

Memorandum 2015-45

**Relationship Between Mediation Confidentiality and Attorney Malpractice
and Other Misconduct: Drafting Issues**

In this study of the relationship between mediation confidentiality and attorney malpractice and other misconduct, the first phase was to complete the extensive background work requested by the Legislature.¹ The Commission recently finished that phase and started to work on the second phase: preparation of a tentative recommendation, to be widely circulated for comment.

In August, the Commission made some preliminary decisions for purposes of drafting a tentative recommendation.² Since then, the Commission has received extensive input on its not-yet-drafted proposal.³ Some of that input appears to reflect confusion or misimpressions about what the Commission decided and the status of this study.

To provide some clarification, inform Commissioners and other persons who were not able to attend the August meeting, and facilitate further thought on the points considered at that meeting, this memorandum begins by recounting and reexamining what the Commission decided in August. More specifically, the memorandum starts by describing the key policy decision, the status of this study, and the many requests to reconsider the key policy decision. Next, the memorandum turns to the drafting issues that the Commission decided in August. Finally, the memorandum addresses additional drafting issues that the Commission will need to resolve if it continues to proceed with the approach tentatively selected in August.

1. For the legislative resolution asking the Commission to conduct this study, see 2012 Cal. Stat. res. ch. 108 (ACR 98 (Wagner)); see also 2014 Cal. Stat. res. ch. 63 (SCR 83 (Monning)).

The background work for this study, as well as any other 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. See Draft Minutes (Aug. 7, 2015), pp. 4-6.

3. See Memorandum 2015-46.

The following materials are attached for Commissioners and other interested persons to consider:

	<i>Exhibit p.</i>
• CLRC staff, 2-page chart summarizing possible approaches ⁴	1
• Excerpt from “Compilation of Possible Approaches” attached to Memorandum 2015-33 (pp. T13-T17, relating to in camera screening approaches)	3
• Michael R. Powell, California Dispute Resolution Council (9/30/15)	8
• Mark Baer, Pasadena (9/23/15)	9
• Michael Carbone, Point Richmond (9/12/15)	10
• Paul Dubow, San Francisco (9/25/15)	11
• Bruce Edwards (9/17/15)	16
• Jack Goetz & Jennifer Kalfsbeek-Goetz (9/18/15)	18
• David Karp, Van Nuys (9/25/15)	20
• Phyllis Pollack, Los Angeles (9/15/15, 2:52 p.m.)	21
• Phyllis Pollack, Los Angeles (9/15/15, 6:09 p.m.)	24
• Martin Quinn, San Francisco (9/29/15)	25
• Shawn Skillin, San Diego (9/16/15)	26
• Jill Switzer, Los Angeles (9/8/15)	28
• Gayle Tamler, Beverly Hills (9/17/15)	31

The staff selected the above-listed comments for inclusion in this memorandum because they seemed particularly pertinent to matters discussed in it. We will present additional new comments in a supplement to Memorandum 2015-46.

KEY POLICY DECISION

By restricting the availability of evidence, California’s mediation confidentiality statutes may on occasion impede the pursuit of justice in a particular case. To some, that is an unacceptable result. To others, that is a regrettable cost of serving a broader societal goal: promoting effective mediation and its beneficial consequences by allowing mediation participants to communicate freely with assurance of privacy.⁵

When it met in August, the Commission considered a wide range of possible approaches to the relationship between mediation confidentiality and attorney

4. The staff distributed this chart to persons attending the August meeting. The approaches listed in it are described in greater detail in the “Compilation of Possible Approaches” attached to Memorandum 2015-33.

5. For more extensive discussion of the competing policy interests at stake, see Memorandum 2014-6.

malpractice and other misconduct. Those approaches are summarized in the attached 2-page chart,⁶ which was distributed at the meeting. They are also described in greater detail in the longer chart attached to Memorandum 2015-33, which was posted to the Commission's website and distributed to interested persons before the meeting.

The staff made no recommendation regarding which approach(es) to pursue, because that choice primarily called for an assessment of how much weight to attach to competing policy interests in a contentious area familiar to the Commissioners (due to the Commission's extensive background work, as well personal experiences).⁷ At this stage in developing a proposal, such a policy assessment should reflect the values of the Commissioners selected to serve the public, not the staff's values. Ultimately, the key policy assessment will be made by the members of the Legislature, as elected representatives of the citizens of California.

After hearing from members of the public, each Commissioner present (Chairperson King, Vice Chairperson Miller-O'Brien, Commissioner Kihiczak, Commissioner Lee, and Senator Roth) shared some thoughts on the appropriate approach to take in a tentative recommendation. By a 4-1 vote,⁸ the Commission decided to pursue the general concept of creating an exception to the mediation confidentiality statutes (Evid. Code §§ 1115-1128) to address "attorney malpractice and other misconduct."⁹ In other words, the Commission tentatively decided to pursue an approach from Category A in the attached 2-page chart, which is comprised of proposals to "Create Some Type of Mediation Confidentiality Exception Addressing 'Attorney Malpractice and Other Misconduct.'"¹⁰

STATUS OF THIS STUDY

The policy decision described above was a preliminary decision for purposes of beginning to draft a tentative recommendation. The Commission is still a long ways from approving a tentative recommendation, which will consist of (1) draft legislation, (2) a Commission Comment to each code section in the draft legislation, and (3) a narrative explanation of the proposal. Once the Commission

6. Exhibit pp. 1-2.

7. See Memorandum 2015-33, pp. 4-5.

8. Chairperson King dissented. See Draft Minutes (Aug. 7, 2015), p. 5.

9. See *id.*

10. See Exhibit p. 1.

approves a tentative recommendation, it will post the tentative recommendation to its website, provide a comment period of approximately 2-3 months, analyze the comments and determine whether to make changes to its proposal, and eventually approve a final recommendation, which will still have to go through the entire legislative process (just like any other legislative proposal) if it is to become law. *No change to existing law is imminent and in fact the Commission does not yet even have a draft proposal for discussion purposes.*

Moreover, to prepare a draft proposal, the staff needs some guidance on how the Commission wants to implement the general concept of creating an exception to address “attorney malpractice and other misconduct.” There are innumerable possibilities, so it is important to flesh out certain basic aspects conceptually before attempting to do any drafting.

To begin obtaining the necessary guidance, the staff orally raised various drafting issues at the August meeting. Before describing and discussing the Commission’s preliminary decisions on those issues, we turn to a threshold matter: the many requests for reconsideration of the Commission’s key policy decision.

REQUESTS FOR RECONSIDERATION

The Commission’s decision to create a new exception to the mediation confidentiality statutes reflects a tentative assessment that existing law does not place enough weight on the importance of using mediation evidence to promote attorney accountability. That decision has already provoked a fierce negative reaction from numerous commenters who urge the Commission to be more attentive to the value of mediation confidentiality.¹¹

Those commenters request that the Commission revisit its preliminary decision to create a new exception addressing attorney accountability.¹² Of particular importance, the opposition includes the California Dispute Resolution Council,¹³ which describes itself as “**unquestionably** the most influential ADR organization in the State of California — perhaps in the nation — when it comes to politics and the judiciary.”¹⁴

11. See, e.g., Exhibit pp. 8-9, 11-31; Memorandum 2015-46, Exhibit pp. 1-209.

12. See *id.*

13. See Exhibit p. 8.

14. See <http://www.cdrc.net/about-cdrc/who-we-are/> (boldface in original).

Many of the requests for reconsideration are similar in content and the arguments made are described in Memorandum 2015-46.¹⁵ That memorandum also describes the handful of new comments supporting the Commission's proposed approach.¹⁶

As noted in Memorandum 2015-46, some of the requests for reconsideration contain additional or different arguments.¹⁷ Those arguments are not summarized in that memorandum, but some good examples are quoted below:

From Larry Rosen:

There is a magic involved in how mediated disputes resolve — and the resolutions can only occur when the participants believe their discussions are confidential and positions will be handled with respect and thoughtfulness, with fairness and with ultimate finality. It is extremely important to the process that participants understand that when they make suggestions and proposals that their ideas will not come back to bite them should they settle for a different outcome. If the confidentiality of the mediation process is destroyed, mediation will be destroyed as an effective dispute resolution tool. Anyone with bitter feelings ... can undo the settlement by merely claiming a bias and an unjust result. That would open up the door to discovery, depositions, and positioning the mediator to take a stance against one of his/her clients. It would undo all the protections the courts have seen fit to give mediation as a preferred dispute resolution tool. The person with the better financial resources could just use those resources to continue litigating in order to wear the other party down — no matter how truthful the charges of bias are. And, what they learned in the course of the mediation will just be turned and used against the other participant(s).¹⁸

From Daniel Yamshon:

Confidentiality allows experienced counsel to give sound advice that clients may not want to hear.¹⁹

From Traci Hinden:

A mediation will not work if parties believe what is being said there will be admissible later. The reason mediations have such a high success rates is the parties and counsel can put their guards down and get to the issues and the emotions behind them. When folks know their words will not be confidential, they are less likely to open up and be willing to move. Your recommendations will cause countless more lawsuits to proceed or ensue because parties

15. See Memorandum 2015-46, pp. 1-2.

16. See *id.* at 3-7.

17. See Memorandum 2015-46, pp. 1-2.

18. Memorandum 2015-46, Exhibit p. 145.

19. *Id.* at Exhibit p. 205.

will have no safe haven to resolve their conflicts without burdening our already clogged courtrooms. In the last couple of years, almost ... 100 courtrooms closed and self help programs have been abolished in many, and even worse, staff at the courts have been slashed and hours reduced. Your move will only make access to justice worse.²⁰

From Leslee Newman:

I have been mediating family law cases in my practice for 31 years, and have never had a request to breach confidentiality. Couples in family law come to mediation for many reasons, but importantly not to have to air “their dirty laundry” in public. In my experience, mediation is the most prevalent player in amicable divorce and family transitions. The destruction of confidentiality threatens the existence of this protocol if either spouse knows that they can attempt to undo their court orders or agreements by threatening a problem with the mediation process. It also potentially creates a balance of power between the spouses.

The family law courtrooms are already too crowded and desperately looking for relief. Destroying confidentiality threatens to ruin this highly effective and essentially fair process.

Please don't interfere with this opportunity for so many California families to make their own agreements, and transition their families peacefully. The chance that you are creating for either spouse to easily threaten the mediation will only continue the fight and create more havoc for the children of divorcing parents who will suffer the most!²¹

From Bruce Edwards:

I am the immediate past Chairman of the Board of Jams, the largest provider of commercial mediation services in the United States and a full time mediator with over thirty years of daily mediation experience. While I am not writing in any official capacity on behalf of Jams, I am urging your Commission to reconsider its August 7th recommendation to draft legislation impacting confidentiality in the mediation process.... When I started the first commercial mediation company in California using attorney mediators, our business plan was to someday get the court system to see the value of the mediation process. A centerpiece of this process was, and remains, the opportunity for each participant to be heard in a confidential environment, free from the potential repercussions of traditional litigation. The goal is for parties, free to discuss a full range of issues, to work out their conflicts, with the assistance of the mediator, thus saving everyone involved, including the court system, tremendous amounts of time and money. To say the mediation process has been successful these past twenty five years would be a huge understatement. As I'm sure you

20. *Id.* at Exhibit p. 77.

21. *Id.* at Exhibit p. 124.

are aware, all law schools now teach mediation, every court has a mandatory mediation program and thousands of conflicts are resolved each year that would otherwise require increasingly scarce judicial resources. Our company alone resolved over 14,000 disputes last year nationwide. Just this past month I helped mediate a large construction case in Yolo county that would have occupied one of four civil departments for almost a full year. In that one instance it's fair to say that mediation freed up approximately 25% of the judicial resources in that county's civil court system for the next year. These results could not be achieved except for the confidentiality protection afforded to participants.

I've never written a letter or email to a legislator on any matter involving proposed legislation. I am compelled to act now because I'm very afraid that your pending actions will emasculate a process that has provided tremendous benefit to individuals, organizations and the court system, all for no persuasive reason....

... To undermine one of the most successful processes developed in recent times ostensibly to deal with a narrow and otherwise manageable issue makes no sense.²²

From Martin Quinn:

I think the Commission's recommendation to dispense with confidentiality in situations where a party alleges attorney or mediator misconduct is well-intentioned but misguided.

This is not an easy issue. The case law that led up to this recommendation exemplifies the maxim that "Hard cases make bad law." They were cases in which the clients seemed dreadfully disadvantaged in not being able to introduce evidence of what was said and done during the mediations. The Commission's desire to rectify this unfairness is understandable. Unfortunately, I strongly believe that changing the law in this way will aid a few disgruntled clients, but imperil the efficacy of mediations for thousands. I understand that California's mediation law is highly protective of confidentiality, and that there is a different way to run a railroad. The Uniform Mediation Act, Section 6, allows for several exceptions, and the world has not come to an end as a result. So this is a tough issue, and a balancing act. But on balance, after due consideration, I believe strongly that the Commission is on the wrong track, and that its chairman's dissent got it right. While it would be nice to believe that all complaints against lawyers and mediators would be well-intentioned and grounded in solid facts and legal merit, that just isn't so. It is far too easy to file a complaint with the State Bar or a complaint in court simply because someone has cold feet about the settlement they just agreed to, or is disgruntled because they failed to obtain one. If this legislation passes, I will have to inform parties and counsel not as I do now that everything is confidential, but instead that everything is

22. Exhibit pp. 16-17

confidential unless you sue me or your lawyer. That is not a good start to a mediation, nor is it a helpful seed to plant in their heads.

Unintended consequences have been the downfall of many a well-motivated effort to fix a wrong. Let us not repeat that here in California, where we have a mediation practice that is the envy of the nation, and indeed the world. If it ain't broke, don't fix it.²³

From Hon. Diane Ritchie (Retired Judge):

From my work as a mediator and in the court, I know that removing any of the confidentiality from mediation will make settlements much more difficult to obtain. Neither side wants to provide evidence which can be used against them in court. With complete confidentiality the parties can work together to successfully resolve their disputes. Confidential mediation provides parties the ability to offer benefits to each other that neither would be able to obtain at trial. Almost all cases in Santa Clara County go to mediation before trial. Mediation drastically reduces the number of cases that go to trial. If part of the ... confidentiality for mediation is removed, this will not be possible. The legislature has dramatically reduced funding to the courts over the last few years. The courts cannot take on the burden of a massive increase in the number of trials without increasing the time a case gets to trial by many years.²⁴

In light of the comments requesting reconsideration, and taking into account the other new input received,²⁵ **is the Commission currently inclined to revisit its decision to create a new exception to the mediation confidentiality statutes?** The staff makes no recommendation on that matter, for the same reasons that we refrained from making a recommendation on the initial choice of policy direction.²⁶

DRAFTING ISSUES DECIDED IN AUGUST

Each of the drafting decisions that the Commission made in August is described below. For the benefit of those who were unable to attend the meeting, and for purposes of facilitating review and further analysis, we also provide additional information about each decision, such as an explanation of the Commission's reasoning and alternatives considered.

23. See Exhibit p. 25.

24. Memorandum 2015-46 at Exhibit p. 141.

25. See Exhibit pp. 10, 18-19; Memorandum 2015-45, Exhibit pp. 210-35.

26. See Memorandum 2015-33, pp. 4-5.

Whose Alleged Misconduct to Cover

In drafting the Commission's proposed new exception, a critical decision is whose alleged misconduct to cover. The Commission resolved that point as follows.

The Commission's Preliminary Decision

The legislative resolution regarding this study asks the Commission to analyze "the relationship under current law between mediation confidentiality and attorney malpractice and other misconduct"²⁷ The phrase "attorney malpractice and other misconduct" is subject to more than one possible interpretation.

The phrase could be limited to misconduct of an attorney acting as such. Alternatively, it could also include misconduct by others, such as an attorney-mediator, a mediator who is not an attorney, any professional attending a mediation (e.g., a doctor, insurer, or accountant), or even a mediation party or other person attending a mediation in a non-professional capacity (e.g., a spouse or friend of a mediation party).

As explained in Memorandum 2015-34 (scope of study), the text of the resolution and its legislative history "strongly suggests that the Legislature intended for the Commission to study and provide a recommendation on **the relationship between mediation confidentiality and alleged attorney misconduct in a professional capacity in the mediation process, including, but not limited to, legal malpractice.**"²⁸ For example, the text of the resolution specifically refers to three cases involving allegations that an attorney engaged in misconduct in representing a client in connection with a mediation.²⁹

The Legislature gave the Commission wide rein to choose the best means of addressing the assigned topic: The resolution directs the Commission to "make *any recommendation that it deems appropriate* for the revision of California law to balance the competing interests between confidentiality and accountability."³⁰ Thus, "a major set of questions concerns whether the Commission's proposal

27. See 2012 Cal. Stat. res. ch. 108 (ACR 98 (Wagner)); see also 2014 Cal. Stat. res. ch. 63 (SCR 83 (Monning)).

28. Memorandum 2015-34, p. 8 (boldface & italics in original).

29. See *id.* at 6.

30. See 2012 Cal. Stat. res. ch. 108 (ACR 98 (Wagner)) (emphasis added); see also 2014 Cal. Stat. res. ch. 63 (SCR 83 (Monning)).

should *solely* address attorney misconduct in a professional capacity in the mediation process.”³¹

At the August meeting, the Commission decided that its proposed new exception to the mediation confidentiality statutes “should apply to alleged misconduct of an attorney or an attorney-mediator.”³² The Commission further decided that the exception should only apply to alleged misconduct in a professional capacity.³³ The Commission seemed to give two main reasons for that focus:

- (1) Attorney misconduct appears to be the problem that the Legislature asked the Commission to solve.
- (2) An attorney-mediator is subject to a set of professional rules, while a lay mediator is not.

