

First Supplement to Memorandum 2017-51

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

The Commission recently received the following additional comments relating to its tentative recommendation:¹

Exhibit p.

- Larry Doyle, Conference of California Bar Associations (9/21/17) 1
- Nancy J. Foster, San Rafael (9/18/17) 5
- Franklin R. Garfield, Los Angeles (9/20/17) 6
- Jeff Kichaven, Los Angeles (9/26/17) 11
- Stephen Sulmeyer, Corte Madera (9/19/17) 12

Those comments are briefly described below.

OPPOSITION TO THE TENTATIVE RECOMMENDATION

Three of the new comments are from persons who oppose the tentative recommendation:

- Nancy J. Foster agrees with the comments of the Civil and Small Claims Advisory Committee. She says that she has written to the staff before, but we have not yet located her prior communication.²
- Franklin Garfield is a new commenter who has been a family lawyer since 1974 and has been a divorce mediator since 1993. He believes that the Commission’s proposed new exception “is unnecessary, unjustified and potentially harmful.”³ He expounds on these points.⁴

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. 5.

3. Exhibit p. 6.

4. See Exhibit pp. 6-7.

- Stephen Sulmeyer has previously commented in this study.⁵ He agrees with Ron Kelly's comments on the tentative recommendation.⁶

SUPPORT FOR THE TENTATIVE RECOMMENDATION

The other new comments are from CCBA and Jeff Kichaven, who have participated extensively in the Commission's study. Both of them criticize the comments submitted in opposition to the tentative recommendation.

Respectfully submitted,

Barbara Gaal
Chief Deputy Counsel

5. See Memorandum 2015-46, Exhibit pp. 176-77.

6. See Exhibit pp. 12-15.



Justice Through Laws

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

September 21, 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
Further Comments in Support of Tentative Recommendation**

Dear Chair Lee and CLRC Members and Staff:

Having reviewed the public comment received by the Commission in response to the [Tentative Recommendation](#) developed by the Commission regarding Study K-402 (“Relationship Between Mediation Confidentiality and Attorney Malpractice and Other Misconduct”) – see [Memorandum 2017-51](#) – I feel it necessary to offer further observations and corrections to some of the misstatements expressed by the opposition.

1. The opposition mischaracterizes the California Supreme Court’s decision in [Cassel v. Superior Court \(2011\), 51 Cal 4th 113](#) – except for Justice Chin’s concurrence - as a rousing endorsement for absolute confidentiality in mediations. In fact, the decision was wholly dispassionate on the subject, referring time and again to the Legislature’s intent in enacting the statute as it had, without word of endorsement or condemnation. The court majority’s attitude is well summed up in the following paragraph at page 136:

We express no view about whether the statutory language, thus applied, ideally balances the competing concerns or represents the soundest public policy. Such is not our responsibility or our province. We simply conclude, as a matter of statutory construction, that application of the statutes' plain terms to the circumstances of this case does not produce absurd results that are clearly contrary to the Legislature's intent. Of course, the Legislature is free to reconsider whether the mediation confidentiality statutes should preclude the use of mediation-related attorney-client discussions to support a client's civil claims of malpractice against his or her attorneys.

CONFERENCE OF CALIFORNIA BAR ASSOCIATIONS
340 SOUTH LEMON AVENUE, #1282 • WALNUT, CALIFORNIA 91789
EMAIL: INFO@CALCONFERENCE.ORG
WWW.CALCONFERENCE.ORG

EX 1

Significantly, the court in *Cassel* spent a great deal of time recounting the numerous instances in it and lower appellate courts “have consistently disallowed such exceptions (to the mediation confidentiality statutes), even where the equities appeared to favor them.) *id at p. 133*. These cases, and the testimony before the Commission in regard to this study, reinforce the assertion that the absolute confidentiality statutes have caused enough harm to warrant remedy.

