Study K-402 September 19, 2013

First Supplement to Memorandum 2013-47

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

The Commission has received the following new comments in connection with its study of the relationship between mediation confidentiality and attorney malpractice and other misconduct:

The Commission and staff are grateful for this new input and appreciate the effort it took to prepare. It is extremely helpful to have knowledgeable persons actively participating in this study, and we hope they will continue to do so as the study progresses.

The Commission's role is to carefully scrutinize and analyze the competing considerations and determine the best means of balancing them. At the August meeting, the staff urged interested persons to think creatively and critically about that matter. We welcome new ideas, evidence, and perspectives, as well as reinforcement or embellishment of views previously expressed.

Due to the demands of the Commission's study of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act, which the

Commission is trying to complete in time to introduce legislation in 2014, the staff is not able to analyze the attached new comments in detail at this time. We will simply summarize them briefly here and analyze them in greater detail at appropriate points later in this study. However, we encourage members of the Commission to read the comments carefully now, so as to promote meaningful discussion at the upcoming meeting. If additional comments arrive before that meeting, the staff will distribute them in another supplemental memorandum.

The attached comments are as follows:

- Joshua Abrams, a volunteer mediator with SEEDS Community Dispute Resolution Center in Berkeley, urges the Commission to "keep mediation discussions inadmissible." Exhibit p. 1. He explains that mediation changes lives, helping "estranged siblings embrace, divorced parents figure out how to co-raise their children, and neighbors learn how to get along." *Id.* He says that in many cases, this "is only possible because we can offer the guarantee of confidentiality." *Id.*
- The Association for Dispute Resolution of Northern California ("ADRNC") is an organization that "promotes alternative dispute resolution in the courts, the community and the broader society." Exhibit p. 2. Founded in 1983, the group has had hundreds of members over the years. *Id.* It expresses "opposition to any changes in the confidentiality provisions for mediations as set forth in the California Evidence Code." *Id.* It explains that position in detail, giving numerous reasons for leaving existing law in place. *Id.* at 2-3.
- Barbara Bryant, a full-time mediator, says it "is important that attorneys not misuse the mediation process against their clients' interest, whether it rises to the level of malpractice or not." She warns, however, that "a broad change in mediation confidentiality is not the solution, and would drastically undermine mediation's value and effectiveness in settling cases." *Id.* at 4.
- Bill Chan was a party to a series of mediations; he says his experience was similar to that of Mr. Cassel in *Cassel v. Superior Court,* 51 Cal. 4th 113, 244 P.3d 1080, 119 Cal. Rptr. 3d 437 (2011), except that he did not attend the mediations voluntarily. Exhibit p. 5. He "will never again use mediation so long as it is a 'get out of jail free' card for attorneys that commit malpractice." *Id.*
- Michael E. Dickstein has "been a full-time mediator of complex disputes since the mid-1990's …." Exhibit p. 6. He explains in detail that (1) "confidentiality is important in almost all of [his] cases," (2) "[m]alpractice in mediation is exceedingly rare," and (3) "if the Commission considers it important to craft protections from malpractice at mediation, then it should carefully balance what will be lost in the vast run of mediation cases in which there is no

malpractice and confidentiality is working very well." *Id.* at 6-7. He "would be very concerned that a rule would be created that would allow parties with buyers' remorse to accuse their lawyers of malpractice, and that their lawyers would then argue that any action could only be considered in the broad context of what was going on at the mediation, which would then remove any confidentiality protection from the entire mediation." *Id.* at 7.

- Attorney Jeffrey Erdman writes that "existing law, particularly as applied in *Cassell,* creates a hornet's nest for attorneys seeking to defend against professional negligence claims related to their conduct at mediation." Exhibit p. 9. Without disclosing names and similar details, he describes a mediation in which his firm represented a client who subsequently sued the firm because she was unhappy with the mediated settlement. *Id.* at 8-9. He says that "the experience shows that there is a need for an exception in the law for matters involving alleged misconduct as that proposed in the CCBA resolution — for the sake of both the clients and the lawyers." *Id.* at 9.
- Armand Estrada has been a practicing attorney for over 30 years and a part-time mediator for the last 5 years. Exhibit p. 10. He says "it is imperative for mediation to REMAIN a fully confidential process for the mediators and participants." Exhibit p. 10 (emphasis in original). In his opinion, it "is precisely because of the confidentiality provided by Evidence Code Sections 1115-1118 that mediation has become so successful and court time has decreased." *Id.* He does not want the Legislature to "use examples of a few bad apples to interfere with voluntary processes that for the overwhelming majority provide a vital and advantageous function." *Id.*
- Bruce Johnsen has been practicing mediation in California as a non-attorney mediator for 30 years. Exhibit p. 11. In his experience, "the foundation for the clear and open communication needed in mediation is the existence of the confidentiality protections we have now." *Id.* He says that "[i]f it is necessary to change the statute to help control malpracticing attorneys, *please ensure that the changes are narrowly targeted* in such a way that mediation can continue to be a healthy and helpful resource for dispute resolution." *Id.* (emphasis added).
- David Meadows "ha[s] been a professional mediator for about 20 years, and ha[s] conducted over 1000 mediations, mostly non-family civil disputes that were in court or would be if not resolved." Exhibit p. 12. He "believe[s] that the extent of problems with the current system are relatively slight, while the dangers of removing confidentiality are both substantial and tangible." *Id.* He explains his position in detail, and offers to provide further information if needed. *Id.* at 12-13.
- Mediator Terry Norbury agrees with the points expressed in Ron Kelly's letter to the Commission dated September 21, 2012. See

Exhibit pp. 14-16. He says "[t]here are no persuasive reasons" to remove the existing confidentiality protections, and "removing them would so change the mediations that mediation's continued and growing utility would be jeopardized." *Id.* at 14.

- Deborah Blair Porter summarizes and expands on the points she made at the August meeting, particularly regarding contractual provisions waiving mediation confidentiality and mediation in special education disputes. Exhibit pp. 17-20. She also provides background information on the *Porter v. Wyner* litigation, *id.* at 20-22, and submits two of the court opinions in that litigation, as well as the petition for review. Those materials are posted on the Commission's website at http://www.clrc.ca.gov/K402.html. As directed by the Legislature, the Commission will consider the *Porter v. Wyner* litigation in depth later in this study. See 2012 Cal. Stat. res. ch. 108.
- Nancy Powers, a trust mediator and trust/estate attorney, says "[y]es, absolutely" she wants her mediations to stay confidential. Exhibit p. 24. She also says "[y]es, absolutely" it is in the public interest for people to be able to speak frankly in mediation. *Id.* In her mind, "at least one important purpose for confidential mediation is to allow for the most effective communication between/among parties without the necessity for legal counsel to 'protect' their clients from saying anything that may later be revealed." *Id.*
- Thomas D. Reese is a past president of the California Dispute Resolution Council. With regard to the magnitude of attorney misconduct in mediations, he "urge[s] the Commission to determine, as best as possible, whether this is a problem in occurrence and in substance, such that it justifies trumping the public interest in preserving confidentiality in mediations." Exhibit p. 25. In short, he recommends that "before attempting to repair it, first determine whether it is badly broken." *Id.*
- Darlene Weide is "the Executive Director of Community Boards, the nation's first and longest running public mediation center." Exhibit p. 26. She is "very concerned about potential changes to the current law on mediation confidentiality," because "any changes to the law that will threaten confidentiality of either the disputing parties or mediators would be very harmful for mediation." *Id.*
- Mediator Gary Weiner, the director of the Appellate Mediation Group, has extensive credentials including experience in thousands of mediations. See Exhibit p. 27. He is "deeply troubled by the prospect that the State of California might revise a statutory scheme that has been in place for so long and has been so thoroughly clarified by the history of Supreme Court jurisprudence dating back to *Foxgate Homeowners' Ass'n, Inc. v. Bramalea California, Inc.*, 26 Cal. 4th 1, 25 P.3d 1117, 128 Cal. Rptr. 2d 642 (2001)." *Id.* He is "among those who believe that there is no