Concerns Raised By Commenters

The Commission’s decision to encompass alleged misconduct of an attorney-mediator has already prompted questions and concerns from a number of sources. For example, mediator David Karp wonders about the basis for including attorney-mediators and points out that *Cassel v. Superior Court*³⁴ “had nothing to do with any alleged mediator conduct.”³⁵ Similarly, mediator Lee Blackman writes:

[O]ne can only marvel at the remarkable discrimination in the treatment of lawyer and non-lawyer mediators. Is there some reason why non-lawyer mediators may rely on the mediation confidentiality rules as an inhibitor against ill-conceived efforts to blame the mediator for a participant’s decisions to settle improvidently while lawyer mediators cannot? Is there reason to conclude that non-lawyer mediators are less likely to commit “mediation malpractice” than lawyer mediators? None that is obvious or apparent. So why make the distinction? The only reason is a desire to limit the adverse effects of diluting mediation confidentiality. But by arbitrarily limiting the scope of the dilution to lawyers? That makes no sense. Perhaps the committee should consider limiting the scope of the exception to the confidentiality rules to right handed mediators or mediators over 35. That revision of the rule would be no more or less reasonable — would not make the rule either more or less tailored to the reason for creating it — than limiting the exception to lawyers. So simply recognize that the

31. Memorandum 2015-34, p. 10 (emphasis in original).

32. See Draft Minutes (Aug. 7, 2015), p. 5.

33. See *id.*

34. 51 Cal. 4th 113, 244 P.3d 1080, 119 Cal. Rptr. 3d 437 (2011).

35. Exhibit p. 20.

exception to the confidentiality rules for suits for mediation malpractice is against lawyer mediators, unless properly and sensibly limited to particular situations where demonstrable injustice is regularly being done, just a bad idea.

As a lawyer who wants to devote his time to mediations without giving up his membership in the Bar, I encourage you to think carefully before eliminating mediation confidentiality for lawyer-mediators simply because there may be participants who believe that their decisions to settle their matter were unduly influenced by the mediator or were somehow causally connected to something the mediator did or said that hindsight suggests was improper or unjust.³⁶

Mr. Blackman further explains that “diluting the strength of mediation confidentiality” as proposed will cause serious problems with regard to mediators, including:

- “The cost of insuring against the potential costs associated with this sort of mediator liability simply cannot be borne if a decision to spend a few hours helping parties in a million dollar case can result in a million dollars in liability.”³⁷
- “[T]he general confidentiality rules mean that the proceedings are not recorded and produce very little from the mediator that is recorded on paper. So the contemplated mediator malpractice case become[s] a dispute over who said what to whom, all without the benefit of documents to test recollection or truthfulness.”³⁸
- “[T]here is the remarkable dearth of standards by which to judge the propriety of mediator conduct. There simply is no standard of care in assessing whether a mediator might have erred in helping the parties evaluate a case or in expressing evaluative judgments about it.”³⁹

In a communication filled with questions for the Commission, Jill Switzer (a full-time attorney-mediator) raises similar concerns. Like Mr. Blackman, one of her many concerns is determining what standards would apply to an attorney-mediator: “Since the attorney mediator is not acting as a lawyer for purposes of conducting the mediation, e.g., not giving legal advice, there’s no attorney-client relationship, what would the Commission see as misconduct by the attorney

36. Memorandum 2015-46, Exhibit p. 21. For a description of Mr. Blackman’s qualifications, see *id.* at Exhibit p. 22.

37. *Id.* at Exhibit p. 20.

38. *Id.*

39. *Id.*

mediator?”⁴⁰ Mediator Paul Dubow also asks: “[W]hat is the standard to determine mediator malpractice?”⁴¹

Mediator Phyllis Pollack makes the same point. She says:

The [Commission’s] proposal ... raises an oxymoron. While it says that the proposed new exception will “...only apply to alleged misconduct in a professional capacity”, most mediators do not consider themselves practicing law while mediating. In fact, as a neutral, they should not be giving legal advice! As the California Rules of Professional Conduct involve mostly actions taken in the practice of law (except for moral turpitude) — what disciplinary violation is at issue? Breach of fiduciary duty? To whom? Lack of competency? To whom? Representing adverse interests? It is far from clear what the CLRC has in mind!⁴²

Ms. Pollack also asks a different set of questions about the distinction between an attorney-mediator and a mediator who is not an attorney:

When I read these minutes initially, I assumed (erroneously) that the exception would apply to all mediators — attorneys and non-attorneys alike. Only after some discussion with my colleagues and a very careful re-reading of the above, did I realize that the ONLY mediators who will be affected by these proposals are attorneys. Those mediators who are NOT attorneys will be completely unaffected. Mediation confidentiality as it exists today in California under *Cassel v. Superior Court* (2011) 51 Cal. 4th 113 and its predecessors will remain absolute and unequivocal in those mediations being conducted by a mediator who is NOT an attorney. The rules as we know them today will apply: what goes on in mediation stays in mediation, no matter what.

However, if the mediator is also an attorney, then not only will the attorneys who are representing the parties be subject both to discipline by the state bar and possible civil litigation but so will be the mediator! The exceptions to mediation confidentiality will apply both to the attorney representing a party and to the mediator.

This means that parties who wish to mediate will now have a new option: do they use a mediator who is not an attorney so that the absolute cover of mediation confidentiality remains intact or do they use a mediator who happens to be an attorney thereby — depending on the outcome of the mediation — possibly opening themselves (as well as the mediator!) up to possible discipline action and civil suits?

*With this new option available, will parties tend to use one category of these mediators over another? I do not know.*⁴³

40. Exhibit p. 28.

41. Exhibit p. 14.

42. Exhibit p. 22.

43. *Id.* (emphasis added); see also Exhibit p. 24 (additional comments of Phyllis Pollack).

Along the same lines, Mark Baer warns of “an unfair advantage to non-lawyer mediators” and expresses his agreement with Ms. Pollack.⁴⁴ Likewise, a recent *Daily Journal* article queries whether cases involving alleged misconduct by a nonlawyer mediator would be excluded from the Commission’s proposed reform.⁴⁵

Contrary to what Ms. Pollack says, the staff presumes that the Commission intended to treat alleged misconduct of an attorney acting in that capacity (not as an attorney-mediator) *the same way*, regardless of whether that misconduct allegedly occurred in (1) a mediation conducted by an attorney-mediator or (2) a mediation conducted by a mediator who is not an attorney. If so, that point could be made clear in drafting the proposed exception.

But there are further concerns about the Commission’s proposed distinction between an attorney-mediator and a non-attorney mediator. Paul Dubow queries how the Commission proposes to treat a mediator who is not licensed to practice law in California, but is licensed to practice in another jurisdiction.⁴⁶ He also asks about the status of a mediator who is disbarred or who has voluntarily resigned from the State Bar.⁴⁷ He says it would be ironic if “attorneys who are in good standing with the State Bar can be sued for mediator malpractice, but attorneys who have been disbarred cannot.”⁴⁸

In addition, Mr. Dubow draws the Commission’s attention to Evidence Code Section 703.5, under which a mediator is incompetent to testify in most types of civil proceedings:

703.5. No person presiding at any judicial or quasi-judicial proceeding, and no arbitrator or mediator, shall be competent to testify, in any subsequent civil proceeding, as to any statement, conduct, decision, or ruling, occurring at or in conjunction with the prior proceeding, except as to a statement or conduct that could (a) give rise to civil or criminal contempt, (b) constitute a crime, (c) be the subject of investigation by the State Bar or Commission on Judicial Performance, or (d) give rise to disqualification proceedings under paragraph (1) or (6) of subdivision (a) of Section 170.1 of the Code of Civil Procedure. However, this section does not apply to a mediator with regard to any mediation under

44. Exhibit p. 9.

45. A. Marco Turk, *Plan Will Force Us to Desert Mediation*, *Daily J.* (Aug. 31, 2015). Mr. Turk is professor emeritus and director emeritus of the Negotiation, Conflict Resolution & Peacebuilding Program at CSU Dominguez Hills.

46. Exhibit p. 14.

47. *Id.*

48. *Id.*

Chapter 11 (commencing with Section 3160) of Part 2 of Division 8 of the Family Code.

Because the Commission's proposed new exception would permit a party to use mediation evidence against an attorney-mediator, he "assumes that it [is] the Commission's intent to recommend an amendment to Section 703.5 by allowing such testimony where the mediator is a defendant."⁴⁹

Mr. Dubow also foresees that court-connected mediation will end if the Commission's proposed new exception is enacted.⁵⁰ He explains that court-connected mediators are typically volunteers or are paid relatively little for their services.⁵¹ Consequently, he believes there "will be no incentive for an attorney to act as a mediator in a court connected matter when he or she is not paid and runs the risk of being sued for malpractice."⁵²

In a different vein, Mediator Shawn Skillin says:

Not all mediators are attorneys. I practice in Family Law. Many mediators are therapists or financial advisors. Those mediators would not be affected. There are bad lawyers out there, there are bad mediators out there, there are some very difficult clients out there. Clients who are frequent [filers] in our court system, who blame others for everything, the lawyers get it wrong, the judge gets it wrong, the court of appeals gets it wrong etc. Does protecting the consumer from a bad attorney mediator really protect them? It doesn't protect them from bad non-attorney mediators. It doesn't protect them from the former attorney who goes inactive to keep mediating and avoid the potential malpractice issues under the new proposed rules.⁵³

Ms. Skillin urges the Commission to regulate mediators (lawyers and nonlawyers alike), instead of revising the mediation confidentiality rules.⁵⁴

In contrast to Ms. Skillin and the other commenters mentioned above, Jack Goetz (USC law professor) and Jennifer Kalfsbeek-Goetz (Dean of Student Learning, Moorpark College) support the Commission's proposed exception but encourage the Commission to *broaden* its scope.⁵⁵ They write:

49. *Id.* at Exhibit p. 14.

50. *Id.* at Exhibit p. 15.

51. *Id.*

52. *Id.*

53. Exhibit p. 27; see also Memorandum 2015-46, Exhibit p. 166 (earlier comments of Ms. Skillin).

54. Exhibit p. 27.

55. Exhibit pp. 18-19. For previous input from Mr. Goetz and Ms. Kalfsbeek-Goetz, see First Supplement to Memorandum 2014-27, Exhibit pp. 3-23; Memorandum 2014-46, Exhibit p. 3.

[W]e would encourage the CLRC to consider changing the recommendation to make all mediators professionally accountable for their mediation practice, and **not** propose revisions to the law that single out attorneys in their role as mediator. We do recognize that the CLRC believes that its scope limits its ability to propose changes that extend beyond members of the bar; as it stated to us in its prior comments (Memorandum 2014-46), “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.**” Nevertheless, the CLRC did an extensive environmental scan and the exception it is carving solely for attorneys functioning as mediators in contrast to all mediators did not, to our knowledge, surface in any other jurisdiction. By approaching it this way, the CLRC may in fact be dipping into an area it sought not to do, de facto exercising influence over the composition of entrants into the field of mediation. The unintended consequences of the proposed changes in their current form would require attorney mediators to consider whether they want to work in a field where they are disproportionately accountable relative to their non-attorney counterparts. Practicing fulltime attorney mediators would have to consider the value of their continued bar membership in relation to their current dispute resolution practice; some may choose to discontinue their bar membership. Alternatively, part-time attorney mediators may choose to stop participating as attorney mediators because of the accountability imposed on them that is not imposed on other non-attorney mediators. If the CLRC chooses to review this, it may find that the best approach may be one such as exists in the UMA in which the exceptions to confidentiality apply when the ethical conduct of any mediator is questioned.⁵⁶

Questions From the Staff

In considering the proper approach to an attorney-mediator, the Commission should also be aware that the staff has some questions about the matter. In particular, the staff needs clarification regarding how (1) the Commission’s August 7 decision to include alleged misconduct by an attorney-mediator in its proposed new exception to the mediation confidentiality statutes interrelates with (2) its earlier, unanimous decision “not to propose statutory revisions relating to mediator immunity in this study.”⁵⁷

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

57. Minutes (June 4, 2015), p. 5.

The doctrine of quasi-judicial immunity for mediators and the underlying policy reasons are discussed at length at pages 34-42 of Memorandum 2015-22. The doctrine is recognized in California case law, but does not appear to have a statutory basis.

The staff counseled against revising the law on mediator immunity:

Because a legislative proposal relating to mediator immunity would be extremely controversial and the Legislature has not asked the Commission to address the matter, the staff strongly recommends that the Commission **refrain from revising the law on mediator immunity in this study**. As the Commission has seen throughout this study, it will be difficult enough to forge a degree of consensus on the confidentiality issues the Legislature has asked it to address, without also getting into a minefield the Legislature has not asked it to study.⁵⁸

The Commission's June 4 decision "not to propose statutory revisions relating to mediator immunity" is consistent with the above recommendation, which remains the staff's position.

It is not clear to the staff whether the Commission intended to override that mediator immunity decision when it decided on August 7 to include alleged misconduct by an attorney-mediator in its proposed new exception to the mediation confidentiality statutes. Was that the Commission's intent, or did the Commission intend to create an exception to the mediation confidentiality statutes, without revising the law on mediator immunity? **Assuming it sticks with its current approach to an attorney-mediator, the Commission should clarify this point.**

In addition, if the Commission intends to leave the law on mediator immunity intact, **it would be helpful to explain the interrelationship between the inclusion of attorney-mediators in the proposed exception and the existing case law on quasi-judicial immunity for mediators**. Is the Commission's proposal meant to prevent mediation confidentiality from being an insurmountable obstacle to a claim against a mediator, while leaving it up to the courts to decide the extent to which mediators are immune from prosecution? Is there some other objective the staff should keep in mind as we draft the Commission's proposal?

58. Memorandum 2015-22, p. 42 (emphasis in original).

Decisions to Make

Given the expressed concerns and questions regarding inclusion of alleged misconduct by attorney-mediators in the proposed new exception, **does the Commission wish to revisit its decision on that point?**

If the Commission is inclined to stick with its previous decision, **the staff requests guidance on the following points:**

(1) Does the Commission intend to treat alleged misconduct of an attorney acting in that capacity (not as an attorney-mediator) *the same way*, regardless of whether that misconduct allegedly occurred in (a) a mediation conducted by an attorney-mediator or (b) a mediation conducted by a mediator who is not an attorney?

(2) For purposes of the proposed new exception, who is an attorney-mediator? Does the term include a mediator who is not licensed to practice law in California, but is licensed to practice in another jurisdiction? Does the term include a disbarred attorney or an attorney who has voluntarily resigned from the State Bar?

(3) Should Section 703.5 be revised to permit an attorney-mediator to testify in a malpractice case or disciplinary proceeding against the attorney-mediator?

If the Commission is inclined to make such a revision, the staff will present proposed language at another time. It would be premature to do so now, because the Commission also needs to resolve a number of other issues relating to mediator testimony, which are discussed later in this memorandum.

(4) Does the Commission intend to leave existing law on mediator immunity intact? If so, **it may be helpful to expressly state as much in the statutory text, along the following lines:**

Nothing in this section is intended to affect the extent to which a mediator is, or is not, immune from liability under existing law.

Would the Commission like to include such language?

(5) If the proposal is intended to leave existing law on mediator immunity intact, how should the staff describe the effect of the proposal on alleged misconduct of an attorney-mediator?

Timing of the Alleged Misconduct

Another issue the Commission discussed in August relates to the timing of the alleged misconduct. Would the Commission's proposed new exception only provide a basis for disclosing mediation evidence bearing on misconduct that

allegedly occurred during the mediation process (i.e., during a “mediation”⁵⁹ or “mediation consultation”⁶⁰)? Or could the exception also be used to obtain disclosure of mediation evidence bearing on misconduct that allegedly occurred in a non-mediation context?

The Commission’s Preliminary Decision

In discussing this timing issue, the Commission recognized that misconduct in a non-mediation context is more readily subject to proof without using mediation evidence than misconduct that occurs during a mediation. Nonetheless, the Commission decided that “[t]he proposed new exception should apply regardless of whether the alleged misconduct occurred during a mediation.”⁶¹

Discussion

Some jurisdictions have taken the Commission’s contemplated approach in drafting their mediation confidentiality exception for attorney misconduct or professional misconduct generally. For example, Michigan’s rule on mediation confidentiality says simply:

(D) **Exceptions to Confidentiality.** Mediation communications may be disclosed under the following circumstances:

....

(10) The disclosure is included in a report of professional misconduct filed against a mediation participant or is sought or offered to prove or disprove misconduct allegations in the attorney discipline process.⁶²

North Carolina’s statute is similar⁶³ and the staff is not sure how to interpret Maryland’s rule.⁶⁴

59. “Mediation” is defined in Evidence Code Section 1115(a).

60. “Mediation consultation” is defined in Evidence Code Section 1115(c).

61. Draft Minutes (Aug. 7, 2015), p. 5.

62. Mich. Ct. R. 2.412(D)(10).

63. See N.C. Gen. Stat. § 7A-38.1(l)(3) (“Evidence of statements made and conduct occurring in a mediated settlement conference ... shall not be subject to discovery and shall be inadmissible in any proceeding in the action or other civil actions on the same claim, except ... [i]n disciplinary proceedings before the State Bar or any agency established to enforce standards of conduct for mediators or other neutrals”).

64. Maryland’s exception for professional misconduct says:

(b) Disclosures allowed. — In addition to any other disclosure required by law, a mediator, a party, or a person who was present or who otherwise participated in a mediation at the request of the mediator or a party may disclose mediation communications:

....

