

Memorandum 2014-46

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

In its study on the relationship between mediation confidentiality and attorney malpractice and other misconduct, the Commission¹ received the following new comments:

	<i>Exhibit p.</i>
• Michael Carbone, Point Richmond (9/28/14)	1
• Jack Goetz & Jennifer Kalfsbeek-Goetz (9/5/14)	3
• Eric van Ginkel, Straus Institute for Dispute Resolution, Pepperdine University School of Law (8/21/14)	4
• Eric van Ginkel, <i>Another Look at Mediation Confidentiality: Does It Serve Its Intended Purpose?</i> , 32 Alternatives to the High Cost of Litigation 119 (Sept. 2014)	5

COMMENTS OF MICHAEL CARBONE

Michael Carbone has been a mediator for 20 years and he “believe[s] strongly in the importance of confidentiality to the process.”² He typically explains confidentiality in a plenary session with all of the mediation participants around the table. He tells them that the law “excludes all communications that take place during meditation from admissibility in evidence in any adjudicative proceeding.”³ He further explains that it “matters not whether the subsequent proceeding is for the purpose of trying the case at hand (should the mediation be unsuccessful) or whether it’s for some other purpose, be it related or unrelated to

1. 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.

2. Exhibit p. 1.

3. *Id.*

the dispute at hand.”⁴ He says that his explanation “seems to put people at ease and to encourage candid discussion.”⁵

Mr. Carbone asks the Commission to consider what might happen if he had to add the following warning to his explanation of confidentiality:

You should know that there is an exception to confidentiality. If one of the parties here should later decide that his or her lawyer didn’t do a good job in this mediation, and if that party should decide to sue that lawyer for malpractice, any one of you might be called to testify as a witness in that lawsuit.⁶

He believes such a warning would have a chilling effect on the mediation process, and might even prompt one or more participants to leave the mediation.⁷

Mr. Carbone offers the following alternative approach:

A balance should be struck between the need for confidentiality and the need for the plaintiff in an action for legal malpractice to be able to prove his or her case. I would reluctantly favor a narrow exception to confidentiality that would allow the plaintiff in the legal malpractice case, and the plaintiff only, to testify about any advice that the lawyer gave during the mediation. None of the other participants should be drawn into that dispute.⁸

An obvious objection to this approach is that it would not be fair to the attorney defendant: The plaintiff could relate what happened at the mediation, but the attorney defendant could not. Mr. Carbone does not address this point. **It would be helpful to hear his view on the matter, as well as comments from others.**

FURTHER COMMENTS OF JACK GOETZ AND JENNIFER KALFSBEEK-GOETZ

In June, the Commission received input from Jack Goetz (Academic Lead for the Program in Mediation and Conflict Resolution at Tseng College, CSU Northridge) and Jennifer Kalfsbeek-Goetz (Assistant Dean at Tseng College, CSU Northridge). They believe that the field of mediation could “better serve the public by developing a system of public accountability that would elevate itself to a formal, professional status.”⁹ In their view, “mediation as a field has not yet

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.* at 2 (emphasis in original).

9. First Supplement to Memorandum 2014-27, Exhibit p. 4.

earned the status of a profession that ordinarily justifies the public trust envisioned by the confidentiality protections.”¹⁰ As explained in a memorandum for the June meeting, they think that “[a]llowing a professional misconduct exception would not seriously reduce the supply of mediators in a crowded field for which the barriers to entry are extremely low, but would likely raise the quality of the practice and encourage the more serious practitioners to get better.”¹¹

They recently submitted additional comments, which expand upon their previous ones. They note that “[i]n mediation, not only do we not have any real government control (court connected cases excepted, perhaps), but we have essentially barred market forces from controlling ethical breaches in mediation by evidentiary codes enacted in many states (including California) that prevent participants from complaining meaningfully.”¹² They consider that situation “almost un-American.”¹³

They also seek to rebut the notion that creating a professional misconduct exception to mediation confidentiality would have harmful effects. In particular, they say:

