

Memorandum 2015-55

**Relationship Between Mediation Confidentiality and Attorney Malpractice and Other Misconduct: *In Camera* Screening Process**

In this study of the relationship between mediation confidentiality and attorney malpractice and other misconduct, the Commission is in the process of preparing a tentative recommendation, which it will widely circulate for comment. In August and again in October, the Commission decided that the tentative recommendation should “propose an exception to the mediation confidentiality statutes (Evid. Code §§ 1115-1128) to address ‘attorney malpractice and other misconduct.’”<sup>1</sup> The Commission also made a number of key decisions about how to draft the proposed new exception. Among other things, the Commission tentatively decided that the exception should utilize an *in camera* screening process.<sup>2</sup> The Commission has not yet fleshed out any details of the *in camera* screening process.<sup>3</sup> This memorandum addresses that matter.

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The following communication is attached as an Exhibit:

- Exhibit p.*
- Lee Blackman, Rolling Hills Estates (10/30/15) ..... 1

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1. See Minutes (Aug. 7, 2015), p. 5; Draft Minutes (Oct. 8, 2015), p. 4.  
 Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission’s website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission’s staff, through the website or otherwise.

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

2. See Minutes (Aug. 7, 2015), p. 5.  
 3. See Draft Minutes (Oct. 8, 2015), p. 6.

## CONTOURS OF THE PROPOSED NEW EXCEPTION

In considering how to craft an *in camera* screening process for the Commission's proposed new exception to the mediation confidentiality statutes, it is important to bear in mind what the Commission has already decided about the contours of that exception. To date, the Commission has tentatively decided the following points:

- The exception should “only apply to alleged misconduct of an attorney acting as an advocate, not to alleged misconduct of an attorney-mediator.”<sup>4</sup>
- The exception “should only apply to evidence of misconduct that allegedly occurred in the context of a mediation.”<sup>5</sup>
- The exception “should only apply to alleged misconduct in a professional capacity.”<sup>6</sup>
- The exception should apply in a State Bar disciplinary proceeding and in a legal malpractice case. It should not apply in a proceeding relating to enforcement of a mediated settlement agreement.<sup>7</sup> The Commission has not yet decided how to handle disputes relating to attorney-client fee agreements.<sup>8</sup>
- The exception “should apply evenhandedly, permitting use of mediation evidence to prove or disprove a claim.”<sup>9</sup> It does not appear necessary to expressly mention “reporting” of professional malfeasance in addition to “proving” and “disproving” such conduct.<sup>10</sup>
- The exception should “apply to all types of mediation evidence,” not just to a private attorney-client discussion or other particular type of mediation communication.<sup>11</sup>

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4. See Draft Minutes (Oct. 8, 2015), p. 4. For background on this decision, see Memorandum 2015-45, pp. 9-17.

5. See Draft Minutes (Oct. 8, 2015), p. 5. “This would include misconduct that allegedly occurred at *any* stage of the mediation process (encompassing the full span of mediation activities, such as a mediation consultation, a face-to-face mediation session, a mediation brief, a mediation-related phone call, or other mediation-related activity).” *Id.* (emphasis in original). The determinative factor is “whether the misconduct allegedly occurred in a mediation context, not the time and date of the alleged misconduct.” *Id.* For background on this decision, see Memorandum 2015-45, pp. 17-21.

6. See Minutes (Aug. 7, 2015), p. 5.

7. See Draft Minutes (Oct. 8, 2015), p. 5. For background on this decision, see Memorandum 2015-45, pp. 21-23, 25.

8. See Draft Minutes (Oct. 8, 2015), p. 5. For discussion of this matter, see Memorandum 2015-45, pp. 23-25.

9. See Minutes (Aug. 7, 2015), p. 5. For background on this decision, see Memorandum 2015-45, pp. 25-27.

10. See Draft Minutes (Oct. 8, 2015), pp. 5-6.

11. See Draft Minutes (Oct. 8, 2015), p. 6. For background on this decision, see Memorandum 2015-45, pp. 31-33.

- The exception should include a provision similar to Section 6(d) of the Uniform Mediation Act, which limits the extent of disclosure of mediation communications.<sup>12</sup>
- The exception should not specify any sanction to impose upon a party who (1) seeks admission or disclosure of mediation evidence pursuant to the exception, (2) causes others to incur expenses or expend effort in response, and (3) ultimately fails to prevail.<sup>13</sup> Existing law on the availability of sanctions and similar consequences should be sufficient.<sup>14</sup>
- The exception should expressly state that it is not intended to affect the extent to which a mediator is, or is not, immune from liability under existing law.<sup>15</sup>
- The exception should only apply to evidence from a mediation that commences after the exception becomes operative.<sup>16</sup>
- The exception should be placed in the Evidence Code.<sup>17</sup>
- The existing provision that makes a mediator incompetent to testify in most civil proceedings (Evidence Code Section 703.5) should remain as is.<sup>18</sup> Accordingly, the proposed new exception would not alter the circumstances under which a court must consider a mediator incompetent to testify. As under existing law, however, a mediator would not be incompetent to testify as to a statement or conduct that could “be the subject of investigation by the State Bar ....”<sup>19</sup>

#### IN CAMERA SCREENING IN GENERAL

Before proceeding further, it may be helpful to provide a little background on *in camera* screening in general. An *in camera* proceeding is one that the court conducts in private, either by (1) holding it in the judge’s chambers or other

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12. See Draft Minutes (Oct. 8, 2015), p. 6. Section 6(d) of the Uniform Mediation Act provides:

(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.

For background on this decision, see Memorandum 2015-45, p. 30.