2. The opponents of the Tentative Recommendation have mischaracterized it as removing a current “right to confidential mediation.” This is inaccurate in two respects:

a. First, the current system does not provide consumers with a “right to choose” confidential mediation, but rather forces absolutely confidential mediation upon them, whether they wish it or no – unless they have the sophistication, foresight and bargaining power to obtain agreement from all other mediation participants to permit the parties to protect themselves from attorney malpractice by removing the current shield on evidence of that malpractice. And even then, any effort by a consumer to protect him/herself in this manner almost certainly would be rejected by the mediator.

b. Second, if the Tentative Recommendation were adopted and its language enacted, there is absolutely nothing to prevent the parties to the mediation to agree among themselves that everything connected with the mediation shall be kept confidential and not used in a subsequent court proceeding, just as the law is now. The difference would be that the validity of such a contractual agreement would be contingent upon the truly informed consent of the parties. That is, the parties would have to be aware that they were waiving their rights and knowingly agree to such a waiver – rather than finding, as under current law, that those rights have been waived for them by statute.

i. Opponents of the TR (and any exception to absolute mediation confidentiality) have cited this ability to “contract around” the exceptions to mediation confidentiality in other states such as New York as the reason why mediation continues to exist in those states notwithstanding the absence of California-like absolute confidentiality. These opponents have argued that the option is not available in California because ethical constraints on California lawyers prohibit it. This is wrong for several reasons:

1. The ethical constraint cited by opponents is supposedly [California Rule of Professional Conduct 3-400](#), which prohibits an attorney from “contract(ing) with a client prospectively limiting the member's liability to the client for the member's professional malpractice.” But this rule is limited in its application to specific contract provisions between attorney and client proposing to limit legal liability; it has no relationship to provisions in a mediation contract (even if signed by both client and attorney) specifying that all parties to the mediation agree that nothing relating to the

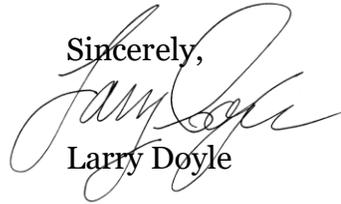
mediation can be used in a subsequent court proceeding. Clients can always agree on protocols or procedures; they can contract around the Statute of Limitations (tolling agreements), about procedures (claw back agreements), and about confidentiality. Fraud would break open the agreement, but that is a good thing.

- a. Note that [New York’s corresponding Rule of Professional Conduct, 1.8\(h\)\(1\)](#), is even tougher than California’s in this regard, providing that: “A lawyer shall not: (1) make an agreement prospectively limiting the lawyer’s liability to a client for malpractice.” This presumably would apply to contracts signed by both lawyer and client, not simply contracts between lawyer and client, per CRPC 3-400. So if mediators and parties in New York (or any other state whose rule is based on the Model Rules of Professional Conduct) can include confidentiality agreements in their contracts, there’s no reason they can’t do so in California.
2. The ability of parties to contract for absolute confidentiality was expressed clearly by the 9th Circuit in [Facebook, Inc. v. Pacific Northwest Software, Inc. \(2011\)](#), 640 F. 3d 1034, which held that a “Confidentiality Agreement stipulating that all statements made during mediation were privileged, non-discoverable and inadmissible ‘in any arbitral, judicial, or other proceeding’” was binding and valid to exclude evidence of what was said and not said during the mediation. The court held that the Confidentiality Agreement was valid, in part because it “merely precludes both parties from introducing evidence of a certain kind. Although this frustrates the securities claims the Winklevosses chose to bring, the Confidentiality Agreement doesn’t purport to limit or waive their right to sue . . .” or other rights. The court did emphasize that the parties to the Confidentiality Agreement were sophisticated and represented by counsel, and thus went into the agreement with their eyes open. Again, this *de facto* requirement that absolute confidentiality agreements can be entered into – but only with the knowing consent of all participants – is a good thing.
3. None of the opponents of the Tentative Recommendation address a key issue in their letters: In jurisdictions where lesser levels of confidentiality prevail – which is essentially all of them - is there any actual evidence of any problems? None have been identified, to our knowledge, yet the opponents continue to insist that any move by California away from absolute confidentiality will destroy mediation in California by dissuading consumers from participating in mediation or by causing mediators to refuse to practice. As we have stated many times, the opponents have presented no evidence in four years that consumers will not participate in

