

Memorandum 2014-44

**Relationship Between Mediation Confidentiality and Attorney Malpractice and Other Misconduct: Texas Law**

As directed by the Legislature,<sup>1</sup> the Commission has been examining the law of other jurisdictions on the relationship between mediation confidentiality and attorney malpractice and other misconduct. This memorandum describes the law in Texas, one of five influential and populous states that the Commission identified for particular attention.<sup>2</sup> The following document is attached as an exhibit:

*Exhibit p.*

- Brian Shannon, *Dancing with the One that “Brung Us” – Why the Texas ADR Community Has Declined to Embrace the UMA*, 2003 J. Disp. Resol. 197, 197-200 (2003) ..... 1

We begin by discussing the Texas statutes that protect mediation materials. Next, we examine Texas case law on the relationship between mediation confidentiality and attorney malpractice or other professional misconduct. Finally, we describe how the legal community in Texas responded to the UMA.

TEXAS STATUTES PROTECTING MEDIATION MATERIALS

“Texas has emerged as a national leader” in the regulation and use of alternative dispute resolution (“ADR”).<sup>3</sup> The Texas ADR Act, enacted in 1987, “was one of the first comprehensive statutes providing courts the authority to

1. See 2012 Cal. Stat. res. ch. 108 (ACR 98 (Wagner)).

2. For descriptions of the law in Florida, Massachusetts, and New York, see Memorandum 2014-35. For a description of the law in Pennsylvania, see Memorandum 2014-43.

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.

3. Greg Dillard, *The Future of Mediation Confidentiality in Texas: Shedding Light on a Murky Situation*, 21 Rev. Litig. 137, 137 (2002).

refer cases to a variety of ADR processes.”<sup>4</sup> The Act “articulates the state’s policy of encouraging peaceable resolution of disputes and the early settlement of pending litigation.”<sup>5</sup>

Under the Texas ADR Act, a court may refer a pending dispute to ADR at any point in the litigation process, but the Act “contemplates mandatory referral only, not mandatory negotiation.”<sup>6</sup> Mediation is the most popular form of ADR in Texas.<sup>7</sup>

Instead of a statute specifically protecting mediation communications, Texas has two statutes that protect ADR communications,<sup>8</sup> as described below. Both provisions were enacted in 1987, as part of the Texas ADR Act.

### **Section 154.053: Few Express Exceptions**

Section 154.053 of the Texas Civil Practice and Remedies Code is in a subchapter of the Texas ADR Act relating to impartial third parties. The section makes clear that “[a] person appointed to facilitate an alternative dispute resolution procedure under this subchapter shall encourage and assist the parties in reaching a settlement of their dispute but may not compel or coerce the parties to enter into a settlement agreement.”<sup>9</sup> Such a person must also comply with a strict confidentiality requirement: “Unless expressly authorized by the disclosing party, the impartial third party may not disclose to either party information given in confidence by the other and shall at all times maintain confidentiality with respect to communications relating to the subject matter of the dispute.”<sup>10</sup>

Section 154.053 also establishes a broad rule regarding the confidentiality of an ADR proceeding, which is not expressly restricted to an impartial third party. More specifically, the statute says that “[u]nless the parties agree otherwise, all matters, including the conduct and demeanor of the parties and their counsel

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4. Eric Galton & Kimberlee Kovach, *Texas ADR: A Future So Bright, I Gotta Wear Shades*, 31 St. Mary’s L.J. 949, 951 (2000).

5. *Smith v. Smith*, 154 F.R.D. 661, 666 (N.D. Tex. 1994).

6. *Id.*; see also *In re Acceptance Ins. Co.*, 33 S.W.3d 443, 451 (Tex. Ct. App. 2000) (policy of encouraging peaceable resolution of disputes through early, voluntary settlement procedures “is consistent with the legislative scheme of the Act by which a court may compel parties to participate in alternative dispute resolution, including mediation, but it cannot compel them to negotiate in good faith or to settle their dispute.”).

7. *Id.* at 140.

8. Brian Shannon, *Dancing With the One That “Brung Us” – Why the Texas ADR Community Has Declined to Embrace the UMA*, 2003 J. Disp. Resol. 197, 215 (hereafter, “Shannon (2003)”) (Texas ADR Act “is applicable to nonbinding processes such as mini-trials, moderated settlement conferences, summary jury trials, and nonbinding arbitrations,” and the Act’s confidentiality provisions “apply to all such nonbinding processes.”).

9. Tex. Civ. Prac. & Rem. Code § 154.053(a).

10. Tex. Civ. Prac. & Rem. Code § 154.053(b).

during the settlement process, are confidential and may never be disclosed to anyone, including the appointing court.”<sup>11</sup>

The section goes on to state that “[e]ach participant, including the impartial third party, to an alternative dispute resolution procedure is subject to the requirements of Subchapter B, Chapter 261, Family Code, and Subchapter C, Chapter 48, Human Resources Code.”<sup>12</sup> The cited subchapters impose duties to report abuse, exploitation, or neglect. Aside from this exception, which was added to the statute in 1999, Section 154.053 is not subject to any express exceptions.

### **Section 154.073: Several Express Exceptions, Including a Provision Requiring *In Camera* Balancing**

The second confidentiality provision in the Texas ADR Act is Section 154.073 of the Texas Civil Practice and Remedies Code. This provision creates a general rule that an ADR communication is confidential, protected from discovery, and inadmissible:

Except as provided by Subsections (c), (d), (e), and (f), a communication relating to the subject matter of any civil or criminal dispute made by a participant in an alternative dispute resolution procedure, whether before or after the institution of formal judicial proceedings, is confidential, is not subject to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceeding.<sup>13</sup>

Notably, this rule expressly applies to “a communication relating to the subject matter of any civil or criminal dispute.”<sup>14</sup> The rule also applies regardless of whether the communication was made “before or after the institution of formal judicial proceedings.”<sup>15</sup>

Section 154.073 further states that “[a]ny record made at an alternative dispute resolution procedure is confidential ....”<sup>16</sup> In addition, the section expressly protects ADR participants from having to testify about ADR proceedings: “[T]he participants or the third party facilitating the procedure may not be required to testify in any proceedings relating to or arising out of the

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11. Tex. Civ. Prac. & Rem. Code § 154.053(c).

12. Tex. Civ. Prac. & Rem. Code § 154.053(d).

13. Tex. Civ. Prac. & Rem. Code § 154.073(a).

14. For an example of a criminal case in which a Texas court declined to consider ADR evidence, see *Williams v. State*, 770 S.W.2d 948, 949 (Tex. Ct. App. 1989).

15. *Id.* (emphasis added).

