

Memorandum 2016-39

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

Since the June meeting, the Commission¹ has received the following new communications relating to its study of the relationship between mediation confidentiality and attorney malpractice and other misconduct:

	<i>Exhibit p.</i>
• Elizabeth Moreno (6/1/16)	1
• Hon. David Velasquez (ret.) & 23 other retired judicial officers (7/14/16)	3
• Nancy Neal Yeend (6/1/16)	5
• Nancy Neal Yeend (7/12/16).....	6
• Supplemental comments from individuals signing the online petition by Citizens Against Legalized Malpractice	8

These comments and some additional materials are discussed below.

COMMENTS OF ELIZABETH MORENO

Since the beginning of this study, Elizabeth Moreno has been urging the Commission to propose a mediation confidentiality exception to address attorney misconduct.² In her most recent letter to the Commission, she comments on the five options for preliminary *in camera* filtering that were discussed in Memorandum 2016-27: (1) the Minnesota approach, (2) a pre-filing meet-and-confer requirement, (3) early neutral evaluation conference (“ENEC”), (4) early case management conference, conducted *in camera*, and (5) summary jury trial, conducted *in camera* at an early stage of the case.

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. See, e.g., Memorandum 2013-47, Exhibit pp. 1-2; Second Supplement to Memorandum 2015-46, Exhibit p. 16.

In her view, each of those options “strengthen mediation confidentiality *rather than proposing an exception* to mediation confidentiality for attorney bad acts.”³ In making that point, she apparently did not realize that the Commission was considering those options *as a component* of a proposal that would include a proposed mediation confidentiality exception for mediation-related attorney misconduct.

Ms. Moreno criticizes each of the five options.⁴ Her comments on the ENEC approach seem most important for present purposes, because that is the only one of the five options that the Commission is currently pursuing. With regard to that approach, she says:

Early neutral evaluation ... would unduly delay plaintiff’s claim. It will unduly burden the courts who already have scarce resources. Plaintiff’s will have to vision that their case will take up to five years or more ... given ... early neutral evaluation The judicial resources are so scarce in Los Angeles Superior court you may get a trial date within 18 months but if your case mandates filing any pre-trial motions, such as summary judgments or discovery motions, the hearing date is set after the trial date. Bringing it to the court’s attention is futile. Litigating has become a nightmare and you are forced to mediate the claim, only to be faced with a process that protects the attorney’s bad acts.⁵

Ms. Moreno’s comments arrived at about the same time that the Commission met in June. They were directed to the ENEC approach as described in Memorandum 2016-27, which contemplated that an ENEC in a legal malpractice case alleging mediation misconduct would be conducted by a judge.

In the approach that the Commission is currently pursuing, however, such an ENEC would be conducted by a private mediator (preferably with legal malpractice expertise).⁶ That might to some extent alleviate Ms. Moreno’s concerns about use of judicial resources and concomitant delay.

In her criticism of the ENEC option, Ms. Moreno also voices concern about mediating a claim “only to be faced with a process that protects the attorney’s bad acts.” That concern would not seem to apply if there were a mediation confidentiality exception addressing attorney misconduct, as the Commission is tentatively proposing.

3. Exhibit p. 1 (emphasis added).

4. See Exhibit pp. 1-2.

5. Exhibit p. 2.

6. See Draft Minutes (June 2016), p. 4; see also Memorandum 2016-37.

COMMENTS OF JUDGE VELASQUEZ AND 23 OTHER RETIRED JUDICIAL OFFICERS

In 2011, David Velasquez “retired as a judge from the Orange County Superior Court after 23 years of service.”⁷ Since his retirement, he has “worked as a private neutral focusing primarily on mediation.”⁸

He writes to “add [his] voice to the many others who have written before [him] strongly urging the California Law Revision Commission *not* to recommend amending Evidence Code §§ 1115 et seq. — the mediation privilege.⁹ It is his “sincere belief that the weakening of the privilege afforded to the information exchanged in the course of mediation will hurt many more people than the potential changes will help.”¹⁰

His letter forcefully presents his reasons for taking that position, which are similar to ones that others have expressed in the course of this study.¹¹ At the end of the letter is a list of 23 other retired judicial officers who join him “in urging the California Law Revision Commission not to amend the provisions of the Mediation Privilege.”¹²

COMMENTS OF NANCY NEAL YEEND

Mediator Nancy Neal Yeend submitted two new letters, as described below.