mediations without absolute confidentiality – and it’s quite likely that if consumers knew that by taking part in such mediations they effectively were waiving their rights to protect themselves from malpractice by their attorneys, they likely wouldn’t participate either. On the other hand, it may be true that creating any exception to absolute confidentiality will discourage people from participating as mediators. But we submit that this exposure can and should be addressed by obtaining knowing waivers from fully informed mediation participants, not by statutory stealth.

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,

A handwritten signature in black ink, appearing to read "Larry Doyle", is written over the typed name.

Larry Doyle

EMAIL FROM NANCY J. FOSTER (9/18/17)

Re: Revisions to CA Mediation Confidentiality Statute

Dear Barbara Gaal,

I have written to you before and now want to express my support for the recommendations contained in the letter to the California Law Revision Commission from the Civil and Small Claims Advisory Committee of the Judicial Council of California. I agree with the Committee that “the potential risks of making the statutory changes tentatively recommended by the Commission outweigh the potential benefits.”

Thank you,

Nancy Foster

Nancy J. Foster, J.D.
Northern California Mediation Center
175 North Redwood Drive, Suite 295
San Rafael, CA 94903
www.ncmc-mediate.org
415-461-6392 voice
415-461-7492 fax

LAW OFFICES OF
GARFIELD & TEPPER
A PARTNERSHIP OF PROFESSIONAL CORPORATIONS
1801 CENTURY PARK EAST, SUITE 2400
LOS ANGELES, CALIFORNIA 90067-2326
TELEPHONE: (310) 277-1981
FAX: (310) 277-1980
EMAIL: FRGARFIELD@GMAIL.COM

September 20, 2017

Barbara S. Gaal
Chief Deputy Counsel
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto CA 94303-4839

Re: *Mediation Confidentiality*

Dear Ms. Gaal:

I have been a member of the California Bar since January, 1971. I have been a family lawyer since 1974; I began to work as a divorce mediator in 1993 and stopped representing individual clients more than 20 years ago. I have mediated more than 1,500 divorce cases. I enclose a copy of my professional resume for your information.

I write to join dozens of organizations and individuals in expressing opposition to the addition of Section 1120.5 to the *California Evidence Code*, which would erode the principle of mediation confidentiality. I will not repeat the reasons offered by others. I will focus on the reasons I believe the proposed amendment is unnecessary, unjustified and potentially harmful.

Mediation is a voluntary process. Other forms of dispute resolution are available to parties who do not want the principle of mediation confidentiality to affect their legal rights; specifically, the legal right to sue their attorneys for malpractice. For that reason alone, eroding the principle of mediation confidentiality is unnecessary.

The proposed statute is also unjustified. There is no evidence that attorney malpractice in the mediation context is a significant problem. Proponents of the proposed amendment have had ample opportunity to provide such evidence and have failed to do so. Indeed, the principle of mediation confidentiality has been in effect in California for decades. All efforts to create exceptions have been rejected by the California Supreme Court; primarily on the ground that the courts cannot create exceptions to absolute confidentiality that is mandated by statute.

Barbara S, Gaal
September 20, 2017
Page 2

The need to create such an exception by statute is unsupported by substantial evidence of a problem that is real as opposed to hypothetical.

Any amendment that erodes the principle of mediation confidentiality is potentially dangerous: It will lead to more exceptions. In spite of the Commission's ongoing efforts to craft a narrow exception to the principle of mediation confidentiality, the amendment is still widely opposed.

