

Memorandum 2013-47

**Relationship Between Mediation Confidentiality and Attorney Malpractice
and Other Misconduct (Public Comment)**

When it met earlier this month in Los Angeles, the Commission commenced a study of the relationship between mediation confidentiality and attorney malpractice and other misconduct. In introducing the study, the Chair and the staff urged attendees to use hypotheticals in sharing their views, rather than disclosing the details of an actual mediation, which could violate mediation confidentiality or affect pending litigation. The Commission gave interested persons an opportunity to express their thoughts on the topic, raised a few questions, and decided some preliminary issues. See Draft Minutes (Aug. 2013), pp. 3-4. Among other things, the Commission decided that the next staff memorandum should provide a preliminary analysis of relevant policy interests relating to the intersection of mediation confidentiality and attorney misconduct. See *id.*

Due to other demands on its time, the staff will not be able to prepare such a memorandum for consideration at the upcoming October meeting in Davis. Nonetheless, it seems advisable to include mediation confidentiality on the agenda, so that persons in northern California will have an opportunity to speak to the Commission about the topic early in the study process.

Accordingly, the primary purpose of this memorandum is simply to **invite interested persons to participate in the October meeting and submit written comments at or before that meeting.** Any comments received will be included in a supplement that will be circulated and posted to the Commission's website shortly before the meeting. The staff will include as much analysis as time permits, and conduct further analysis after the October meeting as needed.

Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

This memorandum also (1) discusses a comment from attorney-mediator-arbitrator Elizabeth Moreno, (2) discusses a comment from attorney Sidney Tinberg, and (3) reports on developments relating to the newly established Stanford Law and Public Policy Laboratory. Those points are addressed below.

The following documents are attached as exhibits and referred to in the discussion:

	<i>Exhibit p.</i>
• Elizabeth Moreno, Los Angeles (8/16/13).....	1
• Sidney Tinberg, Ventura (8/5/13)	3
• Response to Inquiry from Stanford Law School (8/12/13)	5

Unless otherwise indicated, all statutory references in this memorandum are to the Evidence Code.

COMMENTS OF ELIZABETH MORENO

For over ten years, Elizabeth Moreno has been a full-time mediator and arbitrator, participating in hundreds of mediations. Exhibit p. 1. She practiced civil litigation for twenty years before that. *Id.* She was a key proponent of the resolution by the California Conference of Bar Associations that proposed to revise the mediation confidentiality statutes to facilitate proof of attorney malpractice. See Memorandum 2013-39, Exhibit pp. 10-12. She attended the recent Commission meeting in Los Angeles, and she has since submitted written comments, which are discussed below.

Ms. Moreno's Views

Ms. Moreno says she has seen a trend developing in mediations involving small claims, which she illustrates with two scenarios. Exhibit pp. 1-2. To protect confidentiality, she describes those scenarios without providing names or extensive detail. *Id.* In both scenarios, "the amount in controversy was less than \$50,000, plaintiff(s) were of lower economic means, and Spanish speaking." *Id.* at 1. The two scenarios are as follows:

Scenario Number One:

A pre-litigation claim, where plaintiff was represented by an attorney and Defendant was represented by his/her claims adjuster and attorney. Plaintiff only spoke Spanish. The parties appeared for the mediation except for the plaintiff's attorney. The plaintiff's attorney informed the mediator that he was not going to appear because the matter was not worth it, he does not speak or

understand Spanish and that to go ahead without him. He assumed that because I had a Spanish surname that I would conduct the mediation in Spanish, speak to his client and represent his client's interests. I did not go forward with the mediation.

Scenario Number Two:

A litigated claim, where plaintiff was represented by an attorney and Defendant was represented by their Spanish speaking claims adjuster and attorney. Plaintiff did not speak any English and was accompanied by her 10 year old child. Plaintiff's attorney appeared for the mediation but did not speak or understand a word of Spanish. (His Spanish-speaking paralegal had signed up the client and was not available for the mediation.) There was no interpreter except for the 10 year old child, the claims adjuster and myself. I do not conduct mediations in Spanish, because my Spanish is poor but plaintiff's attorney assumed I would act as an interpreter and advocate for him.

Plaintiff could not communicate with her attorney. I informed them I would not go forward with the mediation. Oddly enough, plaintiff at the mediation fired her attorney, wrote in Spanish that she fired her attorney and was representing herself and proceeded with the mediation with the help of her child. Plaintiff's attorney left.

It turns out that plaintiff's attorney had failed to conduct and respond to discovery. Trial was only a few weeks away. The child acted as the interpreter during the mediation and looked to the claims adjuster and myself for the correct Spanish words. It settled. At the end of the mediation, the plaintiff asked me if I would represent her in a legal malpractice action against her attorney.

Id. at 1-2.

Staff Commentary

How would the mediation confidentiality statutes apply to Ms. Moreno's Scenario #1 and Scenario #2? The staff examines each situation in some detail below. Our intent is to engage in similar careful analysis of other scenarios that come to our attention as this study progresses, attempting to explore in depth the nature and extent of any harms resulting from mediation confidentiality, as well as the nature and extent of any benefits that are said to exist. As we proceed, it may be possible to discern some patterns or categories that facilitate analysis or allow us to shortcut the discussion. For now, a slow, step-by-step approach is needed.

