



December 7, 2015

Barbara S. Gaal, Esq.  
Chief Deputy Counsel  
California Law Revision Commission  
4000 Middlefield Road, Room 0-1  
Palo Alto, CA 94303

Re: Study K-402

Dear Ms. Gaal:

The Southern California Mediation Association, since 1989 the leading organization in Southern California supporting the practice of mediation, urges the California Law Revision Commission to recommend against any changes to the California Evidence Code that would further erode the protections of mediation confidentiality.

We start from the premise that the purpose of mediation is to teach parties a more constructive way of resolving conflict than traditional adversarial processes. That purpose would be defeated if mediation itself were to create opportunities for more litigation. Thus, any proposed revisions to the law that could give rise to renewed burdensome litigation in any case in which a party subsequently decides they are not satisfied with a settlement to which they agreed, would undermine the benefits of mediation.

Confidentiality is fundamental to fulfilling mediation's purpose. From its inception in 1965, California's Evidence Code has recognized the importance of confidentiality to the mediation process by strictly limiting the admissibility of evidence of settlement negotiations.

The current statutory protections for mediation confidentiality, set forth in Evidence Code Sections 1115-1128, have made it possible for the practice of mediation to thrive in this state. The California Supreme Court has repeatedly upheld these strong protections for mediation confidentiality. *See, e.g., Rojas v. Superior Court*, (2004) 33 Cal. 4th 407; *Simmons v. Ghaderi*, (2008) 44 Cal.4th 570; *Cassel v. Superior Court*, (2011) 51 Cal.4th 113. Carving out new exceptions to confidentiality would provide opportunities for parties to create new controversies, precisely the result parties seek to avoid when they choose mediation to resolve their disputes.

Our members attest to the importance of confidentiality in providing a safe environment for mediation to occur. Unless mediators are able to provide reliable assurances of confidentiality, participants are unlikely to place trust in the process. For these reasons, we are gratified to hear that the commission has re-considered its initial recommendation to allow an exception to confidentiality for alleged mediator misconduct.

As to an exception for claims involving legal malpractice, we question whether it is necessary to open the door to extensive re-litigation of what occurs behind the closed doors of a mediation proceeding in order to provide effective remedies for attorney malpractice. Despite claims of parties being pressured or deceived into settlement, which in some cases may only indicate buyer's remorse, our experience reveals only rare, isolated or unusual reports of dissatisfaction with the conduct of mediation by either attorneys or mediators. To the contrary, evidence indicates much higher rates of party satisfaction with the mediation process than with litigation in general.

To the extent problems occasionally arise in mediation, those can be addressed without threatening one of the key safeguards that makes mediation successful. SCMA supports, for example, better training for mediators and advocates. SCMA has sponsored programs at local bar associations and other venues to assist attorneys with making more effective use of the mediation process. SCMA has also been in the forefront of efforts to develop voluntary standards and practices for mediators to help insure that mediators are well-qualified. Such measures do more to improve the quality of mediation practice, and reduce the potential for abuse, than would a change to the Evidence Code allowing parties to present evidence of statements made by the participants.

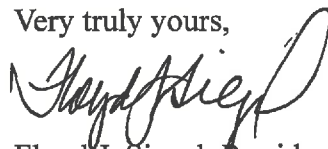
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Moreover, such evidence may be of only marginal value in assessing whether actionable misconduct may have occurred during a mediation session. Mediation is designed to encourage participants to freely express themselves and engage in freewheeling negotiations. Any change to the law that would permit mediation behavior to be scrutinized outside that context risks chilling the creative use of the mediation process by mediators, parties and their counsel, out of fear that their statements will be later used against them.

To the extent that courts in California have allowed judicial scrutiny of events that occurred during mediation, they have done so only in very limited circumstances and applying special procedural safeguards. The leading case is *Rinaker v. Superior Court*, (1998) 62 Cal.App. 4<sup>th</sup> 155, where minors facing delinquency proceedings were permitted to introduce evidence of exculpatory comments made during mediation by the party who was making accusations of misconduct against the two boys. Even in those compelling circumstances, the court required that an in camera proceeding be conducted to determine whether the mediator's testimony was necessary to vindicate the minors' due process right to confront and cross-examine the witnesses against them, thereby maintaining the confidentiality of the mediation process. In the event the Commission decides to recommend an exception for confidentiality in cases alleging attorney malpractice, similar protections to those mandated in *Rinaker* should be a part of the law.

In summary, SCMA strongly recommends against any proposed changes to the Evidence Code. In the event the Commission decides to recommend that evidence of mediation communications should be admissible in cases alleging attorney malpractice, SCMA urges the commission to also recommend that suitable measures be adopted to protect confidentiality.

Very truly yours,

A handwritten signature in black ink, appearing to read "Floyd J. Siegal", written in a cursive style.

Floyd J. Siegal, President