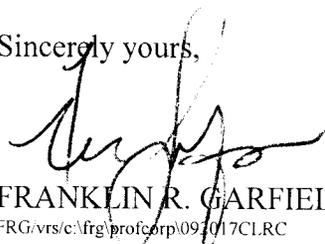
The constituency in support of the amendment consists of academics and others who believe that there must be a remedy for every wrong no matter how theoretical the existence of that wrong may be. The constituency in opposition consists of numerous professional organizations, as well as individual judges, lawyers and mediators, who believe that confidentiality is an important component of the statutory scheme that governs mediation.

In conclusion, mediation is like any other process with rules that may result in an occasional injustice. For example, parties who elect to arbitrate their disputes give up the right to appeal an adverse ruling on many of the grounds that would be available to them in the judicial system. There are similar trade-offs in mediation. Parties who elect to mediate their disputes give up the right to introduce evidence of anything written or said during the process in a subsequent civil proceeding. If that trade-off is unacceptable, the members of the public may protect themselves by declining to participate in mediation; they do not need to be protected by the proposed amendment.

The statutory scheme that governs mediation in the State of California is not in need of a major overall, modernization or minor improvements. The hallmark of that scheme is a guarantee of absolute confidentiality to all participants. That guarantee should not be compromised.

Thank you for considering these comments.

Sincerely yours,



FRANKLIN R. GARFIELD
FRG:\vrs\c:\frg\prof\corp\09\1017CLRC

FRANKLIN R. GARFIELD
A Professional Corporation
GARFIELD & TEPPER
A Partnership of Professional Corporations
1801 Century Park East, Suite 2300
Los Angeles CA 90067-2325
310/277-1981; 310/277-1980 Facsimile

Education and Honors:

University of California, Berkeley, California (1964-1967)

- Phi Beta Kappa (1966)
- A.B. (American History) With Distinction

University of California School of Law (Boalt Hall), Berkeley, California (1967-70)

- American Jurisprudence Prize (Contracts) (1968)
- Gray, Cary, Ames & Frye Scholarship (1967-68)
- Major Walter Dinkelspiel Scholarship (1968-69)
- Research Assistant, Professor Albert A. Ehrenzweig (1968-70)
- Projects Editor, *California Law Review* (1968-70)
- J.D. (1970)

Employment History:

- Teaching Fellow, Stanford Law School, Palo Alto, California (1970-71)
- Law Clerk, Hon. Alfonso J. Zirpoli, United States District Court for the Northern District of California, San Francisco, California (1971-72)
- Associate, Howard, Prim, Rice, Nemerovski, Canady & Pollak, San Francisco, California (1972-75)
- Principal, Garfield & Tepper, A Partnership of Professional Corporations (1975-Present)

Selected Publications:

- "When Marriages Fail," *California Lawyer*, January, 1987
- "Collecting Attorneys' Fees," *Los Angeles Lawyer*, July/August, 1987
- "It's Tough Being a Divorce Lawyer," *National Law Journal*,
October 12, 1987
- "How Much Support is Reasonable?" *National Law Journal*,
May 23, 1988
- "The Trouble with Family Law," *Los Angeles Daily Journal*,
March 24, 1994
- "The Trouble With Ethics Experts," *Los Angeles Daily Journal*,
August 26, 1994
- "Arbitrators Can Write Their Own Rules," *Los Angeles Daily Journal*,
September 8, 1994
- "Nonlawyers Should Stay Out of Family Law Mediation,"
Los Angeles Daily Journal, March 21, 1995
- "Mediators Should Take Responsibility for the Outcome,"
Los Angeles Daily Journal, July 21, 1995
- "In the Beginning," *Los Angeles Daily Journal*, February 14, 1996
- "Family Law Troubles," *California Law Business*, April 15, 1996
- "Side Effects," *Los Angeles Daily Journal*, November 27, 1996
- "The Family Way," *Los Angeles Daily Journal*, May 28, 1997
- "Demilitarized Zone," *Los Angeles Daily Journal*, August 27, 1997
- "Should a Mediator Switch Hats?" *SCMA News* (Southern California
Mediation Association), Vol. 8, No. 5, June, 1998
- "Signing Off," *Los Angeles Daily Journal*, September 30, 1998
- "Speed Mediation," *Los Angeles Daily Journal*, August 25, 1999
- "Unbundling Legal Services in Mediation," *40 Family Court Review* 1,
January, 2002