Scenario #1

In Scenario #1, the plaintiff's attorney failed to appear for a mediation, leaving his client to handle the matter alone even though she did not speak English. If the plaintiff wants to sue for malpractice, would the mediation confidentiality statutes thwart such a claim?

First, let's consider whether the mediator (Ms. Moreno) would be able to testify in the malpractice case. Under Section 703.5,

No ... mediator ... shall be competent to testify, in any subsequent civil proceeding, as to any statement, conduct, decision, or ruling, occurring at or in conjunction with the prior proceeding, except as to a statement or conduct that could (a) give rise to civil or criminal contempt, (b) constitute a crime, (c) be the subject of investigation by the State Bar or Commission on Judicial Performance, or (d) give rise to disqualification proceedings under paragraph (1) or (6) of subdivision (a) of Section 170.1 of the Code of Civil Procedure....

(Emphasis added.) Here, the proper interpretation of Section 703.5 is debatable. On the one hand, a court might say that the mediator cannot testify in the malpractice case because Section 703.5 precludes mediator testimony and none of its exceptions refer to a malpractice case. On the other hand, a court might say that Section 703.5 does *not* bar the mediator from testifying in the malpractice case because the conduct at issue (the attorney's abandonment of his client) "could ... be the subject of investigation by the State Bar" and thus excepted from Section 703.5.

Even if the court takes the latter view, the mediator might be unable to provide evidence in the malpractice case. Under Section 1121,

Neither a mediator nor anyone else may submit to a court or other adjudicative body, and a court or other adjudicative body may not consider, any report, assessment, evaluation, recommendation, or finding of any kind by the mediator concerning a mediation conducted by the mediator, other than a report that is mandated by court rule or other law and that states only whether an agreement was reached, unless all parties to the mediation expressly agree otherwise in writing, or orally in accordance with Section 1118.

(Emphasis added.) To avoid this prohibition and present evidence from the mediator, the plaintiff presumably would have to convince the other party to the mediation to expressly allow the mediator to provide information to the court. That might not be possible.

Although the plaintiff might not be able to present evidence from the mediator, the plaintiff could proffer other evidence to support a malpractice claim. Aside from the provisions specific to mediators (Sections 703.5 and 1121), the key provision governing mediation confidentiality is Section 1119, which provides:

1119. Except as otherwise provided in this chapter:

(a) *No evidence of anything said or any admission made* for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery, and disclosure of the evidence shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.

(b) *No writing, as defined in Section 250*, that is prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation, is admissible or subject to discovery, and disclosure of the writing shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.

(c) All *communications, negotiations, or settlement discussions* by and between participants in the course of a mediation or a mediation consultation shall remain confidential.

(Emphasis added.) This provision focuses on mediation-related “evidence of anything said or any admission made,” “writing[s], as defined in Section 250,” and “communications, negotiations, or settlement discussions.” In a malpractice case stemming from Scenario #1, it would seem to preclude introduction of the attorney’s statement to the mediator “that he was not going to appear because the matter was not worth it, he does not speak or understand Spanish and that to go ahead without him.”

But Section 1119 and the other mediation confidentiality provisions would *not* seem to prevent the malpractice plaintiff from testifying that she hired an attorney to represent her regarding a dispute but the attorney failed to attend a mediation of the dispute, leaving her to attend alone even though she could not speak English. *See generally Foxgate Homeowners’ Ass’n, Inc. v. Bramalea California, Inc.*, 26 Cal. 4th 1, 13-14, 25 P.3d 1117, 108 Cal. Rptr. 2d 642 (2001) (Mediation statutes are clear: “Section 1119 prohibits any person ... from revealing any written or oral communication made during mediation,” while “Section 1121 also prohibits the mediator, **but not a party**, from advising the court about

conduct during mediation that might warrant sanctions." (boldface added; italics in original)).

In addition to her own testimony, the plaintiff could subpoena testimony of others to support her story. A friend, family member, or co-worker could testify to her inability to speak English. Her attorney might be willing to admit that she hired him; if not, she could perhaps corroborate her testimony on that point through a retention agreement, payment records, and testimony from employees within the attorney's office. Finally, the mediation defendant, claims adjuster, and mediation defendant's attorney could all testify regarding whether the plaintiff's attorney attended the mediation; other people might be able to testify as to where the plaintiff's attorney was when the mediation occurred.

In short, the mediation confidentiality statutes appear to preclude introduction of some evidence that would be relevant to a malpractice case stemming from Scenario #1, but they do not appear to preclude introduction of all such evidence. By excluding some relevant evidence, those statutes might create a potential for distortion of justice in the malpractice case. In this particular scenario, however, the magnitude of that effect may be limited. It might be possible to prove the attorney's misconduct despite the exclusion of certain mediation-related evidence.

Because the mediator refused to go forward with the mediation, any damages would appear to be limited to the plaintiff's expenses and lost wages associated with attending the mediation plus the plaintiff's possible liability for similar amounts sustained by the defendant, the claims adjuster's fee for attending the mediation, the defense attorney's fee for attending the mediation, and the mediator's fee. The agreement to mediate would be admissible under Section 1120(b)(3) and thus could be used to establish the mediator's fee. In all likelihood, the parties' expenses and lost wages could be proved without using any "writing ... prepared for the purpose of, in the course of, or pursuant to, a mediation or mediation consultation," which would be inadmissible under Section 1119(b). Whether a court would admit evidence of bills from the claims adjuster and defense attorney, or exclude them under Section 1119(b), is less clear-cut.