significant problem that actually needs to be addressed." *Id.* at 28. He suggests, however, adding a new section to the chapter on mediation confidentiality, which would state:

> 1129. Notwithstanding any other section in this Chapter, nothing prohibits all the participants including the mediator from entering into an express written agreement, signed by all of them, in which they all agree to a different set of provisions regarding the confidentiality of mediation communications in a given mediation.

Id. He believes that this would provide helpful clarification but "would have no impact on the current state of the law," because "parties have always been free to adopt whatever rules regarding confidentiality they choose." *Id.* at 28, 29.

In addition to the written comments described above, the staff received a phone call from retired Magistrate Judge Wayne Brazil, a leading innovator in alternative dispute resolution techniques who has recently served as a JAMS neutral and professor at UC Berkeley School of Law. He suggested a possible project for students in the Stanford Law and Public Policy Laboratory: Carefully comparing and contrasting the experiences under two different confidentiality regimes. In particular, he thought it might be helpful to examine the experiences in Florida and Texas, because those states have long, active mediation cultures and different confidentiality rules. By way of this memorandum, the staff is passing his suggestion along to Professors Hensler and Martinez at Stanford Law School, who will determine what to assign to students in the Stanford Law and Public Policy Laboratory.

The staff looks forward to providing further analysis of the above input as this study progresses. The Commission is fortunate to have such active participation in its study. We encourage interested persons to continue to share their views as the Commission explores the topic and develops its own assessment of the matter.

Respectfully submitted,

Barbara Gaal
Chief Deputy Counsel

EMAIL FROM JOSHUA ABRAMS (9/14/13)

Re: Mediation Confidentiality Rules

Dear Ms. Gaal,

I am a volunteer mediator with SEEDS Community Dispute Resolution Center in Berkeley. I am writing to urge you to keep mediation discussions inadmissible. Mediation changes lives. A have helped estranged siblings embrace, divorced parents figure out how to co-raise their children, and neighbors learn how to get along. In many cases, it is only possible because we can offer the guarantee of confidentiality.

Mediation not only helps the world, it saves public resources, because it keeps these disputes out of the courts and out of the police, if there is not a need to be.

The current system of certification is thorough and ensures that only qualified people are mediators.

Sincerely,

Joshua Abrams

ADRNC
Association for Dispute Resolution
of Northern California
PO Box 40980 San Francisco, CA 94140-0980
650-745-3842 adr@adrnc.net adrnc.net

September 16, 2013

Barbara Gaal
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, CA 94303-4739 Mail to: bgaal@clrc.ca.gov

Re: Review of Mediation Confidentiality Provisions by the California Law Revision Commission.

Dear Ms. Gaal:

The Association for Dispute Resolution of Northern California (ADRNC) is a member based organization which promotes alternative disputes resolution in the courts, the community and the broader society. We were initially founded in 1983. Hundreds of practitioners have been among our membership over the years.

We have been requested by the Board of Directors to express our opposition to any changes in the confidentiality provisions for mediations as set forth in the California Evidence Code. We believe that the adoption of evidentiary rules making mediation confidential was an important milestone in California jurisprudence. These rules were the result of extensive discussions and involved public policy tradeoffs. Amending those rules should not be done casually.

The Commission's review of these provisions are for a well-intentioned purpose: making redress possible for a person whose interests were not well served by their counsel. However, this is a case where the cure can be worse than the disease. The effect of any change to this legislation that violate the confidentiality of mediation would have a chilling effect on both the parties in mediation and their legal counsel.

If the confidentiality provisions of the Evidence Code are changed, clients represented by attorneys will participate in mediation far less frequently and mediated agreements will be more difficult to reach. Even a very competent attorney, who has nothing but the best interests of a client in mind, would then be excessively cautious about entering into mediation or working to persuade a client of the merits of a mediated agreement; the new legislation would needlessly place the attorney at substantial risk in the event of a disagreement with the client.

As mentioned above, public policy tradeoffs are considered in the current rules. The legal system does not and cannot provide perfect redress for every wrong. Nor does changing the present

As mentioned above, public policy tradeoffs are considered in the current rules. The legal system does not and cannot provide perfect redress for every wrong. Nor does changing the present provisions offer perfect redress for incompetent or unethical counsel. Changing the existing confidentiality provisions would compound the existing over-burdening of the court. And, most importantly, it is a well-known fact that a mediated agreement has a much higher compliancy rate than do court orders.

Should the commission weaken the confidentiality provisions as they presently stand, it will make it even more difficult for mediators and competent, ethical attorneys to work with clients to arrive at agreements that best serve the clients' needs—agreements achieved in consideration of *all* the circumstances. On balance, more is achieved by a larger number of individuals participating in mediation than is lost by some potential number of individuals agreeing to ill-advised resolutions.

Further, having mediated many disputes with attorneys as co-mediators, and/or with attorneys as advisors to the disputants, we have found that one of the most important considerations is disclosure. Clarity about the potential benefits, limitations, and disclaimers associated with mediation seems the path to highlight, not weaken the Confidentiality provisions of the evidentiary code. The Confidentiality provisions allow the parties to be open and transparent during negotiations without fear of later repercussions.

As a final matter, the Board of Directors feels that any changes to the Confidentiality provisions of the evidence code would be contrary to the goals set forth in the Model Rules of Conduct adopted by the AAA, ABA, as well as ACR, in that they would not foster diversity within the profession and would make mediation less accessible to the public. In particular, changes to the provisions would likely have a decidedly chilling effect on those offering services at reduced rates or Pro Bono services for those of modest means.

As the Commission carefully considers any potential changes to the existing evidentiary rule as currently written, we ask for your deep consideration of our concerns as noted above.

Should members of the Commission have questions or require further information, the Board of Directors of ADRNC would be more than happy to assist.

Sincerely,

Donald Proby, President

Coreal Riday-White, Vice President

EMAIL FROM BARBARA BRYANT, BERKELEY (9/18/13)

Re: Mediation Confidentiality

HI,

I am a full-time mediator/legal neutral.