13. See Draft Minutes (Oct. 8, 2015), pp. 6-7. For background on this decision, see Memorandum 2015-45, pp. 43-44.

14. See Draft Minutes (Oct. 8, 2015), pp. 6-7. For background on this decision, see Memorandum 2015-45, pp. 43-44.

15. See, e.g., Code Civ. Proc. §§ 128.5, 128.7.

16. See Draft Minutes (Oct. 8, 2015), p. 7. For background on this decision, see Memorandum 2015-45, p. 44.

17. See Minutes (Aug. 7, 2015), p. 6. For background on this decision, see Memorandum 2015-45, pp. 30-31.

18. See Draft Minutes (Oct. 8, 2015), p. 6. For background on this decision, see Memorandum 2015-45, pp. 41-43.

19. Evid. Code § 703.5.

private location or (2) excluding all spectators from the courtroom.<sup>20</sup> 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.<sup>21</sup> 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.<sup>22</sup> Importantly, courts have said that disclosing evidence at an *in camera* proceeding does not constitute a forfeiture of secrecy, a breach of a promise of confidentiality, or a waiver of any applicable privilege.<sup>23</sup>

“Courts have commonly used *in camera* proceedings as a procedural technique to balance a need for disclosure of relevant information in a court proceeding against a need to limit access to that information.”<sup>24</sup> For example, in *Kerr v. United States District Court*,<sup>25</sup> the United States Supreme Court considered prisoners’ discovery request for prisoner files, prison employee personnel files, and documents relating to prison operations. Prison officials claimed that “turning over the requested documents would result in substantial injury to the

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

21. See, e.g., *United States v. Zolin*, 491 U.S. 554, 572 (1989) (“In fashioning a standard for determining when *in camera* review is appropriate, we begin with the observation that ‘*in camera* inspection ... is a smaller intrusion upon the confidentiality of the attorney-client relationship than is public disclosure.”).

22. See, e.g., David Tomeo, *Be Careful What You Say: One Court’s Look at Confidentiality Under the Uniform Mediation Act*, 31 Seton Hall Legislative J. 65, 80 (2006) (Better course is to have witness testify “in the presence of the trial judge and counsel with the understanding that the mediation communications at issue will not be disclosed further unless authorized by the judge. The confidentiality of the disclosures can be preserved by sealing that portion of the record containing the testimony.”). In some circumstances, that type of approach may be statutorily mandated. See, e.g., Evid. Code § 915(b) (If judge determines that information presented at *in camera* hearing is privileged, “neither the judge nor any other person may ever disclose, without the consent of a person authorized to permit disclosure, what was disclosed in the course of the proceedings in chambers.”).

23. See, e.g., *Zolin*, 491 U.S. at 568-69 (“[D]isclosure of allegedly privileged materials to the district court for purposes of determining the merits of a claim of privilege does not have the legal effect of terminating the privilege.”); *Doe v. Tenet*, 329 F.3d 1135, 1148 n.8 (9th Cir. 2002) (“[A] court’s review of documents *in camera* here would not breach any obligation the Does may have to keep the agreement secret.”), *rev’d on other grounds*, 544 U.S. 1 (2005); *Burlington Northern Railroad Co. v. Omaha Public Power Dist.*, 888 F.2d 1228, 1232-33 (8th Cir. 1989) (contract reviewed *in camera* constitutes trade secret).

24. 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); see, e.g., *Ponte v. Real*, 471 U.S. 491, 514-15 (1985) (Marshall, J., dissenting) (“The *in camera* solution has been widely recognized as the appropriate response to a variety of analogous disclosure clashes involving individual rights and government secrecy needs.”); *Foltz v. State Farm Mutual Auto Ins. Co.*, 331 F.3d 1122, 1136 n.6 (9th Cir. 2003) (“[I]n *in camera* inspection is a commonly used procedural method for determining whether information should be protected or revealed to other parties.”).

25. 426 U.S. 394 (1976).

State's prison-parole system by *unnecessarily chilling the free and uninhibited exchange of ideas* between staff members within the system, by causing the unwarranted disclosure and consequent *drying up of confidential sources*, and in general by *unjustifiably compromising the confidentiality* of the system's records and personnel files."<sup>26</sup> The Court endorsed the compromise approach of having the trial judge conduct an *in camera* review of the materials before ruling on disclosure:

In light of the potential seriousness of these considerations and in light of the fact that the weight to be accorded them will inevitably vary with the nature of the specific documents in question, it would seem that an *in camera* review of the documents is a *relatively costless and eminently worthwhile method* to insure that the balance between [prison officials'] claims of irrelevance and privilege and [prisoners'] asserted need for the documents is correctly struck. Indeed, this Court has long held the view that *in camera* review is a highly appropriate and useful means of dealing with claims of governmental privilege.<sup>27</sup>

*In camera* proceedings can take many different forms, involving a variety of different procedural techniques. "[T]he nature of the *in camera* proceeding will depend on the particularities of the case."<sup>28</sup> In some situations, a court might take testimony *in camera*.<sup>29</sup> Other *in camera* hearings might not involve the taking of testimony. Sometimes a judge might conduct an *in camera* proceeding on an *ex parte* basis, meeting with one side alone in chambers. In other cases, an *in camera* hearing may involve broader participation: The proceeding could encompass (1) the judge and all counsel but not all of the parties,<sup>30</sup> (2) the judge and all counsel and all parties, (3) the judge, a witness, and some or all of the counsel and parties, (4) the judge, a witness, some or all of the counsel and parties, and one or more nonparties having a specific stake in the proceeding (such as a non-party whose personal records might be revealed), or (5) some other combination of participants. In some contexts, an *in camera* proceeding is conducted by a person other than the trial judge, such as a special master, discovery referee, or a judicial

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26. *Id.* at 405 (emphasis added; footnotes omitted).