In addition to, or as an alternative to, pursuing a malpractice claim (which may not make economic sense in a case of this size), the plaintiff could file a complaint against her attorney with the State Bar, at no cost. In a State Bar investigation, Section 703.5 would not bar the mediator from testifying, but

Section 1121 would still apply to the mediator. The other mediation confidentiality restrictions would seem to apply in the same manner as in the malpractice case described above. Such a proceeding could result in discipline of the attorney. The State Bar also requires restitution in some cases, but the staff is not sufficiently familiar with the State Bar's practices to know whether restitution is a possibility in a situation like this. We will research that point if we do not learn the answer from stakeholder input or other efficient means.

The staff invites comments on the above analysis of how the mediation confidentiality statutes would apply to Scenario #1. The purpose of that analysis is limited. It is intended only as an evaluation of how mediation confidentiality might affect efforts to prove attorney misconduct under the facts described in Scenario #1. We do not yet have the information necessary to assess the frequency with which Scenario #1 might arise, other scenarios that require consideration, the severity of any harms that might result, or whether such harms would justify changing mediation confidentiality laws.

Scenario #2

Scenario #2 is more complicated than Scenario #1, and the likely effect of the mediation confidentiality statutes is more significant. In this scenario, the plaintiff spoke only Spanish, the plaintiff's attorney spoke no Spanish, and the only Spanish speakers attending the mediation were the plaintiff's 10-year-old child, the mediator (whose Spanish was limited), and the defendant's claims adjuster. The plaintiff fired her attorney at the mediation and proceeded to represent herself with her child's assistance. The case settled at the mediation; the plaintiff then expressed interest in pursuing a malpractice case against her attorney, who had failed to conduct and respond to discovery despite an imminent trial date.

If the plaintiff pursues a malpractice case, how would the mediation confidentiality statutes apply? As in Scenario #1, the mediator might be unable to provide evidence in the malpractice case, due to Sections 703.5 (making a mediator incompetent to testify except in specified circumstances) and 1121 (preventing a mediator from submitting to an adjudicative body any "report, assessment, evaluation, recommendation, or finding of any kind" relating to a mediation, absent agreement of all of the mediation parties).

Further, Section 1119 would preclude all of the mediation participants from testifying to "anything said or any admission made," "writing[s], as defined in

Section 250,” and “communications, negotiations, or settlement discussions” in the mediation. Although Section 1122 provides an exception for disclosure by agreement, it is unlikely to apply here. Under paragraph (a)(1) of that section, all mediation participants must agree to disclosure; here, the plaintiff’s attorney (the malpractice defendant) may well refuse. Under paragraph (a)(2), a “communication, document, or writing ... prepared by or on behalf of fewer than all the mediation participants,” may be admissible if those participants agree to disclosure, but only if the “communication, document, or writing does not disclose anything said or done or any admission made in the course of the mediation.” Here, the writing in which the plaintiff fired her attorney and stated that she was representing herself might constitute a “writing ... prepared by or on behalf of fewer than all the mediation participants,” but it probably could not be used in the malpractice case because it would disclose mediation events (unless the court deemed the firing of the plaintiff’s attorney a separate event, discrete from the mediation itself).

Thus, the plaintiff probably would not be able to present evidence of any of the discussions at the mediation, such as conversations in which her 10-year-old child may have struggled to understand and accurately interpret legal concepts for her mother. Similarly, the plaintiff’s former attorney (the malpractice defendant) might be unable to present evidence that the plaintiff fired him during the mediation and thus he had a reason for leaving in the midst of it.

Although evidence of the mediation discussions is likely to be inadmissible, the parties could present other evidence in the malpractice case. Under Section 1120(a), “[e]vidence otherwise admissible or subject to discovery outside of a mediation or a mediation consultation shall not be or become inadmissible or protected from disclosure solely by reason of its introduction or use in a mediation or a mediation consultation.” For example, evidence that the plaintiff’s attorney failed to conduct and respond to discovery despite an imminent trial date would be admissible in the malpractice case, even if those actions were discussed during the mediation. Evidence of the mediation discussions would not be admissible, however, just evidence of the underlying facts. *See Rojas v. Superior Court*, 33 Cal. 4th 407, 417-18, 93 P.3d 260, 15 Cal. Rptr. 3d 643 (2004).

As in Scenario #1, the plaintiff could also present evidence regarding her inability to speak English. Similarly, she could present evidence regarding her attorney’s inability to speak Spanish, and evidence showing who else attended the mediation, their language capabilities, her child’s age and legal sophistication

(or lack thereof), and the claims adjuster's relationship to the mediation defendant. That might suffice to establish that she could not communicate directly with her attorney during the mediation and had no effective interpreter (due to her child's age and legal inexperience, the mediator's limited knowledge of Spanish, and the claims adjuster's adverse role).

To establish damages, the plaintiff could introduce the mediated settlement agreement under Section 1123 (written settlement agreement) or 1124 (oral agreement), whichever applies. The plaintiff would also have to introduce evidence of similar agreements in comparable cases, in order to demonstrate that the plaintiff would have received a better result if her attorney had represented her more effectively. Depending on the factual circumstances, it might be challenging to obtain such evidence and show that the cases are really comparable.

