

EMAIL FROM MARTIN QUINN (9/29/15)

Re: Mediation Confidentiality — Study K-402

Dear Ms. Gaal, I will keep this short and to the point since you have to read a lot of words on this topic. I've been a mediator for 20 years at JAMS, and taught mediation for 9 years at Hastings and Berkeley Law. So I have the perspectives of both a mediator and part-time academic. I think the Commission's recommendation to dispense with confidentiality in situations where a party alleges attorney or mediator misconduct is well-intentioned but misguided.

This is not an easy issue. The case law that led up to this recommendation exemplifies the maxim that "Hard cases make bad law." They were cases in which the clients seemed dreadfully disadvantaged in not being able to introduce evidence of what was said and done during the mediations. The Commission's desire to rectify this unfairness is understandable. Unfortunately, I strongly believe that changing the law in this way will aid a few disgruntled clients, but imperil the efficacy of mediations for thousands. I understand that California's mediation law is highly protective of confidentiality, and that there is a different way to run a railroad. The Uniform Mediation Act, Section 6, allows for several exceptions, and the world has not come to an end as a result. So this is a tough issue, and a balancing act. But on balance, after due consideration, I believe strongly that the Commission is on the wrong track, and that its chairman's dissent got it right. While it would be nice to believe that all complaints against lawyers and mediators would be well-intentioned and grounded in solid facts and legal merit, that just isn't so. It is far too easy to file a complaint with the State Bar or a complaint in court simply because someone has cold feet about the settlement they just agreed to, or is disgruntled because they failed to obtain one. If this legislation passes, I will have to inform parties and counsel not as I do now that everything is confidential, but instead that everything is confidential unless you sue me or your lawyer. That is not a good start to a mediation, nor is it a helpful seed to plant in their heads.

Unintended consequences have been the downfall of many a well-motivated effort to fix a wrong. Let us not repeat that here in California, where we have a mediation practice that is the envy of the nation, and indeed the world. If it ain't broke, don't fix it.

Thank you for your consideration.

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