Letter Dated June 1, 2016

Ms. Yeend’s first letter arrived on the day of the June meeting, too late to be considered. In it, Ms. Yeend emphasizes the importance of informed consent, noting that it is “a critical legal principle, and in some instances constitutionally required.”¹³ She warns that “[o]nce an informed consent case winds its way to the State Supreme Court, and the media makes the public aware that California’s statutes shield attorney and mediator malpractice, the mediation process will fall out of favor.”¹⁴

She encourages the Commission to “recommend that a mandatory disclosure statement be inserted in all mediation confidentiality agreements, so that all parties are fully informed before agreeing to participate.”¹⁵ She explains:

7. Exhibit p. 3.

8. *Id.*

9. *Id.* (emphasis added).

10. *Id.*

11. Exhibit pp. 3-4.

12. Exhibit p. 3.

13. Exhibit p. 5.

14. *Id.*

15. *Id.*

Designing an elaborate *in camera* process ... will unnecessarily burden the parties by increasing the time and expense of mediation. Having a disclosure statement before mediation permits participants an opportunity to either opt out, or to enter into the process with open eyes.¹⁶

Letter Dated July 12, 2016

In her most recent letter, Ms. Yeend stresses that mediation in California is an unregulated profession, and that the Commission should take this into account in its study:

The public does not understand that mediation is not regulated, and therefore reasonably assumes as a professional, a mediator is properly trained and that there are built-in protections, such as with other professionals. The reality is that there aren't any!¹⁷

She urges the Commission to "focus on fundamental protections of the public," such as "ensuring that both mediators and attorneys fully inform all mediation participants that both mediator and attorney malpractice is protected under the current law."¹⁸

She also writes:

[M]ediation in California still remains the "*Wild West*." There are no standards, we have an uninformed public, and those managing the mediation process ... are in fact only looking out for their own self-interest. The CLRC at last has a chance to take this first critical step towards meaningful change, and catch up with the vast majority of states who have already recognized that consumer protections mandate a malpractice exception. The fact that California lacks regulation and standardization for mediators only makes it common sense to create such an exception.¹⁹

UPDATE ON ONLINE PETITION

As previously reported, the Change.org website includes a petition by a group called Citizens Against Legalized Malpractice. The text of that petition appears in several staff memoranda.²⁰

As of July 18, 2016, the total number of signatories was about 530. A few of the new signatories provided brief supplemental comments.²¹ None of those supplemental comments refer to a mediation.²²

16. *Id.*

17. Exhibit p. 6.

18. Exhibit pp. 6, 7.

19. Exhibit p. 7.

20. See, e.g., Memorandum 2016-30, pp. 9-10; Memorandum 2015-46, Exhibit pp. 210-11.

SENATE BILL 1256 (ANDERSON)

At the June meeting, mediator Phyllis Pollack drew the Commission's attention to Senate Bill 1256 (Anderson), known as the "Civility in Litigation Act." The bill was introduced early this year. It proposed to require an aggrieved person to send a demand letter to the party who allegedly caused the harm, and engage in "good faith efforts to be made whole," before commencing suit. In other words, the bill essentially proposed to impose a pre-filing meet-and-confer requirement in most civil cases. Ms. Pollack wrote a blogpost about the bill while it was pending, and provided the staff with a link to that blogpost after the June meeting.²³

As discussed in June, the bill died in the Senate Committee on Judiciary. Among other concerns, the bill analysis pointed out that the bill "places all burdens to comply with the Civility in Litigation Act on the plaintiff, even if the defendant does not make good faith efforts to respond."²⁴

NEWS ARTICLE BY LOUIE CASTORIA

Attorney and mediator Louie Castoria recently wrote an article in the *Daily Journal* entitled *Mediation Confidentiality: A Wall Against Malpractice Claims or a Sieve?*²⁵ The article discusses the Commission's ongoing study.