The Uniform Mediation Act (“UMA”), which has been enacted in the District of Columbia and eleven states (Hawaii, Idaho, Illinois, Iowa, Nebraska, New Jersey, Ohio, South Dakota, Utah, Vermont, and Washington), takes the opposite approach. The Act’s exception for professional misconduct is expressly limited to misconduct allegedly occurring *during* a mediation:

SECTION 6. EXCEPTIONS TO PRIVILEGE

(a) There is no privilege under Section 4 for a mediation communication that is:

....

(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 mediation⁶⁵

The other states with express exceptions for attorney misconduct or professional misconduct (Florida,⁶⁶ Maine,⁶⁷ New Mexico,⁶⁸ and Virginia⁶⁹) are similar to the UMA in this respect. In addition, Texas case law includes a similar limitation: As the court stated in a leading case, “where a claim is based upon a

(3) To the extent necessary to assert or defend against allegations of professional misconduct or malpractice by a party or any person who was present or who otherwise participated in the mediation at the request of a party, except that a mediator may not be compelled to participate in a proceeding arising out of the disclosure

Md. Code, Courts & Judicial Proceedings § 3-1804(b)(3).

65. See UMA § 6(a)(6).

66. See Fla. Stat. § 44.405(4)(a)(4) & (6), which provide that there is no confidentiality or privilege for any mediation communication:

4. Offered to report, prove, or disprove professional malpractice occurring *during the mediation*, solely for the purpose of the professional malpractice proceeding;

....

6. Offered to report, prove, or disprove professional misconduct occurring *during the mediation*, solely for the internal use of the body conducting the investigation of the conduct.

(Emphasis added.)

67. See Maine R. Evid. 514(c)(5), which says that “[t]here is no privilege under this rule ... [f]or communications 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*.” (Emphasis added.)

68. See N.M. Stat. Ann. § 44-7B-5(A)(8), which says that “[m]ediation communications are not confidential pursuant to the Mediation Procedures Act if they ... are sought or offered to disprove a claim or complaint of professional misconduct or malpractice based on conduct *during a mediation* and filed against a mediation party or nonparty participant” (Emphasis added.)

69. See Va. Code Ann. § 8.01-581.22(vii), which says that “[c]onfidential materials and communications are not subject to disclosure in discovery or in any judicial or administrative proceeding except ... where communications are sought or offered to prove or disprove a claim or complaint of misconduct or malpractice filed against a party’s legal representative based on conduct occurring *during a mediation*” (Emphasis added.)

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.”⁷⁰

The Commission’s proposed approach also appears to be broader than what the Legislature asked the Commission to study. As explained in Memorandum 2015-34, pp. 6-8, only one bill analysis addresses the scope of this study in any detail. That bill analysis identifies the “KEY ISSUE” as:

SHOULD THE COMPLEX ISSUE OF ATTORNEY RESPONSIBILITY FOR MALPRACTICE AND MISCONDUCT *IN MEDIATION PROCEEDINGS* BE ANALYZED BY THE CALIFORNIA LAW REVISION COMMISSION WHICH HAS PREVIOUSLY STUDIED AND HAS EXPERTISE ON THE ISSUE OF MEDIATION CONFIDENTIALITY?⁷¹

Thus, the only available evidence of legislative intent seems to focus on misconduct that occurs *during* the mediation process.

That legislative focus presumably stems from the conundrum that (1) if mediation evidence is inadmissible and protected from disclosure, and (2) misconduct occurs during a mediation, then (3) there may well be no way to prove the misconduct. In other words, the problem is acute: The mediation confidentiality statute might not just hinder proof of misconduct; it might preclude such proof altogether.

In contrast, when misconduct occurs outside the mediation context, the misconduct may well be subject to proof without using mediation evidence. In fact, permitting a litigant to use mediation evidence might have relatively little impact on the truth-finding process in that situation. As the United States Supreme Court noted in a similar context, “[w]ithout a privilege, much of the desirable evidence to which litigants ... seek access ... is unlikely to come into being.”⁷²

70. *Avary v. Bank of America, N.A.*, 72 S.W.3d 770, 802-03 (Tex. Ct. App. 2002) (emphasis added).

71. Assembly Committee on Judiciary Analysis of AB 2025 (May 8, 2012), p. 1 (boldface & italics added).

72. *Jaffee v. Redmond*, 518 U.S. 1, 12 (1996).

Decisions to Make

In light of the above considerations, **does the Commission wish to revisit its decision that “[t]he proposed new exception should apply regardless of whether the alleged misconduct occurred during a mediation”?**

If so, the distinction between a “mediation” and a “mediation consultation” merits attention. Evidence Code Section 1115 provides the following definitions:

1115. (a) “Mediation” means a process in which a neutral person or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement.

....
(c) “Mediation consultation” means a communication between a person and a mediator for the purpose of initiating, considering, or reconvening a mediation or retaining the mediator.

The key provision protecting mediation communications (Evidence Code Section 1119) applies to communications “made for the purpose of, in the course of, or pursuant to, a mediation *or a mediation consultation*.”⁷³

Thus, if the Commission decides to limit its proposed new exception to misconduct allegedly occurring in the mediation context, **it should make clear whether it intends to cover the entire span of mediation activities**, from the mediation consultation phase through the completion of the mediation process. Otherwise, there might be confusion on this point.⁷⁴

Type of Proceeding in Which the Exception Would Apply

Another issue discussed at the August meeting was the type of proceeding in which a person could invoke the proposed new exception to the mediation confidentiality statutes.

The Commission’s Preliminary Decision

The Commission tentatively decided that the proposed new exception should apply in the following types of proceedings:

- (1) A disciplinary proceeding against an attorney for alleged misconduct while acting as an attorney.
- (2) A disciplinary proceeding against an attorney for alleged misconduct while acting as an attorney-mediator.

73. Emphasis added.

74. See, e.g., Exhibit p. 28 (Jill Switzer’s query regarding whether the Commission’s proposed new exception “would apply to the convening stage”).

- (3) A malpractice case against an attorney for conduct in the role of an attorney.
- (4) A malpractice case against an attorney for conduct in the role of attorney-mediator.⁷⁵

The Commission specifically considered and discussed the possibility of also applying the new exception to a proceeding pertaining to enforcement of a mediated settlement agreement (e.g., a proceeding to rescind a mediated settlement agreement or a proceeding to enforce such an agreement). The Commission did not instruct the staff to include such a proceeding, because it was concerned that extending the exception to that context would unduly disrupt the finality of mediated settlement agreements.

Discussion

Since the August meeting, the Commission has not received any complaints about its decision to limit the proposed new exception to a malpractice case or disciplinary proceeding against an attorney or attorney-mediator. On the contrary, the Commission has received multiple comments warning that the proposed new exception, even as currently contemplated, threatens the finality of mediation as a dispute resolution tool to an unacceptable degree.⁷⁶

In general, those negative comments do not draw any distinction between (1) use of mediation evidence in a malpractice case and (2) use of mediation evidence in a disciplinary proceeding against an attorney or an attorney-

75. Draft Minutes (Aug. 7, 2015), p. 5. Commissioner Miller-O'Brien abstained from this decision.

76. See, e.g., Memorandum 2015-46, Exhibit p. 36 (Richard Coleman's comment that Commission's proposal will "destroy mediation" because "[t]here is no situation where a party, after agreeing to a resolution and later becoming dissatisfied with it, will not be able to allege misconduct."); *id.* at Exhibit p. 135 (Tom Reese's comment that "[k]eeping the lid on" in estate distribution disputes "is hard enough now" and he would "oppose removal of confidentiality so that a party who wakes up Monday morning and wishes s/he had not made the deal can throw it all out with an unsupported assertion"); *id.* at Exhibit p. 205 (Daniel Yamshon's comment that "I can imagine a disputant, a few days after settlement, getting sage advice from their next-door neighbor, great uncle or astrologer about how they settled too low, immediately creating buyer's remorse and immediately seeking representation to sue the original lawyer for misconduct, malpractice or worse."); *id.* at Exhibit p. 218 (Guy Kornblum's comment that Commission's proposal "allows any litigant to sue his lawyer because of settlers remorse" and will result in "litigation explosion just like in Royal Globe days."); see also Exhibit p. 12 (Paul Dubow's comment that "One of the major attractions to mediation is that a successful outcome will buy peace, i.e., the matter is ended permanently and the parties can go on with their lives. This will not be the case if the Commission proposal is adopted."); *id.* at Exhibit p. 20 (David Karp's comment that Commission's approach means "any settlements reached in mediation could then be undermined, which, to me, means that no settlements can be reached in mediation."); *id.* at Exhibit p. 29 (Jill Switzer's comment that "[t]here are going to be many cases of 'settlor's remorse,' clients who think that they can leverage a better deal by suing for malpractice.").

mediator. Rather, the commenters warn against any dilution of existing mediation confidentiality protections.

With regard to confidentiality, however, there is a big difference between those two situations. Specifically, disciplinary proceedings against attorneys and complaints against court-connected mediators are kept confidential, with some limitations.⁷⁷ Malpractice cases are not.

Thus, from the standpoint of protecting mediation communications, it may be less damaging to permit disclosure in a disciplinary proceeding than to permit disclosure in a malpractice case. From the standpoint of promoting attorney accountability, however, a disciplinary proceeding might not be as satisfactory as a malpractice case, because it might not afford sufficient means of making an injured client whole.

The Commission should keep these tradeoffs in mind going forward. If it becomes clear that restricting the proposed new exception to a disciplinary proceeding would significantly reduce the amount of opposition, the Commission should carefully consider that possibility.

A quite different question, not discussed in August, is whether the proposed new exception should apply to a fee dispute between an attorney and a client. The impact of mediation confidentiality on that particular type of dispute has been repeatedly mentioned as a source of concern in the course of this study.⁷⁸ Concerns have been raised about (1) a client seeking to enforce a fee reduction allegedly agreed upon during a mediation (but not memorialized in an agreement exempt from mediation confidentiality under Evidence Code Section 1123 or 1124)⁷⁹ and (2) an attorney hypothetically seeking to enforce a fee enhancement agreed upon during a mediation (but not memorialized in an agreement exempt from mediation confidentiality).⁸⁰

The staff is not aware of any existing mediation confidentiality exception that specifically refers to an attorney-client fee dispute. Most of the exceptions

77. See Memorandum 2015-22, pp. 29-31, 44-45.

78. See, e.g., First Supplement to Memorandum 2013-47, Exhibit pp. 18-20 (comments of Deborah Blair Porter); Second Supplement to Memorandum 2013-47, Exhibit pp. 8-9 (comments of Jerome Sapiro, Jr.); Porter v. Wyner, 107 Cal. Rptr. 3d 653 (2010) (alleged fee adjustment in mediation); Chan v. Lund, 188 Cal. App. 4th 1159, 116 Cal. Rptr. 3d 122 (2011) (same).

79. See, e.g., *In re Bolanos*, State Bar Ct. Review Dep't No. 12-0-12167 (May 18, 2015), *petition for review pending* (No. S227680, filed July 1, 2015).

80. See Memorandum 2015-46, Exhibit p. 215 (comments of Ira Spiro). For a different concern relating to collection of an attorney's fee, see Memorandum 2015-24, Exhibit p. 1 (comments of Perry Smith regarding fee arrangement in which lawyer's entitlement to fee might require proof of settlement offer made in mediation).

relating to attorney misconduct just refer to “professional misconduct or malpractice” or something similar.⁸¹ The closest model we could find is a Michigan provision that permits disclosure of mediation communications when “[t]he disclosure is necessary for a court to resolve disputes about the mediator’s fee.”⁸²

While the expressed concerns relating to fee modifications might warrant attention, addressing them through a mediation confidentiality exception would trigger the same kind of problems relating to oral compromises reached in mediation that this Commission considered in 1996. At the time, there were conflicting court of appeal decisions on whether mediation confidentiality applies to an oral compromise reached in mediation, and thus renders the oral compromise unenforceable in practice.⁸³

The Commission concluded that “[c]larifying the application of mediation confidentiality to settlements reached through mediation” was “critical to aid disputants in crafting agreements they can enforce.”⁸⁴ More specifically, the Commission determined that an oral compromise reached in mediation would have to be reduced to writing in compliance with certain requirements, or orally memorialized according to a specified procedure, to be admissible and thus enforceable.⁸⁵ Those rules, now codified as Evidence Code Sections 1123 and 1124, enable parties to know when mediation confidentiality does and does not apply to a deal discussed in mediation; they permit clear differentiation between a deal under discussion and an actual deal that is enforceable in practice. As a result, they “reduce disputes over whether an oral compromise was reached in mediation” and what the terms of a deal are.⁸⁶

Just as in the past there could be uncertainties about whether mediation participants had reached a deal and what the terms of a deal were, so too could

81. See, e.g., UMA § 6(a)(6) (“professional misconduct or malpractice”); Fla. Stat. § 44.405(4)(a)(4) (“professional malpractice”); Fla. Stat. § 44.405(4)(a)(6) (“professional misconduct”); Maine R. Evid. 514(c)(5) (“professional misconduct or malpractice”); Md. Code, Courts & Judicial Proceedings § 3-1804(b)(3) (“professional misconduct or malpractice”); N.M. Stat. Ann. § 44-7B-5(A)(8) (“professional misconduct or malpractice”); Va. Code Ann. § 8.01-581.22(vii) (“a claim or complaint of misconduct or malpractice filed against a party’s legal representative”).

82. Mich. Ct. R. 2.412 (D)(4).

83. Compare *Regents of University of California v. Sumner*, 42 Cal. App. 4th 1209, 50 Cal. Rptr. 2d 200 (1996) (Evid. Code § 1152.5 does not protect oral statement of settlement terms) with *Ryan v. Garcia*, 27 Cal. App. 4th 1006, 33 Cal. Rptr. 2d 158 (1994) (Evid. Code § 1152.5 protects oral statement of settlement terms).

84. *Mediation Confidentiality*, 26 Cal. L. Revision Comm’n Reports 407, 409 (1996).

85. See *id.* at 422-24.

86. *Id.* at 424.

there be uncertainties about whether an attorney and a client have modified a fee agreement during a mediation and, if so, what the new terms are.

One possibility to address the latter situation would be to create a mediation confidentiality exception that would expressly permit attorneys and clients to use mediation evidence to resolve disputes over such matters (Option A). Another alternative (Option B) would be to do something like the following:

- (1) Require the mediator and/or counsel to inform all mediation participants at the start of each mediation that any adjustment of an attorney-client fee agreement during a mediation must be properly memorialized in a writing, or in an oral recording meeting specified requirements, if it is to be effective; and
- (2) Require completion of a form at the end of each mediation, which would (a) ask each participant to indicate whether there has been any adjustment of an attorney-client fee agreement during the mediation, and (b) remind the participants of the need to properly memorialize any such adjustment.

Option B would be consistent with the current general approach to an oral compromise reached in a mediation (the approach that the Commission recommended in 1996), which appears to be working well. As compared to Option A, Option B is also most likely to be acceptable to those who place a high value on mediation confidentiality.

Decisions to Make

Does the Commission wish to revisit its decision that the proposed new exception should apply to malpractice and disciplinary proceedings against attorneys and attorney-mediators?

In particular, how does the Commission wish to handle the situation in which a party alleges that a fee agreement was orally modified during a mediation? Should the proposed new exception apply in that circumstance (Option A)? Or would it be better to require some clear disclosures and stick to the existing approach applicable to any oral compromise reached in mediation (Option B)?

Purpose for Invoking the Exception

Another drafting issue that the Commission discussed in August relates to the purpose for invoking the proposed new exception to the mediation confidentiality statutes.

In some jurisdictions, a mediation confidentiality exception relating to professional malfeasance permits use of mediation communications to *prove or*

disprove alleged professional malfeasance.⁸⁷ In other words, these exceptions are evenhanded with regard to use of mediation evidence: Both the plaintiff and the defendant have an equal opportunity to invoke the exception. Of particular note, the UMA takes that kind of approach.⁸⁸ Florida's exceptions also fall into this category. Notably, however, Florida's exceptions expressly extend not only to *proving and defending* against allegations of professional malfeasance, but also to *reporting* of such conduct.⁸⁹

In other states, the statutory exception appears exclusively or primarily directed at allowing a mediator to defend against allegations of professional malfeasance. For example, a Georgia rule provides:

... Confidentiality does not extend to documents or communications relevant to legal claims or disciplinary complaints brought against a neutral or an ADR program and arising out of an ADR process. Documents or communications relevant to such claims or complaints may be revealed only to the extent necessary to protect the neutral or ADR program....⁹⁰

Similarly, an Oklahoma provision states:

F. If a party who has participated in mediation brings an action for damages against a mediator arising out of mediation, for purposes of that action the privilege provided for in subsection A of this section shall be deemed to be waived *as to the party bringing the action*.⁹¹

At the August meeting, the Commission considered which type of approach (evenhanded or unequal) to follow in drafting its proposed new exception to California's mediation confidentiality statutes. The Commission decided that the proposed new exception "should apply *evenhandedly*, permitting use of

87. See, e.g., Kan. Stat. Ann. § 60-452a (Mediation confidentiality and privilege shall not apply to "[i]nformation that is reasonably necessary to allow investigation of or action for ethical violations against the neutral person conducting the proceeding or for the defense of the neutral person or staff of an approved program conducting the proceeding in an action against the neutral person or staff of an approved program if the action is filed by a party to the proceeding."); Maine R. Evid. 514(c)(4), (5) (There is no mediation privilege for communications sought or offered to "prove or disprove" a claim of professional misconduct or malpractice).

88. See UMA § 6(a)(4) ("There is no privilege under Section 4 for a mediation communication that is ... sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediator"); UMA § 6(a)(6) ("There is no privilege under Section 4 for a mediation communication that is ... 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").