- “Mediators Should Provide the Parties with Basic Information,” *Los Angeles Daily Journal*, June 19, 2002
- “Family Mediators Should Know the Law,” *SCMA News* (Southern California Mediation Association), Vol. 11, No. 4, December, 2002
- “Unite to Divide?” *Los Angeles Daily Journal*, June 11, 2003
- “ADR Buzzwords Create Unrealistic Expectations for Divorcing Parties,” *Los Angeles Daily Journal*, November 6, 2003
- “Avoiding Three Pitfalls of Family-Law Mediations,” *Los Angeles Daily Journal*, March 18, 2004
- “Parties in Divorce, Custody Cases Crave Perception of Fairness,” *Los Angeles Daily Journal*, November 4, 2004
- “Computer Programs Can Help Determine Spousal Support,” *Los Angeles Daily Journal*, June 27, 2006
- “Settling With Boilerplate,” *Los Angeles Daily Journal*, December 19, 2006
- “Split Ends,” *Los Angeles Magazine*, April 2007
- “Settling Divorces,” *Los Angeles Daily Journal*, November 28, 2007

Professional Activities:

- Arbitrator, Los Angeles Superior Court, Alternative Dispute Resolution Program
- Mediator, Los Angeles Superior Court Family Law Mediation Program
- Arbitrator, LACBA and BHBA Fee Arbitration Programs
- Professional Member, Southern California Mediators Association
- Practitioner Member, Association for Conflict Resolution (formerly the Academy of Family Mediators)
- Member, The Best Lawyers in America, 2008



September 26, 2017



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



In Re: Mediation Confidentiality; Public Comment

Dear Ms. Gaal:

Thank you for circulating Memorandum 2017-51, Public Comment on Tentative Recommendation.

With your permission, I would like to share my thoughts.

Once, I heard Alan Dershowitz give a talk on professionalism. Professor Dershowitz was very unhappy with the name-calling in which lawyers often engage. As I recall, he said that the most strongly negative thing any lawyer should ever say about the work of any other lawyer is that it is "remarkable."

The public comments in opposition to the Tentative Recommendation are remarkable.

Not one of the opposition comments -- not one! -- even tries to answer the critical question: In the jurisdictions where lesser standards of mediation confidentiality prevail -- and there are plenty of them -- is there any evidence of any actual problem?

In the continued absence of any such actual evidence, the Commission should make its Tentative Recommendation final.

Respectfully submitted,

Jeff Kichaven

JK:abm

EMAIL FROM STEPHEN SULMEYER (9/19/17)

Re: Opposition to Study K-402 Tentative Recommendation

Hi Barbara,

I'm forwarding my concurrence in Ron Kelly's opposition to the tentative recommendation re Study K-402 relating to mediation confidentiality.

California Law Revision Commission
c/o UC Davis School of Law, 400 Mrak Hall Drive
Davis, California 95615

Re: Study K-402 Tentative Recommendation - Oppose Unless Amended

Summary: Our current right to choose confidential mediation will be eliminated. Participants will need to be warned that "everything you say or write now may be used in court later." Informed participants will not risk being candid. Court caseloads will increase because mediation will be less effective. The damage can be reduced by adding just the twenty words below.

Dear Chairperson Lee, Commissioners, and Staff,

I must regretfully oppose the Tentative Recommendation as currently drafted for the reasons stated below. I would instead organize support if the Recommendation is amended as follows for the reasons stated below:

1. Add three words to paragraph (a)(3) to read: The evidence does not constitute or disclose a writing or oral communication of the mediator relating to a mediation conducted by the mediator.
2. Add paragraph (a)(4) to read: (4) The communication or writing is a communication directly between a client and his or her attorney, only.