It is important that attorneys not misuse the mediation process against their clients' interest, whether it rises to the level of malpractice or not.

However, a broad change in mediation confidentiality is not the solution, and would drastically undermine mediation's value and effectiveness in settling cases. This seems particularly so when there does not seem to be evidence of wide-spread attorney malfeasance towards clients in mediations.

It should already be part of a mediator's practice not to support a settlement if any of the signatories appear to be under undue pressure or coercion.

Thank you for consideration of my remarks.

Barbara S. Bryant

Mediator ● Workplace Investigator Special Master/Discovery Referee

Mailing Address and Couriers to:
Barbara S. Bryant, Esq.
Mediation Law Offices of Barbara S. Bryant
1563 Solano Avenue, Box 215
Berkeley, CA 94707

Mediations and Hearings Held at:
1300 Clay Street, Suite 600
Oakland, CA 94612

(510) 558-0600
(510) 527-6046 fax
bsbryant@pacbell.net
www.BryantMediation.com

EMAIL FROM BILL CHAN (9/11/13)

Re: California Law Revision Commission study of the Relationship between Mediation Confidentiality and Attorney Malpractice

Dear Ms. Gaal,

I recently heard about this study and that you are soliciting inputs from many sources including individuals.

I was a party to a series of mediations prior to the Cassel decision at the California Supreme Court. My experience was very similar to that of Mr. Cassel with one difference. Mr. Cassel's attendance at mediation was voluntary. My attendance was not voluntary.

After the Cassel decision at the Supreme Court, another legal action occurred in which mediation was suggested to me. I opposed and will never again use mediation so long as it is a "get out of jail free" card for attorneys that commit malpractice.

Bill Chan

EMAIL FROM MICHAEL E. DICKSTEIN, DICKSTEIN DISPUTE RESOLUTION/MEDIATE (9/1/13)

Re: The Appropriate Scope of Mediation Confidentiality

Dear Sir/Madam,

I understand that the Commission is currently considering the appropriate scope of confidentiality in mediation, and considering the risks of malpractice being committed under the cloak of confidentiality at a mediation.

I have been a full-time mediator of complex disputes since the mid-1990's (before that I practiced law as a partner in one of California's leading firms). My mediation practice is based in California, but I mediate nation-wide (I have mediated in almost every major city in the country and even in Canada). In almost every mediation I have conducted, each side has been represented by at least one lawyer, and in most of my cases the sides are represented by multiple lawyers and often multiple law firms. So I have had the opportunity, over many years to observe the importance of confidentiality, and the prevalence of malpractice committed in mediation.

I have the following observations, which I hope the commission will consider:

1) Confidentiality is very important to the parties in mediation. It facilitates discussions. It allows for resolutions that would not be possible without a broad sharing of information. And it avoids the parties encumbering the courts with discovery disputes, and wasting the time and money associated with obtaining information after long battles as part of the formal court process (in almost all of my mediations there is an agreed informal sharing of information, which is usually only possible due to the confidentiality of the mediation process). I have even had parties who thought they could reach a resolution through negotiation, pay to mediate (specifically because mediation provides stronger confidentiality protections). In short, confidentiality is important in almost all of my cases. And most would agree it is very important to the effectiveness of mediation generally.
2) Malpractice in mediation is exceedingly rare. Although I have observed cases in which I wondered whether a lawyer could be argued to have committed malpractice BEFORE the mediation, I can think of no cases in which I believed a lawyer was committing malpractice at the mediation. And I can only think of one case in which a lawyer was accused by his clients of misconduct at the mediation. Even in that case, it was not at all clear that the lawyer had committed malpractice at the mediation. Thus, it does not appear that the cloak of confidentiality at mediation is encouraging malpractice at mediation, nor that malpractice at mediation is

sufficiently prevalent to justify a serious erosion of the benefits of mediation confidentiality in all mediations.

3) It is clearly not desirable that mediation confidentiality be used as a screen for malpractice, no matter how rarely that occurs, but the Commission should be very careful not to create worse problems in trying to address that problem. Thus, if the Commission considers it important to craft protections from malpractice at mediation, then it should carefully balance what will be lost in the vast run of mediation cases in which there is no malpractice and confidentiality is working very well. And it should carefully craft any limitation in the strength of mediation confidentiality to make sure that it does not swallow the rule. I would be very concerned that a rule would be created that would allow parties with buyers' remorse to accuse their lawyers of malpractice, and that their lawyers would then argue that any action could only be considered in the broad context of what was going on at the mediation, which would then remove any confidentiality protection from the entire mediation. This would both raise the prospect that malpractice would start to be used as a way of vitiating mediated agreements that parties subsequently decided they did not like, and, more important, it would likely chill open communication in the great majority of mediations in which there was no dispute about malpractice, because the parties could not trust that their confidences would not ultimately be revealed.

Thank you for your consideration.

Sincerely,

Michael E. Dickstein
Dickstein Dispute Resolution/MEDiate
P (415) 474-1449 (416) 352-1222
F (415) 358-5833 (416) 352-1222
md@DicksteinDisputeResolution.com
www.DicksteinDisputeResolution.com

EMAIL FROM JEFFREY W. ERDMAN, LOS ANGELES (8/28/13)

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

Dear Ms. Gaal:

I am informed that the California Law Revision Commission is considering the issue of the "RELATIONSHIP BETWEEN MEDIATION CONFIDENTIALITY AND ATTORNEY MALPRACTICE AND OTHER MISCONDUCT" (Study K-402), flowing from CCBA Resolution 10-06-2011 by the Beverly Hills Bar Association, through the enactment of ACR 98 (Wagner and Gorrell - see also AB 2025 (Gorell)). As you know, this issue arose (most recently) following the California Supreme Court's decision in *Cassel v. Superior Court* (2011) 51 Cal.4th 113. *Cassell* held that the plain language of Evidence Code §1119-1120 compelled it to find that attorney-client confidentiality in a mediation was absolute, but strongly suggested that the Legislature change the statute to address concerns expressed most clearly in the concurring opinion of Justice Chin that "attorneys participating in mediation will not be held accountable for any incompetent or fraudulent actions during that mediation unless the actions are so extreme as to engender a criminal prosecution against the attorney."

I write to add my small voice to the matter, for your consideration.

Without disclosing names and such... A couple of years ago, my firm was sued for professional negligence and breach of fiduciary duty by one of our family law associates (the only time anyone in our firm had ever been sued for alleged misconduct). The client alleged that our associate had pressured her to take at mediation what she now considered to be an unfavorable settlement and even alleged that we threatened to fire her after the mediation if she didn't take the deal. The truth was, our attorney advised against it but did ultimately leave it up to the client after discussing the pros and cons of the proposed settlement, while of course explaining the costs of litigation if the matter didn't settle and she wanted to fight for more in litigation. True, there was a discussion about what would happen if she got to a point that she couldn't pay her legal bills any longer as the case dragged on, and she was told that we would have to move to withdraw from the case if not substituted out. But there was never a threat to quit if she didn't take the settlement. She decided to accept, but later regretted doing so. Apparently, she felt we should have aggressively talked her out of it and/or perceived the discussion about the future litigation costs as a threat.