89. Fla. Stat. §§ 44.405(4)(a)(4), (6).

90. Ga. ADR R. VII(B) (emphasis added).

91. Okla. Stat. tit. 12, § 1805(F) (emphasis added).

mediation evidence to prove or disprove a claim.”⁹² The Commission did not discuss whether to refer to “reporting” of a claim, as in Florida.

To the best of the staff’s knowledge, there is no controversy about this aspect of the Commission’s proposed new exception. On the contrary, only one person urged the Commission to follow an unequal approach,⁹³ and he has since reversed his position on that point.⁹⁴ Moreover, although the above-quoted Georgia and Oklahoma provisions focus primarily on authorizing the use of mediation communications to defend against a misconduct claim, those provisions seem to presume that the plaintiff has already used mediation communications in framing the misconduct claim. Thus, those provisions do not really seem to contemplate that only one party can use mediation evidence to support the party’s position in the misconduct case.

Given the lack of controversy, **the staff presumes that the Commission will stick with its decision that the proposed new exception should apply evenhandedly.**

The Commission should further consider, however, whether to follow Florida’s approach, which refers to “reporting” of professional malfeasance, not just proving or disproving such malfeasance. In concept, **would the Commission like to refer to “reporting” an apparent violation of a State Bar rule, as well as “proving” and “disproving” an alleged violation?** The staff will, of course, present specific statutory language for the Commission to consider later in this study. For now, we are just seeking guidance on the general concept.

In Camera Screening Process

In researching the law of other jurisdictions, the staff found some mediation confidentiality exceptions that use an in camera screening process. To give just one example, UMA Section 6(b)(1) provides:

(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

92. Draft Minutes (Aug. 7, 2015), p. 5 (emphasis added).

93. See Memorandum 2014-6, Exhibit p. 2 (Michael Carbone’s comment urging the Commission to create “a narrow exception to confidentiality that would allow the plaintiff in a legal malpractice case, *and the plaintiff only*, to testify about any advice the lawyer gave during the mediation.” (emphasis in original)).

94. See Exhibit p. 10 (“The attorney must be able to defend herself, and I did not mean to suggest otherwise. It was a mistake on my part.”).

protecting confidentiality, and that the mediation communication is sought or offered in:

(1) a court proceeding involving a felony [or misdemeanor]⁹⁵

When it met in August, the Commission considered whether to take that kind of approach in drafting its proposed new exception to California's mediation confidentiality statutes. The Commission concluded that the exception "should utilize an in camera screening process."⁹⁶

The Commission began to discuss the nature of the in camera screening process, including in particular whether an in camera hearing should be mandatory whenever a person invokes the proposed new exception.⁹⁷ The Commission did not resolve that point, nor did it resolve any other details regarding the nature of the in camera screening process.⁹⁸

The Commission's decision to utilize an in camera screening process is one of the most significant decisions that it made in August. The use of such a process, particularly if it is carefully structured and tailored, may be critical in reducing the level of concern about the Commission's proposed new exception.

Despite the Commission's decision to use an in camera screening process, and even though the Commission has not yet drafted its proposed new exception, many commenters already believe that the exception will permit disclosure of mediation evidence whenever a client alleges that a lawyer engaged in professional misconduct, no matter what the circumstances. For example, Mark Baer says:

The proposed legislation will remove current protections whenever a mediation party ALLEGES misconduct by their lawyer advocate or lawyer mediation.... [P]eople should not be able to breach the mediation confidentiality merely by making an ALLEGATION.⁹⁹

Similarly, Gayle Tamler writes:

It is my understanding that on August 7, 2015, the California Law Revision Commission voted by majority to recommend a law which will essentially destroy mediation and additionally swamp our overburdened courts with many new lawsuits. Based on an allegation of mere misconduct, mediation confidentiality will be lost and every mediation statement and document could be discovered and become admissible evidence. Furthermore under

95. Emphasis added.

96. Draft Minutes (Aug. 7, 2015), p. 5.

97. *Id.*

98. *Id.*

99. Exhibit p. 9 (capitalization in original).

this recommended law, anyone suing a lawyer who was involved in the mediation as well as the lawyer accused of wrong-doing can depose all mediation participants and subpoena mediation documents for evidence. These actions would totally eviscerate the confidentiality statutes which protect the mediation process to ensure open and candid proceedings can take place to resolve legal matters.

By taking away these protections, courts will become burdened by a new load of “follow-up” mediation lawsuits and mediation as we know it will not be used as to resolve disputes due to the real threat of a breach of confidentiality. In fact this new proposal may be viewed as an opportunity to unwind what was accomplished in mediation so the parties may have another “bite at the apple”.¹⁰⁰

Along the same lines, Shawn Skillin warns the Commission of the following scenario:

Under the proposed legislation, all a client would later have to do to open up confidentiality is to allege malpractice. The confidentiality, is often what drives litigants to mediation. Perhaps there are facts in the case they would rather not have be made public, drinking, drugs, sexual assault, other abuse, trade secrets, poor investments, bad business dealings, all of which could affect their lives in other areas. A settlement is reached and later the other side wants the truth to come out and bingo, lets allege attorney misconduct against one of the lawyers in the case. The settlement would stand, the lawyer faces the misconduct charges, the unhappy litigant exposes the other litigant by making this collateral attack. Now no one is happy. What exactly is now the advantage of mediation?¹⁰¹

Many other comments express similar concerns.¹⁰²

100. Exhibit p. 31.

101. Exhibit p. 26.

102. See, e.g., Memorandum 2015-46, Exhibit p. 17 (comment from Anne Bers stating: “Under this law, anyone suing a lawyer and also the accused lawyer can depose all mediation participants and subpoena their mediation documents searching for relevant evidence. Our current predictable protections would disappear with a mere allegation of misconduct.”); *id.* at Exhibit p. 20 (comment from Lee Blackman stating: “It is hard to conceive of a rule more likely to discourage lawyers from entering into the field of mediation than one making the neutral facilitator subject to the cost of defending a claim of mediator malpractice based on nothing more than a participant’s conviction that he or she was wrongfully or improperly induced to accept a settlement that later seems inadequate (or excessive).”); *id.* at Exhibit p. 23 (comment from Dudley Braun stating: “Please do not wreck the whole mediation field by removing confidentiality under prospects of simple unproven charges of ‘misconduct.’ Even a flimsy ‘threat’ of misconduct by change-of-heart-after-the-fact participants, parties who already came to committed agreements, would put a big damper on the proceedings and would undermine mediation entirely.”); *id.* at Exhibit p. 36 (comment from Richard Coleman stating: “This proposal will destroy mediation. There is no situation where a party, after agreeing to a resolution and later becoming dissatisfied with it, will not be able to allege misconduct.”); *id.* at Exhibit p. 94 (comment from Guy Kornblum stating: “While there may be injustices done in the mediation

By devising an in camera screening process that is sensitive to the policy interest in protecting mediation communications, as well as the competing policy interest in holding an attorney accountable for professional misconduct, the Commission may be able to somewhat alleviate the expressed concerns about wide-ranging discovery and use of mediation evidence. That endeavor will require particularly careful drafting. We will further explore the matter later in this memorandum.

Limitation on Extent of Disclosure of Mediation Communications

Another point the Commission considered in August was whether its proposed new exception to the mediation confidentiality statutes should say something about minimizing the extent of disclosure of mediation communications. The Commission decided that the new exception should only permit disclosure of mediation evidence that is strictly relevant to the malpractice case or disciplinary proceeding in which it is sought or proffered.¹⁰³

The UMA includes a provision along those lines, which states:

(d) If a mediation communication is not privileged under subsection (a) or (b), only the portion of the communication necessary for the application of the exception from nondisclosure may be admitted. Admission of evidence under subsection (a) or (b) does not render the evidence, or any other mediation communication, discoverable or admissible for any other purpose.¹⁰⁴

Is that the type of provision that the Commission had in mind?

Code Placement

At the August meeting, the Commission also discussed which code would be the best location for its proposed new exception to the mediation confidentiality

process, the result of wiping out the rules regarding confidentiality on the mere allegation of misconduct does not justify changing the status quo. Please!"); *id.* at Exhibit p. 107 (comment from Timothy D. Martin warning that the Commission's proposed rule change would create a "do over" opportunity "if someone accuses a lawyer of misconduct," yet "[t]he accusation need not be true, complete or accurate: a false accusation might be seen by the accuser as a 'bargaining chip' encouraging everyone to return to the table."); *id.* at Exhibit p. 130 (comment from Nancy Powell stating: "Our current predictable protections will disappear with a mere allegation of misconduct. Few will risk being candid knowing every mediation statement and document can be discovered and become admissible evidence. Under this law, anyone suing a lawyer and also the accused lawyer can depose all mediation participants and subpoena their mediation documents searching for relevant evidence."); *id.* at Exhibit p. 135 (comment from Tom Reese stating: "I oppose removal of confidentiality so that a party who wakes up Monday morning and wishes s/he had not made the deal can throw it all out with an unsupported assertion.").

103. Draft Minutes (Aug. 7, 2015), p. 6.

104. UMA § 6(d).

statutes. The most logical locations seem to be the (1) Evidence Code and (2) the Business and Professions Code. The Commission tentatively decided that the proposed new exception should be placed in the Evidence Code.¹⁰⁵

Earlier in the study, however, some individuals expressed a preference for the Business and Professions Code, while making clear that they did not necessarily endorse the idea of creating a new exception. As the staff recalls, the discussion did not delve into the reasons for this preference.

In accordance with the Commission's instructions, the staff is planning to put the proposed new exception in the Evidence Code. If the Commission later decides that there are good reasons to put the exception in the Business and Professions Code instead, relocating it probably will not be difficult.

ADDITIONAL POINTS TO RESOLVE IF THE COMMISSION CONTINUES WITH ITS CURRENT APPROACH

In addition to the points that the Commission tentatively resolved in August, there are also a number of other important drafting decisions that the Commission needs to make before the staff can begin preparing proposed legislation. Those decisions are discussed below.

Will the Exception Apply Only to Particular Types of Mediation Communications?

A key issue not expressly discussed in August is whether the Commission's proposed new exception to the mediation confidentiality statutes will only apply to particular types of mediation communications. One frequently-raised possibility along these lines would be to create a mediation confidentiality exception that only applies to a private lawyer-client communication.¹⁰⁶ The staff previously provided the following analysis of the pros and cons of that approach:

[Approach #2] might help a client hold a lawyer accountable for legal malpractice or professional misconduct that occurs in the context of a mediation. It might also facilitate resolution of a lawyer-client fee dispute.

105. Draft Minutes (Aug. 7, 2015), p. 6. Commissioner Lee abstained from this decision.

106. See General Approach A-4 in the attached chart summarizing possible approaches (Exhibit pp. 1-2). This idea was known as "Approach #2" in Memorandum 2015-22. See also General Approach A-4 and Options A-4-a, A-4-b, A-4-c, A-4-d, and A-4-e in the "Compilation of Possible Approaches" attached to Memorandum 2015.

But there are a number of disadvantages to Approach #2, some of which were identified in *Cassel* as possible reasons why the Legislature took a different approach in the current mediation confidentiality statutes:

- It may “not be fair to allow a client to support a malpractice claim with excerpts from private discussions with counsel concerning the mediation, while barring the attorneys from placing such discussions in context by citing communications within the mediation proceedings themselves.” Due to this uneven treatment, Approach #2 probably would not promote just results and confidence in the justice system to the same extent as Approach #1 [i.e., Let Evidence Code Section 958 “Trump” Mediation Confidentiality].
- Private lawyer-client communications “will often disclose what others have said during the mediation.” Using a private, mediation-related lawyer-client communication in a later lawyer-client dispute may thus harm the interests of persons who are not involved in that dispute. The possibility of such a disclosure may also chill mediation discussions and impede their effectiveness.
- Ensuring the confidentiality of lawyer-client communications in the mediation context might “facilitat[e] the use of mediation as a means of dispute resolution by allowing frank discussions between a mediation disputant and the disputant’s counsel about the strengths and weaknesses of the case, the progress of negotiations, and the terms of a fair settlement, without concern that the things said by either the client or the lawyers will become the subjects of later litigation against either.” A contrary approach would not provide such an opportunity.
- A mediation participant might have trouble recalling whether a comment was made in a private lawyer-client conversation, as opposed to a mediation conversation involving other participants. Resolving disputes over this point might prove difficult and time-consuming.
- Even if a mediation participant correctly recalls what occurred in a private lawyer-client conversation and what did not, the participant might accidentally refer to what happened in another phase of the mediation when testifying, which could harm the interests of a mediation participant who is not involved in the lawyer-client dispute.¹⁰⁷

107. Memorandum 2015-22, pp. 14-15 (footnotes omitted).

Another possibility, suggested by mediator Paul Dubow, would be to limit the proposed new exception to mediation consultations that occur before the actual mediation session. He writes:

The confidentiality rule applies to “mediation consultations” which include meetings between the attorney and client to discuss mediation strategy. These meetings do not involve the mediator and the other mediation participants. The basis for the malpractice allegation in some of the lawsuits, including *Cassel*, is that the attorney and client agreed not to go beyond a particular settlement number when they were discussing mediation strategy and that the attorney breached this agreement. If the confidentiality exception were limited to these conversations, there would be no need to call the other mediation participants as witnesses in the malpractice suit and the other parties to the settlement would indeed buy peace. The negative side of this proposal is that it is an exception to confidentiality, albeit a small one, and there is the risk of further exceptions.¹⁰⁸

From the general tenor of the discussion at the Commission meeting in August, the staff surmises that the Commission was contemplating an exception applicable to all types of mediation communications, not just a select group of communications. **Is that what the Commission has in mind? Or does the Commission want to restrict its proposed new exception to a particular type of mediation communications?** The staff could further explore this area if the Commission would find it helpful.

Basic Features of the In Camera Screening Process

An in camera proceeding is one that the court conducts in private, either by (1) holding it in the judge’s chambers or (2) excluding all spectators from the courtroom.¹⁰⁹ If confidential information is disclosed in such a proceeding, the degree of intrusion on the interest in confidentiality is less than if the proceeding were held in public, because the information is shared with fewer people. That is particularly true if the judge seals the record of the proceeding and orders the attendees not to discuss the matter with anyone or reveal anything about it.

As Stanford law student Amelia Green explained in her paper for the Commission, “[c]ourts have commonly used *in camera* proceedings as a procedural technique to balance a need for disclosure of relevant information in

108. Exhibit p. 13.

109. Black’s Law Dictionary (3d ed. 1933).

a court proceeding against a need to limit access to that information.”¹¹⁰ Such proceedings can take many different forms, involving a variety of procedural techniques.¹¹¹

As discussed earlier in this memorandum, devising an in camera screening process that is sensitive to the policy interest in protecting mediation communications, as well as the competing policy interest in holding an attorney accountable for professional misconduct, *might be crucial in reducing the level of concern* over the Commission’s proposed new exception to the mediation confidentiality statutes.

In the background work for this study, the staff came across a number of existing statutes and cases that use an in camera procedure to determine whether mediation evidence is admissible or subject to disclosure. Those approaches are summarized in the “Compilation of Possible Approaches” attached to Memorandum 2015-33, which the Commission considered in August.¹¹² For convenient reference, the pertinent pages are reproduced at Exhibit pages 2-7; they include citations to staff memoranda and other materials that discuss the approaches in greater detail. In addition, Ms. Green’s paper describes how courts have used in camera proceedings when determining whether to apply (1) the crime-fraud exception to the lawyer-client privilege¹¹³ and (2) exceptions to the informant privilege.¹¹⁴ Scholarly views on using in camera proceedings for mediation evidence are discussed at pages 34-36 of Memorandum 2015-35. “There is considerable scholarly support for the concept of conducting *in camera* hearings to assess the admissibility and discoverability of mediation evidence, at least in certain contexts.”¹¹⁵

For present purposes, the staff does not think it would be productive to reiterate all of that information here. Instead, we just refer to select materials to illustrate particular points. More extensive discussion may be appropriate in a future memorandum.

The existing statutes in the mediation context provide relatively little detail regarding the in camera screening process. For example, a Texas provision states:

110. Amelia Green, *Mediation Confidentiality and Attorney Malpractice: The Potential for the Use of In Camera Proceedings to Balance Confidentiality with Accountability*, p. 9 (Memorandum 2015-13, Exhibit p. 9).

111. See, e.g., *id.* at 13, 16. (Memorandum 2015-13, pp. 13, 16).

112. See Memorandum 2015-33, pp. T13-T-17.

113. See Green, *supra* note 110, at 10-14 (Memorandum 2015-13, Exhibit pp. 10-14).

114. See *id.* at 14-16 (Memorandum 2015-13, Exhibit pp. 14-16).

115. Memorandum 2015-35, p. 45.

If this section [on mediation confidentiality] 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.¹¹⁶

Similarly, a Wisconsin provision states:

In an action or proceeding distinct from the dispute whose settlement is attempted through mediation, the court may admit evidence otherwise barred by this section if, after an in camera hearing, it determines that admission is necessary to prevent a manifest injustice of sufficient magnitude to outweigh the importance of protecting the principle of confidentiality in mediation proceedings generally.¹¹⁷

A few court decisions, most notably *Rinaker v. Superior Court*¹¹⁸ and *Olam v. Congress Mortgage Co.*,¹¹⁹ provide more information on the mechanics of an in camera screening process in the mediation context. But those discussions do not address the full spectrum of possible scenarios; the guidance they provide is to some extent fact-specific.

For example, *Rinaker* concerns a defendant's right to use mediator testimony to disprove vandalism charges in a juvenile delinquency case. The case does not address testimony of other mediation participants, nor does it deal with alleged misconduct *during* a mediation, which will be particularly challenging to address because almost all of the pertinent information (necessary not only to support a claim but also to state the claim in the first place) is likely to stem from the mediation. In contrast, *Olam* did involve allegations of mediation misconduct, but again the case only concerned mediator testimony.