As in Scenario #1, the plaintiff could file a complaint with the State Bar instead of, or in addition to, a malpractice claim. That would expand the range of possible remedies for her attorney's apparent misconduct. In addition, her attorney's failure to respond to discovery in the mediated case could have been grounds for a motion for sanctions. From Ms. Moreno's description of Scenario #2, the staff presumes that the defense did not file such a motion. In theory, however, it would have been another means to expose and address an aspect of the attorney's apparent wrongdoing.

In sum, it appears that the mediation confidentiality statutes would prevent the plaintiff from introducing significant evidence in a malpractice case arising out of Scenario #2, and perhaps also prevent the plaintiff's attorney (the malpractice defendant) from introducing evidence that he would like to present. But other evidence to prove malpractice or wrongdoing would not be excluded by the mediation confidentiality statutes in this scenario.

The Commission and interested persons should reflect on whether the staff has analyzed this scenario correctly, and whether the admissible evidence is likely to be sufficient to achieve a just result in this particular situation.

Comments on those points would be helpful.

COMMENTS OF SIDNEY TINBERG

Ventura attorney Sidney Tinberg has been practicing law since 1975. As explained below, he believes that the mediation confidentiality statutes should be changed.

Mr. Tinberg's Views

In his comments, Mr. Tinberg compares and contrasts two situations. For ease of reference, the staff will refer to these situations as Scenario #3 and Scenario #4, even though Mr. Tinberg does not use that terminology himself.

In Scenario #3,

[A]n exchange of settlement proposals leads to the verge of settlement. In order to achieve the settlement, the attorney for the plaintiff promises the client to reduce the attorney's fee. The client agrees to accept the settlement in reliance on the lawyer's promise to reduce the fee. However, after a settlement agreement is executed, the attorney reneges on the promise and insists on the full fee contained in the retainer agreement.

... [T]he fact situation occurs outside of mediation.

Exhibit p. 3. In **Scenario #4**, the facts are the same as in Scenario #3, except that the situation occurs within mediation.

Mr. Tinberg notes:

In both contexts, the same public policies exist favoring the settlement of cases, the reduction of the court workload, and the attorney's duty to the client. Yet in one context, the attorney's promise is enforceable but in the mediation context, not only is the client without a remedy but the attorney who committed fraud is free to repeat the fraud over and over and over.

How can the law justify those results? Does not the attorney have a conflict of interest since it involves the attorney's fee? Why should disclosure principles regarding disclosure and the attorney's fee be different at the outset of the relationship as opposed to mediation? How many of the comments opposing any changes in mediation confidentiality came from plaintiffs as opposed to plaintiffs' attorneys?

Id.

To address the problems he perceives in Scenario #4, Mr. Tinberg suggests a disclosure requirement:

Where is the duty to inform the client that the attorney's promise is unenforceable? Between the attorney and the client, it is only the attorney who knows that mediation confidentiality makes

the promise to reduce the fee unenforceable in the mediation context. Suppose the CLRC were to recommend that every retainer agreement and every mediation confidentiality agreement contain language that any promise made by the attorney to reduce the attorney's fee during mediation is unenforceable, and that such language be in a type size larger than the adjoining type and be initialed by the client. How about that for "disclosure."

Id. at 4.

Mr. Tinberg also urges the Commission to consider the effect of Civil Code Section 1668 on the mediation confidentiality agreement. *Id.* That section says: "All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law." Mr. Tinberg queries, "Certainly the object at least indirectly of the mediation confidentiality agreement is to exempt the plaintiff's attorney from responsibility for his own fraud?" Exhibit p. 4.

Finally, Mr. Tinberg refers to "the letters in support of the status quo based on judicial efficiency" *Id.* He asks: "[E]ven if judicial efficiency would be harmed, who would value judicial efficiency over justice? *Id.*

Staff Commentary

Mr. Tinberg is correct that courts probably would treat Scenario #3 and Scenario #4 very differently due to the mediation confidentiality statutes.

In both scenarios, the attorney reneges on a promise to reduce the attorney's fee. If the client has provided a retainer, as Mr. Tinberg appears to contemplate, then the client would either have to forfeit the extra money or take affirmative action to recover it from the attorney, either in court or in a State Bar fee arbitration.

If the client has not provided a retainer (or otherwise paid in advance), the client might refuse to pay the extra amount. But then the attorney might put pressure on the client to pay. Such pressure might be more likely to succeed in Scenario #4 than in Scenario #3, because the attorney in Scenario #4 might tell the client that the attorney's promise in mediation is unenforceable due to the mediation confidentiality statutes. In either scenario, if the client still refuses to pay, the attorney might eventually seek to enforce the retainer agreement. It is also possible that the client would make payment with a reservation of rights, and then seek to recover the extra amount.

The exact posture of a potential proceeding could thus vary, but the evidentiary rules would apply in a similar manner regardless of whether the attorney sues the client or vice versa. The attorney-client privilege would not prevent the client from introducing evidence of the attorney's promise, because there is no attorney-client privilege "as to a communication relevant to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship." Section 958.

