Follow-Up To Urgent Message Regarding Mediation Confidentiality

By Ron Kelly

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Unfortunately, the Commission decided not to shift their main direction or explore the dozens of alternative solutions proposed.

Judge Susan Finlay is a thirty-year bench officer. As she says in her letter below:

"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."

and

"For the Commission to recommend removing this safeguard for mediating parties is to penalize the vast majority for the malpractice of a few."

It's now time for us all to discuss the real impacts – to talk very seriously with attorneys, judges, mediators, businesses, insurance carriers, court officials, political entities, and all mediation participants who have benefited from the predictable mediation confidentiality we've had for thirty years.

We need to talk about what it will really mean to them when it's gone. If they care, they will need to weigh in with the Commission very soon (to Chief Deputy Counsel Barbara Sandra Gaal <bgaal@clrc.ca.gov>). Please consider forwarding this update with Judge Finlay's letter below – or perhaps relevant excerpts, given the Commission's shift on claims against mediators.

Central Issue Unchanged

The central issue remains unchanged. If a client alleges a lawyer improperly recommended settling in mediation (or not settling), the lawyer will want to defend themselves. The accused lawyer will certainly want to provide evidence of the context to show their alleged misconduct was justified – "I recommended this to my client because of what we heard in mediation, which was as follows."

No one is likely to be satisfied with hearsay evidence. Most will subpoena other participants to testify about what they said in mediation. Most will subpoena mediation briefs, mediator notes, and the other documents prepared for and during the mediation. Mediation communications will no longer be protected if the proposed legislation passes. Nearly all legislation recommended by the Commission is enacted.

Responsible mediators and attorneys will then need to warn all participants at the outset that anything they say or write can become evidence if the other side alleges misconduct by their lawyer. Judge Finlay and hundreds of other mediators have warned the Commission that "mediation, as we know it, will not survive this change."

It's time for judges and mediation users to add their voices before it's too late.

Quick Summary of Two Key Decisions

A. Confirmed their prior decision to proceed with drafting legislation to remove current confidentiality protections when lawyer advocate misconduct is alleged.

B. Reversed (for now) their earlier decision which would have also allowed in mediation communications when attorney mediator misconduct is alleged.

Detailed Notes

On October 8, 2015 the Commission voted to:

1. Continue preparing recommended legislation to create a new exception. This will remove our current confidentiality protections for mediation communications – both in malpractice actions and State Bar disciplinary proceedings – whenever someone alleges misconduct against an attorney acting in their professional capacity as an advocate. One example previously discussed by Commissioners was a claim alleging an attorney submitted an inadequate mediation brief. Another was recommending settlement for less than the client expected going in.

2. Reject staff's attempt to explore provisions to discourage improper attempts to use or obtain mediation communications. Staff suggested that such provisions could be crafted to

discourage expensive and time-consuming actions that were improper, while allowing appropriate actions to proceed. Commissioners said that existing statutory mechanisms were sufficient, such as Code of Civil Procedure sections 128.5 and 128.7. They directed staff – "do not include sanctions in our proposed legislation regarding the consequences of invoking the exception."

3. Reverse a portion of their August 7 vote by narrowing the new exception to apply only to claims against attorney advocates. Their August 7 vote was to expand the proposed exception to also apply to alleged misconduct and malpractice claims against attorney mediators. The October 8 vote was to "exclude attorney mediators from any proposed exception".

4. To further change course from their August vote, and "leave Evidence Code 703.5 untouched by our project". Evidence Code 703.5 allows mediators, like judges and arbitrators, to testify in State Bar proceedings but not in civil actions for attorney malpractice. Discussion centered around the process impact, and perceptions of mediator nonneutrality and favoritism if mediators regularly become witnesses later for or against one side in a malpractice action.

5. To direct staff to add clarifying language to the new legislation stating that it does not affect existing common law quasi-judicial immunity for mediators. Staff was directed to draft "a sentence identical or substantially similar to" "Nothing in this section is intended to affect the extent to which a mediator is, or is not, immune from liability under existing law."

6. Limit the new exception to alleged misconduct that "happens within the mediation context". This is slightly narrowed from their August 7 vote, which would have also allowed in mediation communications referring to alleged misconduct occurring outside the mediation context.

7. Reconfirm "the new exception does not apply to settlement enforcement proceedings". There was consensus on this before, but staff said no explicit vote was taken August 7 and requested a formal vote.

8. Not expand the new exception to also include "reporting" alleged misconduct.

9. Confirm staff's suggested language fleshing out the Commission's prior decision to limit the admissible evidence to that relevant in a malpractice/misconduct proceeding. Staff was directed to "use language similar to the Uniform Mediation Act as reflected on page 30 of Memorandum 2015-45" which is:

“If a mediation communication is not privileged under subsection (a) or (b), only the portion of the communication necessary for the application of the exception from nondisclosure may be admitted. Admission of evidence under subsection (a) or (b) does not render the evidence, or any other mediation communication, discoverable or admissible for any other purpose.”

10. Have the new exception “only apply to mediations that occur after the new rule becomes operative”.

11. Request staff prepare a memo considering separately staff’s question – “Do you want this proposed new exception to apply to evidence of alleged oral modification of an alleged fee agreement?” – and considering the possibility this aspect might be placed in the Business and Professions Code.

12. Ask staff to prepare a memo on designing the in camera review process previously approved.

(All text in quotes above is direct quotation from the actual motions and discussions in the Commission’s October 8 meeting.)

* Ron is one of the principal architects of California mediation law. He served as the expert advisor in the drafting and enactment of California's main chapter defining and governing mediation (Evidence Code sections 1115-1128). He's been honored with the Mediation Society's Lifetime Achievement Award and seven other ADR awards for his work in building the field. Mediating since 1970 and arbitrating since 1986, he's a founder of two of California's main ADR professional organizations. Ron has trained thousands of lawyers, judges, government officials, and business professionals on four continents, and his training materials are licensed and used around the world in numerous languages. Judges in nearly every superior court in the Bay Area have chosen to enroll in his trainings. He regularly trains mediators and arbitrators through the Bar Association of San Francisco, other Bay Area bar associations, and through UC Berkeley's CLE program.