16. Tex. Civ. Prac. & Rem. Code § 154.073(b).

matter in dispute or be subject to process requiring disclosure of confidential information or data relating to or arising out of the matter in dispute.”<sup>17</sup>

Section 154.073 includes four express exceptions. First, “[a]n oral communication or written material used in or made a part of an alternative dispute resolution procedure is admissible or discoverable if it is admissible or discoverable independent of the procedure.”<sup>18</sup> California has a similar exception for otherwise admissible evidence that is used in a mediation.<sup>19</sup>

Second, “[a] final written agreement to which a governmental body, as defined by Section 552.003, Government Code, is a signatory that is reached as a result of a dispute resolution procedure conducted under this chapter is subject to or excepted from required disclosure in accordance with Chapter 552, Government Code.”<sup>20</sup> Texas added this open government provision to Section 154.073 in 1999. It has no counterpart in California’s provisions governing mediation confidentiality,<sup>21</sup> but there are constitutional requirements regarding access to government information.<sup>22</sup>

Third, Section 154.073 includes an exception that requires a court to conduct *in camera* balancing of competing considerations in specified circumstances:

If this section conflicts with other legal requirements for disclosure of communications, records, or materials, the issue of confidentiality may be presented to the court having jurisdiction of the proceedings to determine, *in camera*, whether the facts, circumstances, and context of the communications or materials sought to be disclosed warrant a protective order of the court or whether the communications or materials are subject to disclosure.<sup>23</sup>

California does not have a comparable provision.<sup>24</sup>

Finally, Section 154.073 “does not affect the duty to report abuse or neglect under Subchapter B, Chapter 261, Family Code [spousal maintenance], and abuse, exploitation, or neglect under Subchapter C, Chapter 48, Human Resources Code [quality assurance program for adult protective services].”<sup>25</sup> This exception was added to the Texas statute in 1999. Here again, California’s

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17. *Id.*

18. Tex. Civ. Prac. & Rem. Code § 154.073(c).

19. Cal. Evid. Code § 1120(a).

20. Tex. Civ. Prac. & Rem. Code § 154.073(d).

21. See Cal. Evid. Code §§ 1115-1128.

22. See, e.g., Cal. Const. art. I, § 3.

23. Tex. Civ. Prac. & Rem. Code § 154.073(e).

24. See Cal. Evid. Code §§ 1115-1128.

25. Tex. Civ. Prac. & Rem. Code § 154.073(f).

chapter on mediation confidentiality does not include a comparable provision. But the protections of the chapter are inapplicable in a criminal case,<sup>26</sup> a mediation of custody and visitation issues,<sup>27</sup> and a family conciliation proceeding.<sup>28</sup>

### **The Interrelationship of Sections 154.053 and 154.073**

It has not gone unnoticed that Sections 154.053 and 154.073 differ in content and may be difficult to reconcile in some respects. As noted in an article by a Texas mediator and a Texas law professor, “the two distinct provisions of the statute which relate to confidentiality may possibly be interpreted as conflicting with each other, as well as with other legal and policy requirements for disclosure of information.”<sup>29</sup> Texas courts have grappled with this problem to some extent, as discussed later in this memorandum.

### **Ethical Guidelines for Texas Mediators**

In addition to statutory requirements, there are ethical guidelines applicable to Texas mediators. These guidelines are aspirational. “Compliance with the rules depends primarily upon understanding and voluntary compliance, secondarily upon reenforcement by peer pressure and public opinion, and finally when necessary by enforcement by the courts through their inherent powers and rules already in existence.”<sup>30</sup>

The guidelines were approved by the Texas Supreme Court in 2005, after an extensive study showed that (1) there “was no consensus within the mediation profession in Texas as to whether the Supreme Court should become involved in credentialing and/or registration of mediators, but (2) there “currently is consensus within the Texas mediation profession that the Court should promulgate ethical rules.”<sup>31</sup> In approving the guidelines, the Court explained that it “ha[d] long recognized the need for oversight of the quality of mediation in Texas.”<sup>32</sup>

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26. See, e.g., *Cassel v. Superior Court*, 51 Cal. 4th 113, 119, 244 P.3d 1080, 119 Cal. Rptr. 3d 437 (2011).

27. Cal. Evid. Code § 1117(b)(1).

28. *Id.*

29. Galton & Kovach, *supra* note 4, at 967.

30. Tex. R. Civ. Proc. Order 05-9107 (June 13, 2005).

31. *Id.*

32. *Id.*

With regard to confidentiality, the guidelines provide that “a mediator should protect the integrity and confidentiality of the mediation process.”<sup>33</sup> That duty “commences with the first communication to the mediator, is continuous in nature, and does not terminate upon the conclusion of the mediation.”<sup>34</sup> The guidelines further provide:

*Confidentiality.* — A mediator should not reveal information made available in the mediation process, which information is privileged and confidential, unless the affected parties agree otherwise or as may be required by law.

*Comment (a).* A mediator should not permit recordings or transcripts to be made of mediation proceedings.

*Comment (b).* A mediator should maintain confidentiality in the storage and disposal of records and should render anonymous all identifying information when materials are used for research, educational or other informational purposes.

*Comment (c).* Unless authorized by the disclosing party, a mediator should not disclose to the other parties information given in confidence by the disclosing party and should maintain confidentiality with respect to communications relating to the subject matter of the dispute. The mediator should report to the court whether or not the mediation occurred, and that the mediation either resulted in a settlement or an impasse, or that the mediation was either recessed or rescheduled.

*Comment (d).* In certain instances, applicable law may require disclosure of information revealed in the mediation process. For example, the Texas Family Code may require a mediator to disclose child abuse or neglect to the appropriate authorities. If confidential information is disclosed, the mediator should advise the parties that disclosure is required and will be made.<sup>35</sup>

#### TEXAS CASE LAW ON THE RELATIONSHIP BETWEEN MEDIATION CONFIDENTIALITY AND ATTORNEY MALPRACTICE OR OTHER PROFESSIONAL MISCONDUCT

Although the Texas ADR Act was enacted in 1987, there was not much litigation relating to its confidentiality provisions during the first decade or so after its enactment.<sup>36</sup> By now, however, there is a substantial body of case law. Instead of summarizing the entire body of case law, we focus on the cases most relevant to this study, particularly cases involving the intersection of mediation

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33. *Id.* (Guideline #2).

34. *Id.*

35. *Id.* (Guideline #8).

36. Galton & Kovach, *supra* note 4, at 967 (“We frankly have been surprised that more litigation surrounding confidentiality matters has not arisen.”).

confidentiality and professional misconduct.<sup>37</sup> Given that focus, the natural starting point is *Avary v. Bank of America, N.A.*<sup>38</sup>

### *Avary*

In *Avary*, a man was killed when a tractor rolled over him. His relatives and estate filed wrongful death and survival claims against the tractor manufacturer, which were settled at a court-ordered mediation. Thereafter, the guardian representing two of his minor children (Avary) sued the executor of the estate (Bank of America) for breach of fiduciary duty, negligence, fraud, and conspiracy, which allegedly occurred during the mediation. In particular, Avary alleged that the bank breached its fiduciary duty in rejecting, and failing to properly disclose information about, a settlement offer that would have provided a larger share to the minors than the offer it accepted. The bank moved for summary judgment, contending that Avary had no evidence to support her claims because all of the mediation communications were confidential under Section 154.073.

In analyzing that claim, the trial court focused on the exception provided by subsection (e):

If this section conflicts with other legal requirements for disclosure of communications, records, or materials, the issue of confidentiality may be presented to the court having jurisdiction of the proceedings to determine, *in camera*, whether the facts, circumstances, and context of the communications or materials sought to be disclosed warrant a protective order of the court or whether the communications or materials are subject to disclosure.

The trial court concluded that the bank's fiduciary obligations constituted a "legal requirement for disclosure," which conflicted with the confidentiality requirement of Section 154.073. Because of that conflict, the trial court "undertook the analysis under section 154.073(e), whether disclosure of the confidential communications was warranted under the facts and circumstances presented."<sup>39</sup> After conducting an *in camera* hearing in which he heard testimony from the bank's representative, the trial judge permitted some discovery of mediation evidence, but not as much as Avary requested. In particular, the trial

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37. For a more comprehensive discussion of Texas case law on protection of mediation communications, see L. Wayne Scott, *The Law of Mediation in Texas*, 37 St. Mary's L.J. 325, 393-409 (2006); see also Brian Shannon, *Confidentiality of Texas Mediations: Ruminations on Some Thorny Problems*, 32 Tex. Tech. L. Rev. 77 (2000) ((hereafter, "Shannon (2000)").

38. 72 S.W.3d 770 (Tex. Ct. App. 2002).