In both Scenario #3 and Scenario #4, the attorney might object that the proffered evidence is inadmissible under Section 1154, which restricts the admissibility of a promise to discount a claim:

1154. Evidence that a person has accepted or offered or promised to accept a sum of money or any other thing, act, or service in satisfaction of a claim, as well as any conduct or statements made in negotiation thereof, *is inadmissible to prove the invalidity of the claim, or any part of it.*

(Emphasis added.) But the client could counter that the evidence is not being offered to prove invalidity of the attorney's claim under the retainer agreement. Rather, the client could say that the evidence of the attorney's promise is being offered for a different purpose, such as to prove promissory estoppel (a promise to modify the retainer agreement followed by reasonable and detrimental reliance on that promise). Consequently, a court is likely to conclude that Section 1154 does not apply and overrule the attorney's objection to admission of the evidence. *See generally Zhou v. Unisource Worldwide, Inc.*, 157 Cal. App. 4th 1471, 69 Cal. Rptr. 3d 273 (2007).

In Scenario #3, it is hard to think of any other evidentiary rules that would provide a colorable argument for excluding evidence of the attorney's promise. In Scenario #4, however, the promise was made during a mediation and thus Section 1119 (governing the admissibility, disclosure, and confidentiality of mediation communications) would apply. In addition, if the promise was made in the presence of the mediator, Sections 703.5 and 1121 may preclude the mediator from testifying to it (see the discussion of Scenario #1 above). The client in Scenario #4 would thus have a hard time introducing evidence of the attorney's promise to reduce the attorney's fee. As Mr. Tinberg says, the client may be left without a remedy for the attorney's failure to adhere to that promise.

A sophisticated client could guard against this type of situation. If the client accepts a settlement offer in reliance on a promise or other representation made

during a mediation, that fact can and should be incorporated into the settlement agreement. If that is done, and the person who made the promise later breaches it, the client could introduce the settlement agreement to prove the existence of the promise. The mediation confidentiality statutes would not prevent its admissibility, so long as the settlement agreement satisfies the requirements of Section 1123 or 1124.

But what of the unsophisticated client? Is it reasonable to assume that all or even most clients will know how to protect themselves in the manner described above? Would it be helpful to have a disclosure requirement in the mediation agreement, along the lines suggested by Mr. Tinberg (i.e., a warning that any promise made by the attorney to reduce the attorney's fee during mediation is unenforceable)? Would it be preferable to have a different disclosure requirement, informing clients that (1) due to the mediation confidentiality statutes, any promise or other representation made during mediation discussions is likely to be inadmissible and hence unenforceable, but (2) if the client is relying on such a promise or representation in agreeing to settle, the client should make sure that it is incorporated into the settlement agreement, so that the mediation confidentiality statutes will not bar the client from proving it later if necessary? Is there any potential downside to requiring such a disclosure? **The staff invites comments on these points.**

We also encourage comments on how often Scenario #4 (or a similar scenario) is likely to occur. In general, an attorney has a strong incentive to serve a client well, so that the client will give the attorney more business and/or recommend the attorney to other potential clients. In some types of practices, however, attorneys may deal primarily with one-time clients who are unlikely to learn about negative experiences of prior clients. Here, in contrast to the preceding situation, there is perhaps more danger that an attorney will try to take unfair advantage of a client during the mediation process. But just how big is that danger? Is there any way to reliably determine this? **Input on these issues would be helpful.**

STANFORD LAW AND PUBLIC POLICY LABORATORY

As previously reported to the Commission, Stanford Law School is in the process of establishing a Law and Public Policy Laboratory (hereafter, "Policy Lab") with a teaching mission. In late June 2013, Professors Paul Brest (co-leader

of the Policy Lab) and Michael Asimow (a former Commission consultant) contacted the staff to see if the Commission might be interested in participating in this endeavor. They explained that the Policy Lab will seek to match students with a faculty supervisor and a policy-making organization in a collaborative effort. The goal is to give students an opportunity to work on a real public policy problem for academic credit under faculty supervision, producing a work product that is useful to the policymaker.

The Commission has previously been involved in similar arrangements with other law schools, such as the Institute of Legislative Practice at McGeorge School of Law (supervised by Prof. J. Clark Kelso), and the Public Law Research Institute at UC Hastings College of the Law (supervised by Prof. David Jung). After considering the objective of Stanford's new Policy Lab and the Commission's needs, the staff identified two Commission projects that might be suitable for the Policy Lab, one of which was this study of mediation confidentiality.

Since then, Professors Deborah Hensler (an expert in empirical analysis of alternative dispute resolution techniques, who is also co-leader of the Policy Lab) and Janet Martinez (director of the law school's Gould Negotiation and Mediation Program) have expressed interest in supervising students in connection with this study. They asked the staff what type of student work would be useful to the Commission.

In response, the staff identified two areas where we thought student work under faculty supervision would be particularly helpful, as detailed in the attached "Response to Inquiry from Stanford Law School" (Exhibit pp. 5-8). Project #1 would examine procedural techniques that policymakers have used in non-mediation contexts to balance a need for disclosure of relevant information against a need to maintain privacy of that information. See *id.* at 6-7. Project #2 would focus on statistical information relevant to the Commission's study, seeking any such information available, as well as careful analysis of the meaning and limitations of such information and difficulties in gathering useful statistical information. See *id.* at 7-8. The staff also informed Profs. Hensler and Martinez that careful research and analysis of any aspect of the Commission's study (not just Project #1 or Project #2) would be useful and appreciated. See *id.* at 6.