27. *Id.* at 405-06 (emphasis added; footnote omitted).

28. Green, *supra* note 24, at 13 (Memorandum 2015-13, Exhibit p. 13).

29. See, e.g., *Rinaker v. Superior Court*, 62 Cal. App. 4th 155, 74 Cal. Rptr. 2d 464 (1998).

30. See, e.g., *United States v. Anderson*, 509 F.2d 724 (9th Cir. 1974) (In striking balance on disclosure of informant's identity when probable cause is in issue, "the trial judge, in the exercise of his discretion, can conduct an *in camera* hearing to which the defense counsel, but not the defendant, is admitted.").

officer who is not assigned to try the case.<sup>31</sup> Other specifics may vary as well; the concept allows for considerable flexibility.<sup>32</sup>

The context at hand is challenging, because the Commission's proposed new exception would only apply to "evidence of misconduct that allegedly occurred *in the context of a mediation.*"<sup>33</sup> The exception would not apply to mediation evidence that is relevant to proving or disproving an allegation that an attorney engaged in misconduct *outside the mediation context*. Thus, for example, the exception would apply to evidence that an attorney gave erroneous tax advice at a mediation session or made an unauthorized settlement offer in a mediation brief, but it would not apply to an attorney's admission during a mediation that he misappropriated client funds early in the litigation process, before the possibility of mediating was even discussed.

As the Commission discussed in October, misconduct *in the mediation context* presents the strongest case for creating a misconduct exception. In that situation, the existing mediation confidentiality statute "might not just hinder proof of misconduct; it might preclude such proof altogether."

When alleged misconduct is in the mediation context, however, *much, if not all, of the evidence bearing on the misconduct claim is likely to consist of mediation communications and mediation documents*. Thus, it is not just a matter of holding an *in camera* hearing with regard to the admissibility of a single piece of evidence. Rather, there will be *numerous* decisions to make regarding admissibility, discoverability, and disclosure of mediation communications and mediation documents, starting at the pleading stage and continuing through discovery and into trial.

For that reason, it might be necessary to use other judicial tools, not just *in camera* proceedings, to achieve the Commission's desired balance between the

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31. See, e.g., *In re Marriage of Decker*, 606 N.E.2d 1094, 1107 (Ill. 1992) ("Because of the inherent problem involved in a trial court's viewing information that may in fact be privileged, and then later ruling on an issue which the privileged information may affect, it would be prudent, where possible, to have another trial judge conduct the *in camera* inspection once the initial threshold has been met and the court has determined that an *in camera* inspection is proper.").

32. See, e.g., Green, *supra* note 24, at 13 (Memorandum 2015-13, Exhibit p. 13).

33. See Draft Minutes (Oct. 8, 2015), p 5 (emphasis added). "This would include misconduct that allegedly occurred at *any* stage of the mediation process (encompassing the full span of mediation activities, such as a mediation consultation, a face-to-face mediation session, a mediation brief, a mediation-related phone call, or other mediation-related activity)." *Id.* (emphasis in original). The determinative factor is "whether the misconduct allegedly occurred in a mediation context, not the time and date of the alleged misconduct." *Id.* For background on this decision, see Memorandum 2015-45, pp. 17-21.

policy interest in maintaining confidentiality and the competing interest in holding attorneys accountable for professional misconduct. In other situations involving large amounts of sensitive information, or sensitive information at the core of a dispute, courts have used a variety of techniques,<sup>34</sup> such as:

- Sealing court documents, including transcripts.<sup>35</sup>
- Issuance of protective orders restricting the dissemination of information.<sup>36</sup>
- Strict control over copies.<sup>37</sup>
- Redaction of information from documents<sup>38</sup> and allocation of the costs of redaction as appears appropriate in the circumstances at hand.<sup>39</sup>

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34. See generally *Webster v. Doe*, 486 U.S. 592, 604 (1988) (“the District Court has the latitude to control any discovery process which may be instituted so as to balance [the terminated CIA employee’s] constitutional claim against the extraordinary needs of the CIA for confidentiality and the protection of its methods, sources, and mission.”).

35. See, e.g., *United States v. Index Newspapers, LLC*, 766 F.3d 1072, 1095 (9th Cir. 2014) (“[I]f the record is sufficiently voluminous, the consequences of disclosure sufficiently grave or the risks of accidental disclosure sufficiently great, the balance may well tip in favor of keeping records sealed.”); *Guerra v. Board of Trustees*, 567 F.2d 352, 355 (9th Cir. 1977) (There are “alternatives to protect confidentiality such as ... sealing of records ....”); *Estate of Martin Luther King, Jr., Inc. v. CBS, Inc.*, 184 F. Supp. 2d 1353, 1367 (N.D. Ga. 2002) (“[T]he Estate’s interest in maintaining confidentiality trumps any public interest in open access to the information at issue, ... justifying the entry of a protective order sealing the deposition testimony from the public.”); *Los Angeles Times v. Superior Court*, 114 Cal. App. 4th 247, 251, 7 Cal. Rptr. 2d 524 (2003) (“W]e conclude that the motion to quash hearings, and the documents filed in connection therewith, should be closed and sealed *to the extent necessary to prevent disclosure of matters occurring before the grand jury.*” (Emphasis in original.)).