39. *Id.* at 796.

judge ordered disclosure of the bank representative's *in camera* testimony, but he did not conduct an *in camera* hearing to determine the "facts, circumstances, and context" of anyone else's potential testimony, and he did not permit any other discovery regarding what occurred at the mediation.<sup>40</sup> Thereafter, he granted the bank's motion for summary judgment, and Avary appealed.

The Texas Court of Appeals for the Fifth District reversed and remanded the case for trial. In a lengthy opinion, it first found that there was "more than a scintilla of evidence" to support Avary's claims for breach of fiduciary duty, negligence, and fraud, "even without further discovery of communications made at the mediation."<sup>41</sup> Consequently, summary judgment on those claims was improper.<sup>42</sup>

With regard to the conspiracy claim, the overt act alleged was the bank's breach of fiduciary duty, but the trial record did not include sufficient evidence to support the claim.<sup>43</sup> The Court of Appeals thus concluded that "summary judgment on this cause of action was proper unless Avary should have been permitted to conduct further discovery."

In determining whether further discovery was warranted, the Court of Appeals made clear that it agreed with much of the trial court's analysis regarding the mediation evidence:

[T]he trial judge concluded the Bank's fiduciary obligations constituted a "legal requirement for disclosure" for purposes of subsection 154.073(e). We agree.... [T]he Bank had a legal duty to disclose material information to the beneficiaries.... Once such a legal duty to disclose is established, the trial judge must determine under section 154.073(e) whether a conflict exists between the legal duty and the confidentiality requirements of the ADR statute. If a conflict exists, the trial judge must next determine whether, under the facts and circumstances presented, disclosure of the confidential communications is warranted.

... [T]he Bank's fiduciary duty to disclose a material fact potentially affecting the beneficiaries' rights is squarely in conflict with the statutory provisions of section 154.073(a) that "a communication relating to the subject matter of any civil ... dispute made by a participant in an alternative dispute resolution procedure ... is confidential, is not subject to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceeding."...

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40. *Id.* at 786.

41. *Id.* at 791.

42. *Id.*

43. *Id.* at 793.



[B]ecause of the conflict between the Bank’s duty to disclose and the confidentiality provisions of section 154.073, the trial judge undertook the analysis under section 154.073(e), whether disclosure of the confidential communications was warranted under the facts and circumstances presented. The trial judge correctly concluded the Bank’s fiduciary obligations warranted disclosure of mediation communications under these circumstances.<sup>44</sup>

The Court of Appeals acknowledged that “confidentiality of communications is an important part of the statutory scheme of alternative dispute resolution,” and “[w]ithout a guarantee of confidentiality, parties may be reluctant to speak freely and address the heart of their dispute.”<sup>45</sup> The court also pointed out, however, that an executor’s fiduciary duty of disclosure is a “high duty” requiring full disclosure of all material facts that might affect the beneficiaries’ rights.”<sup>46</sup> In addition, the court said there is an important public policy to preserve significant and well-established procedural and substantive rights.<sup>47</sup> In the circumstances before it, the Court of Appeals determined that the balance between the competing interests weighed in favor of disclosure.

It explained:

Here, the parties to the original litigation have peaceably resolved their dispute, as the ADR statute contemplates. Avary now seeks to prove *a new and independent tort* that she alleges occurred between her and her own fiduciary, the Bank, during the course of the mediation proceeding. She *does not* propose to discover evidence to allow her to obtain additional funds from the [mediation] defendants or to use mediation communications to establish any liability on their part after they have peaceably resolved their dispute. Instead, Avary proposes to offer the evidence in a *separate case against a separate party* to prove a claim that is *factually and legally unrelated* to the wrongful death and survival claims.<sup>48</sup>

The court further pointed out that Avary would not disturb the mediated settlement by pursuing her claim,<sup>49</sup> and “[s]ignificant substantive and procedural rights of Avary’s are implicated, including the opportunity to develop evidence of her claim and to submit contested fact issues to a judge or jury.”<sup>50</sup>

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44. *Id.* at 796-97.

45. *Id.* at 797.

46. *Id.* at 796-97.

47. *Id.* at 799.

48. *Id.* at 797-98 (emphasis added).

49. *Id.* at 800.

50. *Id.*

Although the Court of Appeal agreed with much of the trial judge’s analysis, it said he abused his discretion by only permitting discovery of mediation evidence from the bank’s representative. According to the Court of Appeal, the circumstances of the case did “not justify restricting discovery to a single witness who admittedly lacked knowledge of facts material to Avary’s claims.”<sup>51</sup> In its view, the trial judge should at least have conducted *in camera* proceedings regarding whether to allow additional discovery from different witnesses.<sup>52</sup>

The Court of Appeal recognized that conducting an *in camera* hearing with regard to each potential witness was a “potentially cumbersome” process.<sup>53</sup> It pointed out, however, that “convenience is secondary” given “the important considerations involved.”<sup>54</sup> It also provided some guidance regarding factors that the trial judge could consider at the *in camera* hearings on remand.<sup>55</sup>

Finally, the Court of Appeal emphasized the narrowness of its decision:

Our conclusion that the trial judge unreasonably restricted discovery regarding Avary’s affirmative claims *is limited to the facts before us*. We are *not* presented with the question whether discovery of mediation communications would be appropriate if sought in the same case in which mediation had failed, and in which the parties were proceeding to trial on their original claims and defenses. Nor are we presented with the question whether a *mediator* can be compelled to testify or respond to discovery. We conclude *only* that where a claim is based upon a *new and independent tort* committed *in the course of the mediation proceedings*, and that tort *encompasses a duty to disclose*, section 154.073 does not bar discovery of the claim *where the trial judge finds in light of the “facts, circumstances, and context,” disclosure is warranted*.<sup>56</sup>

On remand, the case eventually settled, so it is not clear whether Avary’s allegations against the bank were meritorious.<sup>57</sup>

*Avary* thus construed Section 154.073(e) to permit the introduction of mediation evidence for purposes of proving an “independent tort” during mediation that encompasses a duty to disclose, but only if the trial judge conducts an *in camera* hearing and determines that the “facts, circumstances, and context” warrant disclosure. The “independent tort” at stake involved

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51. *Id.* at 802.

52. *Id.*

53. *Id.* at 802.

54. *Id.*

55. *Id.* at 801.

56. *Id.* at 802-03 (emphasis added).

57. See Scott, *supra* note 37, at 401.

professional misconduct: breach of the bank's fiduciary duty as executor of the estate. But the Court of Appeals did not frame its holding in terms of professional misconduct; it spoke of tortious conduct generally.

**This is another approach to add to the list of options that the Commission should evaluate later in this study.**

### **Cases Following *Avary***

Two years after the *Avary* decision, the same Texas Court of Appeals again addressed a case involving alleged professional misconduct at a mediation. In *Alford v. Bryant*,<sup>58</sup> a dispute was settled through mediation, except for the allocation of attorney's fees and costs. The trial court later decided that each side should bear its own attorney's fees and costs.

One of the mediation participants then sued her attorney for legal malpractice, contending that her attorney failed to disclose the risks and benefits of settlement, including the risk that the trial court would deny recovery of her attorney's fees. In defense, the attorney said that she had made such disclosures to her client, during a discussion that included the two of them and the mediator.

At the trial of the legal malpractice case, the attorney "attempted to call the mediator to testify to the substance of the disclosure, presumably in order to take the controversy out of the context of a swearing match between the litigants."<sup>59</sup> Relying on Section 154.053, the trial court refused to permit such testimony and entered judgment in the client's favor.<sup>60</sup> The attorney appealed.