In discussing these potential projects with Profs. Hensler and Martinez, the staff made clear that the Commission typically receives input from a wide variety

of sources during a study, and **it will treat student input in the same manner as input from any other source, evaluating it on its merits.** In undertaking such evaluation, the Commission primarily focuses on the accuracy of the information, quality of analysis, and import of the comments to the topic under consideration. The Commission also considers the background and characteristics of the source. Here, for example, the Commission would take into account the limited practical experience of most students, as well as the scholarly work, ADR expertise, and professional affiliations of the supervising professors (including Prof. Martinez's tenure on the board of the California Dispute Resolution Council and membership in the Dispute Resolution Section of the American Bar Association).

It is not yet clear whether any students will enroll in this course opportunity. If students do enroll, we do not yet know whether Profs. Hensler and Martinez will assign them to Project #1 or Project #2 or to some other aspect of the Commission's study.

Assuming that students enroll, **their research will supplement not supplant staff's research on this study.** The staff plans to do its own research on the issues described in Project #1 and Project #2, as well as on many other matters, including the experience of other jurisdictions regarding the intersection of mediation confidentiality and attorney misconduct.

Further, **anyone else is welcome and encouraged to submit input on the matters described in Project #1 and Project #2 or any other aspect of the Commission's study.** Thorough gathering of information is a critical part of the Commission's study process. The more input the Commission receives from reliable sources, the better-informed its recommendation will be. In general, input that fairly and accurately reports pertinent information, draws logical, reasonable, and well-supported conclusions, and acknowledges applicable limitations is most helpful to the Commission.

Respectfully submitted,

Barbara Gaal
Chief Deputy Counsel



Elizabeth A. Moreno
A Professional Corporation
Attorney-Mediator-Arbitrator

3507 Barry Avenue
Los Angeles, California 90066-2801
Telephone (310) 391-6064 - Facsimile (310) 526-6859 - Email: emoreno@eampc.com

August 16, 2013

Via email: bgaal@clrc.ca.gov

Barbara Gaal, Esq.
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, CA 94303-4739

Re: Relationship Between Mediation Confidentiality and Attorney
Malpractice and Other Misconduct

Dear Ms. Gaal:

I have been a full-time mediator/arbitrator in both California and Federal jurisdictions for over ten years. For twenty years prior to that I have been a civil litigator. In the course of my practice I have mediated and/or been involved in hundreds of mediations. The following comments are based upon my recent experience as a mediator, where I have seen a trend developing. This prompted me to write the CCBA resolution that went on to the Legislature and thus initiated this study.

I am providing you two scenarios (where the names have been redacted) where I was the mediator. Both of these incidents occurred in mediations where the amount in controversy was less than \$50,000, plaintiff(s) were of lower economic means, and Spanish speaking.

Scenario Number One:

A pre-litigation claim, where plaintiff was represented by an attorney and Defendant was represented by his/her claims adjuster and attorney. Plaintiff only spoke Spanish. The parties appeared for the mediation except for the plaintiff's attorney. The plaintiff's attorney informed the mediator that he was not going to appear because the matter was not worth it, he does not speak or understand Spanish and that to go ahead without him. He assumed that

because I had a Spanish surname that I would conduct the mediation in Spanish, speak to his client and represent his client's interests. I did not go forward with the mediation.

Scenario Number Two:

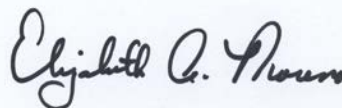
A litigated claim, where plaintiff was represented by an attorney and Defendant was represented by their Spanish speaking claims adjuster and attorney. Plaintiff did not speak any English and was accompanied by her 10 year old child. Plaintiff's attorney appeared for the mediation but did not speak or understand a word of Spanish. (His Spanish-speaking paralegal had signed up the client and was not available for the mediation). There was no interpreter except for the 10 year old child, the claims adjuster and myself. I do not conduct mediations in Spanish, because my Spanish is poor but plaintiff's attorney assumed I would act as an interpreter and advocate for him.

Plaintiff could not communicate with her attorney. I informed them I would not go forward with the mediation. Oddly enough, plaintiff at the mediation fired her attorney, wrote in Spanish that she fired her attorney and was representing herself and proceeded with the mediation with the help of her child. Plaintiff's attorney left.

It turns out that plaintiff's attorney had failed to conduct and respond to discovery. Trial was only a few weeks away. The child acted as the interpreter during the mediation and looked to the claims adjuster and myself for the correct Spanish words. It settled. At the end of the mediation, the plaintiff asked me if I would represent her in a legal malpractice action against her attorney.

I have not gone into detail because I did not want to breach the parties' confidentiality. It seems that this occurs all too frequently on the smaller claims. If you have any questions, please contact me.

Very truly yours,

A handwritten signature in black ink that reads "Elizabeth A. Moreno". The signature is written in a cursive style and is centered on the page.

Elizabeth A. Moreno, Esq.