- “[C]omments by others who oppose any exception to confidentiality are often hinged on the concept of widespread systemic harm that would result. It would seem likely that such widespread systemic harm, if any, would have surfaced in the Commission’s extensive research on this topic that included states in which limited exceptions to confidentiality have been in existence for some time.”¹⁴
- “It seems counterintuitive that exceptions for mediator malfeasance would limit the candor of the disputants or affect the mediation at all other than keeping the mediator operating within the bounds of accepted ethical conduct.”¹⁵

In considering these comments, the Commission should **keep in mind that the Legislature asked it to study “the relationship under current law between mediation confidentiality and attorney malpractice and other misconduct,” not the merits of regulating the mediation profession.**¹⁶

10. *Id.* at Exhibit p. 17.

11. *Id.* at Exhibit p. 17.

12. Exhibit p. 3.

13. *Id.*

14. *Id.*

15. *Id.*

16. 2012 Cal. Stat. res. ch. 108.

COMMENTS OF ERIC VAN GINKEL

Eric van Ginkel is an arbitrator and mediator, as well as an adjunct professor for the Strauss Institute for Dispute Resolution at Pepperdine University School of Law. He has provided the Commission with a copy of his article entitled “*Another Look at Mediation Confidentiality: Does It Serve Its Intended Purpose?*,” which was recently published in *Alternatives to the High Cost of Litigation*, a monthly magazine prepared by the International Institute for Conflict Prevention and Resolution (“CPR”).¹⁷ He has also alerted the staff to some international developments relating to mediation.

He believes “that the Uniform Mediation Act provides the best balance to deal with the various aspects of mediation confidentiality.”¹⁸ He says that the UMA “may not be ideal, but it has considered various implications of mediation confidentiality that have not been addressed by the California statute.”¹⁹

Prof. van Ginkel explains those points in detail in the article he provided, which begins by describing *Cassel v. Superior Court*²⁰ and the Commission’s ongoing study. He then says that “[a] review of the reports issued by CLRC staff reveals that there is relatively little understanding about what purpose the mediation confidentiality laws serve.”²¹ Prof. van Ginkel does not claim to have new information about the matter, but rather attempts to look at the question with a new eye.²²

He frames the inquiry by providing the following background:

To date, no study has been undertaken that would give us the empirical data that connects success in mediation proceedings with the availability of a form of confidentiality protection. In other words, we don’t really know for sure that confidentiality enhances the chance of settlement in a mediation, but most of us generally assume this is the case. Both the California mediation confidentiality laws and the Uniform Mediation Act assume that mediation confidentiality promotes *candor*, which in turn promotes frank exchanges that lead more easily to settlement.

In 2006, Professor Ellen Deason conducted extensive research into this question, and concluded that the principal justification for confidentiality in mediation is that it creates *trust* in the process and thus promotes settlement *What has not been explored in great*

17. See Exhibit pp. 4-9.

18. Exhibit p. 4.

19. *Id.*

20. 51 Cal. 4th 113, 244 P.3d 1080, 119 Cal. Rptr. 3d 437 (2011).

21. Exhibit p. 6.

22. *Id.*

*detail, at least not explicitly, is whether and to what degree the need (and therefore justification) for confidentiality remains, once a settlement has been reached.*²³

He also points out that there are three different forms of mediation confidentiality: “(1) during the mediation, when a party gives information to the mediator while meeting without the other party present (in caucus) as the express or implied obligation of the mediator not to disclose that information to the other party, (2) during and after the mediation, as a general obligation not to disclose information regarding the mediation to any third party, and (3) after the mediation, as a right or duty not to disclose mediation information in a subsequent proceeding.”²⁴ His article focuses on legislative protection of information in the third category.

Prof. van Ginkel says that the need for such confidentiality depends on whether the mediation led to settlement:

If candor and trust are the principal motivating factors for the creation of a confidentiality privilege (or, as in California, an exclusionary rule of evidence), it stands to reason that these factors continue to play a major role in subsequent litigation if the mediation proceedings fail to lead to settlement. The parties need to be assured that disclosures made during mediation are not revealed in subsequent proceedings In fact, that would appear to be the main purpose of confidentiality.