36. See, e.g., Evid. Code § 915(b)(4) (protective order limiting use and dissemination of trade secret); *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1982) (Where “a protective order is entered on a showing of good cause as required by Rule 26(c), is limited to the context of pretrial civil discovery, and does not restrict the dissemination of the information if gained from other sources, it does not offend the First Amendment.”); *Alderman v. United States*, 394 U.S. 165, 185 (1969) (If defendant and defense counsel are allowed to inspect surveillance materials, “the trial court can and should, where appropriate, place [them] under enforceable orders against unwarranted disclosure of the materials which they may be entitled to inspect.”) *Anderson*, 509 F.2d at 724 (If defense counsel attends *in camera* hearing on disclosure of informant’s identity when probable cause is in issue, “the district court can and should, when appropriate, place defense counsel under enforceable orders against unwarranted disclosure of the evidence that he has heard.”).

37. See, e.g., *Guerra*, 567 F.2d at 355.

38. See, e.g., *United States v. Business of the Custer Battlefield Museum*, 658 F.3d 1188, 1195 n.5 (9th Cir. 2011) (“In many cases, courts can accommodate ... concerns by redacting sensitive information rather than refusing to unseal the materials entirely.”); *Foltz*, 331 F.3d at 1138 (“On remand, we instruct the district court to redact identifying information from third-party medical and personnel records.”); *In re United States*, 872 F.2d 472, 478 (D.C. Cir. 1989) (Government’s concerns about national security were amply addressed through measures such as “mechanisms limiting the disclosure of certain documents, including redaction of names”); but see *Index Newspapers*, 766 F.3d at 1095 (“[E]ven seemingly innocuous information can be so entangled with secrets that redaction will not be effective.”); *People v. Jackson*, 128 Cal. App. 4th 1009, 1028, 27 Cal. Rptr. 3d 506 (2005) (“Attempts to redact portions of these documents would yield, at best, unintelligible paragraphs.”).

These are essentially compromise measures, means of providing some access to sensitive information for purposes of achieving justice in a pending suit, without affording full public disclosure. In some circumstances, however, the need for secrecy is so great that courts have said a claim cannot proceed.<sup>40</sup> Similarly, certain evidence may be so sensitive that it is improper for a court to jeopardize the policy objective underlying an evidentiary privilege “by insisting upon an examination of the evidence, *even by the judge alone, in chambers.*”<sup>41</sup> At the other end of the spectrum, courts have sometimes ordered disclosure of sensitive information, even when that step might have severe consequences, such as letting a dangerous criminal avoid prosecution.<sup>42</sup>

### EXISTING *IN CAMERA* APPROACHES

Courts across the country conduct *in camera* proceedings in many contexts. Among other things, California courts use *in camera* screening in specified circumstances to evaluate certain claims of privilege,<sup>43</sup> and to rule on a request

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39. See, e.g., *In re Gabapentin Patent Litigation*, 312 F. Supp. 2d 653, 668 (D. N.J. 2004) (“It is eminently reasonable that IPDA bear the costs of redaction given that the benefit of redaction, if any, would inure to IPDA.”).

40. See, e.g., *General Dynamics Corp. v. United States*, \_\_ U.S. \_\_, 131 S.Ct. 1900, 1909 (2011) (“We leave the parties where they are,” because “[b]oth parties — the Government no less than petitioners — must have assumed the risk that state secrets would prevent the adjudication of claims of inadequate performance” pursuant to contract to build stealth aircraft); *Tenet v. Doe*, 544 U.S. 1, 3, 11 (2005) (Court upholds longstanding rule “prohibiting suits against the Government based on covert espionage agreements” because “[t]he state secrets privilege and the more frequent use of *in camera* judicial proceedings simply cannot provide the absolute protection we found necessary in enunciating [that] rule.”).

41. *United States v. Reynolds*, 345 U.S.1, 10 (1952) (involving state secrets privilege, which promotes policy interest in national security); see also *Zolin*, 491 U.S. at 491 (“A blanket rule allowing *in camera* review as a tool for determining the applicability of the crime-fraud exception, ... would place the policy of protecting open and legitimate disclosure between attorneys and clients at undue risk.”).

42. See, e.g., *Alderman*, 394 U.S. at 184 (“It may be that the prospect of disclosure will compel the Government to dismiss some prosecutions in deference to national security or third-party interests. But this is a choice the Government concededly faces with respect to material which it has obtained illegally and which it admits, or which a judge would find, is arguably relevant to the evidence offered against the defendant.”).

43. See, e.g., Evid. Code § 915(b), which provides:

(b) When a court is ruling on a claim of privilege under Article 9 (commencing with Section 1040) of Chapter 4 (official information and identity of informer) or under Section 1060 (trade secret) or under subdivision (b) of Section 2018.030 of the Code of Civil Procedure (attorney work product) and is unable to do so without requiring disclosure of the information claimed to be privileged, the court may require the person from whom disclosure is sought or the person authorized to claim the privilege, or both, *to disclose the information in chambers out of the presence and hearing of all persons except the person authorized to claim the privilege and any other persons as the person authorized to claim the privilege is willing to have present.* If the judge determines that the information is privileged, neither



for personnel records of a peace officer or custodial officer (a “Pitchess motion”).<sup>44</sup> The United States Supreme Court has endorsed the use of *in camera* hearings in a number of situations, such as determining whether to apply the crime-fraud exception to the attorney-client privilege,<sup>45</sup> or determining whether to disclose the identity of a confidential informant.<sup>46</sup>

As discussed in Memorandum 2015-35, there is considerable scholarly support for the general concept of conducting an *in camera* hearing to assess the admissibility or discoverability of mediation evidence, at least in certain contexts.<sup>47</sup> The details of such an approach could vary widely.

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the judge nor any other person may ever disclose, without the consent of a person authorized to permit disclosure, what was disclosed in the course of the proceedings in chambers.

