From: "Susan P. Finlay"
Date: Friday, October 2, 2015 4:22 PM
To: Barbara Gaal <bgaal@clrc.ca.gov>
Subject: Study K-402

Dear Ms. Gaal:

I strongly oppose the Commission's August 7th decision to draft recommended legislation removing our current confidentiality protections when a mediation participant alleges lawyer misconduct. I will urge every organization of which I am a member to oppose it.

As a bench officer for 32 years, I can affirm the value of the mediation process for litigants and particularly for families going through a dissolution. After leaving the bench, I became involved in mediation in order to help parties stay out of court, which I know to be a harmful, toxic experience for the majority of litigants.

Yes, there are a few cases of attorney malpractice; the Commission's desire to protect these victimized consumers is understandable. The result, however, will in turn victimize all of those thousands of parties who participate in mediation each year, with the assurance of knowing that their negotiations are confidential and can't be used against them in subsequent proceedings. For the Commission to recommend removing this safeguard for mediating parties is to penalize the vast majority for the malpractice of a few.

We have all seen the "sign and sue" cases, where the parties sign an enforceable agreement, then have buyers' remorse at a later time and either blame their attorneys or their mediators. Perhaps we should have a statute that contains a clause, as we do in other types of contracts, to the effect that the parties have 5 days to cancel their agreement and if they fail to act within the proscribed time, then the evidence code as it relates to confidentiality applies. This would give the parties time to "cool off", seek a first or second opinion, and to think it over. Surely there has to be a way to protect all of the clients who mediate, not just the few who allege attorney malpractice.

Mediation, as we know it, will not survive this change. Access to our courts and access to justice will be further restricted. The Courts can't handle their case loads now; adding clients who would otherwise mediate would cause an even greater overload.

Mediation has been particularly helpful to divorcing parents since it enables them to preserve their co-parent relationship which benefits the children. If if they do not have this option, then they are forced to litigate which destroys families, seriously damaging the children in the process.

It is difficult to imagine any mediator who would want to expose herself or himself to litigation of any kind. Most of us are in the mediation business because we know how harmful litigation can be. The majority of mediators would not choose to be part of an on-going case as a witness or a party. We would not choose to have our records subject to

subpoena and our depositions taken, or be forced to testify against or for a client when we have been their "neutral". Why would a party tell the mediator anything in confidence if it is not going to be confidential? The answer is that they won't. Few would risk being candid when they know every statement is discoverable and could be used against them in future litigation.

For thirty years the parties' right to choose confidential mediation has served the courts and the parties well. Please consider alternatives to removing this beneficial process as a choice for the people of the State of California.

Sincerely yours,

Susan P. Finlay
Judge of the Superior Court, ret.