On the other hand, *if the dispute settles, the need for confidentiality* arguably persists if relevant facts disclosed in a mediation could play a role in a different but related proceeding (see, e.g., *Rojas v. Superior Court*, 33 Cal. 4th 407 (2004)), but *would no longer be as important with respect to the dispute that was settled*. After all, the need for trust and candor has been fulfilled, the mediation is over, and now it is a matter of implementing (or enforcing or challenging) the settlement agreement.²⁵

In other words, he believes that the need for confidentiality decreases once a mediated dispute is settled.

Prof. van Ginkel also notes that “[t]he parties, the mediator, and all other participants (including any attorneys) need confidentiality, but not all to the

23. *Id.* (emphasis in original).

24. *Id.*

25. *Id.* (emphasis added).

same degree.”²⁶ In his view, the parties have the greatest need for confidentiality, then the mediator, and lastly the other mediation participants.²⁷

He thus supports the UMA, because it “acknowledges that the needs of these various participants are different,” and it is cast as a privilege as opposed to an evidentiary rule, which he considers less capable of providing a nuanced approach to protection of mediation communications.²⁸ He says that “[o]ne can criticize the drafters of the UMA for not going far enough with the exceptions it provides, but compared to the California statute, we are approaching Nirvana.”²⁹

In his opinion, the UMA “falls just a hair short of being the ideal mediation confidentiality statute in two major respects.”³⁰ First, he would “prefer something in between the more general common law rule ... that the settlement privilege ceases to be effective once there is a settlement agreement, and the UMA rule that there will be an exception to the mediation privilege after a positive finding *in camera*, to the extent that only the portion of the communication necessary for the application of the exception from nondisclosure may be admitted”³¹ More specifically, his “in-between” solution would follow the UMA approach but eliminate the need for *in camera* review.³²

He also faults the UMA for prohibiting mediator testimony when a party challenges a mediated settlement agreement.³³ He considers that a mistake because often “the mediator is the best witness as to what took place during the mediation when it comes to allegations of mistake, misrepresentation, duress and/or undue influence, especially when all or part of the mediation took place in caucus.”³⁴

With regard to malpractice, Prof. van Ginkel agrees with the UMA approach, including the rule prohibiting mediator testimony regarding a claim of malpractice against a professional other than the mediator.³⁵ In his view, “the need for confidentiality does not apply to situations where either an attorney or the mediator himself is accused of malpractice,”³⁶ and it should not “become a

26. *Id.* at 7.

27. *See id.*

28. *Id.* at 8.

29. *Id.*

30. *Id.*

31. *Id.* at 8-9.

32. *Id.* at 9.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

shield to protect the mediator from allegations of misdeeds that could constitute malpractice”³⁷

We appreciate hearing Prof. van Ginkel’s perspective, as well as the comments from others who have taken the time to share their thoughts with the Commission. Such input is crucial in the Commission’s study process, enabling it to reach well-informed decisions about what to recommend to the Legislature. **Further comments are welcome and encouraged at any time throughout the Commission’s study, in any format.**

Respectfully submitted,

Barbara Gaal
Chief Deputy Counsel

37. *Id.* at 7.

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September 28, 2014

California Law Revision Commission
c/o UC Davis School of Law
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Davis, CA 95616

Re: Relationship Between Mediation Confidentiality and Attorney Malpractice

Dear Members of the Commission:

I have been a mediator for 20 years, and I believe strongly in the importance of confidentiality to the process. I discuss confidentiality with the parties at the beginning of every mediation. It is important that all participants share a common understanding of what confidentiality means and why it's important to the success of the mediation.

I usually explain confidentiality in a plenary session with all participants around the table. I explain that there is a strong public policy in California in favor of mediation. The law excludes all communications that take place during mediation from admissibility in evidence in any adjudicative proceeding. It matters not whether the subsequent proceeding is for the purpose of trying the case at hand (should the mediation be unsuccessful) or whether it's for some other purpose, be it related or unrelated to the dispute at hand. My explanation seems to put people at ease and to encourage candid discussion.