The Texas Court of Appeals reversed and remanded. In so doing, it noted that Texas has two mediation confidentiality provisions, Sections 154.053 and 154.073, which serve important policy considerations: "encourag[ing] the peaceful resolution of disputes through voluntary settlement procedures," and providing the "guarantee of confidentiality" without which "parties may be reluctant to speak freely and address the heart of the dispute."<sup>61</sup> The appellate court further noted that there is an "apparent conflict between the two rules, i.e., section 154.053 being apparently absolute on its face, and section 154.073 allowing for an exception to the bar on disclosure."<sup>62</sup> The court concluded, however, that it "need not resolve that apparent conflict because ... [the client]

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58. 137 S.W.3d 916 (Tex. Ct. App. 2004).

59. *Id.* at 919.

60. *Id.* at 919.

61. *Id.* at 921.

62. *Id.* at 922.

waived mediation confidentiality under both ADR confidentiality statutes *due to her offensive use of the statutory confidentiality provisions.*"<sup>63</sup>

The Court of Appeals explained that in Texas "one cannot invoke the jurisdiction of the courts in search of affirmative relief, and yet, on the basis of privilege, deny a party the benefit of evidence that would materially weaken or defeat the claims against her."<sup>64</sup> According to the court, "[s]uch offensive, rather than defensive, use of a privilege lies outside the intended scope of the privilege."<sup>65</sup> The court further explained that in Texas three requirements must be met before a party may be found to have waived an asserted privilege under the "offensive use" doctrine:

- (1) The party asserting the privilege is seeking affirmative relief.
- (2) The privileged information sought is such that, if believed, in all probability it would determine the outcome of the case.
- (3) Disclosure of the confidential information is the only way for the aggrieved party to obtain the evidence.<sup>66</sup>

The court then found that

all elements for the offensive use doctrine would be met in this case were the attorney-client privilege at issue. Because the mediation confidentiality statutes and the attorney-client privilege are grounded upon similar policy rationales, including effective legal services and administration of justice, the offensive use doctrine should apply similarly to the mediation confidentiality statutes. *It is only fair to require [the client] either to abandon her claim of confidentiality or abandon her claim of legal malpractice entirely.*<sup>67</sup>

In addition to invoking this "offensive use" doctrine, the Court of Appeals also discussed *Avary* and determined that the circumstances satisfied the requirements for disclosure enunciated in *Avary*:

As in *Avary*, the parties to the original litigation peacefully resolved their dispute. Again, as in *Avary*, one of the parties now seeks to prove a *new and independent cause of action* that is alleged to have occurred *during the mediation process*. That party does not propose to discover or use the evidence to obtain additional funds from the settling roofing contractor in the underlying litigation. The confidential information was offered in this *separate and distinct case*

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63. *Id.* (emphasis added).

64. *Id.* at 921.

65. *Id.*

66. *Id.*

67. *Id.* at 922 (emphasis added; citation omitted).

*arising between one of the parties to the underlying litigation and her attorney.*

The new cause of action asserted by [the client] below involved [her attorney's] alleged legal malpractice during the mediation proceedings. *Significant substantive and procedural rights of [the attorney] are implicated*, including the opportunity to develop evidence of her defense to the claim of legal malpractice and to submit contested fact issues to the fact-finder. In pursuing her defense, [the attorney] *will not disturb the settlement in the underlying litigation*. From a policy standpoint, these considerations support disclosure of the confidential communications at issue in this case.<sup>68</sup>

The appellate court in *Alford* thus concluded that “under the facts of this case, the trial court abused its discretion when it improperly excluded the testimony of the mediator.”<sup>69</sup> In other words, *Alford* extended the *Avary* doctrine to testimony by a mediator.

*Alford* is not the only Texas case following *Avary*. The discussions in other cases do not seem to warrant inclusion here, however, because the discussion does not pertain a mediation,<sup>70</sup> or the discussion is short and not too enlightening.<sup>71</sup>

### **Cases Distinguishing *Avary***

Several subsequent cases have distinguished *Avary*. Shortly after *Avary* was decided, another Texas Court of Appeals considered *Allison v. Fire Ins. Exchange*,<sup>72</sup> a case in which a homeowner sued an insurer for its handling of her homeowners' insurance claims. A jury entered a big verdict against the insurer and the insurer appealed. Among other things, the insurer cited *Avary* and argued that the trial court erroneously excluded evidence that the homeowner demanded “no less than \$10 million plus media rights” at mediation, which would help to show that the insurer acted in good faith with regard to settling the insurance claims.

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68. *Id.* (emphasis added, citations omitted).

69. *Id.* at 923. For criticism of *Alford*, see Scott, *supra* note 37, at 403-05.

70. See, e.g., *Knapp v. Wilson N. Jones Memorial Hosp.*, 281 SW.3d 163 (Tex. Ct. App. 2009) (applying *Avary* approach in arbitration context).

71. See, e.g., *Flood v. Katz*, 294 S.W.3d 756, 762 n.2 (Tex. Ct. App. 2009) (Citing *Avary* for propositions that (1) wrongful act is “not shielded” because it took place in compromise negotiation, and (2) party “is not prevented from proving a separate cause of action, fraud in this case, simply because some of the acts complained of took place during compromise negotiations.”).

72. 98 S.W.3d 227 (Tex. Ct. App. 2002), *pet. granted, judgment vacated w/out reference to the merits* (Tex. S. Ct. 2004).

The Court of Appeals said *Avary* was distinguishable because the mediation evidence in *Avary* “went to the heart of the parties’ dispute.”<sup>73</sup> In its view, the evidence of the homeowner’s mediation demand was of a different caliber, because the insurer’s conduct was at issue, not the homeowner’s conduct.<sup>74</sup> Thus, it upheld the trial court’s determination that the circumstances did not justify breaching the “cloak of confidentiality” that surrounds mediation, which “should be breached only sparingly.”<sup>75</sup>

More recently, in *In re Empire Pipeline Co.*,<sup>76</sup> the Texas Court of Appeals for the Fifth District considered the admissibility of evidence from mediation of a contract dispute between an individual and some oil and gas companies. The dispute was settled during the mediation, but the individual later moved to vacate the settlement on several grounds, including duress and fraud. He sought to depose the mediator and compel the mediator to produce documents. The oil and gas companies objected on several grounds, including mediation confidentiality. When the trial court partially granted a motion to compel, they appealed.

On appeal, the individual said that *Avary*, *Alford*, and *Knapp* supported his request for discovery from the mediator. But the Court of Appeals disagreed:

*Avary* involved a claim based on a “new and independent tort,” the pursuit of which would not disturb the settlement reached at the mediation proceeding as to which discovery was sought. The evidence sought was to be offered “in a separate case against a separate party to prove a claim that is factually and legally unrelated to the wrongful death and survival claims” that were the subject of the mediation. Here, [the plaintiff in a mediated dispute] has asserted “affirmative defenses and matters in avoidance” in an action by [the defendants] to enforce the [mediated] agreement. [The plaintiff] cites no authority, and we have found none, for his assertion that the narrow holding of *Avary* applies when defending an action, like this one, to enforce a settlement reached in the mediation proceeding as to which discovery is sought. Accordingly, we conclude *Avary* is inapplicable here.<sup>77</sup>

Likewise, the same Court of Appeals distinguished *Avary* in a case it decided just last year, *Hydroscience Technologies, Inc. v. Hydroscience, Inc.*<sup>78</sup> As in *Empire*

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73. *Id.* at 260.

74. *Id.*

75. *Id.* at 259.

76. 323 S.W.3d 308 (Tex. Ct. App. 2010).

77. *Id.* at 313-14 (emphasis added, citations omitted).

78. 401 S.W.3d 783 (Tex. Ct. App. 2013).

*Pipeline*, the court emphasized that *Avary* does not apply when a party seeks to undo a mediated settlement, as opposed to proving a new and independent tort:

This is not a situation similar to *Avary* where [a mediation participant] is trying to use evidence from mediation to support a new and independent tort. Rather, [the appellant] is trying to obtain evidence to potentially change the [mediated] settlement agreement.... [W]e refuse to construe the application of the mediation privilege so narrowly.