She had a friend with her during the entire mediation, who was a witness to the discussions between the client and the attorney. However, the mediation privilege stated in Evidence Code section 1119 precluded discovery regarding what was actually said to the client by the lawyer – and such would not been admissible -- in an effort to defend against the allegations. Indeed, our associate would likely have been precluded from testifying at trial about what was said. Sure, we could use the same confidentiality statutes perhaps to preclude the prosecution of the charges, but that seems like a poor way

to defend against such charges. It feels like an admission of wrongdoing but a tactical means of getting away with it. And, besides, she was violating the privilege at her all over the place and we would have been left with no choice but to seek to strike it – unring the bell as it were. In sum, the existing law, particularly as applied in *Cassell*, creates a hornet's nest for attorneys seeking to defend against professional negligence claims related to their conduct at mediation.

While we did ultimately settle the case with the former client, with her having to pay a portion of our bill (something that the case was probably directed at in the first place), the experience shows that there is a need for an exception in the law for matters involving alleged misconduct as that proposed in the CCBA resolution – for the sake of both the clients and the lawyers. I hope that the commission will come down in support of the proposed legislations.

Thank you for your time.

Jeffrey W. Erdman
jwe@bennetterdman.com
ph: 323.935.0041
fx: 323.935.0071

B&E Bennett &Erdman
LAWYERS FOR YOUR LIFE
5670 Wilshire Boulevard, Suite 1400
Los Angeles, CA 90036

BUCHMAN PROVINE BROTHERS SMITH LLP

Reply to:

Armand M. Estrada
aestrada@bpbsllp.com

September 18, 2013

VIA E-MAIL BGAAL@CLRC.CA.GOV

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

Re: Study on Mediation Confidentiality

Dear Ms. Gaal:

I have been a part-time mediator for the last 5 years. Prior to that, my full-time practice involved business and construction litigation, in which I participated as a attorney representing parties countless times over my 30 years of practice. The use of mediation has had a dramatic affect on reducing court time, productivity loss to business parties and costs to both the litigants and the courts.

I fully understand the issues regarding attorney misconduct. Mediation is a voluntary process and mediators spend a considerable amount of time advising attorneys and their clients that they are not compelled to settle. It seems that the legislature in this state is always finding ways to use examples of a few bad apples to interfere with voluntary processes that for the overwhelming majority provide a vital and advantageous function. Erosion of mediation confidentiality is another example. It is precisely because of the confidentiality provided by Evidence Code Sections 1115-1118 that mediation has become so successful and court time has decreased. Moreover, I have mediated many cases for parties without attorneys as a volunteer mediator for the Contra Costa County Superior Court, and having them understand that their comments are confidential is a key factor in their participation. However, it is imperative for mediation to REMAIN a fully confidential process for the mediators and participants. Otherwise, participants will not be willing to engage in open and frank discussions for the purpose of resolving disputes. In fact, most of the non-represented parties will refuse to participate in mediation at all.

Mediation must remain a fully confidential Process for it to be as successful as it has become. Do not change the law, the Evidence Code or the process.

Very truly yours,

BUCHMAN PROVINE BROTHERS SMITH LLP

Armand M. Estrada

Bruce Johnsen, Mediator
824 Munras Ave. Suite G
Monterey, CA 93940

August 30, 2013

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

Re: Study on Mediation Confidentiality

I have been practicing mediation in California as a "non-attorney" mediator for 30 years. My experience is that the foundation for the clear and open communication needed in mediation is the existence of the confidentiality protections we have now. My concern is that if these protections are weakened for mediation participants, the process will gradually become useless, leading to more court cases and additional taxpayer costs for the various levels of government.

If it is necessary to change the statute to help control mal-practicing attorneys, please ensure that the changes are narrowly targeted in such a way that mediation can continue to be a healthy and helpful resource for dispute resolution.

Thank you for your efforts in keeping the mediation process one to be used often, and trusted by all participants.

Best regards

Bruce Johnsen

Bruce Johnsen

EMAIL FROM DAVID MEADOWS, OAKLAND (9/10/13)

Dear Ms. Gaal:

I welcome the chance to participate in this discussion. I will keep my remarks brief here, but am happy to provide further information on any subject about which you or the commission would like to hear more.

The problem with revamping mediation confidentiality is complicated, I acknowledge, but the core questions are simple. What is the extent of the problem and what are the costs of fixing it? I believe that the extent of problems with the current system are relatively slight, while the dangers of removing confidentiality are both substantial and tangible.

I have been a professional mediator for about 20 years, and have conducted over 1000 mediations, mostly non-family civil disputes that were in court or would be if not resolved. In that time, I can count on one hand the number of occasions in which I had some concern about the behavior of one of the lawyers, and I believe I dealt with those concerns in a manner to assure that the client understood that the client had the power to make decisions and control his or her destiny.

By contrast, the occasions when it was crucial to the process that the participants could count on confidentiality in order to communicate sufficiently to reach an agreement were many. Often, that confidentiality applied to private discussions between myself and the party and attorney on one side, and sometimes they involved direct discussions between the parties.

Confidentiality can be significant for many reasons. The subject may be private in a personal way or significant for business reasons, so that disclosure outside the mediation would be embarrassing and/or financially and emotionally damaging. Sometimes the information is provided only to me privately. For example, background circumstances may affect the negotiation on one side so powerfully that disclosure would create huge leverage and so would not be disclosed if it might reach the other side, but it is nonetheless important for me as the mediator to know. The list of possible circumstances is long and varied, but the core principle is the same. Without the assurance of confidentiality, a key piece of communication will not occur.

I have heard the arguments that parties do not disclose what they do not want to disclose at a mediation, and so confidentiality is redundant to the process. There are certainly cases where this is true, where the parties and/or lawyers are careful to only provide me and the other side the information and perspective that is helpful to their cause. Frankly, these are often the most difficult cases to resolve because every step is carefully planned and gives very little. It is the parties' choice if they want to proceed in this way, and as the mediator I honor their choices. But in my experience, there are many cases in which the discussions with me especially are more open and forthright, and the information I glean is crucial to reaching an agreement that is acceptable to both sides, meets the parties' needs, and does not require an overly long and painful process to achieve.

I appreciate that confidentiality also appears to provide a shroud that may hide wrongdoing. But the process has built in checks. Nothing is binding unless it is signed *by the party*. Existing rules require mediators to explain confidentiality to the participants. Most mediators use written confidentiality agreements that spell it out further. Most mediators have direct conversations with the party and the lawyer together, not separate discussions with the lawyer. Indeed, in many ways, these checks provide unwary parties more protections from manipulations by their lawyer than they receive in many contexts.

Without knowing in more detail what kind of proposals are being considered, I cannot comment on them and would welcome the chance. If you have any questions for me, I will be happy to respond. I appreciate any consideration you give these thoughts.