(Emphasis added.) See also Evid. Code §§ 1042 (procedure for *in camera* hearing on disclosure of identity of informant), 1061 (procedure for assertion of trade secret privilege); Code Civ. Proc. § 2018.060 (work product privilege and *in camera* hearings under *People v. Superior Court (Laff)*, 25 Cal. 4th 703 (2001)); Penal Code § 1524 (use of special master and *in camera* hearing to evaluate privilege claims with regard to material seized from lawyer, physician, psychotherapist, or member of clergy).

44. See Evid. Code § 1045(b); see also Evid. Code §§ 1043-1047.

45. See *United States v. Zolin*, 491 U.S. 554 (1989). For a discussion of *Zolin*, see Green, *supra* note 24, at 10-14 (Memorandum 2015-13, Exhibit pp. 10-14).

46. See *Roviaro v. United States*, 353 U.S. 53 (1956). For a discussion of *Roviaro*, see Green, *supra* note 24, at 14-16 (Memorandum 2015-13, Exhibit pp. 14-16).

47. See Samara Zimmerman, *Judges Gone Wild: Why Breaking Mediation Confidentiality Privilege for Acting in “Bad Faith” Should be Reevaluated in Court-Ordered Mandatory Mediation*, 11 *Cardozo J. Conflict Resol.* 353, 382 (2009) (proposing *in camera* approach for addressing claims of bad faith conduct in mediation); Sarah Rudolph Cole, *Secrecy and Transparency in Dispute Resolution, Protecting Confidentiality in Mediation: A Promise Unfulfilled?*, 54 *Kan. L. Rev.* 1419, 1456 (2006) (suggesting that “in camera hearing format” would be preferable to California’s strict approach to mediation confidentiality); Rebecca Hiers, *Navigating Mediation’s Uncharted Waters*, 57 *Rutgers L. Rev.* 531, 578 (2005) (“Establishment of a well-defined process for judicial review of mediated agreements, if challenged for duress, fraud, or other misconduct, ... could be very helpful. Such a process could ensure that such a review would be held *in camera* and also would allow the parties to request to have that record sealed, if appropriate.”); Maureen Weston, *Confidentiality’s Constitutionality: The Incursion on Judicial Powers to Regulate Party Conduct in Court-Connected Mediation*, 8 *Harv. Negotiation L. Rev.* 29, 78 (2003) (In determining whether party failed to mediate in good faith, judge could “minimize deleterious effects by adopting appropriate safeguards to shield [mediation] information from unnecessary public disclosure, such as an in camera sanctions hearing conducted by a judge who will not preside over the merits of the case.”); Ellen Deason, *Enforcing Mediated Settlement Agreements: Contract Law Collides With Confidentiality*, 35 *U.C. Davis L. Rev.* 33, 102 (2001) (Courts should implement balancing approach through “in camera methods, which can protect confidentiality while a court evaluates the need for mediation confidentiality in the world of contract doctrine.”); Scott Hughes, *The Uniform Mediation Act: To the Spoiled Go the Privileges*, 85 *Marq. L. Rev.* 9, 77 (2001) (“[P]rocedural step prior to accessing [mediation] testimony (such as an in camera hearing or sealed proceedings) is appropriate ....”); Alan Kirtley, *The Mediation Privilege’s Transition from Theory to Implementation: Designing a Mediation Privilege Standard to Protect Mediation Participants, the Process and the Public Interest*, *J. Disp. Resol.* 1, 51-52 (1995) (“By hearing the competing claims *in camera*, the court could preserve [mediation] confidentiality unless disclosure was held to be necessary and appropriate.”); but see Deason, *supra*, at 101 (“Not all commentators view the idea of a preliminary in camera examination favorably.”). See also Memorandum 2015-35, pp. 20, 21, 22-23, 34-36.

Several *in camera* approaches to mediation evidence already exist. Those approaches are described below.

### **Alabama Approach**

Alabama Civil Court Mediation Rule 11 says that “[a]ll information disclosed in the course of a mediation, including oral, documentary, or electronic information, shall be deemed confidential and shall not be divulged by anyone in attendance at the mediation ....”<sup>48</sup> That general rule is subject to several exceptions.<sup>49</sup> Of particular note, Rule 11(b)(3) states that the confidentiality provision does not apply:

- (i) to a communication made during a mediation that constitutes a threat to cause physical injury or unlawful property damage;
- (ii) to a party or mediator who uses or attempts to use the mediation to plan or to commit a crime; or
- (iii) to the extent necessary if a party to the mediation files a claim or complaint against a mediator or mediation program alleging professional misconduct by the mediator arising from the mediation.<sup>50</sup>

Rule 11 does not expressly refer to an *in camera* screening process, but the accompanying Comment does. It says that “[a]ny review of mediation proceedings as allowed under Rule 11(b)(3) should be conducted in an *in camera* hearing or by an *in camera* inspection.” Neither the Comment nor any other source we located provides further details regarding this *in camera* process. Consequently, Alabama’s approach does not provide much potential guidance.

### **Michigan Approach**

In Michigan, mediation communications “are confidential.”<sup>51</sup> With certain exceptions, they are not admissible or subject to discovery, and they may not be disclosed to anyone other than the mediation participants.<sup>52</sup>

One of the exceptions to mediation confidentiality is Michigan Court Rule 2.412(D)(12), which applies “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 ....” Under

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48. Ala. Civ. Ct. Mediation R. 11(a).

