a mediator's communications from a source other than the mediator, such as another participant or internet service provider.

*Lisa Zonder is a family law attorney, mediator and collaborative divorce professional with offices in Westlake Village. She is the immediate past president of CP Cal and former divorce talk radio show host on KVTA 1590 AM. She acknowledges Ron Kelly's time and resources for this article. Any opinions expressed are solely those of the author. You can reach her at [lisa@zonderfamilylaw.com](mailto:lisa@zonderfamilylaw.com) or (805) 777-7740.*