Regards,
David

David Meadows
Mediation & ADR Services
679 Arimo Avenue
Oakland, CA 94610
510-451-2660
510-451-2651 (fax)
djm@davidmeadows.com

EMAIL FROM TERRY NORBURY, SAN FRANCISCO (8/28/13)

Re: Will Your Mediation Stay Confidential? Yes

Dear Barbara Gaal,

I fully endorse the points made by Ron Kelly in his letter to you (below) dated 21 September 2012. There are no persuasive reasons to remove the confidentiality protections from mediations that currently exist in California Law. However, removing them would so change the mediations that mediation's continued and growing utility would be jeopardized.

Terry Norbury, Esq., Mediator
415 661 3228

September 21, 2012

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

Re: Study on Mediation Confidentiality

Dear Commission Members and Staff,

Purpose. This letter is intended to assist the Commission in its initial work of deciding the scope of its study and allocation of resources in response to the new topic of mediation confidentiality in the Legislature's regular Commission authorization resolution, ACR 98 of 2012.

History of Referral. This topic was added to ACR 98 by incorporating the language of AB 2025 as amended May 10, 2012. This language in turn was compromise language entirely replacing the original text of AB 2025, which would have added a new exception to mediation confidentiality by amending section 1120 of the Evidence Code. Section 1120 was part of a set of fourteen interrelated Evidence Code sections, 1115-1128, sponsored by the Commission in 1997 to define and govern mediation in California.

These fourteen statutes were adopted unanimously by the Legislature and later upheld unanimously five times in challenges heard by the California Supreme Court. They have been in force unamended since they took effect January 1, 1998. AB 2025 as introduced would have amended them to allow use of mediation communications between attorney and client in later actions against the attorney.

Scope of Referral? A threshold question for the Commission is the scope of its study. ACR 98 begins describing this new topic as "Analysis of the relationship under current law between mediation confidentiality and attorney malpractice and other misconduct...". Given the background of AB 2025, it seems clear that this phrase refers to alleged

attorney malpractice and other attorneymisconduct, rather than a much wider scope involving possible later allegations of misconduct in mediation against any party, accompanying family member, expert witness, or other participant.

Mediation is now used very widely in California, thanks in part to the protections for candid communication which Evidence Code sections 1115-1128 together provide. If the Commission were to open up the study to cover the much larger scope of whether mediation communications should be admissible in later actions against any and all participants, it would almost certainly require the allocation of a great deal more resources and time. The Commission might be well served to decide this scope question as early as possible so as not to unnecessarily alarm and draw in all those who currently use, conduct, or benefit from mediations conducted under the current statutory protections.

Resources - Opposition to Amendment. The standard legislative history record for AB 2025 could be misleading. For instance, the Bill Analysis states there was no registered support or opposition to AB 2025 as amended to refer this matter to the Commission. Respectfully submitted for the Commission's study are copies of all statements of support and opposition to the original introduced version of AB 2025 in the Assembly Judiciary Committee files (as supplied by the Committee Secretary, and which includes the bound sampling submitted).

There was a single letter of support from one individual. There were more than sixty statements of opposition to the original bill submitted to the Legislature. These were from the California Employment Lawyers Association, California Lawyers for the Arts, the Southern California Mediation Association, the Association for Dispute Resolution of Northern California, and dozens of lawyers, court personnel, mediators, mediation program directors, and others.

In allocating resources for this study, the Commission could reasonably expect there to be significant opposition to amending the current statutes. Since their enactment all mediation participants, including attorneys, have been free to speak candidly in mediation without fear that their words might be used against them in any later non-criminal proceeding. In the submitted statements, those involved in mediation affirmed that this has been centrally important to the effectiveness of mediation. Echoed in many of the submitted statements, my own view was that proponents had not adequately considered the complexity of this area and the consequences of their proposed amendment.

Evidence? Initial Study. This current system has been operating for fourteen years. Has attorney misconduct now become a significantly large problem in the real world that revision of these statutes is in the public interest?

The Commission might also be well served by an initial investigation. Is there evidence that actual attorney misconduct in California mediations happens significantly often where a remedy is unavailable because of the current statutes? If so, what is the nature of the actual problem? Does it happen often enough that this harm outweighs the public benefit of all participants knowing they're able to talk off the record in mediation? John Blackman's March 15 letter, Richard Collier's March 30 letter, and the April 11 letter from the California Employment Lawyers Association (enclosed) are representative of

those with significant relevant experience who believe the problem is very small and the public benefit that will be lost is very large.

Offer. I've been regularly leading discussions of the public policy questions involved in mediation confidentiality for over twenty years. I served as an expert advisor to the Commission in its study and drafting of the current mediation statutes. I was actively involved in nearly all of the drafting meetings for the Uniform Mediation Act. Enclosed is a 1996 letter from the Commission's Executive Director on my work with the Commission. He states in part:

> Your assistance in this project has been critical. You have brought problems to our attention, suggested solutions, provided background on issues, and analyzed proposals. You have always been fair and even-handed in this effort.

I hope to again be of assistance to the Commission in its study of this topic.

Respectfully submitted,

Ron Kelly
2731 Webster St.
Berkeley CA 94705
510-843-6074

Deborah Blair Porter
1156 5th Street, Manhattan Beach, CA 90266
(310) 379-0386 (home) – (310) 977-5377 (cell)
deborah.blair.porter@gmail.com

August 24, 2013

TRANSMITTED VIA E-MAIL

California Law Revision Commission
C/o UC Davis School of Law
400 Mrak Hall Drive
Davis, CA 95616
Attention: Barbara Gaal, Chief Deputy Counsel

Re: August 2, 2012 – Comments and Supplemental Information (Study K-402)

Dear Barbara:

Thank you for the opportunity to participate in the Commission's August 2, 2013 hearing on the relationship between mediation confidentiality and attorney malpractice and other misconduct.

I have received and reviewed the minutes of the August 2nd hearing and note that they do not reflect the comments made by the various participants present that day. It occurred to me that it might be helpful to the Commission members if I documented the points I made at the hearing (with clarification in some instances), to be sure my points are in mind during the Commission's consideration of the issues as it moves forward in review of this important matter. I also see that the Staff's next memorandum is to be a preliminary analysis of relevant policy interests relating to the intersection of mediation confidentiality and attorney misconduct and I thought that reiterating the points I made would contribute to this process.

Briefly, the points I made at the August 2, 2013 hearing related to the following:

Contractual Provisions Waiving Mediation Confidentiality

> The initial information released by the Commission regarding the study indicated the Commission would consider among other matters "The

availability and propriety of contractual waivers." I noted that the Memorandum 2013-39 Commission staff prepared specifically referenced only those contractual agreements mediation participants sometimes enter into which restrict disclosure of mediation confidentiality. At the hearing I asked that the Commission in its analysis also consider contractual provisions which seek to waive confidentiality, i.e., specifically those waivers which may be used in the context of disputes involving public agencies where transparency and accountability are at issue. (This was the situation in the mediation and settlement of the litigation underlying *Porter v. Wyner* and was an issue there as at the time many public education agencies were using confidentiality as a means of cloaking the nature and extent of litigation in which such agencies were involved).