Please consider what might happen if I had to add the following warning:

You should know that there is an exception to confidentiality. If one of the parties here should later decide that his or her lawyer didn't do a good job in this mediation, and if that party should decide to sue that lawyer for malpractice, any one of you might be called to testify as a witness in that lawsuit.

Obviously this caveat would have a chilling effect on the process. The purpose of mediation is to end litigation, not to stir up more of it. One or more persons might get up and leave. And if such an exception were to be explained to parties beforehand, they might decide not to mediate.

A balance should be struck between the need for confidentiality and the need for the plaintiff in an action for legal malpractice to be able to prove his or her case. I would reluctantly favor a narrow exception to confidentiality that would allow the plaintiff in the legal malpractice case, and the plaintiff only, to testify about any advice that the lawyer gave during the mediation. None of the other participants should be drawn into that dispute.

Thank you for your attention to my recommendation.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Michael P. Carbone', with a stylized, cursive script.

MICHAEL P. CARBONE

EMAIL FROM JACK GOETZ & JENNIFER KALFSBEEK-GOETZ (9/5/14)

Re: Mediator Confidentiality and Misconduct

We do appreciate the Commission's continued extensive research on this topic. Since we have commented previously, we will keep our additional comments summary in nature.

We believe that the public is ultimately poorly served by having an out of court system of dispute resolution (mediation) affecting substantial legal and equitable rights that operates in the absence of an enforceable ethical code and with little or no training requirements for the "leader" of this dispute resolution system. Generally, we are accustomed to the ongoing societal debate on many issues between governmental control and the concept of "laissez faire." In mediation, not only do we not have any real government control (court connected cases excepted, perhaps), but we have essentially barred market forces from controlling ethical breaches in mediation by evidentiary codes enacted in many states (including California) that prevent participants from complaining meaningfully.

It is almost un-American...in our opinion.

We acknowledge that comments by others who oppose any exception to confidentiality are often hinged on the concept of widespread systemic harm that would result. It would seem likely that such widespread systemic harm, if any, would have surfaced in the Commission's extensive research on this topic that included states in which limited exceptions to confidentiality have been in existence for some time. It seems counter-intuitive that exceptions for mediator malfeasance would limit the candor of the disputants or affect the mediation at all other than keeping the mediator operating within the bounds of accepted ethical conduct.

Regards,

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August 21, 2014

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Re: Mediation Confidentiality

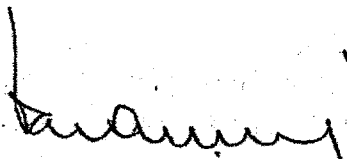
Dear Ms. Gaal,

Enclosed please find an advance copy of my article "Another Look at Mediation Confidentiality: What is its Purpose?," which may be of interest to you and the Commission. The article will appear in the monthly magazine "Alternatives", published by CPR.

As you see, not specifically for California, but generally, I am of the opinion that the Uniform Mediation Act provides the best balance to deal with the various aspects of mediation confidentiality. The UMA may not be ideal, but it has considered various implications of mediation confidentiality that have not been addressed by the California statute.

Please do not hesitate to contact me if you have any questions.

Very truly yours,



Eric van Ginkel
President

Staff Note. With his letter dated August 21, 2014, Prof. van Ginkel provided an advance copy of his article entitled “*Another Look at Mediation Confidentiality: Does It Serve Its Intended Purpose?*.” The article has since been published, and Prof. van Ginkel sent us a link to the published version. The published version is presented here, instead of the advance copy.

Prof. van Ginkel and his publisher requested that we provide the following introductory note:

A version of Mr. van Ginkel’s comments appears as an article entitled “Another Look at Mediation Confidentiality: Does It Serve Its Intended Purpose?” in 32 *Alternatives* 119 (Sep. 2014). Reprinted here with permission.
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Alternatives

TO THE HIGH COST OF LITIGATION

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Mediation

Another Look at Mediation Confidentiality: Does It Serve Its Intended Purpose?