Cases in other areas of the law, such as the United States Supreme Court decisions in *United States v. Zolin* (crime-fraud exception to the lawyer-client

116. Tex. Civ. & Rem. Code § 154.073(e). Closely similar provisions include Ark. Code Ann. § 16-7-206(c); La. Rev. Stat. § 9:4112(D); Miss. Ct. Annexed Mediation R. VII(D).

117. Wis. Stat. § 904.085(4)(e).

118. 62 Cal. App. 4th 155, 74 Cal. Rptr. 2d 464 (1998). For discussion of *Rinaker*, see Memorandum 2015-4, pp. 32-34.

American International Specialty Lines Co. v. Chubb Custom Ins. Co., 2011 Phila. Ct. Com. Pl. LEXIS 265 (2011), is another case addressing procedural aspects of in camera screening in the mediation context. For discussion of *Chubb*, see Memorandum 2014-43, pp. 9-10.

119. 68 F. Supp. 2d 1110 (N.D. Cal. 1999). For discussion of *Olam*, see Memorandum 2014-45.

privilege)¹²⁰ and *Roviaro v. United States* (exceptions to the informant privilege),¹²¹ provide additional guidance on the use of in camera proceedings. Yet they too have limitations as potential models, because they do not involve mediations and pertinent considerations may differ.

The staff is still gathering information regarding in camera proceedings and the best means of using them in the mediation context. **We especially welcome input on this matter**, because we believe this aspect of the Commission's proposal requires extra time, care, and attention to draft effectively.

Our sense, based on what we have seen thus far, is that following an existing model would leave important questions unanswered, providing less than optimal guidance to mediation participants and others on how to proceed. We recognize that it might be desirable to leave some degree of discretion and flexibility to the courts, to adjust to the circumstances of a particular case. But we **encourage the Commission to at least explore the idea of going beyond what has been done in this area previously.**

In particular, we think it would be helpful for the Commission to **visualize and talk through the entire process of:**

- Litigating a malpractice case that involves alleged mediation misconduct by an attorney or attorney-mediator; and
- Handling a disciplinary proceeding that involves alleged mediation misconduct by an attorney or attorney-mediator.

In making this suggestion, the staff has in mind a discussion similar to, but more extensive than, the discussion of the pleading process that the Commission started at the August meeting.

At that time, Commissioners brainstormed about how, under the legislation they are crafting, a plaintiff would plead a claim of mediation misconduct by an attorney or attorney-mediator without running afoul of the mediation confidentiality statutes. Questions raised in that discussion, or brought to mind because of it, include:

- Would it be necessary for a plaintiff to seek court approval (perhaps at an in camera hearing) *before* filing a complaint alleging mediation misconduct by an attorney or an attorney-mediator?

120. 491 U.S. 554 (1989). For discussion of *Zolin*, see Green, *supra* note 110, at 10-14, 17 (Memorandum 2015-13, Exhibit pp. 10-14, 17).

121. 353 U.S. 53 (1957). For discussion of *Roviaro*, see Green, *supra* note 110, at 14-16 (Memorandum 2015-13, Exhibit pp. 14-16).

- Would it be preferable to permit a plaintiff to file a complaint that includes only barebones allegations and then seek court permission to provide further specificity? If so, precisely what should the plaintiff do? File some kind of request under seal? Participate in an in camera hearing? Both? To what extent could a plaintiff reveal mediation communications to the court in a sealed document or an in camera hearing without any advance ruling from the court or notice to other mediation participants?
- To address this context, is it necessary to revise the statutory requirement that a complaint shall contain a “*statement of the facts constituting the cause of action, in ordinary and concise language*”?¹²²
- What rules governing the use of mediation communications should apply when a defendant responds to a complaint alleging mediation misconduct by an attorney or an attorney-mediator?
- Should the above questions be answered differently depending on whether the underlying mediated dispute (i.e., the dispute that the mediation participants sought to resolve at the mediation) is still pending?¹²³ If the underlying dispute remains pending, should the court stay the malpractice case or disciplinary proceeding until the underlying mediated dispute is resolved? Should other steps be taken to prevent mediation communications from having an adverse impact on a mediation participant in connection with the underlying mediated dispute?
- Would it be helpful to have the Judicial Council prepare some kind of cover sheet or informational materials regarding the proper procedures to follow in pleading this type of claim? If so, should that document also cover other procedural requirements or rules applicable to this type of claim?

Similar sets of questions could be posed regarding the other stages of a malpractice case or disciplinary proceeding (e.g., the discovery process, motion practice, trial). By trying to carefully envision the problems that parties might encounter at each stage, the Commission may gain insight into:

- (1) what type of statutory guidance (as opposed to court rules, judicial discretion, or case law) would be helpful, and
- (2) how to effectively combine judicial tools such as in camera hearings, protective orders, and sealing orders (bearing in mind existing constraints on the use of sealing orders).

122. Code Civ. Proc. § 425.10(a)(1) (emphasis added).

123. See generally Memorandum 2014-46, Exhibit pp. 4-9 (comments of Eric van Ginkel); Sarah Cole, *Secrecy and Transparency in Dispute Resolution, Protecting Confidentiality in Mediation: A Promise Unfulfilled?*, 54 Kan. L. Rev. 1419, 1450-51 (2005).

This exercise might thus shed light not only on the best means of implementing an in camera screening process, but also on other matters to consider in proposing a new exception to the mediation confidentiality statutes.

Focusing more specifically on developing an in camera screening process, **the following questions may warrant attention:**

- ***When is an in camera hearing required?*** Should it be mandatory for the court to conduct an in camera hearing every time someone seeks disclosure of mediation evidence pursuant to the Commission's proposed new exception? Should the court have some discretion in this regard? Should there be a fixed threshold requirement for conducting an in camera hearing?

In *Zolin*, for instance, the United States Supreme Court determined that “[b]efore engaging in *in camera* review to determine the applicability of the crime-fraud exception, ‘the judge should require a showing of a factual basis adequate to support a good faith belief by a reasonable person’ ... that *in camera* review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies.”¹²⁴ The Court further determined that “[o]nce that showing is made, the decision whether to engage in *in camera* review rests in the sound discretion of the district court.”¹²⁵

Similarly, in *American International Specialty Lines Co. v. Chubb Custom Ins. Co.* (an apparently unpublished case),¹²⁶ the defendant sought discovery of certain mediation documents and argued that the court could not properly restrict discovery of those documents unless it first conducted an in camera review and ruled on each document after inspecting it. The court disagreed, explaining that in camera review is not necessary in all discovery disputes and a court “has discretion to order same when circumstances necessitate.”¹²⁷

- ***Notice and an Opportunity to Be Heard.*** Who should get notice of an in camera hearing on admissibility or disclosure of mediation evidence pursuant to the proposed new exception? Should mediation participants be notified and given opportunity to participate in the hearing? If so, who should be responsible for providing that notice? How much notice should be given and by what means? Should there be a briefing schedule? Should one or more of these points be left up to the individual judge, or addressed through a court rule, rather than by statute?
- ***Conditional Admissibility.*** Should the proposed new exception expressly allow a court to condition the use of proffered mediation

124. 491 U.S. at 572 (citation omitted).

125. *Id.*

126. 2011 Phila. Ct. Com. Pl. LEXIS 265 (2011).

127. *Id.* at *15.

evidence on the admissibility of other evidence from the same mediation, so as to present a full picture? This concept would be similar to the “rule of completeness” in the Federal Rules of Evidence, which says: “When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.”¹²⁸ If a court can condition admissibility on the contemporaneous admission of additional evidence, should mediation participants be notified about the potential disclosure of the additional evidence and have opportunity to weigh in on it?

- **Applicable Standard.** What standard should the court apply in determining whether to permit disclosure of mediation evidence pursuant to the Commission’s proposed new exception? Under that standard, who bears the burden of proof?

There are many possibilities in selecting an appropriate standard. For example, a UMA exception requires the party seeking discovery or the proponent of the evidence to show “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 ... a court proceeding involving a felony [or misdemeanor].”¹²⁹

In contrast, Magistrate Judge Brazil used a 2-stage balancing process in *Olam*.¹³⁰ According to Prof. John Lande, the UMA approach is more protective than the *Olam* approach in two ways: (1) the UMA requires a showing that the “need for the evidence substantially outweighs the interest in protecting confidentiality” but *Olam* does not, and (2) the UMA only allows use of mediation communications if the evidence is “not otherwise available,” while *Olam* lacks such a restriction.

The Federal Administrative Dispute Resolution Act of 1996 presents another possible model. Under Section 574(a)(4)(C), “[a] mediation communication made inadmissible or protected from disclosure by the provisions of this chapter shall not become admissible or subject to disclosure under this section unless a court first determines at an in camera hearing that this is necessary to prevent harm to the public health or safety of sufficient magnitude in the particular case to outweigh the integrity of dispute resolution proceedings in general by reducing the confidence of parties in future cases that their communications will remain confidential.” Mediator Ron Kelly expressed a preference for this standard, if the Commission concluded that weakening the

128. Fed. R. Evid. 106.

129. UMA § 6(b)(1) (emphasis added).

130. See 68 F. Supp. 2d at 1131-32, which is quoted at Exhibit p. 5.

mediation confidentiality statutes was absolutely necessary and it decided to use an in camera hearing process.¹³¹

There are many other possible standards as well. Of particular note, the Commission might consider developing a standard that directly balances (1) the impact of admissibility or disclosure on the policy interest in attorney accountability against (2) the impact of admissibility or disclosure on the policy interest in protecting mediation communications.

- **Decisionmaker.** Who should conduct the in camera hearing on the admissibility or disclosure of mediation evidence pursuant to the proposed new exception? If the case will entail a bench trial, should the judge who will ultimately act as factfinder also conduct the in camera hearing? Would it be better to have a different judicial officer conduct that hearing, so as to ensure that the judge is “in a position of detachment”¹³² and eliminate the “need to worry about the judge becoming prejudiced against one of the disputing parties”¹³³? Would such an approach be overly burdensome?

Similarly, suppose that a party to a State Bar disciplinary proceeding seeks to introduce mediation evidence pursuant to the proposed new exception. If the standard for using such evidence would require the decisionmaker to assess the potential impact on the policy interest in attorney accountability, would it be appropriate for the decisionmaker to be a State Bar employee? Or should someone else conduct the in camera hearing on admissibility, such as a superior court judge? If so, should there be some kind of transfer mechanism between the State Bar and the superior court? Transfer mechanisms have sometimes been used in other contexts.¹³⁴

131. See Third Supplement to Memorandum 2014-60, Exhibit p. 3.

132. *Illinois Educational Labor Relations Bd. v. Homer Community Consolidated School Dist.*, 132 Ill. 2d 29, 43, 547 N.E.2d 182 (Ill. S.Ct. 1989). In that case, the Illinois Supreme Court considered whether an in camera examination of allegedly privileged materials should be conducted by the circuit court or by the Illinois Educational Labor Relations Board. The Court concluded that the circuit court should conduct the in camera examination. It explained:

[T]he reason the circuit court should perform the *in camera* examination is that the circuit court is in a position of detachment. While the Board might decide that the materials sought to be discovered are privileged and thus inadmissible, it would nevertheless be placed in an awkward position of having seen the materials yet having to disregard them in adjudicating the unfair labor practice complaint. Moreover, a party to a labor dispute might fear that the Board would be subtly influenced if the Board were to view the privileged materials. Allowing the circuit court to examine the materials relieves the Board of the burden of having to disregard privileged materials.

Id.

133. Samara Zimmerman, *Judges Gone Wild: Why Breaking the Mediation Confidentiality Privilege for Acting in “Bad Faith” Should Be Reevaluated in Court-Ordered Mandatory Mediation*, 11 *Cardozo J. Conflict Resol.* 353, 383 (2009).

134. See, e.g., Code Civ. Proc. § 1991; see also *Riverside County Sheriff’s Dep’t v. Stiglitz*, 60 Cal. 4th 624, 339 P. 3d 295, 181 Cal. Rptr. 3d 1 (2014) (although Legislature created statutory transfer

- *Form of Decision.* When a court conducts an in camera hearing to determine whether mediation evidence is admissible or subject to disclosure pursuant to the Commission’s proposed new exception, should the court be required to state the reasons for its decision in writing or on the record? Would that requirement help promote sound and consistent decision-making? Would it be overly burdensome?

Mediator Testimony

As previously discussed, Evidence Code Section 703.5 makes a mediator incompetent to testify in most types of civil proceedings. If the Commission’s proposed new exception would permit a party to use mediation evidence to support a malpractice or disciplinary claim against an attorney-mediator, presumably the Commission will also propose to amend Section 703.5 to permit the mediator to testify in defense.¹³⁵

A different question is whether a party could rely on the proposed new exception to compel a mediator to testify or produce documents in a malpractice case or disciplinary proceeding against an attorney. Still another question is whether a mediator could *voluntarily* testify in such a malpractice case or disciplinary proceeding.

The UMA’s exception for professional misconduct (other than mediator misconduct) precludes a party from compelling the mediator to testify:

(a) There is no privilege under Section 4 for a mediation communication that is:

....
 (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*

....
 (c) *A mediator may not be compelled to provide evidence of a mediation communication referred to in subsection (a)(6)*¹³⁶

The accompanying Comment explains:

Section 6(c) allows the mediator to decline to testify or otherwise provide evidence in a professional misconduct ... cas[e] to protect against frequent attempts to use the mediator as a tie-

mechanism in certain other contexts, it did not create statutory transfer mechanism between administrative hearing officer and superior court for *Pitchess* motion).

135. See above discussion of “Whose Alleged Misconduct to Cover.”

136. UMA § 6(a)(6) (emphasis added).

breaking witness, which would undermine the integrity of the mediation process and the impartiality of the individual mediator. Nonetheless, the parties and other may testify or provide evidence in such cases.

...

Consistent with the UMA approach, the case law and literature on mediation confidentiality are replete with statements emphasizing the perils of compelling a mediator to testify. For example, a leading Ninth Circuit decision explains:

However useful the testimony of a conciliator might be ... in any given case, we can appreciate the strong considerations of public policy underlying the [regulation denying conciliator testimony] and the refusal to make exceptions to it, because of the unique position which the conciliators occupy. To execute successfully their function of assisting in the settlement of labor disputes, the conciliators must maintain a reputation for impartiality, and the parties to conciliation conferences must feel free to talk without any fear that the conciliator may subsequently make disclosures as a witness in some other proceeding, to the possible disadvantage of a party to the conference. If conciliators were permitted or required to testify about their activities, or if the production of notes or reports of their activities could be required, not even the strictest adherence to purely factual matters would prevent the evidence from favoring or seeming to favor one side or the other. The inevitable result would be that the usefulness of the [Federal Mediation and Conciliation Service] in the settlement of future disputes would be seriously impaired, if not destroyed. The resultant injury to the public interest would clearly outweigh the benefit to be derived from making their testimony available in particular cases.¹³⁷

Similarly, Magistrate Judge Brazil said in *Olam*:

[O]rdering mediators to participate in proceedings arising out of mediations imposes economic and psychic burdens that could make some people reluctant to agree to serve as a mediator, especially in programs where that service is pro bono or poorly compensated.

This is not a matter of time and money only. Good mediators are likely to feel violated by being compelled to give evidence that could be used against a party with whom they tried to establish a relationship of trust during a mediation. Good mediators are deeply committed to being and remaining neutral and non-judgmental, and to building and preserving relationships with parties. To force them to give evidence that hurts someone from

137. *NLRB v. Joseph Macaluso, Inc.*, 618 F.2d 51, 55-56 (9th Cir. 1980), quoting Tomlinson of High Point, Inc., 74 N.L.R.B. 681, 688 (1947).

whom they actively solicited trust (during the mediation) rips the fabric of their work and can threaten their sense of the center of their professional integrity. These are not inconsequential matters.¹³⁸

A downside of the UMA approach is that it could result in a distorted picture of what occurred during a mediation. Because the mediator's evidence is unavailable, the factfinder must try to determine the truth based solely on the stories of the other mediation participants. Depending on the circumstances, a malpractice case or disciplinary proceeding may come down to a swearing contest between a lawyer and a client. In that situation, there is a possibility of anti-lawyer bias that might make it difficult to get a fair result.

Those considerations could cut in more than one direction. On the one hand, the interest in presenting a full story to accurately determine the lawyer's accountability weighs in favor of requiring the mediator to testify, just like any other witness.

On the other hand, given both (1) the detriments of having the mediator testify and (2) the distorted picture that may result if the mediator does not testify, one might conclude that the costs of the Commission's proposed new exception are not worth the benefits.

The Commission should carefully consider these points and determine how it wants to handle mediator testimony.

Consequences of Invoking the New Exception and Losing

Another important issue is whether any sanctions should be imposed on a party who:

- seeks admission or disclosure of mediation evidence pursuant to the proposed new exception,
- causes others to incur expenses or expend effort in response, and
- ultimately fails to prevail (either because the court concludes the evidence is not admissible or subject to disclosure, or because the evidence is admitted or disclosed but the party's claim turns out to be meritless).

Would the availability of some type of sanctions in that situation help to ensure that the exception is not abused?

138. 68 F. Supp. at 1133-34.

The challenge for the Commission would be to set a consequence that is harsh enough to discourage spurious claims that could result in unnecessary intrusions on mediation confidentiality and unwarranted burdens on mediation participants, but not so drastic as to inhibit meritorious claims. To achieve the desired result, it might also be important to promote awareness of the potential sanction.

One idea would be to statutorily require the losing party to reimburse all costs, attorney's fees, and other expenses incurred by any person that objected to admissibility or disclosure of the mediation evidence. The statute could perhaps also give the court discretion to impose additional sanctions that it finds just and proper.