“A cloak of confidentiality surrounds mediation, and the cloak should be breached only sparingly. Under these facts, to allow [the appellant] to use alleged discussions from the mediation regarding the stock would undermine the very purpose of confidentiality in the mediation process. Parties must not be allowed to use evidence from mediation to dispute terms of a settlement agreement, particularly years later, as is the case here. To do so would chill the overall purpose of mediation, which is to allow parties to come to the table knowing they can speak freely about their dispute and have confidence what they say will be confidential. To conclude otherwise defeats section 154.073 and section 154.053(c) of the Texas Civil Practice and Remedies Code. Accordingly, [the appellant] may not rely on evidence from the 2001 mediation to create a fact issue as to ownership of the stock because such information is protected by the mediation privilege.<sup>79</sup>”

As best the staff can tell, neither *Empire Pipeline* nor *Hydroscience Technologies* involved allegations of legal malpractice or other attorney misconduct in mediation. But those cases seem to mean that a party in Texas could use evidence of such misconduct only to prove an independent tort (e.g., a legal malpractice claim) when the *Avary* requirements are met, not to try to undo a mediated settlement.

Whether a party might be able to use such evidence for purposes of an attorney discipline proceeding is not clear. That would not be a tort claim, but it would be independent and distinct from the mediated dispute. The staff suspects that the latter point would be determinative — i.e., mediation evidence could be introduced in a Texas attorney discipline proceeding upon satisfying the requirements stated in *Avary*.

### **Other Relevant Cases**

In addition to the *Avary* line of cases, several other Texas cases may be of some interest in this study, as briefly summarized below:

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79. *Id.* at at 795-96 (citations omitted).

- In *Randle v. Mid Gulf*,<sup>80</sup> the trial court granted summary judgment to a party seeking specific performance of a mediated settlement agreement. On appeal, the losing party argued that the trial court erred by excluding evidence that he was suffering from chest pains during the mediation and thus the mediated settlement was unenforceable due to duress. In an unpublished decision, the court of appeal agreed, explaining that a party cannot sue for specific performance based on a mediation agreement while, at the same time, invoking mediation confidentiality to exclude evidence of duress at the mediation.<sup>81</sup> A Texas law professor says *Randle* was wrongly decided, because “[t]he Texas ADR Act’s confidentiality provisions do not include an exception for providing evidence of traditional contract defenses.”<sup>82</sup>
- In *Lype v. Watkins*,<sup>83</sup> a mediation resulted in a settlement, but one of the parties thereafter refused to sign the release papers. The other side sought specific enforcement of the settlement agreement. In defense, the recalcitrant party alleged that the settlement was obtained through duress by the party’s counsel. The trial court rejected that argument, explaining that “[d]uress or undue influence can suffice to set aside a contract, but it is well-settled that these must emanate from one who is a party to the contract.”<sup>84</sup> In other words, a settlement agreement cannot be avoided based on the actions of an attorney for a settling party. The trial court’s decision was upheld in an unpublished opinion on appeal. In discussing the case, a commentator queried whether the decision “means that a mediator can never be guilty of coercion or duress?”<sup>85</sup> The commentator answered his own question by saying, “Surely not.”<sup>86</sup>
- In *Vick v. Waits*,<sup>87</sup> a mediation resulted in a settlement, but one side later brought suit against the other side for breach of the settlement agreement and fraudulently inducing them to settle at the mediation. The fraud claim was based on statements allegedly made during the mediation. The trial court excluded those statements and granted summary judgment to the defendant. The Court of Appeals affirmed in an unpublished decision, noting that “Section 154.073 expressly prohibits the use of any statements made during the mediation and appellants do not attempt to

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80. 1996 Tex. App. LEXIS 3451 (Tex. Ct. App. 1996).

81. *Id.* at \*4.

82. Shannon (2000), *supra* note 37, at 87, 89; see also Edward Sherman, *Confidentiality in ADR Proceedings: Policy Issues Arising From the Texas Experience*, 38 S. Tex. L. Rev. 541, 557-58 (1997) (warning that *Randle* approach could “considerably reduce the confidentiality protection of the Texas ADR Act if there will always be a waiver of confidentiality whenever a contract defense is asserted.”).

83. 1998 Tex. App. LEXIS 6626 (Tex. Ct. App. 1998).

84. *Id.* at \*7-\*8.

85. Scott, *supra* note 37, at 389.

86. *Id.*

87. 2002 Tex. App. LEXIS 3982 (Tex. Ct. App. 2002).



explain why that section does not apply to its summary judgment evidence.”<sup>88</sup> The Court of Appeals further explained that “[t]he Texas ADR Act does not include an exception for claims of fraud, and this Court will not create an exception to the confidentiality provisions of the Texas ADR Act.”<sup>89</sup>

- In *Gaskin v. Gaskin*,<sup>90</sup> a divorcing husband and wife reached a settlement in mediation, but the husband later alleged that the mediator “altered it surreptitiously.” The husband subpoenaed the mediator to testify, and the mediator sought to quash the subpoena. The trial court held an *in camera* hearing pursuant to Section 154.073, and then granted the protective order requested by the mediator. The Court of Appeals affirmed in an unpublished decision.
- In *Rabe v. Dillard’s, Inc.*,<sup>91</sup> a woman sued a department store for injuries sustained at the store. The dispute was settled at a mediation, but the woman subsequently refused to sign the settlement documents, alleging that she settled under duress. She contended that during the mediation, opposing counsel “threatened to contact the worker’s compensation carrier to advise that [the woman] had a prior injury and was ‘doctor shopping’ for narcotics.”<sup>92</sup> The trial court excluded her statement regarding the alleged threat, and granted summary judgment against her. The Court of Appeals affirmed in a short, published opinion, which explained that ADR communications are confidential and may not be used as evidence.<sup>93</sup> Consequently, it said “there was no competent summary judgment evidence of a threat,” which was “fatal to [the woman’s] claim of duress.”<sup>94</sup> The court’s opinion does not mention *Avary*, presumably because this was not an “independent tort” case and the appellant did not try to argue that the *Avary* doctrine applied.

Most of the above cases are unpublished, but they are nonetheless “fair game for consideration.”<sup>95</sup> Since 2003, the Texas Supreme Court has recognized that unpublished opinions “may be cited in judicial proceedings, even though they have ‘no precedential value.’”<sup>96</sup>

In all of these cases, as well as in *Empire Pipeline*, a party tried to undo a mediated settlement due to alleged misconduct during the mediation, and

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88. *Id.* at \*11.

89. *Id.*

90. 2006 Tex. App. LEXIS 7689 (Tex. Ct. App. 2006).

91. 214 S.W.3d 767 (Tex. Ct. App. 2007).

92. *Id.* at 769.

93. *Id.*

94. *Id.*

95. Sherman, *supra* note 82, at 329.

96. *Id.* (footnote omitted).

sought disclosure of mediation communications for that reason.<sup>97</sup> While such a scenario might be relatively uncommon as compared to the total number of mediations, it clearly does arise on occasion in Texas, just as in Florida, California, and elsewhere.