BY ERIC VAN GINKEL

INTRODUCTION

In 2005, Michael Cassel sued his attorneys for malpractice, alleging they coerced him into a much lower settlement than they had agreed to in meetings held in preparation for mediation. The attorneys moved under the California mediation confidentiality statutes to exclude all evidence of communications between Cassel and his attorneys that were related to the mediation, including matters discussed at pre-mediation meetings and private communications between Cassel and the lawyers while the mediation was under way.

The Court had to decide whether the California mediation confidentiality law required exclusion of conversations and conduct solely between a client, Cassel, and his attorneys, Wasserman Comden, during meetings in which they were the sole participants and which were held outside the presence of any opposing party or the mediator. Should the public policy of protecting mediation confidentiality outweigh clients' right to sue for malpractice so that attorneys can take advantage of those mediation con-

fidentiality laws, and successfully avert their client's suit for malpractice? According to the California Supreme Court, the answer is an unqualified yes.

In its 2011 opinion, the court held that "[w]e have repeatedly said that these [mediation] 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." Consequently, the Court ruled in favor of the law firm, and Mr. Cassel was unable to challenge his lawyers for having committed malpractice; *Cassel v. Superior Court*, 51 Cal.4th 113, 118 (2011) (bit.ly/1pL4as4; the case was the subject of a CPR seminar, reported at bit.ly/1B9heNV).

Given the language of the California statute, the Court was correct. As the Court observed, "[w]ith 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.'"

Mainly because of the *Cassel* case, the California Law Revision Commission (CLRC) is currently reviewing the statutory provisions dealing with mediation confidentiality in that state; see bit.ly/1r5rEfo. A review of the reports issued by CLRC staff reveals that there is relatively little understanding about what purpose the mediation confidentiality laws serve. This article will not reveal anything novel, but as Marcel Proust once wrote, "The real voyage of discovery consists not in seeking new landscapes, but in having new eyes." Let us therefore take another look at why we have mediation confidentiality laws.

LACK OF EMPIRICAL DATA

To date, no study has been undertaken that would give us the empirical data that connects success in mediation proceedings with the availability of a form of confidentiality protection. In other words, we don't really know for sure that confidentiality enhances the chance of settlement in a mediation, but most of us generally assume this is the case. Both the California mediation confidentiality laws and the Uniform Mediation Act assume that mediation confidentiality promotes *candor*, which in turn promotes frank exchanges that lead more easily to settlement.

In 2006, Professor Ellen Deason conducted extensive research into this question, and concluded that the principal justification for confidentiality in mediation is that it creates *trust* in the process and thus promotes settlement (see box). What has not been explored in great detail, at least not explicitly, is whether and to what degree the need (and therefore justification) for confidentiality remains, once a settlement has been reached.

THREE FORMS OF MEDIATION CONFIDENTIALITY

It bears repeating that we can distinguish three forms of mediation confidentiality: (1) during the mediation, when a party gives information to the mediator while meeting without the other party present (in caucus), as the express or implied obligation of the mediator not to disclose that information to the other party; (2) during and after the mediation, as a general obligation not to disclose information regarding the mediation to any third party; and (3) after the mediation, as a right or duty not to disclose mediation information in a subsequent proceeding.

For purposes of this discussion, we will focus on the legislative protection of confidentiality in the third category.

(continued on next page)



The author is an international arbitrator and mediator. He is an Adjunct Professor of Law in International Commercial Arbitration and Investor-State Arbitration at Pepperdine Law School, a Fellow of the College of Commercial Arbitrators, and a member of the International Council for Commercial Arbitration. In addition to IP and biotech matters, he has experience in high-tech joint ventures, licensing and distribution agreements, and commercial real estate. He serves as arbitrator and/or mediator for the AAA (Complex Case and IP Panels), CPR (Banking, Oil & Gas, IP and Real Estate Panels), ICC, ICDR, LCIA, and WIPO.

Mr. van Ginkel is a published author, and frequent speaker and trainer on ADR-related subjects. He holds JD degrees from Leiden University Law School in the Netherlands, and Columbia University Law School in New York City. He also holds a Master of Laws (LL.M.) degree in Dispute Resolution from the Straus Institute. A citizen of the Netherlands, he is fluent in Dutch (native), English, French and German.