Mediation in Special Education Disputes

Under both the federal "Individuals with Disabilities Education Act" (IDEA) and California's Education Code, mediation is strongly encouraged as an alternative for resolving disputes which arise between education agencies and parents over the education of children with disabilities. The use of mediation was added to the IDEA in 1997 and further encouraged in IDEA's 2004 reauthorization and its role in dispute resolution in special education in California has grown during the past decade. This is not only due to the cost-effective nature of mediation, but its simplified nature compared to administrative proceedings and due process makes it a less stressful alternative for both school staff and parents and it is perceived as less harmful to the long-term relationship between parents and schools than litigation.

Many of the parties in special education disputes are parents and/or guardians of children eligible for special education services. The vast majority of these parties are unsophisticated regarding the law and legal processes in general, and specifically mediation. As a result, these individuals rely heavily upon legal counsel they may hire in this process. Given the lack of low-cost special education legal counsel in California, as well as special education legal counsel in general, parents and guardians often have few attorneys from which to choose. Furthermore, most parents and/or guardians are completely unaware of the ethical standards under which attorneys should be operating or their rights, and the rights of their children, in connection with such standards.

Given their overall lack of awareness of the legal process, few of these parents/guardians are aware of *Cassel v. Superior Court* (2011) 51 Cal.4th 113 (*Cassel*). Even though *Porter v. Wyner* arose out of underlying litigation related to special education and the obligations of California's state and local education agencies to ensure the provision of a free appropriate public education and that litigation received wide-spread coverage in the media at the time of its settlement in August 2005, the Court of Appeal's decisions in *Porter v. Wyner* are both unpublished decisions, so that the special education community has had no notice that under California's current interpretation of the mediation statutes, parents/guardians who decide to participate in the strongly-encouraged process of mediation relinquish significant rights, not only in relation to the acts or statements of their legal counsel at mediation, but also quite possibly with regard to their child's substantive educational rights.

As I mentioned, some special education attorneys apparently believe that because IDEA is a fee-shifting statute, they have free rein to negotiate on their own behalf regarding their fees, including during the mediation process, so that a significant conflict of interest can arise during mediation which violates all ethical standards. As a consequence, mediation can be extremely detrimental to the rights of parents and guardians of students whose rights and interests can end up sacrificed to, and compromised by, their attorney who may place greater emphasis on their personal desire to be paid over the educational needs of their client student/parent. As noted above, this not only affects the rights of the parties in the mediation vis-a-vis their legal counsel, but can lead to the loss of substantive educational rights underlying a student's right to a free appropriate public education under both state and federal law as well as these same rights relative to a parent or guardian, given that significant rights may be waived in exchange for settlement.

I also discussed the fact that in mediations, attorneys hired by local education agencies have been known to convince parents and guardians of students who receive special education to waive substantive educational rights under the law in order to get services for their

children in settlement. As well, these attorneys often document any agreements arising out of such resolutions. Given that such documents and communications regarding them are presently precluded from disclosure by California's current interpretation of the mediation statute, where a parent or guardian unwittingly relinquishes rights that are critical to their child receiving a free appropriate public education either at a mediation or in the documentation of any agreement, these parents and/or guardians have no recourse against such legal counsel or their own attorney should they be an unwitting party to such activity.

I will provide the Commission with further data regarding the use of mediation in special education disputes so that the extent of its use, and the potential for harm as a result given the current legal climate, can be part of the Commission's consideration in its study. For now I thought it would be helpful to supply this context.

Hypotheticals Proffered by Opponents of Exceptions re: Attorney Misconduct

Also, as I mentioned, it appears that a good amount of what those who oppose the possibility of exceptions to the mediation confidentiality statutes have presented in their opposition statements consists of hypotheticals. Understanding the Commission's admonition that such hypotheticals should be rebutted where possible, but without using specific names or revealing matters subject to confidentiality, I will provide supplemental comments to rebut such hypotheticals prior to the Commission's next memorandum in advance of its October meeting.

Additional *Porter v. Wyner* Opinion and Supreme Court Petition for Review

In addition to the decision *Porter v. Wyner,* 107 Cal. Rptr. 3d 653 (2010) (formerly published at 183 Cal. App. 4th 949) (cited in Memorandum 2013-39, page 26), the Commission should also consider the subsequent unpublished July 27, 2011 Court of Appeal decision in *Porter v. Wyner* (modified August 18, 2011), as well as the September 2, 2011 Petition for Review to California's Supreme Court in that matter. Both address and further elaborate upon the issues in the initial *Porter* decision which the Commission has cited as part of its Study K-402.

Additional *Porter v. Wyner* Opinion/Supreme Court Petition for Review (cont'd)

After the initial 2010 decision in *Porter v. Wyner,* the case was appealed to California's Supreme Court and attached to *Cassel*, which had preceded it on appeal. Our attorney, Gerald L. Sauer, submitted an *amicus* brief in *Cassel* (*see*, opinion in *Cassel,* footnote 2) and also presented in oral argument before the Supreme Court on November 2010.

After the Supreme Court issued its *Cassel* decision in early 2011, *Porter v. Wyner* was sent back to the Court of Appeal for consideration in light of *Cassel.* In the resulting unpublished decision (dated July 27, 2011; modified August 18, 2011), the Court of Appeal considered contractual waiver provisions in the underlying Settlement Agreement (¶19) related to confidentiality, finding "The settlement agreement provided only that the "[p]arties," a description that did not include respondents Wyner Tiffany, waived the provisions of the mediation confidentiality agreement and that the "[p]arties acknowledge and agree that the terms and provisions of *this Agreement* are not confidential." (Italics added.)" The Court of Appeal concluded the Settlement Agreement did not include an express waiver of mediation confidentiality despite the parties negotiating and documenting their intent for such a waiver in reaching a mutually acceptable settlement of their dispute.

Subsequently, a Petition for Review in *Porter v. Wyner* was submitted to the Supreme Court (*see* attached Petition for Review S195868), which addressed the issue of whether a contractual provision agreed to by the parties in a documented Settlement Agreement, through which they intended to waive confidentiality in resolving their dispute in a "mutually acceptable agreement" (EC 1115(a)), was valid or could be set aside by a party's attorneys later claiming they didn't agree with the waiver and/or that the waiver did not comply with evidence code. Specifically, the Petition presented the following issues:

> 1. Who controls the decision to waive mediation confidentiality? Specifically, where all parties to a dispute have expressly waived mediation confidentiality, should non-party participants to the mediation be allowed to thwart that decision?
>
> 2. Does a documented waiver of mediation confidentiality contained in a fully executed Settlement Agreement require the signatures of all non-party participants to the mediation in order to constitute a valid express waiver of mediation confidentiality?