49. See Ala. Civ. Ct. Mediation R. 11(b).

50. Ala. Civ. Ct. Mediation R. 11(b)(3).

51. Mich. Ct. R. 2.412(C).

52. *Id.*

this exception, a court may permit disclosure of mediation communications in such a proceeding if it

finds, *after an in camera hearing*, that the party seeking discovery or the proponent of the evidence has shown

(a) that the evidence is not otherwise available, and

(b) that the need for the evidence substantially outweighs the interest in protecting confidentiality.<sup>53</sup>

Michigan thus uses an *in camera* screening process in which a court is to examine whether proffered or otherwise specified mediation communications constitute evidence that is “not otherwise available.” If the court finds that there are other means of proof, then the mediation communications must remain confidential. If the court finds that the mediation communications constitute evidence that “is not otherwise available,” then it must further find that “the need for the evidence *substantially outweighs* the interest in protecting confidentiality.”<sup>54</sup> Only then may the court permit disclosure of the mediation communications 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 ....”<sup>55</sup>

As currently conceptualized, the Commission’s proposed new exception to the mediation confidentiality statutes would not apply in the type of proceeding addressed in Michigan Court Rule 2.412(D)(12).<sup>56</sup> Still, the Commission might want to give some thought to Michigan’s requirements that (1) the evidence “is not otherwise available” and (2) “the need for the evidence *substantially outweighs* the interest in protecting confidentiality.”

Importantly, the Commission’s proposed new exception would only apply to evidence of attorney misconduct that allegedly occurred in the context of a mediation.<sup>57</sup> It is therefore likely that *some* mediation evidence would be necessary to prove or disprove the allegations.

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53. Mich. Ct. R. 2.412(D)(12) (emphasis added).

54. *Id.* (emphasis added).

55. *Id.*

56. See Draft Minutes (Oct. 8, 2015), p. 5. For background on this decision, see Memorandum 2015-45, pp. 21-23, 25.

57. See Draft Minutes (Oct. 8, 2015), p. 5. “This would include misconduct that allegedly occurred at *any* stage of the mediation process (encompassing the full span of mediation activities, such as a mediation consultation, a face-to-face mediation session, a mediation brief, a mediation-related phone call, or other mediation-related activity).” *Id.* (emphasis in original). The determinative factor is “whether the misconduct allegedly occurred in a mediation context, not the time and date of the alleged misconduct.” *Id.* For background on this decision, see Memorandum 2015-45, pp. 17-21.

That does not mean, however, that the two Michigan requirements discussed above would *necessarily* be met with regard to *every* mediation communication proffered under the Commission’s proposed new exception. Rather, a proffered mediation communication might pertain to a point that the proponent could prove through other means. For example, suppose a client alleges that his attorney gave him erroneous tax advice in a mediation. Suppose further that the client seeks to introduce a statement from a mediation brief relating to the cost basis for a particular stock investment. In that situation, other evidence almost certainly would be available to prove the cost basis; it would be wrong to say that evidence of the point in question “is not otherwise available.”

Similarly, a proffered mediation communication might be irrelevant to, or only marginally related to, the alleged misconduct. If so, there would be no need for the evidence that “substantially outweighs the interest in protecting confidentiality.”

### **New Mexico Approach**

In New Mexico, “all mediation communications are confidential, and not subject to disclosure and shall not be used as evidence in any proceeding.”<sup>58</sup> There are numerous exceptions to that general rule.<sup>59</sup>

Among other things, “[m]ediation 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.”<sup>60</sup> Like the Michigan provision discussed above, this New Mexico exception concerns the enforceability of a mediated settlement agreement, a situation in which the Commission’s proposed new California exception would not apply.

Nonetheless, the Commission might want to consider the two substantive requirements of New Mexico’s *in camera* approach. One of them is the identical to a Michigan requirement already discussed: the requirement that the proffered mediation evidence is “not otherwise available.”

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58. N.M. Stat. Ann. 44-7B-4.

59. See N.M. Stat. Ann. 44-7B-5.

60. N.M. Stat. Ann. 44-7B-5(B) (emphasis added). This statutory provision makes clear that nothing in it “shall require disclosure by a mediator of any matter related to mediation communications.” *Id.* Similarly, the Commission’s proposed new exception to California’s mediation confidentiality statutes would not alter the existing provision (Evid. Code § 703.5) under which a mediator is incompetent to testify in most civil proceedings. See Draft Minutes (Oct. 8, 2015), p. 6. For background on that decision, see Memorandum 2015-45, pp. 41-43.

The other requirement is simply a showing of “good cause.” The New Mexico statute does not define “good cause.” Presumably, the Legislature intended to let New Mexico’s courts flesh out that concept. In that respect, the statute is similar to many California statutes that include a “good cause” requirement.<sup>61</sup>

## **Texas Approach**

The Texas approach is worth a close look, because Texas courts have used *in camera* screening in much the same type of situation that the Commission is trying to address: professional misconduct in the mediation context. We first describe the statutory scheme, and then turn to the Texas case law on *in camera* screening of mediation communications. Lastly, we discuss some possible lessons from the Texas approach.

### *Statutory Scheme*

Texas has two key statutes on mediation confidentiality. Section 154.053 of the Texas Civil Practice and Remedies Code establishes a broad rule regarding the confidentiality of an alternative dispute resolution (“ADR”) proceeding. It is subject to a single express exception, which relates to mandated reporting of specified abuse, exploitation, or neglect.<sup>62</sup>

The other key statute is Section 154.073 of the Texas Civil Practice and Remedies Code. Like Section 154.053, it protects ADR communications, making them confidential, inadmissible, and protected from disclosure.<sup>63</sup> Unlike Section 154.053, it contains multiple exceptions.<sup>64</sup> The relationship between this section and Section 154.053 is not altogether clear.<sup>65</sup>

Among the exceptions to Section 154.073 is one that calls for *in camera* screening. Subdivision (e) provides:

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

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61. See, e.g., Code Civ. Proc. § 1054(a); Evid. Code § 1228.1(b); Prob. Code § 1051(b).