SIDNEY TINBERG

ATTORNEY

21 S. California Street, Suite 206
Ventura, California 93001-2862
Telephone: 805/585-2116
Fax: 805/585-2118
E-mail:stinberg@gmail.com

August 5, 2013

E-mail (address@clrc.ca.gov), first class mail, and fax
(415-494-1827)

California Law Revision Commission
Attn: Barbara S. Gaal, Staff Counsel
4000 Middlefield Road, Room D-2
Palo Alto, CA 94303-4739

AUG 8 2013

Re: Study and Comments on Mediation Confidentiality

Dear Ms. Gaal:

This letter is to provide input to the California Law Revision Commission in its study of mediation confidentiality and its formulation of recommendations for revisions, if any, to the existing statutes regarding mediation confidentiality, specifically the disclosure of confidential communications solely between a lawyer and his or her client. I have been practicing law since 1975.

Consider the fact situation in *Cassel v. Superior Court* (2011) 51 Cal. 4th 113. Suppose an exchange of settlement proposals leads to the verge of settlement. In order to achieve the settlement, the attorney for the plaintiff promises the client to reduce the attorney's fee. The client agrees to accept the settlement in reliance on the lawyer's promise to reduce the fee. However, after a settlement agreement is executed, the attorney reneges on the promise and insists on the full fee contained in the retainer agreement.

In one hypothetical, the fact situation occurs outside of mediation. In the other hypothetical, the fact situation occurs within mediation.

In both contexts, the same public policies exist favoring the settlement of cases, the reduction of the court workload, and the attorney's duty to the client. Yet in one context, the attorney's promise is enforceable but in the mediation context, not only is the client without a remedy but the attorney who committed fraud is free to repeat the fraud over and over and over.

How can the law justify those results? Does not the attorney have a conflict of interest since it involves the attorney's fee? Why should disclosure principles regarding disclosure and the attorney's fee be different at the outset of the relationship as opposed to mediation? How many of the comments opposing any changes in mediation confidentiality came from plaintiffs as opposed to plaintiffs' attorneys?

EX 3

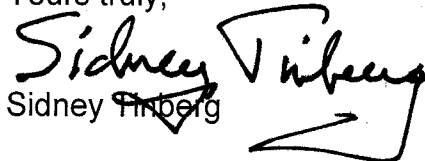
Where is the duty to inform the client that the attorney's promise is unenforceable? Between the attorney and the client, it is only the attorney who knows that mediation confidentiality makes the promise to reduce the fee unenforceable in the mediation context. Suppose the CLRC were to recommend that every retainer agreement and every mediation confidentiality agreement contain language that any promise made by the attorney to reduce the attorney's fee during mediation is unenforceable, and that such language be in a type size larger than the adjoining type and be initialed by the client. How about that for "disclosure."

What is the effect of Civil Code Section 1668 on the mediation confidentiality agreement? Certainly the object at least indirectly of the mediation confidentiality agreement is to exempt the plaintiff's attorney from responsibility for his own fraud?

As for the letters in support of the status quo based on judicial efficiency, even if judicial efficiency would be harmed, who would value judicial efficiency over justice?

Thank you.

Yours truly,


Sidney Tiberberg

ST: bm

CALIFORNIA LAW REVISION COMMISSION

4000 MIDDLEFIELD ROAD, ROOM D-2

PALO ALTO, CA 94303-4739

650-494-1335



August 12, 2013

Relationship Between Mediation Confidentiality and Attorney Malpractice and Other Misconduct

Response to Inquiry from Stanford Law School

Background

Stanford Law School is in the process of establishing a Stanford Law & Public Policy Initiative, which will include a Law & Public Policy Laboratory with a teaching mission. According to the Executive Summary, the Law & Public Policy Laboratory "would extend opportunities for law students — typically in their second or third year — to engage in rigorous research and analysis involving real public policy problems under the supervision of faculty members and ideally working with government officials or representatives of non-governmental organizations or business enterprises."

In late June 2013, representatives of Stanford Law School asked the staff of the Law Revision Commission whether the Commission would be interested in participating in this endeavor and, if so, specifically which Commission projects might be suitable for Stanford students to work on under faculty supervision. After meeting with Law School representatives to discuss this matter, the staff identified two possible projects, one of which was the relationship between mediation confidentiality and attorney malpractice and other misconduct. The staff provided the following description of that topic:

Relationship Between Mediation Confidentiality and Attorney Malpractice and Other Misconduct

The Legislature has directed the Law Revision Commission to analyze "the relationship under current law between mediation confidentiality and attorney malpractice and other misconduct, and the purposes for, and impact of, those laws on public protection, professional ethics, attorney discipline, client rights, the willingness of parties to participate in voluntary and mandatory mediation, and the effectiveness of mediation, as well as any other issues that the commission deems relevant." 2012 Cal. Stat. res. ch. 108 (ACR 98 (Wagner & Gorrell)). The Commission "shall make any recommendations that it deems appropriate for the revision of California law to balance the competing public interests between confidentiality and accountability." *Id.*

In conducting this study, the Commission is to consider the following matters, among others:

- (1) Evidence Code Sections 703.5, 958, and 1119 and predecessor provisions.