Is the Commission interested in this idea? Can anyone propose a better approach?

Retroactivity

The Commission should also consider is whether its proposed new exception to the mediation confidentiality statutes should apply retroactively.

The staff suggests that **the new exception should only apply with respect to evidence from a mediation that is conducted after the operative date of the legislation creating the new exception.** Otherwise, the expectations of participants in mediations conducted under existing law could be defeated: Their mediation communications might be disclosed pursuant to a confidentiality exception that did not exist when they were informed of the confidentiality rules applicable to their mediation.

Other Drafting Issues

The above discussion attempts to cover the key drafting issues that the Commission needs to resolve before the staff can prepare proposed legislation. Additional drafting issues will inevitably surface as the Commission crafts its tentative recommendation. **Comments identifying new issues or shedding new light on points already under consideration would be much appreciated.**

Respectfully submitted,

Barbara Gaal
Chief Deputy Counsel

CATEGORY A: CREATE SOME TYPE OF MEDIATION CONFIDENTIALITY EXCEPTION ADDRESSING “ATTORNEY MALPRACTICE AND OTHER MISCONDUCT”	CATEGORY B: OTHER IDEAS ABOUT MODIFYING THE EXTENT OF MEDIATION CONFIDENTIALITY
A-1. Allow disclosure for purposes of legal malpractice action	B-1. Revise rules re waiver of mediation confidentiality
A-2. Allow disclosure for purposes of attorney disciplinary proceeding (or make explicit how mediation confidentiality applies to such a proceeding)	B-2. Enact UMA in California
A-3. Create exception for both legal malpractice & attorney disciplinary proceeding (e.g., UMA § 6(a)(6))	B-3. Create general exception to mediation confidentiality (<i>In re Teligent</i>)
A-4. No mediation confidentiality for private attorney-client communications	B-4. Make mediation confidentiality optional
A-5. Let Evid. Code § 958 “trump” mediation confidentiality	B-5. Make explicit that mediation participants can modify extent of mediation confidentiality by agreement
A-6. Create exception for mediator misconduct (e.g., UMA § 6(a)(5))	B-6. Clarify meaning of Evid. Code § 1119(c) making mediation communications “confidential”
A-7. Create exception for monitoring mediators & mediation programs	B-7. Expressly address using mediation evidence in juvenile delinquency case
A-8. Create exception re validity & enforceability of mediated settlement agreement (e.g., UMA § 6(b)(2))	B-8. Revise Evid. Code § 1120(a)(3) re mediator’s prior mediations
A-9. Use an <i>in camera</i> screening approach in determining admissibility	B-9. Retain existing California law on mediation confidentiality
A-10. Seal court proceedings, instead of using <i>in camera</i> approach	
A-11. Focus on fairness & use judicial tools to accommodate competing interests (similar to A-9 & A-10)	

CATEGORY C: REQUIRE DISCLOSURES REGARDING MEDIATION CONFIDENTIALITY OR SIMILAR REFORMS		CATEGORY D: OTHER IDEAS	
	C-1. Require disclosure that lawyer is immune for any act in mediation		D-1. Empirical study
	C-2. Require disclosure that includes examples of malpractice		D-2. Daily time limit
	C-3. Require pre-mediation distribution & completion of disclosure form		D-3. Modify standards for attorney malpractice claims involving mediation communications
	C-4. Require mediator or attorney to make some/all of the disclosures already required of a mediator in a court-connected mediation		D-4. Enact provision explicitly stating that mediation party is entitled to bring support person along to mediation
	C-5. Require a disclosure re confidentiality like the one in a 2005 proposal by the Civil & Small Claims Advisory Committee of the Judicial Council		D-5. Cooling-off period
EX 2	C-6. Require use of a simple form that (1) states any representations being relied upon and (2) waives confidentiality re those representations		D-6. Develop mediator regulation system for California
	C-7. Require Judicial Council to prepare informational video on mediation confidentiality & require mediation participants to view it before mediation		D-7. Require mediation to take place within 30 days of filing of lawsuit
	C-8. Require inclusion of disclosures re mediation confidentiality in ADR informational packet that court distributes when referring case to ADR		D-8. Prohibit person from serving as mediator and referee in same case
	C-9, C-10, C-11 & C12. Require disclosures re adjusting fees in mediation		

CATEGORY A: CREATE SOME TYPE OF MEDIATION CONFIDENTIALITY EXCEPTION ADDRESSING
 "ATTORNEY MALPRACTICE AND OTHER MISCONDUCT" OR ASPECTS THEREOF

APPROACH	SOURCE OF IDEA
<p>General Approach A-9. Use an <i>in camera</i> screening approach, in which a judge or other decision-maker reviews proffered mediation evidence in chambers to determine its admissibility pursuant to a statutory standard.</p>	<p>See, e.g., Memorandum 2014-6, Exhibit p. 3 (comments of Ron Kelly, which do not state his personal view). See also Memorandum 2014-24, pp. 21-23 (discussing practicalities of UMA's <i>in camera</i> approach for certain exceptions); Memorandum 2014-43, pp. 9-10 (discussing <i>in camera</i> issue raised in Pennsylvania case); Memorandum 2015-13, p. 2 & Exhibit pp. 1-2 (paper by Amelia Green).</p>
<p>Option A-9-a. Enact an attorney misconduct or professional misconduct exception modeled on the <i>in camera</i> approach of UMA Section 6(b). To give one possible example:</p> <p>Section 1119 does not apply 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:</p> <p>(a) 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.</p>	<p>See also Memorandum 2015-35, pp. 34-36 (summarizing scholarly views on use of <i>in camera</i> hearings).</p>

Compilation of Possible Approaches

CATEGORY A: CREATE SOME TYPE OF MEDIATION CONFIDENTIALITY EXCEPTION ADDRESSING
 “ATTORNEY MALPRACTICE AND OTHER MISCONDUCT” OR ASPECTS THEREOF

APPROACH	SOURCE OF IDEA
<p>Option A-9-b. Enact an exception modeled on the <i>in camera</i> approach of Texas Civ. & Rem. Code § 154.073(e):</p> <p>(e) If this section [on mediation confidentiality] 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 <i>in camera</i> 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.</p> <p>Closely similar provisions include Ark. Code Ann. § 16-7-206(c); La. Rev. Stat. § 9:4112(D); Miss. Ct. Annexed Mediation R. VII(D).</p> <p>In <i>Avary v. Bank of America, N.A.</i>, 72 S.W.3d 770 (Tex. Ct. App. 2002), the Texas Court of Appeals for the Fifth District 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 <i>in camera</i> hearing and determines that the “facts, circumstances, and context” warrant disclosure. The “independent tort” at stake involved professional misconduct (breach of a bank’s fiduciary duty as executor of an estate). But the Court of Appeals did not frame its holding in terms of professional misconduct; it spoke of tortious conduct generally. For further discussion of <i>Avary</i> and related cases, see Memorandum 2014-44, pp. 6-15, 24-25; see also <i>Wimsatt v. Superior Court</i>, 152 Cal. App. 4th 137, 163, 61 Cal. Rptr. 3d 200 (2007) (praising “independent tort” approach used in Texas and criticizing more strict approach used in California).</p>	

Compilation of Possible Approaches

CATEGORY A: CREATE SOME TYPE OF MEDIATION CONFIDENTIALITY EXCEPTION ADDRESSING
 “ATTORNEY MALPRACTICE AND OTHER MISCONDUCT” OR ASPECTS THEREOF

APPROACH	SOURCE OF IDEA
<p>Option A-9-c. Codify the <i>in camera</i> approach that Magistrate Judge Brazil described in <i>Olam v. Congress Mortgage Co</i>, 68 F. Supp. 2d 1110 (N.D. Cal. 1999):</p> <p>“[A California trial judge should] conduct a two-stage balancing analysis. The goal of the first stage balancing is to determine whether to compel the mediator to appear at an <i>in camera</i> proceeding to determine precisely what her testimony would be. In this first stage, the judge considers all the circumstances and weighs all the competing rights and interests, including the values that would be threatened not by public disclosure of mediation communications, but by ordering the mediator to appear at an <i>in camera</i> proceeding to disclose only to the court and counsel, out of public view, what she would say the parties said during the mediation. At this juncture the goal is to determine whether the harm that would be done to the values that underlie the mediation privileges simply by ordering the mediator to participate in the <i>in camera</i> proceedings can be justified — by the prospect that her testimony might well make a singular and substantial contribution to protecting or advancing competing interests of comparable or greater magnitude.</p> <p>The trial judge reaches the second stage of balancing analysis only if the product of the first stage is a decision to order the mediator to detail, <i>in camera</i>, what her testimony would be. A court that orders the <i>in camera</i> disclosure gains precise and reliable knowledge of what the mediator’s testimony would be — and only with that knowledge is the court positioned to launch its second balancing analysis. In this second stage the court is to weigh and comparatively assess (1) the importance of the values and interests that would be harmed if the mediator was compelled to testify (perhaps subject to a sealing or protective order, if appropriate), (2) the magnitude of the harm that compelling the testimony would cause to those values and interests, (3) the importance of the rights or interests that would be jeopardized if the mediator’s testimony was not accessible in the specific proceedings in question, and (4) how much the testimony would contribute toward protecting those rights or advancing those interests — an inquiry that includes, among other things, an assessment of whether there are alternative sources of evidence of comparable probative value.”</p>	<p>In <i>Olam</i>, Magistrate Judge Brazil said this approach was based on <i>Rinaker v. Superior Court</i>, 62 Cal. App. 4th 155, 74 Cal. Rptr. 2d 464 (1998).</p> <p>For further discussion of <i>Olam</i>, see Memorandum 2014-45.</p> <p>For discussion of <i>Rinaker</i>, see Memorandum 2015-4, pp. 32-34.</p>

Compilation of Possible Approaches

CATEGORY A: CREATE SOME TYPE OF MEDIATION CONFIDENTIALITY EXCEPTION ADDRESSING
“ATTORNEY MALPRACTICE AND OTHER MISCONDUCT” OR ASPECTS THEREOF

APPROACH	SOURCE OF IDEA
<p>Option A-9-d. Enact an <i>in camera</i> approach similar to Section 574(a)(4)(C) of the Federal Administrative Dispute Resolution Act of 1996:</p> <p>A mediation communication made inadmissible or protected from disclosure by provisions of this chapter shall not become admissible or subject to disclosure under this section unless a court first determines in an <i>in camera</i> hearing that this is necessary to prevent harm to the public health or safety of sufficient magnitude in the particular case to outweigh the integrity of dispute resolution proceedings in general by reducing the confidence of parties in future cases that their communications will remain confidential.</p> <p>Additional A-9 options. For other examples of <i>in camera</i> approaches, see:</p> <ul style="list-style-type: none"> • Ala. Civ. Ct. Mediation R. 11(b)(3) & Comment. The rule itself does not say anything about an <i>in camera</i> hearing, but the Comment says: “Any review of mediation proceedings as allowed under Rule 11(b)(3) should be conducted in an <i>in camera</i> hearing or by an <i>in camera</i> inspection.” • Mich. Ct. R. 2.412(D)(12), which says that mediation communications may be disclosed when “[t]he disclosure is in a proceeding to enforce, rescind, reform, or avoid liability on a document signed by the mediation parties or acknowledged by the parties on an audio or video recording that arose out of mediation, if the court finds, after an <i>in camera</i> hearing, that the party seeking discovery or the proponent of the evidence has shown <ul style="list-style-type: none"> (a) that the evidence is not otherwise available, and (b) that the need for the evidence substantially outweighs the interest in protecting confidentiality. <p><i>(continued on next page)</i></p>	<p>Ron Kelly supports this concept ‘IF the Commission determines that weakening our current mediation confidentiality protections is absolutely necessary, and recommends an <i>in camera</i> hearing process.’ Third Supplement to Memorandum 2014-60, Exhibit p. 3.</p>

Compilation of Possible Approaches

CATEGORY A: CREATE SOME TYPE OF MEDIATION CONFIDENTIALITY EXCEPTION ADDRESSING
 “ATTORNEY MALPRACTICE AND OTHER MISCONDUCT” OR ASPECTS THEREOF

APPROACH	SOURCE OF IDEA
<p>Additional A-9 options (cont’d):</p> <ul style="list-style-type: none"> • N.M. Stat. Ann. § 44-7B-5(A)(8), which says: “Mediation communications may be disclosed if a court, after hearing in camera and for good cause shown, orders disclosure of evidence that is sought to be offered and is not otherwise available in an action on an agreement arising out of a mediation evidenced by a record. Nothing in this subsection shall require disclosure by a mediator of any matter related to mediation communications.” • Wis. Stat. § 904.085(4)(e): “In an action or proceeding distinct from the dispute whose settlement is attempted through mediation, the court may admit evidence otherwise barred by this section if, after an in camera hearing, it determines that admission is necessary to prevent a manifest injustice of sufficient magnitude to outweigh the importance of protecting the principle of confidentiality in mediation proceedings generally.” <p>General Approach A-10. Seal court proceedings instead of using an in camera screening approach. This concept is similar to General Approach A-10, just a different procedural mechanism to achieve the same effect.</p>	<p>Magistrate Judge Brazil followed this approach in <i>Olam v. Congress Mortgage Co</i>, 68 F. Supp. 2d 1110 (N.D. Cal. 1999). For further discussion of <i>Olam</i>, see Memorandum 2014-45.</p> <p>This idea was known as “Approach #4” in Memorandum 2015-22. For staff analysis of the idea, see <i>id.</i> at 16-17.</p>
<p>General Approach A-11. Focus on ensuring fairness and using judicial tools to accommodate the competing interests. This concept is similar to General Approach A-9 and General Approach A-10. It would embrace two key principles: (1) the importance of providing a level playing field with regard to use of mediation communications in a lawyer-client dispute (giving both lawyer and client an equal opportunity to present relevant mediation communications), and (2) using judicial tools such as <i>in camera</i> hearings or sealing orders to creatively accommodate the competing interests to the greatest extent possible (providing a certain amount of statutory guidance, while affording some degree of flexibility to the trial judge to tailor the approach to the circumstances of a particular case). The approach could be fleshed out in many different ways.</p>	

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September 30, 2015

Ms. Barbara Gaal, Chief Deputy Counsel
California Law Revision Commission

Re: Opposition to Commission's August 7, 2015 Decision

The Board of Directors of the California Dispute Resolution Council has voted to oppose the Commission's August 7, 2015 decision to draft recommended legislation removing current confidentiality protections when a mediation participant alleges lawyer misconduct. We take this position based on CDRC's Principles, adopted and in effect since 1995 to guide our public policy positions. These state in relevant part:

Section 3: Confidentiality.

Confidentiality and public policies supporting confidentiality are fundamental to the viability and success of many alternative dispute resolution processes, particularly mediation and other mediative processes.

A. Necessity of Confidentiality.

1. Mediative Processes: To maximize the potential for resolving a dispute in mediation, it is essential that all parties be free to speak truthfully and fully without fear that their words might be used against them in an adversarial proceeding. Without confidentiality, the trust necessary for candid, self-determined exploration of differences and resolution of disputes would be compromised and mediation would become a less effective dispute resolution process. Communications with a prospective mediator or ADR provider in anticipation of agreement upon mediation are integral parts of a mediation process and should be considered within the scope of mediation confidentiality. Once parties have agreed to mediation, all statements made to a mediator, ADR provider, or other participants in the mediation during the course of the mediation, whether before, during or after a mediation conference, and all writings created for the purpose of, or pursuant to a mediation or mediation consultation, should not be admissible or subject to discovery, and disclosure should not be compelled, in any noncriminal proceeding. All communications, negotiations, or settlement discussions by and among participants in a mediation or mediation consultation should remain confidential at all times, at the mutual option of the affected participants, including after conclusion of a mediation.

Sincerely,

A handwritten signature in blue ink that reads 'Michael R. Powell'.

Michael R. Powell

CDRC Administration

725 S. Figueroa St., Suite 400, Los Angeles, CA 90017
Ph: 1-213-622-6619 Fax: 1-213-623-9134 cdrc@mediate.com www.cdrc.net

EMAIL FROM MARK BAER (9/23/15)

Re: Mediation Regulation by the Bar

Dear Barbara:

The State Bar of California has no business regulating mediation because mediation is not limited to legal disputes and not all mediators are attorneys. Since the Bar cannot regulate non-lawyer mediators, the Bar's efforts are absurd and produce an unfair advantage to non-lawyer mediators.

I completely agree with Phyllis G. Pollack (<http://www.mediate.com/articles/PollackPbl20150918.cfm>) and Ron Kelly and many others who take serious issue with the Bar's efforts. As Mr. Kelly has said, mediation confidentiality is an essential aspect of mediation. The proposed legislation will remove current protections whenever a mediation party ALLEGES misconduct by their lawyer advocate or lawyer mediator. Again, note, the Bar can only apply such regulations on LAWYER mediators, which is completely outrageous. Furthermore, people should not be able to breach the mediation confidentiality merely by making an ALLEGATION.

Sincerely,

Mark

Mark B. Baer, Esq.
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Author/Lecturer/Keynote Speaker/Legal Analyst
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EMAIL FROM MICHAEL CARBONE (9/12/15)

Re: Mediation Confidentiality

Ms. Gaal,

In Memorandum 2014-46 you asked whether in my view an attorney as well as the client in a legal malpractice action should be allowed to testify about what was said between the two of them during a mediation.

You are correct that there was an obvious flaw in my proposal when I said “the plaintiff only.” The attorney must be able to defend herself, and I did not mean to suggest otherwise. It was a mistake on my part.