Additional *Porter v. Wyner* Opinion/Supreme Court Petition for Review (cont'd)

The Petition also noted that Justice Chin, in his separate concurring opinion in *Cassel,* "presaged the precise issue presented here: whether the litigants can be stripped of their express decision to waive confidentiality where counsel for one side belatedly claims he did not agree to the waiver." (*See,* Petition for Review, page 16). The Petition for Review in S195868 was denied on October 19, 2011.

In the same way the Commission will be scrutinizing the facts and law in *Cassel* and the initial *Porter v. Wyner* decision, it should make the 2011 *Porter v. Wyner* decision, as well the Petition for Review, part of its analysis. Both documents, which are attached, are part of the public record and this aspect of the litigation is no longer pending. We therefore submit both documents and hope they prove helpful to the Commission's analysis of how the issues related to mediation confidentiality are affecting parties in California in their resolution of their disputes.

Conclusion

Again, I would like to thank you and the Commission generally for the opportunity to attend these hearings and present information for the Commission's consideration. I appreciate the open nature of this process and the public's ability to be involved in the resolution of what is a very important issue for California. I can't help but feel that this transparency will ensure greater confidence in the outcome of the study and in the overall process in general.

Should the Commission have any questions with regard to the information contained in this letter, please do not hesitate to contact me at the numbers referenced above.

Most sincerely,

Deborah Blair Porter

Deborah Blair Porter

Attachments:

1) Opinion in *Porter v. Wyner* following transfer from Supreme Court, filed July 27, 2011, B211398.

2) Modified Opinion in *Porter v. Wyner*, issued August 18, 2011.

3) Petition for Review to California Supreme Court in *Porter v. Wyner* (S195868) submitted September 2, 2011.

EMAIL FROM NANCY POWERS (9/10/13)

Re: Mediation Confidentiality

My thoughts below are to start the dialog and are not carefully thought out because I'm heading out to a meeting of the CCCBA ADR Section Board. These comments represent my immediate response to this proposal. I would need to know why anyone wants to reduce confidentiality and for what purpose. Is this really aimed at what is termed mediation but is really litigation settlement negotiation?

The questions posed by Ron Kelly:

1. **Do you want your mediations to stay confidential?**

Yes, absolutely.

What type of mediation does this question apply to? Is the focus on court "ordered" mediation? Or on all mediation, including mediation entered into voluntarily by families, parties, etc., to work on their own resolution of issues?

My opinion: in any case (except those already carved out, such as family law), no exceptions to confidentiality (except those already codified for safety, etc.).

2. **Do you believe it's in the public interest that people be able to speak frankly in mediation?**

Yes, absolutely.

What is the purpose of reducing confidentiality in mediation?

In my mind, at least one important purpose for confidential mediation is to allow for the most effective communication between/among parties without the necessity for legal counsel to "protect" their clients from saying anything that may later be revealed. If confidentiality in mediation is reduced, then there is no other confidential setting like this for folks to work out their issues.

I will be interested in learning more about why this proposal is being floated.

Nancy L. Powers
Trust Mediator & Trust/Estate Attorney
POWERS LAW
2010 Crow Canyon Place, Suite 100
San Ramon, CA 94583
510.599.7494
PowersLaw@aol.com
www.PowersLawAndMediation.com
www.linkedin.com/pub/nancy-powers/23/568/2a6/

EMAIL FROM TOM D. REESE, PALO ALTO (9/3/13)

Re: Law Revision study of Mediation Confidentiality

Dear Ms Gaal,

This follow's Ron Kelly's email to many of us in the mediation community. My credentials include past President of the CDRC. Thus I know John Blackman, Richard Collier, and Ron Kelly well, and greatly respect their views.

My message here is directed to the question of the magnitude of attorney misconduct in mediations. I urge the Commission to determine, as best as possible, whether this is a problem, in occurrence and in substance, such that it justifies trumping the public interest in preserving confidentiality in mediations. In short, before attempting to repair it, first determine whether it is badly broken.

Regards, Tom Reese, full time neutral, Palo Alto CA.

EMAIL FROM DARLENE WEIDE, COMMUNITY BOARDS (9/4/13)

Re: Requesting Information About AB 2025

Dear Barbara,

I am very concerned about potential changes to the current law on mediation confidentiality (AB 2025). I understand your Commission is currently studying this issue. As the Executive Director of Community Boards, the nation's first and longest running public mediation center, I can share that any changes to the law that will threaten confidentiality of either the disputing parties or mediators would be very harmful for mediation.

I would greatly appreciate it if you could appraise me of the current status of your study on this topic and any pending legislature that would impact mediation confidentiality.

Thank you so much.

Sincerely,

Darlene Weide

Darlene Weide, MPH, MSW
Executive Director
Community Boards
601 Van Ness Avenue, Suite 2040
San Francisco, CA 94102
(415) 920-3820, ext. 105
dweide@communityboards.org
conflict resolution services since 1976

Barbara Gaal
Chief Deputy Counsel
California Law Revision Commission
Via email to bgaal@clrc.ca.gov

September 12, 2013

RE: Mediation Confidentiality

Hello. I write to add my views to the public comment on the California Law Review Commission's work regarding the Relationship Between Mediation Confidentiality and Attorney Malpractice and Other Misconduct.

1. Bona Fides

I am a mediator and director of the Appellate Mediation Group and have been a mediator, arbitrator and an attorney since 1983. My experience in the field includes the following:

- Mediation Program Administrator for the Court of Appeal, First Appellate District from 2009 to 2013
- Director of the Sonoma County Superior Court Office of Alternative Dispute Resolution from its inception through June 2004
- member of the Board of Directors of the California Dispute Resolution Council
- former member ADR committee of the State Bar of California
- former adjunct professor of law at the Hastings College Center for Negotiation and Dispute Resolution teaching the ADR survey course
- mediation trainer and adviser to the High Courts of Mumbai and Delhi, India
- featured speaker on court connected ADR and the state of mediation at Bar Association meetings all over northern California, at the annual conference of the Center for Public Resources (CPR Institute in New York) and as member of numerous panels at dispute resolution conferences all over the country
- expert assistance regarding mediation practice and procedure in California litigation.

In the course of my career in mediation I have mediated or overseen the convening, management and evaluation of thousands of mediations in all fields. I've read and written extensively on the topic and have attended hundreds of hours of training and conference sessions here and abroad on a broad array of topics related to mediation. I have read all of the information prepared by the commission in this matter and all of the public comment that has been published by the Commission.

During the pendency of the litigation in *Cassel v. Superior Court,* 51 Cal. 4th 113, 244 P.3d 1080, 119 Cal. Rptr. 3d 437 (2011), I was serving as Mediation Program Administrator at the Court in San Francisco. I was responsible for the continuing education and evaluation of the mediators who served on the Court's mediation panel. In that capacity I followed the litigation carefully from the time it began in the Court of Appeal through the final decision of the Supreme Court.