Respectfully submitted,

Barbara Gaal
Chief Deputy Counsel

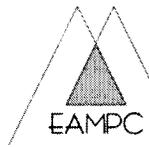
21. See Exhibit p. 8.

22. See *id.*

23. See <http://www.pgpmediation.com/civility-litigation-novel-concept/>.

24. Senate Committee on Judiciary Analysis of SB 1256 (May 3, 2016), p. 4, available at http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160SB1256.

25. Louie Castoria, *Mediation Confidentiality: A Wall Against Malpractice Claims or a Sieve?*, Daily J. (June 3, 2016).



Elizabeth A. Moreno
A Professional Corporation
Attorney- Mediator - Arbitrator

3507 Barry Avenue
Los Angeles, California 90066-2801
Telephone (310) 391-6064 - Facsimile (310) 526-6859 - Email:
emoreno@eampc.com

June 1, 2016

Sent via email: bgaal@clrc.ca.gov

Barbara Gaal, Esq.
California Law Revision Commission
c/o UC Davis School of Law
400 Mrak Hall Drive
Davis, CA 95616

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

Dear Ms. Gaal:

Each of the suggestions in the 2016-27 memo strengthen mediation confidentiality rather than proposing an exception to mediation confidentiality for attorney bad acts. The suggestions of the in camera review are burdensome, complex and tax the judicial resources.

The first two suggestions Minnesota's approach and pre-filing meet and confer, mirror the MICRA statutes CCP section 364-365. (Prior to practicing alternative dispute resolution, I spent 20 years as a litigator prosecuting and defending medical malpractice actions.) These statutes require no action for professional negligence may be commenced unless the defendant has been given at least 90 days' prior notice of the intention to commence the action. The notice shall notify the defendant as to the legal basis of the claim, the type of loss sustained including the specificity of the nature of the injuries suffered.

As we all know the medical profession lobbyists are so strong that the MICRA cap for non-economic damages has remained at \$250,000 for more than 3 decades. No lawyer will take a case because the recovery is so minimal the costs to prosecute such a case is so exorbitant that it would exhaust the amount of any recovery. Only those patients with large wage loss or medical bills are typically able to find attorneys. The death of a child or senior citizen typically does not result in "economic" damage because there is no basis for wage loss or measuring

medical bills. In these types of cases, there is typically no legal accountability for wrongdoers.

Minnesota's approach and pre-filing meet and confer do not mandate extensive cost but do mandate a large amount of attorney's time and fees. No attorney will take a case involving in camera review of mediation confidentiality unless the case is valued over \$150,000. If it is any less than that, the plaintiff will not realize any value to the case. In essence, these approaches suggested are mandating that the mediation confidentiality exception apply to the high value cases.

Early neutral evaluation and summary jury trial would unduly delay plaintiff's claim. It will unduly burden the courts who already have scarce resources. Plaintiff's will have to vision that their case will take up to five years or more in given the early neutral evaluation and summary jury trial proposals. The judicial resources are so scarce in Los Angeles Superior court you may get a trial date within 18 months but if your case mandates filing any pre-trial motions, such as summary judgments or discovery motions, the hearing date is set after the trial date. Bringing it to the court's attention is futile. Litigating has become a nightmare and you are forced to mediate the claim, only to be faced with a process that protects the attorney's bad acts.

The remaining suggestion, early case management conducted in camera, is the only suggestion that maybe workable. However, a court can delay the conference given lack of resources, then the plaintiff is faced with the same barriers of delay, waiting for the claim to be adjudicated on its merits. The suggestions are creative, but do not belong in California the world of budget cuts and lack of judicial resources.

The administration of justice would best be served by legislation which allows these few legal malpractice claims to go forth unencumbered by in camera review.

