

## Memorandum 2014-60

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

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In its study on the relationship between mediation confidentiality and attorney malpractice and other misconduct, the Commission<sup>1</sup> has received a new letter from mediator Nancy Neal Yeend, which is attached as an Exhibit. Her comments are discussed below. Afterwards, this memorandum addresses the breadth of public comment in this study.

## COMMENTS OF NANCY NEAL YEEND

In her latest letter to the Commission, mediator Nancy Neal Yeend asks the Commission to focus on ethics, particularly the following ethical issues:

Do judges have an ethical duty to inform participants that their court-connected mediation programs protect malpractice? How will the courts view encouraging parties to participate in a process that protects malpractice? Will courts lose their best case-management tool, and become loath to encourage parties to participate in mediation, knowing that both attorney and mediator malpractice are protected? Are there additional ethical issues for the courts to ponder?

What are the ethical issues for the California Bar Association and its members? If an attorney fails to inform the client that malpractice is protected, then is this an ethical violation? What will the public's perception of attorneys and the entire legal profession look like once clients learn that malpractice is protected, and that there is no notice to the consuming public?<sup>2</sup>

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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.

2. See Exhibit.

She suggests that these scenarios “are not only plausible, but also they are a train wreck waiting to happen.”<sup>3</sup> She urges the Commission to “provide definitive guidance, and sooner rather than later.”<sup>4</sup>

She further writes that “[i]f the Commission is unable to recommend an exception to report both attorney and mediator malpractice, then there is a very simple solution — create a rule that attorneys and mediators must make a written, specifically worded, disclosure that their malpractice is protected.”<sup>5</sup> She notes that “[t]here could be a required paragraph that provides unequivocal wording, notifying all disputing parties that malpractice is protected, and then if the participants agree to mediate, they could check a box or initial, removing malpractice from under the confidentiality umbrella.”<sup>6</sup>

Ms. Yeend’s questions and suggestions deserve consideration. With regard to treatment of ethical issues, however, the Commission needs to be mindful of the appropriate roles of the State Bar and the Supreme Court, as opposed to the Legislature and others involved in the legislative process.

#### BREADTH OF PUBLIC COMMENT

In the course of this study, the Commission has been fortunate to receive many public comments, particularly from mediators and attorneys, but also from some mediation parties and other sources. Such input is crucial in the Commission’s study process, helping to inform and shape its recommendations to the Legislature and the Governor.

When it met in September, the Commission considered a comment from Karen Mak, urging the Commission to try to obtain greater participation from mediation parties — i.e., the disputants themselves, not their representatives or the mediator.<sup>7</sup> The Commission discussed the difficulties involved in generating such participation, particularly the lack of any organized group consisting of mediation parties (in contrast to the State Bar, numerous local and nationwide bar associations, and many mediation and ADR organizations).<sup>8</sup>

At the September meeting, the Commission also directed the staff to send a notice to persons on the mailing lists for this study, encouraging them to spread

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3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. See Memorandum 2014-36, p. 4 & Exhibit p. 6.

8. Minutes (Sept. 2014), p. 4.

word about the study to others who might be interested in it.<sup>9</sup> This memorandum constitutes that notice; the staff hereby respectfully requests that anyone reading it **consider whether there is anything they can do, or the Commission can do, to effectively encourage mediation parties (as well as others) to participate in this study and share their views with the Commission,** so that the Commission can properly take their views into account in making its recommendations.

**If anyone has a suggestion for the staff or the Commission regarding this matter, we are eager to hear it.** Suggestions and other comments can be in any format. They may be submitted to the Commission's Chief Deputy Counsel, Barbara Gaal, via email at the following address:

bgaal@clrc.ca.gov

Alternatively, suggestions and comments may be submitted by traditional mail to the following address:

Barbara Gaal  
Chief Deputy Counsel  
California Law Revision Commission  
4000 Middlefield Road, Room D-1  
Palo Alto, CA 94303

There is no deadline for providing input. The Commission's study is ongoing and there will be ample time for interested persons to submit, and the Commission to consider, written comments on the topic in question.

In addition, interested persons are welcome and encouraged to participate in the Commission's public meetings. Meeting agendas are available on the Commission's website at:

[http://www.clrc.ca.gov/Menu1\\_meetings/sitemap1.html](http://www.clrc.ca.gov/Menu1_meetings/sitemap1.html)

The Commission maintains both a traditional mailing list and an electronic notification system for this study. Interested persons can subscribe to the electronic notification system by following the directions at the following web address:

<http://www.clrc.ca.gov/K402.html>

Background information on the Commission's study, including all of the staff memoranda and minutes, is available at the same web address.

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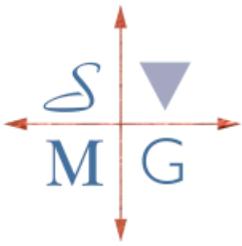
9. *Id.*

Although the Commission is interested in input from any knowledgeable source, **it cautions such persons to be mindful of existing constraints on disclosure of mediation communications and materials.** That is particularly important with respect to a mediated dispute that remains pending.

In sharing information and views with the Commission, it is not necessary, and may be improper, to describe what happened at a particular mediation. Instead, **comments that describe a situation in hypothetical terms, without revealing details that may disclose the identities of actual mediation participants, are preferable.**

Respectfully submitted,

Barbara Gaal  
Chief Deputy Counsel



## SILICON VALLEY MEDIATION GROUP

December 5, 2014

California Law Revision Commission  
4000 Middlefield Road, Room D-1  
Palo Alto, CA 94303-4739

Re: Relationship Between Mediation Confidentiality and Attorney Malpractice (Study K-402)

Dear Commissioners:

Over the past two years the Commission has reviewed mediation confidentiality, invited comments, and reviewed statutes from both UMA and non-UMA states. The purpose of the investigation is to determine if the existing California statutes, currently shielding malpractice, are appropriate. Your study has focused on pivotal questions: will changing the statutes interfere with a fundamental process element, and should protecting malpractice continue? I would now like to focus on ethics.

Do judges have an ethical duty to inform participants that their court-connected mediation programs protect malpractice? How will the courts view encouraging parties to participate in a process that protects malpractice? Will courts lose their best case-management tool, and become loath to encourage parties to participate in mediation, knowing that both attorney and mediator malpractice are protected? Are there additional ethical issues for the courts to ponder?

What are the ethical issues for the California Bar Association and its members? If an attorney fails to inform the client that malpractice is protected, then is this an ethical violation? What will the public's perception of attorneys and the entire legal profession look like once clients learn that malpractice is protected, and that there is no notice to the consuming public?

If the Commission is unable to recommend an exception to report both attorney and mediator malpractice, then there is a very simple solution—create a rule that attorneys and mediators must make a written, specifically worded, disclosure that their malpractice is protected. There could be a required paragraph that provides unequivocal wording, notifying all disputing parties that malpractice is protected, and then if the participants agree to mediate, they could check a box or initial, removing malpractice from under the confidentiality umbrella.

It does not seem far-fetched to realize that any of these above mentioned scenarios are not only plausible, but also they are a train wreck waiting to happen. The Commission needs to provide definitive guidance, and sooner rather than later. Please support either creating an exception regarding both attorney and mediator malpractice, or a specific disclosure requirement that all attorneys, mediators and courts must include prior to a person participating in mediation.

Sincerely,

Nancy

Nancy Neal Yeend

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