Mediation

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ADVANTAGES AND DISADVANTAGES OF MEDIATION CONFIDENTIALITY

Even if there is no scientific basis of empirical data available to determine the effective usefulness of mediation confidentiality, there is general agreement among authors with respect to the advantages of mediation confidentiality legislation (as opposed to leaving it to the parties to enter into a confidentiality agreement). As a result of the mediation privilege, mediation-related information cannot be used:

- in current litigation;
- in a different law suit;
- by adversaries or potential adversaries (including public authorities);
- to prejudice legal rights;
- to expose a party to legal liability or prosecution; or
- to prejudice a party in commercial dealings.

Of course, there are also perceived disadvantages to mediation confidentiality. The law of evidence in many jurisdictions, notably in the common law countries, views courts as entitled to every person's evidence, so that generally public policy in those jurisdictions forbids parties to agree to withhold evidence.

The generally recognized disadvantages include the fact that mediation confidentiality

- hinders the fact-finder by excluding salient information;
- runs counter to democratic principles of transparency and participation in public processes; and
- competes with other important values that are served by reporting certain conduct (preventing crime, attorney misconduct, child abuse).

THE NEED FOR CONFIDENTIALITY AFTER MEDIATION HAS LED TO SETTLEMENT

If candor and trust are the principal motivating factors for the creation of a confidentiality privilege (or, as in California, an exclusionary

rule of evidence), it stands to reason that these factors continue to play a major role in subsequent litigation if the mediation proceedings fail to lead to settlement. The parties need to be assured that disclosures made during mediation are not revealed in subsequent proceedings (whether they be administrative, court or arbitration). In fact, that would appear to be the main purpose of confidentiality.

On the other hand, if the dispute settles, the need for confidentiality arguably persists if relevant facts disclosed in a mediation could play a role in a different but related proceeding (see, e.g., *Rojas v. Superior Court*, 33 Cal.4th 407 (2004)), but would no longer be as important with respect to the dispute that was settled. After all, the need for trust and candor has been fulfilled, the mediation is over, and now it is a matter of implementing (or enforcing or challenging) the settlement agreement.

The Supreme Court of Canada opined in a recent case involving a mediation confidentiality agreement under the laws of Quebec that "a communication that has led to a settlement will cease to be privileged if disclosing it is necessary in order to prove the existence or the scope of the settlement." In addition, the Court found that "[w]hile allowing parties to freely contract for confidentiality protection furthers the valuable public purpose of promoting settlement, contracting out of the exception to settlement privilege that applies where a party seeks to prove the terms of a settlement might prevent parties from enforcing the terms of settlements they have negotiated; *Union Carbide Canada Inc. v. Bombardier Inc.*, 2014 SCC 35 (2014) (bit.ly/Vg7kjk).

DIFFERENT PARTICIPANTS IN THE MEDIATION HAVE DIFFERENT NEEDS

Looking at the need for confidentiality, another question arises: who needs what kind of confidentiality? Do all participants have the same needs, as the California mediation confidentiality laws assume?

The parties, the mediator, and all other participants (including any attorneys) need confidentiality, but not all to the same degree. The participants that would appear to need the most confidentiality are the parties themselves. After all, the "candor" and "trust" arguments underlying the need for confidentiality apply directly to them. For the parties it is important

that all participants in the mediation (i.e., all persons present) keep confidential all that is said, written or inferred from their respective behavior. It concerns mainly "the damaging use against a mediation disputant of tactics employed, positions taken, or confidences exchanged in the mediation," as the California Court of Appeal reasoned in *Cassel*, 51 Cal.4th at 118.

The mediator's need for confidentiality is perhaps less. Many (mostly mediators) have argued that the mediator should not be allowed to testify in any subsequent proceeding lest this might color or affect his neutrality in conducting the mediation. I tend to agree with that notion, although the protection should not be absolute. There may be circumstances in which, for example, the need for testimony regarding challenges to the settlement agreement on the grounds of mistake, misrepresentation, duress, and/or undue influence outweighs the mediator's need for confidentiality regarding the conduct of the mediation proceedings. Nor should that need for confidentiality become a shield to protect the mediator from allegations of misdeeds that could constitute malpractice, and there should be an exception to the mediation confidentiality rules allowing evidence of the mediator's behavior to come in during a malpractice suit against her.