#### THE UNIFORM MEDIATION ACT IN TEXAS

As mentioned in Memorandum 2014-43, the Texas legal community expressed concerns about the UMA while the UMA was being drafted. Around that time, the Texas ADR Act was sometimes characterized as including “perhaps the broadest ADR confidentiality provision in the country.”<sup>98</sup> As one writer put it,

The breadth of coverage provided by [Section 154.073] is enormous. The statute is presently understood in theory and practice to provide a blanket of near total confidentiality on communications made during all ADR procedures. Even mediations conducted in the absence of litigation are theoretically protected by Texas’s broad confidentiality provision. The simplicity and brevity of the Texas ADR Act are the cornerstones of the Act’s stunning success and the seemingly broad confidentiality that the Act provides to participants.<sup>99</sup>

Texas groups thus warned that enacting the UMA would decrease the level of protection for mediation communications in Texas. In 2001, for example, Greg Dillard (then a law student in Texas, now a Texas lawyer) provided this description of the Texas ADR community’s reaction to the UMA:

Most practitioners have taken a “don’t fix it if it ain’t broke” attitude toward the confidentiality provisions in the Texas ADR Act. Consequently, most practitioners and supporters of the Texas ADR Act’s broad confidentiality provision prefer not to amend the statute as they believe amendments would create more problems than they would solve.

Without question, there are many benefits to the present system. The increasingly frequent use of mediation in the last twenty years exemplifies the Act’s success....The consensus among professional mediators is that mediation has become such a successful ADR procedure due in large part to the overarching blanket of confidentiality that the Texas ADR Act provides.... [M]any commentators and practitioners argue that shrinking the breadth of

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97. See also *Smith v. Smith*, 154 F.R.D. 661 (N.D. Tex. 1994); *Lopez v. Kempthorne*, 2010 U.S. Dist. LEXIS 118749 (S.D. Tex. 2010).

98. Sherman, *supra* note 82, at 542.

99. Dillard, *supra* note 3, at 141 (footnotes omitted).

the confidentiality provision will result in a direct decrease in the use and success of mediation as an ADR procedure.<sup>100</sup>

The same year, the State Bar Alternative Dispute Resolution Council took the position that “the proposed UMA does a relatively poor job of protecting the confidentiality of the mediation process,”<sup>101</sup> attempting to “safeguard confidentiality through a complex and dizzying array of privileges and exceptions.”<sup>102</sup> The group regarded the existing Texas provisions as “far superior” and explained that “[b]ecause the UMA offers a much more limited form of confidentiality protection than does the Texas ADR Act, the council has serious concerns about the proposal and will oppose its enactment in Texas.”<sup>103</sup>

Similarly, the Texas Association of Mediators registered strong opposition to the UMA, as did the Association of Attorney-Mediators (a national association headquartered in Dallas).<sup>104</sup> According to Texas law professor Brian Shannon, “[t]he primary concerns of these organizations relate[d] to two principal areas: (1) the UMA drafters’ approach to confidentiality in comparison to the long-established legislative approach set forth in the Texas ADR Act, and (2) the relative complexity of the UMA’s provisions.”<sup>105</sup>

In a 2003 article entitled *Dancing with the One that “Brung Us” — Why the Texas ADR Community Has Declined to Embrace the UMA*,<sup>106</sup> Prof. Shannon explained those points in detail. Among other things, he provided two contrasting examples of what a mediator might say about confidentiality when starting a mediation: Alternative I (Texas law) and Alternative II (UMA). While Prof. Shannon admitted that those examples “may well be subject to charges of exaggeration,” they dramatically illustrate the perceived differences between Texas law and the UMA, so the staff has reproduced them in an exhibit.<sup>107</sup>

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100. Dillard, *supra* note 3, at 141-42 (footnotes omitted).

101. Wayne Fagan & Brian Shannon, *A Potential Threat to Texas ADR*, 65 Tex. Bar J. 27, 27 (2001), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1830270](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1830270).

102. *Id.*

103. *Id.*; see also <http://static.squarespace.com/static/523385e7e4b0bfcfa198761d/t/523664d7e4b055124732eaf4/1379296471661/How-Much-Confidentiality-Does-the-UMA-Provide.pdf> (“Some of the strongest opposition [to the UMA] has come from those within the mediation community who expressed a variety of objections, including the complaint that the confidentiality provisions did not go far enough. Some state bar associations, such as those of Texas and Pennsylvania, also objected to the UMA on that basis.”).

104. Shannon (2003), *supra* note 8, at 201.

105. *Id.*

106. Shannon (2003), *supra* note 8.

107. See Exhibit pp. 1-3.

Prof. Shannon argued that “[t]he UMA’s backwards approach to confidentiality as well as its maze of privileges, waivers, and exceptions are not an adequate substitute for the current Texas approach.”<sup>108</sup> He acknowledged, however, that “the Texas ADR Act’s confidentiality provisions are far from perfect.”<sup>109</sup> He went on to suggest several potential improvements.<sup>110</sup>

Of particular note here, Prof. Shannon suggested revising the Texas confidentiality provisions to better address malpractice:

[A] few of the UMA’s numerous exceptions to its complex privileges structure should merit serious contemplation as possible additional exceptions to the Texas confidentiality provisions. For example, the UMA drafters have added exceptions by which mediation communications can be used to prove or disprove malpractice claims against the mediator, party, or party’s attorney. As for the exception for malpractice suits against mediators, the drafters included the exception “to promote accountability of mediators by allowing for grievances to be brought against mediators, and as a matter of fundamental fairness, to permit the mediator to defend against such a claim. *The Texas Legislature might give consideration to adding such an exception to the Texas ADR Act for the same reasons stated by the UMA’s drafters. Given, however, the potential dangers of such an exception in opening the door to potential frivolous actions, checks and balances such as in camera hearings and the possibility of imposing sanctions should also be included.*<sup>111</sup>

In making this suggestion, Prof. Shannon built on pre-UMA comments by Edward Sherman (a dean and law professor at Tulane University), who pointed out that “for compelling policy reasons,” a Texas court interpreting the Texas ADR Act “could determine that the integrity of the ADR process would be jeopardized if neutrals could commit malpractice with impunity, and that applying absolute confidentiality would contravene public policy.”<sup>112</sup>

In his pre-UMA article, Prof. Sherman also discussed the possibility of recognizing some type of exception to the mediation confidentiality statutes to allow traditional contract defenses to a mediated settlement agreement.<sup>113</sup> As he pointed out, however, a proposal by the ADR Section of the Texas State Bar Association to create “an exception for communications relevant to a

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108. Shannon (2003), *supra* note 8, at 220.

109. *Id.* at 205.

110. See *id.* at 205-11.

111. *Id.* at 207-08 (emphasis added, footnotes omitted).

112. Sherman, *supra* note 82, at 559.

113. See *id.* at 553-59.

determination of ‘the meaning or enforceability’ of an ADR agreement ... was never adopted into law.”<sup>114</sup>

Prof. Shannon raised the same concept in his article on the UMA, suggesting that the Texas Legislature “consider adopting an exception to confidentiality for traditional contract defenses.”<sup>115</sup> But the idea apparently has not taken hold in Texas.

Although there appears to have been widespread sentiment against enacting the UMA in Texas, that sentiment was not universal. For example, Mr. Dillard concluded that “the best solution is a merger of the Texas ADR Act and the UMA,”<sup>116</sup> in which “the UMA is adopted in its entirety,”<sup>117</sup> but “additional measures ... implemented to patch over any remaining gaps in confidentiality.”<sup>118</sup> He maintained that “[t]he Texas ADR Act’s expansive grant of confidentiality is superlative in theory; however, in practice, issues will arise that require either judicial interpretation or legislative clarification.”<sup>119</sup> He also warned that if the Legislature failed to act,

[J]udicial regulation will be a slow process as individual judges carve out limited exceptions to the Texas ADR Act’s broad confidentiality provision. The result will be like a hundred small knife pricks that slowly dissolve a fighter’s strength until he can no longer fight. Mediation will be weakened with each new exception, and participants’ faith in the system will deteriorate.<sup>120</sup>

In short, to ensure that confidentiality in Texas would not become “a paper tiger — appearing strong while actually having no teeth,”<sup>121</sup> Mr. Dillard thought significant legislative reform was needed.

