

VERDICTS & SETTLEMENTS

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Mediation Confidentiality Reform

By Lisa Zonder

Those engaged in civil, family or other non-criminal mediation should be aware of the California Law Revision Commission's (CLRC) draft legislation in the pipeline. It may kill your mediation practice. For more than 20 years, California has had a strict shield of confidentiality around mediation. All persons attending a mediation session can speak frankly, without fear of having their words turned against them. The draft legislation aims to create an exception to that shield in certain cases.

The "small exception" in the CLRC's current draft, however, may be tantamount to opening a floodgate to the Oroville Dam. While a sea change may be inevitable, it need not cause mediators to shutter their practices. An arguably better option was put on the table by the Conference of California Bar Associations (CCBA) in 2011 and warrants re-examination. It is more narrowly tailored and strikes the right balance between consumer concerns and mediation confidentiality.

You may recall that the Supreme Court decided *Cassel v. Superior Court*, 51 Cal. 4th 113 (2011), confirming that California's statutes provide a shield of confidentiality such that mediation communications would not be admissible in later non-criminal proceedings, including malpractice actions. This raised a serious concern for Justice Ming Chin, who concurred with the majority in *Cassel*, but expressed



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ambivalence about whether courts were shielding acts of attorney malpractice.

The California Legislature referred the question to the CLRC, which began a study known as "K-402." For two years, public comments were submitted to the CLRC contemplating countless approaches that would not weaken mediation confidentiality. In August 2015, the commission voted to recommend legislation removing current protections and allowing in "all relevant evidence" when anyone alleges lawyer misconduct, including the lawyer and mediator. Hundreds of opposition statements were submitted, including the California Judges Association and the state of California's own Mediation and Conciliation Service.

This debate rages on with two polarized schools of thought — maintaining our current strict protections versus adding a new malpractice exception.

Proponents of strict mediation confidentiality note that until now, they could comfortably tell clients "what happens in Vegas

stays in Vegas." It has been the bedrock of mediation to get folks to the settlement table. If it does not "stay in Vegas," will clients still consider the potential benefits of mediation to be worth the risks?

Consider the assurances given by Chief Judge Sidney Thomas of the 9th U.S. Circuit Court of Appeals: "[A]lthough the mediators are court employees, they are well shielded from the rest of the court's operation. The court has enacted strict confidentiality rules and practices; all who participate in the court's mediations may be assured that what goes on in mediation stays in mediation."

Proponents of creating an exception echo Chin's concern about limiting the court's ability to consider relevant evidence in deciding malpractice and State Bar claims. Ron Kelly — an authority on mediation confidentiality who sponsored the Evidence Code sections that secure mediation confidentiality — summarizes the proponents arguments as follows: no one wants to give safe haven to attorneys committing malpractice or

State Bar violations. The statutes were not meant to immunize attorneys. Further, change is needed because lawyers cannot ethically recommend mediation if the process immunizes their own conduct.

Both sides of the debate seemingly agree that statistically there are few cases in which a malpractice exception would ever be invoked and that consumers should be protected from lawyers who are incompetent or deceptive.

This month, the commission met to discuss the proposed changes to the confidentiality rules and voted to reject all major alternative proposals which would not have significantly weakened mediation confidentiality. The staff were directed to continue drafting the tentative recommendation to allow discovery and admissibility of all mediation communication on an allegation of attorney misconduct. If this proposed legislation moves forward as is, parties will be required to produce in later discovery all confidential briefs, documents, emails and other communications with the mediator. It will make all these mediation communications admissible later if relevant to malpractice claims or defenses.

Current California Rule of Court 3.854 (b) states: "At or before the outset of the first mediation session, a mediator must provide the participants with a general explanation of the confidentiality of mediation proceedings." Kelly, a mediator for over 40 years, said in a recent interview to consider the following scenario:

“If [the CLRC’s] current proposal becomes law, honest mediators will have to start their mediations as follows: ‘Warning! Anything you say here you may be subpoenaed to repeat under oath if the other side later complains against their lawyer. You may have to give them any documents we create, and any texts or emails we write.’”

This would certainly affect your conduct in mediation and the advice you would give your client.

By ignoring all of the alternative proposals, it may be that the CLRC has opted to focus on the “call of the question” — i.e., whether to carve out a malpractice exception. If an exception is established, the law should be narrowly tailored — as depicted in the CCBA’s original proposal, Resolution 10-6-2011. The CCBA sought with that reso-

lution to enact legislation that would make admissible mediation “communications directly between the client and his or her attorney, only,” not all mediation communications among all the other parties and the mediator.

If an exception is established, the law should be narrowly tailored — as depicted in the CCBA’s original proposal, Resolution 10-6-2011.

The Evidence Code would continue to shield the mediator and opposing counsel from a subpoena. It is unclear why the CLRC has not adopted this CCBA-approved resolution as its tentative recommendation.

If the CCBA’s proposal were enacted, the mediator’s opening statement might instead start with

“what happens in mediation stays in mediation, except that the existing rules apply to any communications directly between the client and his or her attorney, only.” This opening statement should appease both sides of the debate.

Attorney-mediator Fred Glassman noted in a brief interview that mediation-consulting attorneys accept their responsibility to provide competent legal advice to their mediation clients. Adopting the CCBA’s original proposal merely confirms for attorneys that we must do our jobs competently and be accountable to the client. It seems that most of the “voices” who participated in the CLRC process should be able to “live with” the CCBA’s resolution.

You can voice your opinion before the CLRC votes by writing to bgaal@clrc.ca.gov.

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