Michael P. Carbone
1201 Brickyard Way #201
Point Richmond, CA 94801-4140
Office: (510) 234-6550
Fax: (415) 480-1799
Cell: (510) 918-1465

**PAUL J. DUBOW
Arbitrator-Mediator
88 King Street #318
San Francisco, CA 94107**

MEMORANDUM

TO: CALIFORNIA LAW REVISION COMMISSION

FROM: PAUL J. DUBOW

SUBJECT: COMMISSION STUDY K-402

DATED: SEPTEMBER 25, 2015

I am a member of the State Bar and have been a mediator since 1994. I retired from the practice of law at the end of 2000 (but retained my membership in the Bar) and have been a full time neutral since then, conducting both arbitrations and mediations. I estimate that I have acted as the mediator in approximately 500 mediations since 2000.

I have followed the activities of the Commission on the subject of mediation confidentiality (K-402) ever since the study began and I very much appreciate the effort that the Commission and its staff have exerted in an attempt to resolve the conflict between mediation confidentiality and the need to make attorneys responsible for malpractice committed during the course of mediation. Nevertheless, I disagree with the conclusions that the Commission reached at its meeting on August 7, set forth in Memorandum 2015-29, that mediation confidentiality should be waived in lawsuits alleging the commission of malpractice by attorneys during the course of a mediation and that this waiver should also include lawsuits alleging the commission of malpractice by an attorney mediator.

1. ATTORNEY MALPRACTICE

a. The competing policies

There have been two competing policies with which the Commission has had to grapple. One is the policy that attorneys should be liable to their clients and/or disciplined by the State Bar if they have committed malpractice. The other is that mediation communications be confidential, i.e., not admissible in court, so that the mediation parties can engage in a frank exchange of views without fear that their statements would be used in a subsequent litigation. The policy pertaining to mediation confidentiality is so strong that the California Supreme Court has repeatedly stated that there should be no judge made exceptions to it.

The two policies have clashed in cases where an attorney has been accused of committing malpractice in the course of a mediation. That is so because communications between the attorney and client made during the course of the mediation are often needed to prove malpractice, but such evidence is inadmissible because of mediation confidentiality. Thus, the Commission's task has been to determine whether it is more important to make an exception to mediation confidentiality for the admission of this evidence or it is more important to preserve mediation confidentiality by continuing to bar this evidence.

It would seem that the best way to resolve this conflict is to determine the degree to which both policies need to be addressed in disputes between litigants. In other words, if there is evidence that attorney malpractice frequently occurs in mediation or that confidentiality is not a crucial element in the mediation process, then confidentiality can be waived in malpractice suits. However, the Commission has not come up with evidence that attorney malpractice in mediation is rampant (as illustrated by the limited number of reported decisions involving this issue) nor has it refuted the general view that confidentiality is a significant element in the mediation process.

Nevertheless, the Commission has opted in favor of waiving confidentiality in malpractice cases. This decision, if implemented, will have at least two consequences.

First, it will deter at least to some degree, the willingness of litigants to participate in mediations. One of the major attractions to mediation is that a successful outcome will buy peace, i.e., the matter is ended permanently and the parties can go on with their lives. This will not be the case if the Commission proposal is adopted. The keystone of mediation malpractice suits is that the malpractice plaintiff settled the dispute on unfavorable terms because of the action of the defendant attorney. In order to defend against that allegation, the defendant attorney may need the testimony of other participants in the mediation in order to justify why the allegedly unfavorable settlement amount was recommended. Thus, a mediation party will not buy peace in a successful mediation, because such party runs the risk of testifying in a subsequent litigation if its adversary later claims, rightly or wrongly, that the settlement was unfair and the result of attorney malpractice. Furthermore, while the settlement itself will not be in jeopardy, there would be a strong likelihood that the events that gave rise to the dispute would have to be relitigated in order to establish that the settlement was unfair.

Second, the exception to mediation confidentiality that is set forth in the proposal may lead to other exceptions to mediation confidentiality. The proponents of the malpractice exception to confidentiality argue that it is manifestly unfair to allow an attorney to go unpunished for mediation committed during the course of mediation. The undersigned does not disagree. Indeed, in the three Supreme Court cases that preceded *Cassel*, it could be argued that the decisions prevented a legitimate issue from being adjudicated. In *Foxgate Homeowners Association v. Bramalea California, Inc.* (2001), 26 Cal. 4th 1, a mediator was prevented from reporting to the court that a party's attorney was acting in bad faith in a court connected mediation. In *Rojas v. Superior Court* (2006), 33 Cal. 4th 407, tenants suing the owner of a dilapidated apartment complex were prevented from introducing revealing photographs of the premises because the photographs had been

produced in connection with the mediation of a lawsuit not involving the tenants. In *Simmons v. Ghaderi* (2008), 44 Cal. 4th 570, a party who accepted a settlement offer from the defendant's insurer was prohibited from enforcing the settlement agreement when the defendant reneged and refused to sign it. If these three cases had followed *Cassel* rather than preceding it and the Commission's recommendations of August 7 had been implemented by the Legislature, could not the plaintiffs in those cases, noting that the decisions were as unfair to them as the decision in *Cassel* was unfair to the plaintiff therein, legitimately to ask the Court or the Legislature to craft additional exceptions that would aid the prosecution of their cases? In short, confidentiality may lead to unfair results in some cases but, overall, it is the major reason why mediation is successful. And the early resolution of cases that are the result of successful mediations is a practice that should be encouraged, not damaged.

b. Possible solutions

There are remedies that the Commission could recommend that do not lead to the wholesale waiver of confidentiality in malpractice lawsuits. They are listed below in order of their least effect on the state's confidentiality policy.

1. Warning to the parties. Attorneys would be required to advise clients in writing when recommending mediation that conversations between them made during the course of the mediation will not be admissible should the client sue the attorney for malpractice committed during the mediation. The document would be required to be signed by both the attorney and client and must be retained by the attorney for a specified period of time. Thus, clients who proceed with the mediation do so with full knowledge that it would be difficult to sue their attorneys for mediation malpractice. Failure to obtain the document would be grounds for a disciplinary proceeding by the State Bar.

2. Limit the exception to mediation consultations that occur prior to the actual mediation session. The confidentiality rule applies to "mediation consultations" which include meetings between the attorney and client to discuss mediation strategy. These meetings do not involve the mediator and the other mediation participants. The basis for the malpractice allegation in some of the lawsuits, including *Cassel*, is that the attorney and client agreed not to go beyond a particular settlement number when they were discussing mediation strategy and that the attorney breached this agreement. If the confidentiality exception were limited to these conversations, there would be no need to call the other mediation participants as witnesses in the malpractice suit and the other parties to the settlement would indeed buy peace. The negative side of this proposal is that it is an exception to confidentiality, albeit a small one, and there is the risk of further exceptions.

3. Limit the exception to State Bar disciplinary proceedings. This exception would resolve the issue of lack of punishment for attorneys who commit malpractice. It also would probably reduce malpractice claims by clients who are simply sore losers. The negative side of the proposal that it does not eliminate the risk of further testifying by the other mediation participants.

II. MEDIATOR MALPRACTICE

a. Background

The exception to confidentiality proposed by the Commission also applies to lawsuits against attorney mediators alleging malpractice. Yet there has been little evidence presented to the Commission indicating that there is a strong risk that attorney mediators engage in malpractice. The evidence presented to the Commission has either been anecdotal or is not actual evidence of malpractice. In addition, Evidence Code 703.5 bars testimony by mediators in civil proceedings. The undersigned assumes therefore that it also the Commission's intent to recommend an amendment to Section 703.5 by allowing such testimony where the mediator is a defendant.

b. Questions raised by the proposal

Why is the exception limited to attorney mediators? Assuming that there is a problem involving mediator malpractice, is there any evidence that attorney mediators are more prone to commit malpractice than non-attorney mediators? Perhaps the reason for the different treatment is that attorney mediators are subject to discipline by the State Bar and non-attorney mediators are not. But non-attorney mediators are as subject to civil actions as attorney mediators. There is no rationale for this difference.

What is an attorney mediator? A member of the State Bar is obviously an attorney mediator. What about a mediator who is not a member of the State Bar but who is admitted in another jurisdiction? What about a mediator who is disbarred or who has voluntarily resigned from the State Bar? The attorney skills of such a mediator is not sucked out of him or her merely because the mediator is no longer a Bar member. Ironically, if the rule is limited to members of the State Bar, then attorneys who are in good standing with the State Bar can be sued for mediator malpractice, but attorneys who have been disbarred cannot.

What is the standard for commission of malpractice? There is a standard to determine attorney malpractice, but what is the standard to determine mediator malpractice? For example, if the allegation is that the mediator's malpractice resulted in an unfavorable settlement for a party, how does the mediator know that the settlement was unfavorable? Mediators, unlike attorneys, do not know all of the facts surrounding the dispute and only know what the parties choose to tell them. The parties rarely tell mediators what their bottom or top line is and when they do, the mediator is generally justified in not believing them and treating the statement as a negotiating ploy.

c. The outcome if the proposal is adopted

Mediators are likely to be sued when a party believes that a settlement was unfavorable. Mediation malpractice suits are almost always based on an allegation that a settlement that the plaintiff was unwilling to accept was imposed upon him or her. In the limited number of cases that have alleged mediation malpractice by attorneys, it is the attorney who allegedly forced the plaintiff to accept the unfavorable settlement. It will be a

small leap for the plaintiff to add the mediator to that mix. This is particularly so where the mediator's malpractice insurance policy would be an additional source for settlement funds.

There will be less mediators available for mediations. Mediation is not a lucrative practice. There are very few individuals who make a living from mediations alone. Most attorney mediators draw the bulk of their incomes from their law practice, their arbitration practice, or retirement income. Perhaps an attorney mediator who is retired from the practice of law could resign from the Bar, but there is no assurance that such an act would end the designation of "attorney mediator". More likely, individuals who earn a substantial portion of their incomes from other sources will choose not to practice mediation. This group probably constitutes the bulk of the mediation community.

Court connected mediations will end. Court connected mediation has been a major factor in the reduction of civil trials. The vast majority of mediators who conduct court connected mediations are attorneys. In most cases, they are pro bono. Even in the limited amount of courts where compensation is paid to the mediator, it is normally below market rate. There will be no incentive for an attorney to act as a mediator in a court connected matter when he or she is not paid and runs the risk of being sued for malpractice.

III. CONCLUSION

Mediation is a worthy endeavor. It reduces the number of civil trials. It saves time and energy for parties because they don't have to undergo the agony and expense of trials. Most importantly, it has enabled parties to settle disputes on their own terms, rather than terms determined by a judge or jury. Confidentiality has been the mainstay of mediation. Mediation would not be as successful as it has been without it. Although attorney malpractice has occurred during the course of some mediations, the practice has not been rampant enough to damage or destroy confidentiality so that parties who merely allege (not prove) that they are victims of attorney mediation malpractice can proceed with their lawsuits.

The Commission's recommendations should be withdrawn.

very truly yours,

A handwritten signature in black ink, appearing to read "Paul Dubow". The signature is written in a cursive, flowing style.

Paul J. Dubow

EMAIL FROM BRUCE EDWARDS (9/17/15)

Re: August 7th decision to draft legislation impacting mediation confidentiality

Dear Ms Gaal. I am the immediate past Chairman of the Board of Jams, the largest provider of commercial mediation services in the United States and a full time mediator with over thirty years of daily mediation experience. While I am not writing in any official capacity on behalf of Jams, I am urging your Commission to reconsider its August 7th recommendation to draft legislation impacting confidentiality in the mediation process. Some background. When I started the first commercial mediation company in California using attorney mediators, our business plan was to someday get the court system to see the value of the mediation process. A centerpiece of this process was, and remains, the opportunity for each participant to be heard in a confidential environment, free from the potential repercussions of traditional litigation. The goal is for parties, free to discuss a full range of issues, to work out their conflicts, with the assistance of the mediator, thus saving everyone involved, including the court system, tremendous amounts of time and money. To say the mediation process has been successful these past twenty five years would be a huge understatement. As I'm sure you are aware, all law schools now teach mediation, every court has a mandatory mediation program and thousands of conflicts are resolved each year that would otherwise require increasingly scarce judicial resources. Our company alone resolved over 14,000 disputes last year nationwide. Just this past month I helped mediate a large construction case in Yolo county that would have occupied one of four civil departments for almost a full year. In that one instance it's fair to say that mediation freed up approximately 25% of the judicial resources in that county's civil court system for the next year. These results could not be achieved except for the confidentiality protection afforded to participants.

I've never written a letter or email to a legislator on any matter involving proposed legislation. I am compelled to act now because I'm very afraid that your pending actions will emasculate a process that has provided tremendous benefit to individuals, organizations and the court system, all for no persuasive reason. In over six thousand mediations I have been involved with I have never seen the possible benefit to someone looking to breach the confidentiality protection currently afforded. I can see obvious reasons why one might use these arguments as pretext for all sorts of strategic advantage but this shouldn't justify revising current confidentiality protections .

In life we often have to trust others with more experience to help us get things right. As a pioneer in this industry with more mediation and teaching experience than I need to recount, let me simply say, you are in grave danger of getting it wrong. I would counsel more reflection and an industry led dialogue on how to manage whatever legitimate interests need to be addressed without throwing the baby out with the bathwater.

Let's focus on the bigger picture for a moment. We can all agree that we live in a world with increasing stressors and conflict, many of which already escalate all too readily to violence. Even those that find their way into our legal system are further delayed in an environment of diminishing judicial resources. We desperately need any and all processes that encourage dialogue, find compromise and ultimately resolve conflict. To undermine one of the most successful processes developed in recent times ostensibly to deal with a narrow and otherwise manageable issue makes no sense.

If you or others on the Commission would like to understand more about the potential consequences of your pending legislative efforts I would gladly volunteer my time to help you get it right. In the meantime please do no legislative harm to the confidentiality protections currently afforded those in desperate need of dispute resolution processes.

Bruce Edwards

**EMAIL FROM JACK GOETZ AND JENNIFER KALFSBEEK-GOETZ
(9/18/15)**

Re: California Law Revision Commission Study

Dear Ms. Gaal:

We agree, in principle, with the work of the CLRC. We do not read any of the carefully orchestrated objections to the CLRC's suggested approach to deal effectively with Nancy Yeend's primary point, that the informed consent is missing as mediation is currently practiced. Disputants have legal rights in the ordinary course of being a citizen that are somehow abrogated once they enter the mediation process. It is our belief that the abrogation that currently exists is an unintended consequence of the interpretation of California's blanket mediation confidentiality exception. While confidentiality in mediation may be vital, there is no evidence to suggest (in the jurisdictions that have adopted the UMA) that the exceptions the CLRC is recommending would make anyone less candid in mediation than they are currently. In sum, the thoroughness of the CLRC research, and the thoughtfulness of the approach, reflect tremendous effort and have resulted in some long overdue suggested changes that will likely correct some of the unfortunate unintended consequences of the current law surrounding mediator confidentiality.

However, we would encourage the CLRC to consider changing the recommendation to make all mediators professionally accountable for their mediation practice, and **not** propose revisions to the law that single out attorneys in their role as mediator. We do recognize that the CLRC believes that its scope limits its ability to propose changes that extend beyond members of the bar; as it stated to us in its prior comments (Memorandum 2014-46), "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.**" Nevertheless, the CLRC did an extensive environmental scan and the exception it is carving solely for attorneys functioning as mediators in contrast to all mediators did not, to our knowledge, surface in any other jurisdiction. By approaching it this way, the CLRC may in fact be dipping into an area it sought not to do, de facto exercising influence over the composition of entrants into the field of mediation. The unintended consequences of the proposed changes in their current form would require attorney mediators to consider whether they want to work in a field where they are disproportionately accountable relative to their non-attorney counterparts. Practicing fulltime attorney mediators would have to consider the value of their continued bar membership in relation to their current dispute resolution practice; some may choose to discontinue their bar membership. Alternatively, part-time attorney mediators may choose to stop participating as attorney mediators because of the accountability imposed on them that is not imposed on other non-attorney mediators. If the CLRC chooses to

review this, it may find that the best approach may be one such as exists in the UMA in which the exceptions to confidentiality apply when the ethical conduct of any mediator is questioned.

Thus, we support the CLRC's continued efforts to improve California law and appreciate the Commission's continued openness to public comment. However, we suggest that by proverbially "plugging the hole in the dam" on the current issue, the current suggested approach may be unintentionally creating another unintended hole in the dam elsewhere. Thank you again for considering our input.

Regards,

Jack R. Goetz, Esq., M.B.A., Ph.D.
USC Gould School of Law
Consultant on ADR Programs

and

Jennifer Kalfsbeek-Goetz, Ph.D.
Moorpark College
Dean of Student Learning
Business, Science, Child Development
& Distance Education

EMAIL FROM DAVID KARP (9/25/15)

Re: Study K-402

California Law Revision Commission
c/o Ms. Barbara Gaal, Chief Deputy Counsel

I oppose the Commission's August 7th decision to draft recommended legislation, removing the current confidentiality protections, when a mediation participant alleges lawyer misconduct. I believe that any settlements reached in mediation could then be undermined, which, to me, means that no settlements can be reached in mediation. People will shy away from mediation if there is no protected candor. Mediation will become useless. What is the good of that?

Also, what is the basis for carving out an exception to mediation confidentiality vis-a-vis attorney-mediators? To my recollection, *Cassel v. Superior Court*, 51 Cal. 4th 113 (Cal. 2011) had nothing to do with any alleged mediator conduct. The mediator wasn't even present in the private caucuses between client and lawyer that were at issue in that case if I remember correctly.

To me, all of this appears to be a knee-jerk overreaction to *Cassel*.