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

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

64. See Tex. Civ. Prac. & Rem. Code § 154.073(c)-(f).

65. See Eric Galton & Kimberlee Kovach, *Texas ADR: A Future So Bright, I Gotta Wear Shades*, 31 St. Mary’s L.J. 949, 967 (2000); see also Memorandum 2014-44, p. 5.

whether the communications or materials are subject to disclosure.<sup>66</sup>

Arkansas, Louisiana, and Mississippi have closely similar provisions that call for *in camera* screening of mediation communications.<sup>67</sup> Thus, Texas cases interpreting Section 154.073(e) might be influential not only in Texas, but also in those jurisdictions.

*Leading Texas Case Interpreting Section 154.073(e)*

As discussed at pages 7-15 of Memorandum 2014-44, the leading case interpreting Section 154.073(e) is *Avary v. Bank of America, N.A.*<sup>68</sup> In *Avary*, the guardian for two minor children (Avary) sued the bank that served as executor of their father's estate. On behalf of the minors, she brought claims for breach of fiduciary duty, negligence, fraud, and conspiracy, which allegedly occurred at a mediation. In particular, she claimed that the bank wrongfully rejected, and failed to properly disclose information about, a settlement offer made during the mediation, which would have provided more money to the minors than the offer it accepted. The bank moved for summary judgment, contending that Avary had no evidence to support the claims because all of the mediation communications were confidential under Section 154.073.

The trial court concluded that the bank's fiduciary obligations constituted a "legal requirement for disclosure," which conflicted with the confidentiality requirement of Section 154.073. Because of that conflict, the trial court "undertook the analysis under section 154.073(e), whether disclosure of the confidential communications was warranted under the facts and circumstances presented."<sup>69</sup> After conducting an *in camera* hearing in which he heard testimony from the bank's representative, the trial judge permitted some discovery of mediation evidence, but not as much as Avary requested. In particular, the trial judge ordered disclosure of the bank representative's *in camera* testimony, but he did not conduct an *in camera* hearing to determine the "facts, circumstances, and context" of anyone else's potential testimony, and he did not permit any other discovery regarding what occurred at the mediation.<sup>70</sup> Thereafter, he granted the bank's motion for summary judgment, and Avary appealed.

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66. Emphasis added.

67. Emphasis added.

68. See Ark. Code Ann. § 16-7-206(c); La. Rev. Stat. § 9:4112(D); Miss. Ct. Annexed Mediation R. VII(D).

69. *Id.* at 796.

70. *Id.* at 786.

In a lengthy opinion, the Texas Court of Appeals reversed and remanded. It found that there was “more than a scintilla of evidence” to support Avary’s claims for breach of fiduciary duty, negligence, and fraud, “even without further discovery of communications made at the mediation.”<sup>71</sup> Consequently, summary judgment on those claims was improper.<sup>72</sup>

With regard to the conspiracy claim, the trial record did not include sufficient evidence to support the claim.<sup>73</sup> The Court of Appeals thus concluded that “summary judgment on this cause of action was proper unless Avary should have been permitted to conduct further discovery.”

In determining whether further discovery was warranted, the Court of Appeals agreed with much of the trial court’s analysis regarding the mediation evidence. It said:

[B]ecause of the conflict between the Bank’s duty to disclose and the confidentiality provisions of section 154.073, the trial judge undertook the analysis under section 154.073(e), whether disclosure of the confidential communications was warranted under the facts and circumstances presented. The trial judge correctly concluded the Bank’s fiduciary obligations warranted disclosure of mediation communications under these circumstances.<sup>74</sup>

The Court of Appeals acknowledged that “confidentiality of communications is an important part of the statutory scheme of alternative dispute resolution,” and “[w]ithout a guarantee of confidentiality, parties may be reluctant to speak freely and address the heart of their dispute.”<sup>75</sup> The court also pointed out, however, that an executor’s fiduciary duty of disclosure is a “high duty” requiring full disclosure of all material facts that might affect the beneficiaries’ rights.<sup>76</sup> In addition, the court said there is an important public policy to preserve significant and well-established procedural and substantive rights.<sup>77</sup> In the circumstances before it, the Court of Appeals determined that the balance between the competing interests weighed in favor of disclosure.

It explained:

Here, the parties to the original litigation have peaceably resolved their dispute, as the ADR statute contemplates. Avary

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71. *Id.* at 791.

72. *Id.*

73. *Id.* at 793.

74. *Id.* at 796-97.

75. *Id.* at 797.

76. *Id.* at 796-97.