What about the other participants—including the attorneys? Do they need protection from the mediation confidentiality rules? I am referring to friends, experts, other witnesses, and, last but not least, attorneys.

Of course, as between the attorney and his client, there is the attorney-client privilege, and there is a serious question to what degree this privilege applies in mediation, or whether the privilege (which can be waived by the client) is overruled by the mediation privilege or evidentiary rule. In *Cassel*, the California Supreme Court considered the Court of Appeal's reasoning that the mediation confidentiality statutes were not intended to trump Section 958 of the California Evidence Code, which eliminates the attorney-client privilege in suits between clients and their own lawyers. The Supreme Court rejected this theory on the ground that "the mediation confidentiality statutes include no exception for legal malpractice actions by mediation disputants against their own counsel. Moreover, though

both statutory schemes involve the shielding of confidential communications, they serve separate and unrelated purposes.”

DEFINITIONS OF MEDIATION PARTICIPANTS

The California Evidence Code does not distinguish among the various participants in a mediation. Section 1115, the definitional section, defines only the words “mediation,” “mediator” and “mediation consultation.” The actual sections dealing with the inadmissibility of evidence are written in the passive tense, thus not distinguishing among the various participants. Section 1119(c) refers to participants and the general duty of confidentiality with respect to “all communications, negotiations, or settlement discussions by and between” them “in the course of a mediation or a mediation consultation.” The word “participants” is not defined.

In contrast, the Uniform Mediation Act (UMA)(bit.ly/1oY3Ab6) does make the necessary distinctions—although I would have preferred if it had given a separate definition for attorneys present at the mediation who represent one or more of the parties, so as to make more transparent what this privilege entails. Section 2 UMA defines, *inter alia*, the words “mediator” (§2(3)), “mediation party” (§2(5)), and “non-party-participant” (§2(4)). Specifically, “non-party participant” means “a person, other than a party or mediator, that participates in a mediation.”

Although not explained in so many words, the UMA introduces these different definitions because it acknowledges that the needs of these various participants are different, and it gives each category a different mediation privilege.

PRIVILEGE VERSUS EVIDENTIARY RULE

Although the California statute introduces a rule of evidence rather than a privilege, the two are frequently confused, and often even treated as if they were the same thing. As I wrote in 2003, in a discussion of the UNCITRAL Model Law on International Commercial Conciliation (see box):

“To approach the confidentiality issue as an evidentiary privilege has the advantage

that it can clearly define (a) what is the scope of the privilege in terms of what [mediation] information and activities are covered; (b) which persons are burdened by the privilege; (c) in which later proceedings will the privilege apply; (d) who are the holders of the privilege, with the right to involve or waive the privilege (and to what extent); and (e) what information will be excepted from the privilege. This also means that such a provision can account for the separate and perhaps conflicting interests of [mediation] parties and the [mediator] in maintaining confidentiality” (citing Alan Kirtley, *see box*).

Having chosen the evidentiary rule rather than a privilege, and not distinguishing among the mediation parties, the mediator and non-party participant, it is perhaps no wonder that the California mediation statute lacks the nuance that can adhere to the several privileges for each of those categories, along with the specific exceptions to the privilege that are set forth in Section 6 UMA. Clearly, had the UMA been applicable to the *Cassel* case, the outcome would have been different.

THE UMA ADDRESSES THE INDIVIDUAL NEEDS OF EACH MEDIATION PARTICIPANT

Although the Commentary to the UMA, whether in the Prefatory Note or the specific comments following each section, does not specifically address the purpose of mediation confidentiality or the extent to which each participant has a need for it, the UMA effectively addresses these points with a degree of sophistication it is not always given credit for.

