

CALIFORNIA JUDGES ASSOCIATION

The Voice of the Judiciary

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Barbara Gaal, Chief Deputy Counsel
California Law Revision Commission
4000 Middlefield Road, Room D-2
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Re: Study K-402 – Mediation Confidentiality

Dear Ms. Gaal:

I have been authorized to write to you by the Executive Board of the California Judges Association. I am a retired judge member of that board and am in the 2nd year of a three year term. In an earlier lifetime, before retirement in May 2011, I spent just shy of 18 years on the Ventura County Superior Court, 10 ½ of those years as Supervising Civil Judge where my primary daily diet was 4 to 6 Mandatory Settlement Conferences (*mediations on steroids!*) per day. Before retirement I presided over or conducted more than 9,500 of such settlement of which an estimated 85% to 90% were successfully settled.

Since retiring I have engaged in a private ADR practice in my own firm, not affiliated with any of the “corporate” ADR providers and have conducted over 250 private mediations.

The California Judges Association opposes the proposed changes as presently set forth in Study K-402. It is our belief that it is the confidentiality of the mediation process that, in large part, allows it to be successful in the settlement of cases as the comfort of candor, by counsel, disputing parties and the mediator is a major component of that process and its success.

Private mediation also plays a significant part in controlling the trial case load of the Superior Courts of our state. It lessens the burdens of the terribly underfunded civil trial courtrooms, civil trial judges and staff by resolving cases with no economic cost to the court or the justice system. Unfortunately, we see no short or medium term likelihood of significant increases in funding for the civil trial departments of our courts whose cases loads are significantly relieved by the private settlement of cases where *unfettered private civil mediation* is available. We believe that dynamic will substantially change for the worse if mediation confidentiality is abrogated.

Mediation is a favored public policy of the California Courts and the same is true in the federal courts. To adversely impact that favored public policy, even in the extraordinarily rare cases of “legal malpractice claims” by litigants who, most likely are suffering from post-settlement *settler’s remorse* rather than the victims of true violations of the standard of care by their counsel, would be short sighted and should be (we would argue **must be**) avoided.

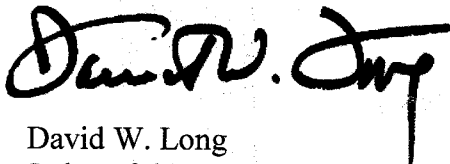
At the very least, if the statutory confidentiality of the private mediation process is going to be invaded, certain exceptions to that invasion must be preserved. To wit:

- Mediators must be statutorily deemed legally incompetent to testify in State Bar Court as well as in any civil court in legal malpractice actions against an attorney arising from a private mediation.
- Only a client alleging misconduct and the lawyer defending against the claim can be subject to subpoena to testify about mediation communications or turn over **their** documents created for mediation.
- Mediation statements made by persons other than the client alleging misconduct and the lawyer defending against the claim **must be prevented**.
- Such exceptions should apply only in cases where a client alleges misconduct by their own lawyer.

I reiterate, however, that 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.

Thank you for considering our views.

Yours very truly,



David W. Long
Judge of the Superior Court (Ret.)
Member CJA Executive Board