Prior to the case reaching the Court of Appeal I was fully conversant with the entire jurisprudence on mediation confidentiality in the State of California and had read all of the legislative commentary on Evidence Code 1115 et seq. I have read all of the appellate briefs in the case in both courts, listened to transcripts of the oral argument in the Court of Appeal and attended oral argument in the Supreme Court. Immediately following oral argument I lead a dialogue with some of the top panelists in the program about what we had just heard. Both during the pendency of the case before the Supreme Court and after the court published its opinion, I led continuing education programs on mediation confidentiality, the meaning of the case, the public policy implications and mediators' and attorneys' duties in light of the decision and its antecedents.

In sum, I believe I have a thorough understanding of the context and the law pertaining to mediation confidentiality in California and would qualify as an expert were I called to testify in a court of law on the subject.

2. Comment on confidentiality

I am deeply troubled by the prospect that the State of California might revise a statutory scheme that has been in place for so long and has been so thoroughly clarified by the history of Supreme Court jurisprudence dating back to *Foxgate Homeowners' Ass'n, Inc. v. Bramalea California, Inc.,* 26 Cal. 4th 1, 25 P.3d 1117, 128 Cal. Rptr. 2d 642 (2001). All of us who work daily in dispute resolution, mediators, attorneys, arbitrators and judges alike, understand the meaning and implications of the current

statutory framework regarding admissibility of mediation communications. It is simple and clear and the courts have essentially completed dealing with the range of cases including what many have thought to be one of the "worst case scenarios."

One of the foundational premises of mediation in California is that it is intended to promote and honor party self-determination. All of the various codes of ethics and guidelines adopted in the various jurisdictions and mediation programs in the state have this as their fundamental statement of policy and principle.

For example, Rule 3.853 of the Rules of Court which apply to court connected mediation states the following

> **Voluntary participation and self-determination**
> A mediator must conduct the mediation in a manner that **supports the principles of voluntary participation and self-determination** by the parties. For this purpose a mediator must:
> (1) Inform the parties, at or before the outset of the first mediation session, that any resolution of the dispute in mediation requires a voluntary agreement of the parties;
> (2) Respect the right of each participant to decide the extent of his or her participation in the mediation, including the right to withdraw from the mediation at any time; and
> (3) Refrain from coercing any party to make a decision or to continue to participate in the mediation.
> *Rule 3.853 amended and renumbered effective January 1, 2007; adopted as rule 1620.3 effective January 1, 2003. [Emphasis added.]*

It has always been the case that the parties have been free to decide how mediation would work for them. Included among the decisions that have always been the purview of the parties is the degree to which information shared and statements made in preparation for and during mediation would be confidential.[1]

I believe that the current hue and cry that "something must be done" arises from two fundamental misunderstandings:

- That the parties must abide by all of the provisions of Chapter 2 and
- That mediators do not have a broad and meaningful duty to assist the parties in understanding *all of the implications of mediation including the real meaning of the confidentiality protections and how they might affect the parties in real life, in difficult situations*

I hold the view that the parties have always been free to adopt whatever rules regarding confidentiality they choose. I know that this was discussed prior to the adoption of the Evidence Code 1115 statutory scheme and there is nothing in it that limits them. If, e.g., the parties want to reserve the right to have the statements made by their attorneys and the mediator admissible in a lawsuit against an attorney for malpractice, all they would need to do is enter into a written agreement to do so. I am also of the view that it is the *mediator's duty to assure that the parties understand this and choose something.*

At meetings of various kinds all over California I have suggested this to mediators and attorneys as the simple solution for the "Cassel problem." Typically, mediators respond by asserting that "it is the attorney's job to explain the law to the clients and not ours." I have also been asked "why on earth would you want to start a mediation by talking with the parties about their attorneys' possible malpractice?"

In response to those concerns I note, first, that, at least in court connected mediation, Rule 3.854 (b) on confidentiality states that "At or before the outset of the first mediation session, a mediator must provide the participants with a general explanation of the confidentiality of mediation proceedings." In court connected mediation, then, there is no real option for the mediator; there is a codified duty to explain.

There are very easy ways to get around the discomfort that underlies the second question. I, for example, send every attorney in every mediation I do a thoroughgoing Mediation Information Sheet for Participants. It contains all of the applicable rules of court, Evidence Code sections and suggests that it be shared with clients and other participants attending the mediation session. It also states the following regarding 1115 et seq:

[1] This was, of course, subject to only the narrowest range of situations, e.g., those involving fundamental constitutional rights in criminal proceedings. See, e.g., *Rinaker v. Superior Court,* 62 Cal. App. 4th 155, 74 Cal. Rptr. 2d 464 (1998)

"The California Supreme Court has decided several very important cases interpreting these statutes. The most recent, Cassel v Superior Court begins with this:

> *"In order to encourage the candor necessary to a successful mediation, the Legislature has broadly provided for the confidentiality of things spoken or written in connection with a mediation proceeding. With specified statutory exceptions, neither "evidence of anything said," nor any "writing," is discoverable or admissible "in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which … testimony can be compelled to be given," if the statement was made, or the writing was prepared, "for the purpose of, in the course of, or pursuant to, a mediation … ." (Evid. Code, § 1119, subds. (a), (b).) 1 "All communications, [118] negotiations, or settlement discussions by and between participants in the course of a mediation … shall remain confidential." (*Id.*, subd. (c).) We have repeatedly said that these confidentiality provisions are clear and absolute. Except in rare circumstances, they must be strictly applied and do not permit judicially crafted exceptions or limitations, even where competing public policies may be affected…" "*

At each mediation I ask all of the participants if they've read the entire information sheet and if they have any questions.

I am among those who believe that there is no significant problem that actually needs to be addressed. I have managed two substantial court mediation programs. In all I have reviewed the results and received party evaluations in hundreds if not thousands of mediations. Frankly, I've seen almost no substantial complaints at all from counsel or parties regarding any of the mediators who've mediated cases for the courts I worked with. In fact, the overwhelming statistical evidence is that, *regardless of whether the parties reach a settlement or not*, counsel and parties approve of the process and of the practitioners in over 70% of the submitted evaluations. Both of the courts I worked in adopted complaint procedures in compliance with the rules of court and there was *not a single complaint lodged in any of the cases I managed at either court*.

3. Recommendation

There is a simple solution available that would clarify the misunderstanding that Division 9: Evidence Affected Or Excluded By Extrinsic Policies, Chapter 2: Mediation *must* apply *in its entirety* to all mediation communications. I suggest that the Commission consider recommending the addition of a new section to the statutory scheme. This is a proposed draft:

> *1129. Notwithstanding any other section in this Chapter, nothing prohibits all the participants including the mediator from entering into an express written agreement, signed by all of them, in which they all agree to a different set of provisions regarding the confidentiality of mediation communications in a given mediation.*

This would have no impact on the current state of the law which is clear and easy to explain. It would also serve as notice to all those who participate in mediation and those who review the process post hoc that the parties can determine for themselves how to handle issues of confidentiality. Nothing more, really, need be done to solve the problem that some people believe exists.

Thank you.

Gary Weiner
Mediator and Attorney at Law