



The Superheroes of Facts, Evidence and Logic enter the fray over legal malpractice protection in mediation

Laws that continue to protect attorney misconduct during mediation need to be changed

BY NANCY NEAL YEEND

It's been a tough battle, but superheroes Facts, Evidence and Logic are winning the fight against continuing to protect attorney misconduct and malpractice during mediation. The pilot for the series began four years ago with the California Supreme Court's decision that explicitly stated malpractice is protected by mediation confidentiality statutes. (*Cassel v. Superior Court* (2011) 51 Cal.4th 113, 138.)

The full-length series began a couple of years later in 2013, when the California Legislature referred the issue of attorney malpractice to the California Law Review Commission, CLRC, for study and recommendations. (*Mediation Confidentiality: A Malpractice Exception or Not*, Yeend and Gizzi, Plaintiff Magazine, October 2013).

The series has been entertaining attorneys and mediators ever since. Oh, you missed the first few episodes? Well, here is a synopsis:

Episode One

The argument to continue protecting attorney malpractice posits a change in the statute would cause mediation participants to be less candid, be less willing to share information or even reluctant to participate. Enter superhero Facts, and the fight was dramatic, as there is no evidence to support this claim



from any of the states that adopted the Uniform Mediation Act, UMA, or from any of the several dozen other states that have attorney and/or mediator malpractice exceptions.

Episode Two

Superhero Evidence enters and provides a sharp blow to the argument that there are not enough cases of malpractice to warrant changing the statute. The argument was based on the few cases that survived the long journey to the state Supreme Court. The broad umbrella of mediation confidentiality has made it impossible to determine exactly how many actual claims exist. One hair-raising example is noted in the California Law Review Commission's memo MM36-s1. (Deborah Porter's letter detailing *Porter v. Manhattan Beach Unified School District*.)



Episode Three

Superhero Logic smashed the ridiculous argument that since the law protecting malpractice has been in existence for 30 years, it should remain unchanged. Keeping laws unchanged only for reasons of longevity is not logical. Prudent legislators recognize that new information or changes in circumstances require revising laws. If laws were not changed, then



women would still not have the right to vote!

Fall Lineup

The fall season premiered in October at the CLRC meeting. The fourth episode featured superhero Informed Consent. The challenge: if judges order parties to participate in mediation, or if there are court-connected mediation programs, are those judges or courts responsible for notifying mediation participants that both attorney and mediator misconduct and malpractice are protected? Historically, mediation participants have not been notified about malpractice protection. How will Informed Consent grapple with this insidious problem?

You ask, "What about attorneys who represent their clients in mediation, and who have not explicitly informed their clients that attorney misconduct and malpractice is protected?" It is the hope of many viewers that Informed Consent will triumph along with the other superheroes: Facts, Evidence and Logic! In addition, it is anticipated that in this fourth episode Informed Consent will go head-to-head confronting the ethical question of mediators having an obligation to inform participants that both mediator and attorney misconduct and malpractice are protected. This episode promises to be a real nail biter.

Much excitement has been generated for this fall's series because of the "trailers" sponsored by those opposed to changing the rules: "The sky is falling –



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no one will mediate!” All this unfounded hype promises another thrilling season, as it improves ratings and increases the size of the viewing audience!

Coming Soon

Stay tuned for future episodes when superhero Consumer Rights joins the other superheroes and tackles the thousands of mediation cases where one or more of the mediation participants is a self-represented litigant, SRL. It is anticipated that this episode will address the issue of the general public’s unawareness that malpractice is protected.

When superhero Consumer Rights succeeds, the series may wind down as all



is in the works that will feature addressing the issue of mediator malpractice, competency standards and ethics. Stay tuned!

As this excitement-packed season progresses, the CLRC can move forward with its recommendation to the Legisla-

of the specious arguments and emotion-laden excuses attempting to protect malpractice will be defeated. However, viewers should not lose hope as a new mini-series

ture to rescind the protection of attorney misconduct and malpractice emanating from mediation. It is anticipated that in 2016 the CLRC will collect the award for Outstanding Achievement in Equitable Justice!



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