- (2) California court rulings, including, but not limited to, *Cassel v. Superior Court*, 51 Cal. 4th 113, 244 P.3d 1080, 119 Cal. Rptr. 3d 437 (2011), *Porter v. Wyner*, 107 Cal. Rptr. 3d 653 (2010) (formerly published at 183 Cal. App. 4th 949), and *Wimsatt v. Superior Court*, 152 Cal. App. 4th 137, 61 Cal. Rptr. 3d 200 (2007).
- (3) The availability and propriety of contractual waivers.
- (4) The law in other jurisdictions, including the Uniform Mediation Act, as it has been adopted in other states, other statutory acts, scholarly commentary, judicial decisions, and any data regarding the impact of differing confidentiality rules on the use of mediation.

See id.

The Commission plans to commence this study at a public meeting on August 2, 2013. The Commission welcomes input as its study progresses; commentary that is knowledgeable, carefully researched, and even-handed would be particularly useful.

Since then, Stanford professors Deborah Hensler and Janet Martinez have expressed interest in supervising students on this topic, and have requested further guidance from Commission staff regarding what type of student input would be useful to the Commission. The staff's response is provided below.

Student Projects

The relationship between mediation confidentiality and attorney malpractice and other misconduct is an important, controversial, and politically sensitive subject. The Legislature is expecting the Commission to conduct a thorough and impartial study and then "make any recommendations that it deems appropriate for the revision of California law to balance the competing public interests between confidentiality and accountability." 2012 Cal. Stat. res. ch. 108 (ACR 98 (Wagner & Gorell)).

Careful research and analysis of any aspect of the above-described study would be useful and appreciated. It would be particularly helpful, however, to receive input on the following matters:

Project #1

What procedural techniques have policymakers used in other contexts to balance a need for disclosure of relevant information against a need to maintain privacy of that information or otherwise limit access to that information? There are many contexts in which this type of balancing may be needed, (e.g., evidentiary privileges, other confidentiality rules, trade secrets, work product protection, suppression motions, issuance of arrest or search warrants). There are also many ways to attempt to accommodate the competing interests (e.g., holding an *in camera* hearing before a special master or other court officer; allowing disclosure under limited circumstances or to a limited extent; requiring advance disclosure of a confidentiality restriction and its implications). Which existing techniques could be adapted to the context of mediation

confidentiality as it intersects with attorney malpractice and other misconduct? Which procedural techniques would be unworkable in that context and why?

For each option identified, please describe the existing procedural technique with specificity and explain precisely how it could be adapted to this new context in California. Please bear in mind that the prospect of mediator testimony involves special considerations (see, e.g., Cal. Evid. Code §§ 703.5, 1121). Please also discuss the potential advantages and disadvantages of the option.

If an option would entail disclosing mediation communications to a court, or to court-affiliated or court-appointed personnel, what are the constitutional implications? Would it be possible to disclose such information to any person connected with the court without triggering a public right of access to that information? *See, e.g., NBC Subsidiary (KNBC-TV) v. Superior Court*, 20 Cal. 4th 1178, 980 P.2d 337, 86 Cal. Rptr. 2d 778 (1999); *Wilson v. Science Applications Int'l Corp.*, 52 Cal. App. 4th 1025, 60 Cal. Rptr. 2d 883 (1997); *Copley Press, Inc. v. Superior Court*, 6 Cal. App. 4th 106, 111 (1992); *see also* U.S. Const. amend. I (free speech & press); Cal. Const. art. I, § 1 (right of privacy); Cal. Const. art. I, § 2(a) (free speech & press); Cal. Const. art. I, § 3(b) (public right of access); *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978) (common law right of access to judicial records); B. Witkin, *Summary of California Law, Constitutional Law* §§ 419-423 (10th ed. 2005 & 2013 Supp.). If a public right of access would exist, please take this into account in evaluating the potential advantages and disadvantages of the option.

It might be helpful to have assistance from an evidence law expert in connection with this project, as well as access to experts on constitutional law and alternative dispute resolution. A thorough analysis of a few procedural techniques may be more useful than a less detailed description of many different techniques.

Project #2

What types of statistics exist that would be relevant to the Commission's study? What do those statistics show or suggest?

If you made any assumptions in reaching the foregoing conclusions, please explain those assumptions in detail and discuss how likely they are to be valid. Please also explain in detail any other limitations of the available evidence.

Ideally, the Commission would like to have reliable statistical data on the following points, obtained through properly controlled research:

- What effect does the degree of mediation confidentiality have on mediation participation rates?

- What effect does the degree of mediation confidentiality have on the candidness of mediation participants?
- What effect does the candidness of mediation participants have on the likelihood of reaching a settlement through mediation?
- How often does a client allege that attorney malpractice or other attorney misconduct occurred during mediation? How often does actual (as opposed to alleged) attorney malpractice or other attorney misconduct occur during mediation? What types of attorney misconduct occur during mediation, and what harm is done?
- How often, and to what extent, does mediation confidentiality prevent a client from obtaining satisfactory redress for actual attorney misconduct during mediation? Does the answer to this question vary depending on the degree of mediation confidentiality, and, if so, how much?
- Are the answers to the above questions significantly different for harm due to mediator misconduct or to other misconduct in the mediation process? If so, how?

The Commission suspects that such data would be extremely difficult, if not impossible, to obtain.

Is the Commission correct about this? Why or why not? If reliable, properly controlled data on the above points cannot be obtained, are there ways to obtain approximate answers? If so, what ways exist and what are their advantages and disadvantages?

The Commission would much appreciate careful student work on either or both of these projects, or any piece of them.

* * *