Very truly yours,

Elizabeth A. Moreno, Esq.

**EMAIL FROM HON. DAVID VELASQUEZ (RET.) &
23 OTHER RETIRED JUDICIAL OFFICERS (7/14/16)**

Re: Relationship Between Mediation and Attorney Malpractice

Barbara Gaal
California Law Revision Commission

Dear Ms. Gaal,

Please allow me to add my voice to the many others who have written before me strongly urging the California Law Revision Commission *not* to recommend amending Evidence Code §§1115 et seq. — the mediation privilege. It is my sincere belief that the weakening of the privilege afforded to the information exchanged in the course of mediation will hurt many more people than the potential changes will help.

I speak from personal experience. In 2011, I retired as a judge from the Orange County Superior Court after 23 years of service. During the last seven years of my service, I was assigned to the Complex Civil Panel of the Court, the last four years of which assignment I was the Supervising Judge of the Complex Civil Panel. Since my retirement, I have worked as a private neutral focusing primarily on mediation.

The benefits of mediation to the Court and public involved in litigation are not seriously debated today. The availability of mediation eases the Court's work load by lessening the rate of trial, and shortening the time from the filing of the lawsuit to the disposition of the case. It goes without saying that settlement reduces the cost of litigation, and brings certainty and finality to the parties' disputes. (Alternative Dispute Resolution in Civil Cases; Report of the Task Force on the Quality of Justice Subcommittee on Alternative Dispute Resolution and the Judicial System, Administrative Office of the Courts (August 1999). See also, Benefits of Court Ordered Mediation; Evaluation of the Early Mediation Pilot Programs, Administrative Office of the Courts (February 27, 2004).) The availability of mediation also implicates access to justice.

For mediation to be effective it must be conducted in an atmosphere of candor, openness and trust. The mediation privilege currently provides the parties and their counsel complete protection of the confidentiality they have come to expect in the mediation process. It is the strong opinion of this writer that the chipping away of the confidential nature of mediation will have a severe chilling effect on the litigants' desire to use mediation as a means of settling their disputes.

Without the full protection of the mediation privilege, every mediation would present the potential of post-mediation adversity between the parties and their counsel, or between the participants and the mediators. Full trust and candor in the mediation process would be lost.

I see no reason to urge the Legislature to change its long held view of the importance of confidentiality in mediation. The strong public policy in favor of confidentiality in mediation has been recognized several times by the California Court of Appeal, and the California Supreme Court. "In order to encourage the candor necessary to a successful

mediation, the Legislature has broadly provided for the confidentiality of things spoken or written in connection with a mediation proceeding.” (Cassel v. Superior Court (2011) 51 Cal.4th 113. Emphasis added.) The Legislature has sent a clear message that it does not wish our private neutrals to become embroiled in the matters over which they presided. (See, Evidence Code §703.5.)

I invite the Commission to consider that instances of attorney misconduct in the course of mediation are extremely rare. On the other hand, I would offer the educated estimate that hundreds of cases are resolved everyday statewide in California through mediation.

Any disincentive to participate in mediation will, among other things, adversely affect the parties’ access to justice. Mediation presents a relatively inexpensive means of resolving disputes as compared to the full cost of litigation. The economics of litigation often presents a hardship to the parties, whether plaintiff or defendant. There are cases where one of the parties simply cannot withstand the costs associated with trial and trial preparation, whether for the plaintiff or the defendant — where the cost to the plaintiff outpaces the value of the case, or the defendant is beaten down simply because the cost of defense is greater than the value of the disputed claim.

The private mediation process is a powerful adjunct to our public system of justice. I respectfully ask the Commission not to diminish its effectiveness in helping to deliver justice to the public.

Yours truly,

Hon. David C. Velasquez (ret.)

The following retired judicial officers join in urging the California Law Revision Commission not to amend the provisions of the Mediation Privilege.

Hon. Russell Bostrom (ret.)

Hon. Michael Virga (ret.)

Hon. Judith Chirlin (ret.)

Hon. John Leo Wagner (ret.)