Richard Reuben (a Missouri law professor who served as a reporter for the Uniform Mediation Act) expressed similar views a couple of years after approval of the UMA. He described Section 154.073 as “somewhat representative of the simple ‘mediation is confidential’ statutes found in some state statutes and court rules.”<sup>122</sup> He considered such statutes problematic:

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114. *Id.* at 554.

115. Shannon (2003), *supra* note 8, at 206.

116. Dillard, *supra* note 3, at 139.

117. *Id.* at 156.

118. *Id.*

119. *Id.* at 143.

120. *Id.* at 146.

121. *Id.* at 140.

122. Richard Reuben, *The Sound of Dust Settling: A Response to Criticisms of the UMA*, 2003 J. Disp. Resol. 99, 114 (2003).

While such statutes are seductive in their simplicity, they are deceptive in that they raise more questions than they answer, promise much more than they deliver, and in the end contribute little to the reliability of mediation confidentiality. At worst, they are downright misleading.

....

As is typical among these “mediation is confidential” statutes, the Texas law conveniently avoids the harder questions that are likely to lead to litigation. For example, while stating that alternative dispute resolution processes are “confidential,” the statute does not define what an “alternative dispute resolution proceeding” is for purposes of the act, nor does it define “confidential,” nor does it define its express limitation to communications that “relate to the subject matter” of the dispute, nor does it list any exceptions to its general rule of confidentiality.<sup>123</sup>

He noted that “Professor Shannon and the other members of the ADR Section of the State Bar of Texas interpret this broad language to provide both a categorical rule against the discovery or introduction of mediation communications evidence in subsequent judicial proceedings (with no exceptions), as well as a categorical rule against disclosure of mediation communications outside of proceedings (with no exceptions).”<sup>124</sup> Prof. Reuben was not so sure that courts would interpret the provision that way. In his view, “[a]n equally plausible, and more defensible, judicial reading of the statute’s plain language, would seem to compel a more restrictive interpretation — as a relatively narrow evidentiary exclusion for certain statements made during a mediation.”<sup>125</sup> Citing California as an example, he cautioned that courts have generally “viewed such ‘mediation is confidential’ statutes as requiring them to balance the mediation confidentiality interests against the parties’ interest in the evidence in the case before them — frequently deciding in favor of admissibility.”<sup>126</sup> (His comments predated *Cassel* and other California cases interpreting California law more strictly.)

Prof. Reuben also pointed out that “Texas law goes one step further in limiting the scope of mediation confidentiality, providing a broad statutory exception to the broad general rule of confidentiality”<sup>127</sup> — i.e., Section 154.073(e), which calls for *in camera* balancing when the statute conflicts with

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123. *Id.*

124. *Id.* (footnotes omitted).

125. *Id.* at 115.

126. *Id.*

127. *Id.*

other legal requirements for disclosure. He warned that this exception could swallow the rule:

On its face, this exception is clearly broader than the proposed “manifest injustice” standard vilified by UMA critics in the early drafting [of the UMA]. *Indeed, it is difficult to imagine how one might draft a broader exception than Subsection (e). A more accurate description of Texas law might be: “Mediation communications are confidential unless a court wants to hear them.”* And courts in Texas — arguably more than in other states have repeatedly shown themselves prone to wanting that information.<sup>128</sup>

Prof. Reuben said that scholars had frequently targeted categorical mediation confidentiality statutes for that reason, and, “state legislatures [were] reluctant to enact such rules, overwhelmingly preferring the privilege structure adopted by the UMA.”<sup>129</sup>

Prof. Reuben’s comments predated the *Avary* line of cases, and the staff does not know his view on the current state of Texas law. As best we can tell, the Texas legal and mediation community remains inclined to retain the longstanding Texas statutes on mediation confidentiality. For example, a short 2011 article by a Texas lawyer pointed out that “the numerous exceptions and seemingly complex structure of the UMA do not make it attractive in comparison to the Texas ADR Act.”<sup>130</sup> After reviewing Texas case law, the author concluded:

[T]he cases do show courts adhering to the intention of the Texas ADR Act in that there is a general presumption of confidentiality of communication from mediation and only a few exceptions exist for this confidentiality, though they will be respected in the rare circumstances in which they arise. Although the choice would remain to switch to the UMA in the interest of state-to-state uniformity in mediation confidentiality, the cases show that Texas does have a workable system that promotes confidentiality and trust in the mediation process from lawyers and non-lawyer participants alike.<sup>131</sup>

Perhaps more tellingly, a search of Texas legislation revealed that the UMA apparently has not been introduced in Texas at any time.

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128. *Id.* at 116 (emphasis added, footnotes omitted).

129. *Id.* (footnotes omitted).

130. See <http://www.mediate.com/articles/VanBurenVbl20110619.cfm>.

131. *Id.*

## SUMMARY OF TEXAS LAW

Texas enacted its ADR Act in 1987, and has been considered a leader in ADR developments ever since. Its ADR Act includes two confidentiality provisions (Sections 154.053 and 154.073), which do not seem entirely consistent. As yet, Texas courts have not clarified the relationship between the two provisions.

Most of the case law pertinent to this study focuses on Section 154.073, which creates a general rule that an ADR communication is confidential, protected from discovery, and inadmissible in any judicial or administrative proceeding. It is thus somewhat similar to Section 1119 of the California Evidence Code, but broader in that it applies to all types of ADR evidence (not just mediation evidence) and it excludes such evidence in a criminal case (not just in a noncriminal proceeding).

Section 154.073 is subject to four express exceptions, including subdivision (e), which requires a court to conduct *in camera* balancing of competing considerations in specified circumstances:

If this section conflicts with other legal requirements for disclosure of communications, records, or materials, the issue of confidentiality may be presented to the court having jurisdiction of the proceedings to determine, *in camera*, whether the facts, circumstances, and context of the communications or materials sought to be disclosed warrant a protective order of the court or whether the communications or materials are subject to disclosure.

California does not have a comparable provision.

In cases such as *Avary* and *Alford*, Texas courts applied subdivision (e) to mediation evidence bearing on allegations of professional misconduct. These cases hold that subdivision (e) permits introduction of mediation evidence if (1) Section 154.073 conflicts with a legal requirement for disclosure, (2) a party seeks to prove that a “new and independent” tort (unrelated to the mediated claims) occurred during the mediation, and (3) the trial judge conducts an *in camera* hearing which shows that “the facts, circumstances, and context” warrant disclosure of the evidence. This doctrine can be invoked to compel evidence from a mediator, as well as from other mediation participants. But it does not apply where a party is seeking to use mediation evidence to undo a mediated settlement.

This approach differs in significant respects from some of the other approaches the Commission has examined. Among other things:



- The Texas approach focuses on whether “a new and independent tort” allegedly occurred during mediation (as opposed to legal malpractice, professional misconduct, or the like).
- The Texas approach requires an *in camera* hearing, at which the trial judge must assess whether “the facts, circumstances, and context” warrant disclosure. (A few of the UMA exceptions similarly require an *in camera* hearing, but the balancing test is different. The UMA exception for professional misconduct does not require such a hearing.)
- If the disclosure requirements are satisfied, a mediator can be compelled to testify under the Texas approach.<sup>132</sup> (That is not true under the UMA’s professional misconduct exception.)

**The Commission should add this approach (and its components) to the mix of options it will evaluate as this study progresses.**

The UMA received some attention in Texas, but the legal and mediation community appears to prefer the existing Texas approach. To the staff’s knowledge, the UMA has not been introduced in the Texas Legislature at any time.