Dozens of alternative solutions have been suggested to the Commission to address the alleged problem without removing current confidentiality protections. I request you pursue these instead.

For thirty years the current right to choose confidential mediation — and also to opt out of it — has served the people and courts of California extremely well. Removing this right is a very radical change which should require solid evidence establishing a need. Is there any? I doubt it. Personally, I've never seen such a need in the 900+ mediations I have conducted in 11 years of mediation practice.

I urge you not to turn your back on the Commission's own 1996 statement recommending our current statutory protections be enacted — "All persons attending a mediation, parties as well as nonparties, should be able to speak frankly, without fear of having their words turned against them."

Thank you for your attention to the foregoing.

Very truly yours,

David I. Karp

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EMAIL FROM PHYLLIS POLLACK (9/15/15, 2:52 P.M.)

Re: objections to proposals of CLRC re study k-402

Dear Ms. Gaal:

I post a blog each Friday about issues involving mediation. The following will post this Friday- September 18, 2015. Please share my views with the commission.

Second Thoughts on Mediation Confidentiality

Recently, I posted a blog about the August 2015 meeting of the California Law Revision Commission (CLRC) in which as part of its study on the “Relationship between Mediation Confidentiality and Attorney Malpractice and Other Misconduct” (Study K-402), the Commission requested that Staff Counsel draft legislation to include exceptions to mediation confidentiality. Specifically, and in pertinent part, those draft minutes provide:

General Concept

The Commission directed the staff to begin the process of preparing a draft of a tentative recommendation that would propose an exception to the mediation confidentiality statutes (Evid. Code §§ 1115-1128) to address “attorney malpractice and other misconduct.” (Commissioner King voted against this decision.)

Types of Misconduct to Cover

The proposed new exception should apply to alleged misconduct of an attorney or an attorney-mediator.

The proposed new exception should only apply to alleged misconduct in a professional capacity.

The proposed new exception should apply regardless of whether the alleged misconduct occurred during a mediation.

Types of Proceedings in Which the Exception Would Apply

The proposed new exception should apply in the following

(1) A disciplinary proceeding against an attorney for alleged misconduct while acting as an attorney.

(2) A disciplinary proceeding against an attorney for alleged misconduct while acting as an attorney-mediator.

(3) *A malpractice case against an attorney for conduct in the role of an attorney.*

(4) *A malpractice case against an attorney for conduct in the role of attorney-mediator. (Commissioner Miller-O'Brien abstained from this decision.)....*

Draft Minutes • August 7, 2015

When I read these minutes initially, I assumed (erroneously) that the exception would apply to all mediators — attorneys and non-attorneys alike. Only after some discussion with my colleagues and a very careful re-reading of the above, did I realize that the ONLY mediators who will be affected by these proposals are attorneys. Those mediators who are NOT attorneys will be completely unaffected. Mediation confidentiality as it exists today in California under *Cassel v Superior Court* (2011) 51 Cal 4th 113 and its predecessors will remain absolute and unequivocal in those mediations being conducted by a mediator who is NOT an attorney. The rules as we know them today will apply: what goes on in mediation stays in mediation, no matter what.

However, if the mediator is also an attorney, then not only will the attorneys who are representing the parties be subject both to discipline by the state bar and possible civil litigation but so will be the mediator! The exceptions to mediation confidentiality will apply both to the attorney representing a party and to the mediator.

This means that parties who wish to mediate will now have a new option: do they use a mediator who is not an attorney so that the absolute cover of mediation confidentiality remains intact or do they use a mediator who happens to be an attorney thereby — depending on the outcome of the mediation — possibly opening themselves (as well as the mediator!) up to possible discipline action and civil suits?

With this new option available, will parties tend to use one category of these mediators over another? I do not know.

The proposal also raises an oxymoron. While it says that that the proposed new exception will “...only apply to alleged misconduct in a professional capacity”, most mediators do not consider themselves practicing law while mediating. In fact, as a neutral, they should not be giving legal advice! As the California Rules of Professional Conduct involve mostly actions taken in the practice of law (except for moral turpitude) — what disciplinary violation is at issue? Breach of fiduciary duty? To whom? Lack of competency? To whom? Representing adverse interests? It is far from clear what the CLRC has in mind!

The CLRC has been studying this matter for three years. Throughout that period, it has been my impression (perhaps wrongly!) that it was studying exceptions to mediation confidentiality only with respect to attorneys representing parties; and not to the mediator. Both the initial draft bill (AB 2025) introduced into the legislature and then its amendment referring the matter to the CLRC seemed to indicate that it was the attorneys representing the parties that were to be the focus.

Evidently, I was wrong. For those of you who hold the same impression I did, I urge you to send your comments to Barbara Gaal at bgaal@clrc.ca.gov. The next meeting of the commission is October 8, 2015 in Davis, California.

... Just something to think about.

Thank you,

Phyllis G. Pollack

Phyllis G. Pollack

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EMAIL FROM PHYLLIS POLLACK (9/15/15, 6:09 P.M.)

Re: objections to proposals of CLRC re study k-402

Dear Ms. Gaal;

Subsequent to my e mail to you of this morning, I have reviewed Memorandum 2015-46 which has helped clarify my thinking.

The issue as I pointed out earlier is disparate treatment between mediators who are attorneys and those who are not attorneys. This unequal treatment raises its own issues. For example, suppose the mediator is NOT an attorney but the mediation is being held with parties that are represented by counsel. As the mediator is not an attorney — does the absolute cover of mediation confidentiality apply so that the attorneys are protected? Or, are the attorneys subject to the exceptions but the mediator remains protected and so cannot be subpoenaed et cetera. Or, suppose, no one attending the mediation is represented by counsel and the mediator is not an attorney. Does this mean that none of the proposals by the CLRC applies such that this mediation is confidential in the strictest sense as our Supreme Court has determined? Or, suppose only one of the parties is represented by counsel and the mediator is an attorney? Again, is there confidentiality or not, and to what extent? Suppose the same example but the mediator is not an attorney? Again — what would be the rule and the exception?

As you can see, this proposal will create more problems than it will solve... and a lot of litigation!

Thank you for your anticipated review and consideration of both this e mail and the one I sent this morning.

Sincerely,

Phyllis G. Pollack

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EMAIL FROM MARTIN QUINN (9/29/15)

Re: Mediation Confidentiality — Study K-402

Dear Ms. Gaal, I will keep this short and to the point since you have to read a lot of words on this topic. I've been a mediator for 20 years at JAMS, and taught mediation for 9 years at Hastings and Berkeley Law. So I have the perspectives of both a mediator and part-time academic. I think the Commission's recommendation to dispense with confidentiality in situations where a party alleges attorney or mediator misconduct is well-intentioned but misguided.

This is not an easy issue. The case law that led up to this recommendation exemplifies the maxim that "Hard cases make bad law." They were cases in which the clients seemed dreadfully disadvantaged in not being able to introduce evidence of what was said and done during the mediations. The Commission's desire to rectify this unfairness is understandable. Unfortunately, I strongly believe that changing the law in this way will aid a few disgruntled clients, but imperil the efficacy of mediations for thousands. I understand that California's mediation law is highly protective of confidentiality, and that there is a different way to run a railroad. The Uniform Mediation Act, Section 6, allows for several exceptions, and the world has not come to an end as a result. So this is a tough issue, and a balancing act. But on balance, after due consideration, I believe strongly that the Commission is on the wrong track, and that its chairman's dissent got it right. While it would be nice to believe that all complaints against lawyers and mediators would be well-intentioned and grounded in solid facts and legal merit, that just isn't so. It is far too easy to file a complaint with the State Bar or a complaint in court simply because someone has cold feet about the settlement they just agreed to, or is disgruntled because they failed to obtain one. If this legislation passes, I will have to inform parties and counsel not as I do now that everything is confidential, but instead that everything is confidential unless you sue me or your lawyer. That is not a good start to a mediation, nor is it a helpful seed to plant in their heads.

Unintended consequences have been the downfall of many a well-motivated effort to fix a wrong. Let us not repeat that here in California, where we have a mediation practice that is the envy of the nation, and indeed the world. If it ain't broke, don't fix it.

Thank you for your consideration.

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EMAIL FROM SHAWN SKILLIN (9/16/15)

Re: Mediator Confidentiality

California Law Revision Commission
c/o Ms. Barbara Gaal, Chief Deputy Counsel

Re Study K-402

I oppose the Commission's August 7th decision to draft recommended legislation removing our current confidentiality protections when a mediation participant alleges lawyer misconduct. I will oppose this legislation if it goes to the Legislature and will urge organizations of which I'm a member to oppose it.

Litigants should have an avenue in which they can explore settlement, be frank so as to likely be more successful at settlement and not be worried that their efforts to settle can later be used against them. Attorney's likewise should be able to represent their clients in mediation and assist them in exploring strategies that can lead to settlement without being concerned that advice appropriate under mediation conditions, can later be used against them in a malpractice action. Our current ethical standards require us to advise clients on alternative means to settle their cases and manage costs. With this legislation, would mediation be an option that would appeal to attorneys or clients? Certainly, it would be less desirable.

Mediated settlements often come about after discussion of issues that would be inadmissible and prejudicial in court. For instance, a party may make an admission, or make an apology in order to move toward settlement. An attorney would not advise that in another setting, but in mediation it may be appropriate. The "issue" isn't always the legal issue in a case. The "issue" is often the underlying values, interests and emotions of the clients. These issues are not dealt with well in court. Yet they are the very thing blocking settlement. Attorney's may advise a client to take a settlement less favorable than that which could be achieved in court, simply because of the time, cost, unpredictability of outcome and emotional strain the client would experience in litigation.

Under the proposed legislation, all a client would later have to do to open up confidentiality is to allege malpractice. The confidentiality, is often what drives litigants to mediation. Perhaps there are facts in the case they would rather not have be made public, drinking, drugs, sexual assault, other abuse, trade secrets, poor investments, bad business dealings, all of which could affect their lives in other areas. A settlement is reached and later the other side wants the truth to come out and bingo, lets allege attorney misconduct against one of the lawyers in the case. The settlement would stand, the lawyer faces the misconduct charges, the unhappy litigant exposes the other litigant by making this collateral attack. Now no one is happy. What exactly is now the advantage of mediation?

Without mediation as a viable option our courts will be even more severely overcrowded. Especially in family law.

Not all mediators are attorneys. I practice in Family Law. Many mediators are therapists or financial advisors. Those mediators would not be affected. Yet attorney mediators who act as the mediator are subject to attack for malpractice. There are bad lawyers out there, there are bad mediators out there, there are some very difficult clients out there. Clients who are frequent flyers in our court system, who blame others for everything, the lawyers get it wrong, the judge gets it wrong, the court of appeals gets it wrong etc. Does protecting the consumer from a bad attorney mediator really protect them? It doesn't protect them from bad non-attorney mediators. It doesn't protect them from the former attorney who goes inactive to keep mediating and avoid the potential malpractice issues under the new proposed rules.

Frankly without the confidentiality, mediation will seem much less desirable to the litigants, the attorneys who represent clients in mediation, and the attorneys who act as the mediators. All clients would have to be advised that discussions in mediation are confidential as long as no one alleges malpractice. If they do, no confidentiality. You are stuck with your bad agreement, but you can sue your lawyer. All your dirty laundry will still get aired in public.

If we are interested in protecting the consumer, how about regulating mediators? Lawyers and non-lawyers alike. Let's require the mediators to disclose any conflicts, to explain confidentiality, to require the clients to consult with independent counsel prior to signing any agreement, to give the clients a basic explanation of their basic rights under the law. Let's require mediators to understand the area of the law they mediate in. For example, family law mediators need to be family law attorney's with 5 years of experience. Mediators should be required to attend a minimum 40 hour course on mediation with additional periodic CE required. Non-attorney mediators should be required to send clients to an actual attorney for all legal documents and paperwork.

Let's not throw out the baby with the bath water. There is a better solution.

Shawn D. Skillin

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EMAIL FROM JILL SWITZER (9/8/15)

Dear Ms. Gaal:

I am a full time attorney mediator; while I am affiliated with ARC, Alternative Resolution Centers, this email represents my views only and not the views of ARC or any other organization with which I may be affiliated.

I have been an active member of the State Bar of California for almost forty years. I have been involved in mediation for more than twenty years, first as an advocate and now as a mediator. Every case that I handled as an advocate resolved at mediation; every case that I have handled as a mediator has resolved either at mediation or thereafter, with mediation serving as the catalyst for eventual resolution. Mediation confidentiality has been essential to the resolution process.

I have a number of comments and questions about the Commission's proposal:

1. The general concept is to propose an exception to the mediation confidentiality statutes that would address "attorney malpractice and other misconduct." What other misconduct does this contemplate? What would that be? Since the attorney mediator is not acting as a lawyer for purposes of conducting the mediation, .e.g not giving legal advice, there's no attorney-client relationship, what would the Commission see as misconduct by the attorney mediator?
2. The exception should apply "...regardless of whether the alleged misconduct occurred during a mediation." So, does this mean that it would apply to the convening stage, any/all pre and or post mediation communications, telephone calls, etc.? How would that even arise, especially since the clients are not involved in the convening, the pre/post mediation communications that the lawyers and mediators may have?
3. I carry mediator malpractice insurance (in an abundance of caution), which, right now, is very reasonable because mediators don't get sued. That will certainly change. Rates will go up and if mediators are indeed brought into litigation as defendants or cross-defendants, the rates may well skyrocket. So, I will have to raise my rates to cover the increased insurance costs. Great, try explaining that to parties and counsel who think my rates are too high as they are.
4. What if I have insurance and the defendant lawyer doesn't? On the deep pocket theory, plaintiff's counsel will either sue me at the outset, or the defendant will cross-complain against me for indemnity. I thus become the "deep pocket." Will I need to ask the counsel participating in the mediation whether he/she carries insurance? Should I ask for a certificate of insurance to satisfy that inquiry? Since malpractice insurance is on a "claims made" basis, what if the attorney has insurance at the time of the mediation, but does not have it at the time the claim is made? What if my carrier decides to settle based

on nuisance value, etc., costs of defense, etc? I have a deductible I have to pay, regardless of whether I'm in for a penny or in for a pound in the litigation.

Putting the mediator in the mix is going to prompt some mediators, such as me, to start looking for something else to do. I'm not going to go bare, but I'm also not going to be the "fall gal" for an attorney's alleged malpractice. I refuse to be a guarantor.

5. Even if I know nothing, I wasn't in any caucuses where counsel and client were discussing the pros and cons of resolution, which is where the claimed malpractice occurred, I'm going to get dragged in. I am going to have to prove a negative. No plaintiff's counsel is necessarily going to take my word that I wasn't present without my being deposed. Unless and until the plaintiff's counsel then decides that there's "no there there," and defense counsel sees that there is no basis for a cross-complaint against me, I'm stuck.

6. Whose job will it be to advise the clients that there's no mediation confidentiality? Shouldn't that be the attorneys' job? If they don't advise in advance of the mediation, does it then become my job to advise the clients in the mediation that there's no confidentiality? Do I demand proof from the attorneys that they have so advised? How many cases would settle without mediation confidentiality?

7. After the mediation, unless I'm continuing my efforts to resolve the matter, I shred all notes, briefs, and/or any correspondence post-mediation. If there's now the possibility of being sued, how long do I have to keep those? Do I have to keep them at least one year post legal malpractice possibility? When does that statute start running? If I don't, am I liable for spoliation? How do I determine whether I think the resolution (or non-resolution as the case may be) may lead to a malpractice claim and thus require document retention?

8. This proposal is only going to increase litigation and its attendant costs, which is what mediation is supposed to alleviate. Mediation is a voluntary process, so the parties can leave at any time, and I've had that happen. Mediation is supposed to be a way to resolve disputes in an efficient, cost-effective manner. Why is there the assumption that the client got hosed by its lawyer in mediation and was forced to settle? There are going to be many cases of "settlor's remorse," clients who think that they can leverage a better deal by suing for malpractice.

9. If we lose mediation confidentiality, then there's no point to mediating. Just have everything handled as an early settlement conference, MSC, or ENE by a judicial officer and ditch mediation altogether. Given the sorry financial state of the courts these days, I'm sure that they'll be delighted to have even more work than they already have.

This proposal takes the sledgehammer to the gnat approach. If the clients don't want to be bound by confidentiality and thus retain the option of a potential legal malpractice claim, then they shouldn't mediate, but please don't eviscerate what works for a great many to satisfy just a few. I urge the Commission to rethink its proposal and both the unintended consequences and collateral damage it will cause.

Should you have any questions or comments, please do not hesitate to contact me. Thank you for your consideration.

Jill Switzer

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EMAIL FROM GAYLE TAMLER (9/17/15)

Re: Mediation Confidentiality

TO WHOM IT MAY CONCERN:

It is my understanding that on August 7, 2015, the California Law Revision Commission voted by majority to recommend a law which will essentially destroy mediation and additionally swamp our overburdened courts with many new lawsuits. Based on an allegation of mere misconduct, mediation confidentiality will be lost and every mediation statement and document could be discovered and become admissible evidence. Furthermore under this recommended law, anyone suing a lawyer who was involved in the mediation as well as the lawyer accused of wrong-doing can depose all mediation participants and subpoena mediation documents for evidence. These actions would totally eviscerate the confidentiality statutes which protect the mediation process to ensure open and candid proceedings can take place to resolve legal matters.

By taking away these protections, courts will become burdened by a new load of “follow-up” mediation lawsuits and mediation as we know it will not be used as to resolve disputes due to the real threat of a breach of confidentiality. In fact this new proposal may be viewed as an opportunity to unwind what was accomplished in mediation so the parties may have another “bite at the apple”.

I urge the Commission to rethink its position and reject this draft proposal.

Sincerely,

Gayle M. Tamler

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