One can criticize the drafters of the UMA for not going far enough with the exceptions it provides, but compared to the California statute we are approaching Nirvana. Section 4 UMA grants each of the three categories of mediation participants a mediation privilege, whereby under Section 5 the parties can agree to waive their privilege (which affects all other participants), but they need the consent of the mediator when it comes to mediation communications of the mediator, and from the relevant non-party participant when it involves mediation communications of such non-party participant.

Section 6 UMA includes the following exceptions:

- “(a) There is no privilege under Section 4 for a mediation communication that is:
 - [...]
 - (5) sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediator;
 - (6) except as otherwise provided in subsection (c), sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediation party, nonparty participant, or representative of a party based on conduct occurring during a mediation;
- (b) There is no privilege under Section 4 if a court, administrative agency, or arbitrator finds, after a hearing *in camera*, that the party seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise available, that there is a need for the evidence that substantially outweighs the interest in protecting confidentiality, and that the mediation communication is sought or offered in:
 - [...]
 - (2) except as otherwise provided in subsection (c), a proceeding to prove a claim to rescind or reform or a defense to avoid liability on a contract arising out of the mediation.
- (c) A mediator may not be compelled to provide evidence of a mediation communication referred to in subsection (a)(6) or (b)(2).

CONCLUSION: THE UMA IS VERY GOOD, BUT NOT PERFECT

The UMA falls just a hair short of being the ideal mediation confidentiality statute in two major respects: I would prefer something in between the more general common law rule cited by the Canadian Supreme Court that the settlement privilege ceases to be effective once there is a settlement agreement, and the UMA rule that there will be an exception to the mediation privilege after a positive finding *in camera*, to the extent that only the portion

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of the communication necessary for the application of the exception from nondisclosure may be admitted, as provided in Section 6(d). My suggested "in-between" solution would maintain the limitation of Section 6(d), but eliminate the need for an *in camera* review as contemplated in Section 6(b).

The other flaw is, in my opinion, the exception of Section 6(c), pursuant to which the mediator cannot testify in cases alleging malpractice and challenges of mediated settlement agreements. I am in favor of retaining the exclusion of mediator testimony in cases alleging malpractice, but I find myself disagreeing with the exclusion of the mediator's testimony with respect to challenges of mediated settlement agreements. Often, the mediator is the best witness as to what took place during the mediation when it comes to allegations of mistake, misrepresentation, duress, and/or undue influence, especially when all or part of the mediation took place in caucus. In such events, he may well be the only person who

REFERENCES AND FURTHER READING

Ellen Deason, "The Need for Trust as a Justification for Confidentiality in Mediation: A Cross-Disciplinary Approach," 54 *U. Kan. L. Rev.* 1387 (2006).

Owen V. Gray, "Protecting the Confidentiality of Communications in Mediation," 36 *Osgoode Hall L.J.* 667 (1998).

Scott Hughes, "A Closer Look: The Case for a Mediation Privilege Still Has Not Been Made," *Disp. Res. Mag.* 14 (Winter 1998).

Alan Kirtley, "The Mediation Privilege's

Transition from Theory to Implementation: Designing a Mediation Privilege Standard to Protect Mediation Participants, the Process and the Public Interest," 1995 *J. Disp. Res.* 1.

Peter Robinson, "Centuries of Contract Common Law Can't Be All Wrong: Why the UMA's Exception to Mediation Confidentiality in Enforcement Proceedings Should be Embraced and Broadened," 2003 *J. Disp. Res.* 135.

Eric van Ginkel, "The UNCITRAL Model Law on International Commercial Conciliation, A Critical Appraisal," 21 *J. Int'l Arb.* 1, 42-43 (2004).

can provide the needed evidence (for a more detailed exposé of these points, as well as an extensive summary of the relevant cases, see Peter Robinson (box)).

That said, the drafters of the UMA realized that the need for confidentiality does not apply to situations where either an attorney or the mediator himself is accused of malpractice, or where the settlement agreement is challenged (although the latter is subject to weighing the

need for disclosure against the need to protect the mediation confidentiality).

Both these exceptions to the privilege would have protected Mr. Cassel's situation had California adopted the UMA, as he could have used the available evidence in his malpractice suit against his attorneys and have challenged the settlement agreement.

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