Respectfully submitted,

Barbara Gaal  
Chief Deputy Counsel

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132. See *Alford*, 137 S.W.3d 916; see also Thomas D’Amato & Adam Koss, *Mediation Confidentiality*, For the Defense 70, 74 (Oct. 2013) (noting that “a court in a Texas jurisdiction could compel the mediator to testify”); but see Scott, *supra* note 37, at 406 (“At a minimum, the courts must recognize that Texas Civil Practice and Remedies Code, subsections 154.053(b) and (c), and subsection 154.073(a) create a separate confidential right in the mediator (as opposed to the parties) that precludes the testimony of the mediator. The statutes could not be any more plain.”) (footnote omitted).

**EXCERPT FROM BRIAN SHANNON, *DANCING WITH THE ONE THAT  
“BRUNG US” — WHY THE TEXAS ADR COMMUNITY HAS DECLINED TO  
EMBRACE THE UMA, 2003 J. DISP. RESOL. 197, 197-200 (2003)***

**Alternative I.** Let me now turn to the topic of confidentiality. You should be aware that under state law, except for a few narrow exceptions, everything that we discuss here today is confidential. In general, that means you are not supposed to talk about what we say and do here today once we conclude the mediation. In particular, the relevant state law makes all communications at this mediation — both verbal and nonverbal — that relate to this pending dispute confidential. Our communications are not subject to disclosure and cannot be used as evidence in any later court or agency proceeding. These confidentiality rules apply to both you and me. The governing statute states very explicitly that I have to maintain confidentiality with respect to any of the communications here today that relate to this dispute. Additionally, that same law requires that unless both sides later agree, all matters covered here today, including the conduct and demeanor of all those who are present, are confidential, and I cannot disclose them to anyone, including the court. Similarly, if we break into caucus sessions, as I described earlier in my overview, if you tell me something in confidence at that time, I am not allowed to disclose that information to the opposing side without your permission. In general, the only exceptions set out in the law relate to situations in which some other law might require disclosure — for example, there is another law that requires the reporting of child or elder abuse or neglect. Moreover, a court will not allow an exception to confidentiality unless it first holds a non-public and in camera hearing to consider the applicability of the exception or need for disclosure. You should also be aware that our state confidentiality statute might not be applicable in the event of some type of federal criminal investigation.

When our state legislature enacted our first comprehensive alternative dispute resolution procedure statute some fifteen years ago, the lawmakers intended to encourage the peaceable resolution of disputes outside of court, and to provide a broad cloak of confidentiality for proceedings like the one you are participating in today. The purpose of requiring confidentiality was to encourage everyone to be candid, and to have the opportunity to be very forthcoming about the strengths and weaknesses of pending cases without the fear that such candor with regard to offers and other information might be subject to later attempts at disclosure either in court or elsewhere. There was a strongly held belief that a broad confidentiality law would better facilitate frank and open discussions and thereby bring about greater opportunities for understanding and settlement. Accordingly, the matters discussed today should be kept confidential. Unless somehow ordered by a court, you are not going to have to, nor will you be allowed to, give evidence about the matters discussed in this session. Indeed, you have a duty to keep today's proceedings confidential.

Our laws relating to confidentiality also apply to any writings or documents created at today's session. Unlike those depositions that you told me about that were taken earlier in this pending case, you have no doubt noticed that there is no court reporter present with us today. That is because a record is not normally kept as part of a mediation. In fact, at the end of the mediation session, I am going to require you to give me all of your notes. I will then take your notes, along with mine, and destroy them after the mediation's conclusion. The only documents that will originate in this session that might ultimately be subject to later disclosure are either a final signed agreement, or a form that we will complete if no settlement is reached. Obviously, I will use my best efforts to facilitate your reaching a voluntary settlement here today, but if we are unable to reach agreement, I will need to send to the court [if the mediation has been conducted pursuant to a court order or local rule] a statement that the mediation was conducted today as ordered, that you showed up as required, and that no settlement was reached.

Do any of you have any questions about the requirements of confidentiality that govern our proceedings today?

**Alternative II.** Let me now turn to the topics of privilege and confidentiality. Our state law includes provisions that are intended to protect the confidentiality of mediation communications against attempts at disclosure in later legal proceedings. If there is some later legal proceeding in which a person attempts to discover or introduce evidence about what we have addressed today, state law has created certain mediation privileges. These privileges apply broadly to all types of mediation communications, including verbal, non-verbal, and written communications. As a general matter, a privilege operates to allow a person either to refuse to disclose information or to stop somebody else from disclosing information; it allows for a type of blocking function. That is, if you have a privilege, it gives you certain powers to block later disclosure. You should be aware, however, that different people involved in this process have differing levels of privilege. For example, as a general matter, you two parties have the ability to refuse to disclose any of our mediation communications here today and block any of the rest of us from so disclosing. I must caution you, however, that our law considers your attorneys as nonparty participants, and they can only refuse to disclose and prevent others from disclosing any communications made today by the nonparty participants. For our purposes today, that would apply to the two attorneys who are present. As the mediator, I can refuse to disclose any mediation communications, but I can only block others from disclosing my communications. On the other hand, if you don't like these various rules, you can agree right now in writing, or at any point during the mediation, that all or part of the mediation is not privileged. In that case, the state's laws on privileges will not be applicable.

I should also caution you that our state law sets forth a lengthy number of waivers and exceptions to these blocking privileges that I have just described. Let me first address waivers of the privilege. If both of you parties agree in writing or orally at some later legal proceeding to waive any of the privileges, you can do so for certain privileges. But, as for my privilege as a mediator, I would have to agree, too. Similarly, given that your respective lawyers who are present here today are considered as nonparty participants, they will have to agree to any waiver of their mediation privileges. In addition, you will waive your privilege if you make disclosures in some later proceeding that prejudices another person in that proceeding. In such a case, the other person can talk about what happened in the mediation as a response to the prior disclosure. And, obviously, if you are attempting to use these proceedings to plan, attempt to commit or commit a crime, or to conceal criminal activity, you will not be able to assert any sort of mediation privilege. Of course, I hope that will not be the case with today's mediation! In addition, on this topic of criminal law, you should also be aware that our state law privileges statute might not be applicable in the event of some type of federal criminal investigation.

Let me now turn to the principal exceptions to the various mediation privileges. Our legislature has created a number of these exceptions. For example, similar to the waiver I just discussed, statements threatening bodily harm, violence, or other criminality are not covered. Also, if you ever bring a claim of malpractice against me, you can try to prove your claim or I can try to disprove your claim with testimony about what we have to say today. Obviously, I do not believe that you will need to consider any such action because I plan to act professionally throughout our proceedings. On the topic of malpractice, however, I should also point out that the statute has certain exceptions related to disclosures of mediation communications if some type of malpractice claim is pursued against one of the attorneys or parties here today; however, I could not be compelled to disclose anything in such a case. There is also no privilege that attaches to allegations of child or adult abuse, neglect, abandonment, or exploitation. The law also has exceptions relating to contract defenses to any settlement agreement we might reach and criminal proceedings, but before such an exception is invoked, the court will first hear argument relating to the need for such evidence in camera — not in public.

Do you have any questions so far with regard to mediation privileges, waivers, and exceptions to the privileges? As you can readily appreciate, our state legislature believes that these matters are very important. I suspect that is why they set out such a detailed array of rules, waivers, and exceptions. Before we proceed with the mediation, however, I need to discuss one further matter relating to this general topic. I would be remiss if I did not address the difference between confidentiality and privilege. Under our state law, the discussions we have today are not generally

confidential. That is, there is no law that precludes you from talking about what we say today with any other person outside of a later legal proceeding. Thus, you are free to talk about the things learned at mediation with anybody, including the media. The mediation privilege statute that I just explained to you relates only to disclosures in later legal proceedings. If you would like to have a broader degree of confidentiality, you will have to agree to it. Is this something that you would like to consider? Is it an issue that you would like to discuss with your attorneys? If so, we can take a little break at this point before proceeding further. Otherwise, do you have any questions about confidentiality and later disclosures?