A. Reasons to Amend as Suggested Above.

1. Mediator's Oral Communications. The intent of the current draft's (a)(3) is to allow mediators to be candid in creating their own notes and in their written communications to the participants, knowing they are not creating new evidence. The same logic applies to allowing mediators to be candid in their oral communications with the participants.

2. Attorney/Client Communications Only. The words "a communication directly between a client and his or her attorney, only" come directly from the Conference of California Bar Associations Resolution 10-06-2011 which initiated this Study. The Conference's logic was solid then, and still is. Attorney/client communications are created on behalf of the client. They should be admissible at the client's discretion. The

resolution directly follows the finding in the Court of Appeal's decision in the Cassel case. This cited the existing exception in Evidence Code section 1122(a)(2) for a communication created on behalf of the client when the client agrees to disclosure.

B. Reasons for Opposition to the Tentative Recommendation as Currently Drafted.

1. No Evidence This Change Is Needed. A basic threshold question asked of everyone submitting a bill to the Senate Judiciary Committee is as follows: **“Please summarize any studies, reports, statistics, or other evidence showing that the problem exists and that the bill will address the problem.”** For many years the Law Revision Commission staff and many of the rest of us have all searched diligently for reliable evidence that lawyer malpractice in mediation happens frequently enough to justify weakening our current protections in all mediations. No reliable study, report, statistics, or similar evidence justifying this change has been found. Since the enactment of Evidence Code Section 1152.5 in 1985 (later expanded into the current section 1119), disputants in California have had the right to choose either confidential mediation or nonconfidential mediation. Before policy-makers take away this effective and well-tested right, they should require clear reliable evidence of a need for this change, and evidence that it will actually make things better, not worse.

2. Mediations Vary Widely, Some Kinds Severely Impacted. Right to Choose. Some commercial mediators say no one ever tells them the truth anyway. The kind of mediations they conduct probably won't be affected much. But many of us conduct a different kind of mediation. These often involve family members, friends, coworkers, business partners, neighbors, and others with past personal or business relationships. As mediators, we have been able to help disputants reach better agreements, and reduce the damage people do to each other and their families and coworkers, because they have been able to entrust us with sensitive confidential information. Anyone who has wanted to conduct a nonconfidential mediation has always been able to do so with a single one sentence agreement signed by the participants. The right to choose confidential mediation requires the support of a statutory scheme like our current sections 1115-1128, without exceptions that will subvert their predictability.

3. Groups Of Judges, Lawyers, Mediation Users, and Mediators Have Opposed Because They Understand The Damage. Since this proposal to weaken current protections was first introduced in the Legislature in 2012 as AB 2025, hundreds of opposition statements have been submitted. These include opposition from organizations like the State of California's own State Mediation and Conciliation Service, California Judges Association, California Dispute Resolution Council, Southern California Mediation Association, Association for Dispute Resolution of Northern California, Contra Costa and Marin County Bar Associations, and Community Boards of San Francisco, as well as individual mediators from all sectors of practice ranging from the immediate past president of JAMS to former family law bench officers. (All available in “Public Comments” memos at <http://www.clrc.ca.gov/K402.html>) For example:

a. The California Judges Association wrote in opposition explaining the adverse impact on their already unmanageable court caseloads. Sample quote:

“...it is the California Judges Association position that there exist no valid reasons, including the very rare claim of malpractice by an attorney during the mediation process, to justify an abrogation of the existing statutory confidentiality of the mediation process. It is simply too valuable to the civil court system in our state as a matter of public (and effective) policy to sacrifice that confidentiality.”

(Exhibit 5 <<http://www.clrc.ca.gov/pub/2016/MM16-19.pdf>>)

b. Likely the largest single collection of mediation users in the state wrote in opposition — a united coalition of eleven major construction industry associations. These are the unionized builders of our public schools, hospitals, roads, and mass transit systems. They urged the Commission to adopt one of the many proposed alternatives that did not remove confidentiality protections. Sample quote:

“Eliminating confidentiality would not only reduce the effectiveness of mediation as a tool, it would completely destroy it.”