Hon. Steven R. Denton (ret.)

Hon. Stuart Waldrip (ret.)

Hon. Vincent P. Di Figlia (ret.)

Hon. Christopher J. Warner (ret.)

Hon. Herbert B. Hoffman (ret.)

Hon. Mitchel R. Goldberg (ret.)

Hon. Christine Goldsmith (ret.)

Hon. John J. Hargrove (ret.)

Hon. C. Robert Jameson (ret.)

Hon. Victor B. Kenton (ret.)

Hon. William McCurine (ret.)

Hon. Bruce R. Minto (ret.)

Hon. David B. Moon, Jr. (ret.)

Hon. Gregory Munoz (ret.)

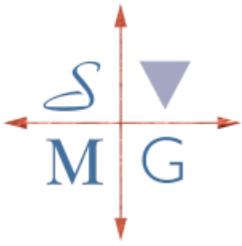
Hon. Leo S. Papas (ret.)

Hon. Robert J. Polis (ret.)

Hon. Linda Quinn (ret.)

Hon. Patricia Schnegg (ret.)

Hon. William Sheffield (ret.)



SILICON VALLEY MEDIATION GROUP

June 1, 2016

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:

Susan Oberman's detailed research, *Confidentiality in Mediation: An Application of the Right of Privacy*, provides a critical analysis of the topic you are studying. In short, she states that "*Choosing mediation, while important and often valuable, should not require parties to abdicate other 'inalienable' rights.*" Oberman is essentially paraphrasing Jacqueline M. Nolan-Haley's article, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decision-making*. Although the Commission has referenced both these articles, there has been little discussion regarding a key point: informed consent.

Informed consent is a critical legal principle, and in some instances constitutionally required. Informed consent must not be discarded, when the Commission continues its labored discussions regarding the present practice of protecting both mediator and attorney malpractice committed during mediation.

Once an informed consent case winds its way to the State Supreme Court, and the media makes the public aware that California's statutes shield attorney and mediator malpractice, the mediation process will fall out of favor. This will be a stunning blow for court-connected mediation programs, and courts will lose one of their most successful case management processes. Private practice mediators will see a significant decline in cases, and community based programs will suffer as well.

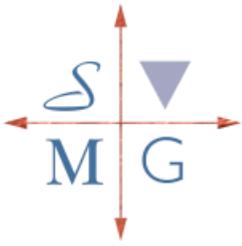
I encourage the Commission recommend that a mandatory disclosure statement be inserted in all mediation confidentiality agreements, so that all parties are fully informed before agreeing to participate. Designing an elaborate *in camera* process, will unnecessarily burden the parties by increasing the time and expense of mediation. Having a disclosure statement before mediation permits participants an opportunity to either opt out, or to enter into the process with open eyes.

It is stunning that the State Bar has not directly mandated that all attorneys make such a written disclosure, and that the Judicial Council has not directed or even encouraged courts to educate mediation parties that malpractice is protected, nor have they require mediators handling court-connect cases to make such disclosures. It is now the Commission's opportunity to correct the situation, to require written disclosure, and provide some protection for the uninformed public.

Sincerely,

Nancy

Nancy Neal Yeend



SILICON VALLEY MEDIATION GROUP

July 12, 2016

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)

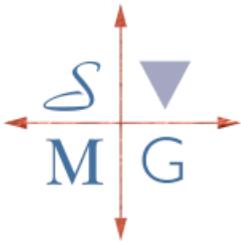
Dear Commissioners:

On June 20, 1990 a group of mediation trainers met at Golden Gate Law School to discuss mediator training and what the proper criteria should be for individuals to qualify as a mediator in the State of California. It is now 26 years later, and there are still no standards in California. Though perhaps not immediately apparent, this fact is significant to the Committee's present review of mediation confidentiality. It is also important for the work of the Committee to be aware that in California:

- There are no competency or other technical requirements for persons identifying themselves as a "mediator".
- There are no uniform training requirements for mediators (*except those imposed by certain agencies, employers or other funding sources*). It is ironic that DRPA, which was enacted in the mid-1980s, set standards and requirements for community-based, volunteer mediators.
- There is no statewide ethical standard, or code of conduct for mediators and there is no uniformity within the California court system.
- There are no statewide requirements for the number of hours for mediation courses for new mediators, and no continuing education requirements.
- There are no requirements for what needs to be covered in a training, such as ethics, law, skills, etc., or even how to present a course: what percentage of lecture, exercises, or roleplays.
- There are no regulations or requirements for a person to call him/herself a mediation trainer.
- There is no statewide mediator credentialing process, although some trainers, to add "credibility" to their offerings, state that people completing their course are "certified" mediators.

These factors are significant to the CLRC, because they must be considered when it reviews the protections presently provided for both mediator and attorney malpractice. The public does not understand that mediation is not regulated, and therefore reasonably assumes as a professional, a mediator is properly trained and that there are built-in protections, such as with other professionals. The reality is that there aren't any!

When you have an unregulated group holding themselves out as "professionals" it becomes apparent that at the very least those who create policies, procedures and laws need to factor in this anomaly. When someone is practicing in a true, "regulated" profession, then it is possible for those who create laws to make certain presumptions. When people merely hang out a sign and self-identify as a "mediator" in California, where there is no regulation, then laws need to be more detailed and cannot naively be based on a *presumption* of quality. Because mediators are regulated, the CLRC's job should primarily be to bridge this gap and focus on fundamental protections of the public.



SILICON VALLEY MEDIATION GROUP

"Protecting the public" includes ensuring that both mediators and attorneys fully inform all mediation participants that both mediator and attorney malpractice is protected under the current law. Not only does this fulfill the legal and ethical requirements required by attorneys, but also it creates "informed consent."

Neither the California Bar Association, the state courts, nor the Judicial Council appear to have aggressively worked to protect the public on this issue, so the CLRC offers the last opportunity to create a process that is fair and transparent. If the Commission is unable to produce such recommendations, then California will languish for years waiting for either the legislature or the trial courts to resolve this issue. In the meantime members of the public will continue to be hurt by rulings like *Cassel v. Superior Court*, 51 Cal. 4th 113 (2011).

I ask, no I implore the CLRC to consider that almost 3 decades later mediation in California still remains the *"Wild West."* There are no standards, we have an uninformed public, and those managing the mediation process, although espousing *"protecting"* the it, are in fact only looking out for their own self-interest. The CLRC at last has a chance to take this first critical step towards meaningful change, and catch up with the vast majority of states who have already recognized that consumer protections mandate a malpractice exception. The fact that California lacks regulation and standardization for mediators only makes it common sense to create such an exception.

Thank you for your consideration,

Nancy

Nancy Neal Yeend

**SUPPLEMENTAL COMMENTS OF PETITIONER CARMELITA SANDR
(IRWIN, PA — 6/25/16)**

I am signing because it's against legal ethics, unconstitutional.

**SUPPLEMENTAL COMMENTS OF CONCERNED CITIZEN
(REVERE, MA — 6/26/16)**

#greedbreedsunfairness

**SUPPLEMENTAL COMMENTS OF PETITIONER MELISSA RIDGE
(HANOVER, PA — 6/26/16)**

Unlawful behavior should never be declared unlawful for special interest groups against the citizens.

**SUPPLEMENTAL COMMENTS OF PETITIONER STEVE RIDGE
(HANOVER, PA — 6/26/16)**

We are a nation of laws, not of men. We need lawyers who follow the law, not themselves.

**SUPPLEMENTAL COMMENTS OF PETITIONER MARY BECKHAM
(ROSWELL, NM — 6/27/16)**

This is against the constitution of the United States. Any politician supporting this is in violation of their Oath of Office.

**SUPPLEMENTAL COMMENTS OF PETITIONER JOE WINTERS
(CAVE JUNCTION, OR — 6/27/16)**

My rights as a US citizen have been literally stripped for no reason and they laughed in my face. Loyal Americans would never do this.