(Exhibit 1 <<http://www.clrc.ca.gov/pub/2016/MM16-50.pdf>>)

c. Even the State of California’s own State Mediation and Conciliation Service, mediating since 1949, felt they had to take the unusual step of writing in opposition. Sample quote:

“Were SMCS to lose the promise of absolute confidentiality...The result would be failed mediations and costly and disruptive labor disputes.”

(Exhibit 7 <<http://www.clrc.ca.gov/pub/2015/MM15-46s3.pdf>>)"

4. Misleading Focus on Lawsuits Alleging Malpractice, “Consumer Protection”. Most people discussing this are focussing on later lawsuits alleging lawyer malpractice. But late in its discussions the Commission widened the scope well beyond malpractice lawsuits. The new exception will now remove current protections when a client alleges, whether in court or arbitration, that their lawyer violated the professional requirement that fees charged for their services in the mediation process be “reasonable”. (See *Bird v. Superior Court* (2003) 106 Cal.App.4th 419 - “Attorneys owe clients fiduciary duties that mandate fair, reasonable, and conscionable fees.”)

Suppose I’m the lawyer later accused of charging too much for services in a mediation context. My defense attorney will likely want to get details of the various positions taken, information shared, settlement proposals made and rejected, etc. to put together a defense based on the time the attorney needed to research and/or respond to all of these. The new exception will probably be used more often by defense attorneys to defend their lawyer clients from claims than by the client/consumers the proponents claim to be championing.

Some judges, and especially some arbitrators, will later decide that “due process” will require that all mediation communications be discoverable and admissible to enable the accused attorney to defend themselves. See the position taken by a federal judge who

decided that defendants accused of misconduct were later entitled to use the communications from a mediation even though all participants believed at the time their communications were confidential (*Milhouse v. Traveler's* (2014) — California Central District Case No. 08-CV-01739 — “Due process demanded that the Court allow the jury to hear the testimony regarding the parties’ mediation statements.”)

5. Unpredictable Protection, Chilling Effect on Mediation Candor. When people come to understand that they can later be forced to turn over all previously confidential briefs and emails they might send to their mediator — and they can even be forced to later repeat under oath all statements made in mediation — if the other party simply later claims their lawyer charged unreasonable fees, then how forthcoming are they likely to be in the mediation in the first place?

The main concern has never been that there will be lots of clients who are later unhappy — or their accused lawyers — who will subpoena everything. There might be. The main concern has always been that it won’t take many of these being successful to make confidentiality unpredictable. As one former presiding judge pointed out, “Some judges will let nothing in. Some will let everything in. Some will end up in between. There's no way you'll know in advance.”

6. More Exceptions Coming, Predictable Confidentiality Lost. This exception is just one of many that will be coming if the current Tentative Recommendation is enacted. See for instance the Conference of California Bar Association’s 2015 resolution which aimed to remove confidentiality protections in divorce mediations (CCBA Resolution 09-03-2015 - opposed, withdrawn, acceptable compromise reached, compromise enacted this year as SB-217). There will be a dozen more exceptions proposed.

In one way or another, all forty million residents of our state have been affected by the millions of mediations we’ve conducted here. Our current right to choose confidential mediation was created thirty years ago for sound public policy reasons which remain valid today. Enacting any evidentiary exclusion involves tough public policy choices. There will always be an appeal to create a new exception for every scenario where our current protections might work an injustice. If we do, we will be destroying the widespread public benefits of predictable confidentiality in mediation.

As Commission staff pointed out in Staff Memorandum 2016-18: **“The United States Supreme Court has warned that ‘[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.’”**

Stephen Sulmeyer, mediator
Stephen H. Sulmeyer, J.D., Ph.D.
21 Tamal Vista Blvd., Suite 215
Corte Madera, CA 94925
tel (415) 927-4334
fax (415) 927-7571
www.stevesulmeyer.com