77. *Id.* at 799.

now seeks to prove a *new and independent tort* that she alleges occurred between her and her own fiduciary, the Bank, *during the course of the mediation proceeding*. She *does not* propose to discover evidence to allow her to obtain additional funds from the [mediation] defendants or to use mediation communications to establish any liability on their part after they have peaceably resolved their dispute. Instead, Avary proposes to offer the evidence in a *separate case against a separate party* to prove a claim that is *factually and legally unrelated* to the wrongful death and survival claims.<sup>78</sup>

The court further pointed out that Avary would not disturb the mediated settlement by pursuing her claim,<sup>79</sup> and “[s]ignificant substantive and procedural rights of Avary’s are implicated, including the opportunity to develop evidence of her claim and to submit contested fact issues to a judge or jury.”<sup>80</sup>

Although the Court of Appeals agreed with much of the trial judge’s analysis, it said he abused his discretion by only permitting discovery of mediation evidence from the bank’s representative. According to the Court of Appeals, the circumstances of the case did “not justify restricting discovery to a single witness who admittedly lacked knowledge of facts material to Avary’s claims.”<sup>81</sup> In its view, the trial judge should at least have conducted *in camera* proceedings regarding whether to allow additional discovery from different witnesses.<sup>82</sup>

The Court of Appeals recognized that conducting an *in camera* hearing with regard to each potential witness was a “potentially cumbersome” process.<sup>83</sup> It pointed out, however, that “convenience is secondary” given “the important considerations involved.”<sup>84</sup>

The Court of Appeals also provided some guidance regarding factors that the trial judge could consider at the *in camera* hearings on remand.<sup>85</sup> In particular, it suggested examining (1) whether a particular mediation participant had knowledge of facts relevant to the pending claims, and, if so, (2) whether that evidence was critical to the pending claims and (3) whether the evidence was protected by the attorney-client or work product privilege.<sup>86</sup> In addition, it said

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

79. *Id.* at 800.

80. *Id.*

81. *Id.* at 802.

82. *Id.*

83. *Id.* at 802.

84. *Id.*

85. *Id.* at 801.

86. *Id.* at 800-01.



the trial judge could (4) “weigh any potential harm to the mediation process by disclosure of communications the parties made under the expectation that they would remain confidential.”<sup>87</sup> The Court of Appeals explained that “[i]t is one thing to order discovery from a party alleged to have committed a tort during the mediation process; *it is another to reach across the mediation table to parties who have settled the claims against them.*”<sup>88</sup>

*Other Cases Interpreting Section 154.073(e)*

A few later cases follow *Avary*'s approach to mediation communications.<sup>89</sup> Some other Texas decisions distinguish *Avary*, making clear that the *Avary* approach only applies when a party seeks disclosure of mediation communications to prove or disprove a new and independent tort that allegedly occurred in a mediation, not when a party seeks such disclosure in connection with an attack on a mediated settlement.<sup>90</sup>

These subsequent cases do not shed much light on details of the *in camera* screening approach required by Section 154.073. Accordingly, they do not warrant further discussion here.

*Lessons From the Texas Approach*

Like the Commission's proposed attorney misconduct exception to California's mediation confidentiality statutes, the approach to mediation communications that the Texas Court of Appeals used in *Avary* only applies with respect to misconduct that allegedly occurred *in the mediation context*. As previously discussed, that type of misconduct allegation presents the strongest basis for seeking disclosure of mediation communications, because such communications are likely to be the only means of proving or disproving the allegation.

For the same reason, it probably will not be sufficient to hold an *in camera* hearing with regard to the admissibility of a single piece of evidence in such a situation. Instead, as already noted, a court considering an allegation of mediation misconduct is likely to have to make multiple rulings on admissibility or disclosure of mediation communications.

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87. *Id.* at 801.

88. *Id.* (emphasis added).

89. See, e.g., *Alford Bryant*, 137 S.W.3d 916 (Tex. Ct. App 2004). For discussion of *Alford* and similar cases, see Memorandum 2014-44, pp. 11-13.

90. See, e.g., *In re Empire Pipeline*, 323 S.W.3d 308 (Tex. Ct. App. 2010). For discussion of *Empire Pipeline* and similar cases, see Memorandum 2014-44, pp. 13-15.

*Avary* demonstrates that point. In *Avary*, the Texas Court of Appeals faulted the trial court for conducting only one *in camera* hearing on the admissibility of mediation evidence and remanded so that the trial court could conduct additional *in camera* screening under Section 154.073(e). The Court of Appeals acknowledged that this requirement was “potentially cumbersome,” but stressed that “convenience is secondary,” given the importance of the competing interests at stake.

In developing its attorney misconduct exception to the mediation confidentiality statutes, the Commission should thus consider the burdens that *in camera* screening would potentially impose on courts and litigants. In particular, the Commission will need to decide whether it agrees with the Texas of Court of Appeals that “convenience is secondary,” given the importance of the competing interests at stake.

Like the Michigan approach and the New Mexico approach discussed above, the Texas approach used in *Avary* also provides some ideas regarding possible criteria for a court to consider when it holds an *in camera* hearing on disclosure of mediation communications pursuant to the Commission’s proposed attorney misconduct exception. Specifically, *Avary* identifies the following factors bearing on the propriety of disclosing a mediation participant’s *in camera* testimony:

- (1) Whether the mediation participant has knowledge of facts relevant to the pending claims.
- (2) If the mediation participant has relevant knowledge, whether that evidence is critical to the pending claims.
- (3) If the mediation participant has relevant knowledge, whether that evidence is protected by a privilege, such as the attorney-client privilege or the work product privilege.
- (4) Whether and to what extent disclosure of the mediation participant’s testimony would cause potential harm to the mediation process, particularly if the disclosure would reveal mediation confidences of someone who is not a party to the pending dispute.

### **Wisconsin Approach**

In Wisconsin, “no oral or written communication relating to a dispute in mediation made or presented in mediation by the mediator or a party is admissible in evidence or subject to discovery or compulsory process in any judicial or administrative proceeding.”<sup>91</sup> That general rule is subject to several

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91. Wis. Stat. § 904.085.

express exceptions, including the following exception that involves an *in camera* hearing:

(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*.<sup>92</sup>

There appears to be little case law interpreting this Wisconsin exception, so it is not clear what would constitute “a manifest injustice of sufficient magnitude to outweigh the importance of protecting the principle of confidentiality in mediation proceedings generally.”<sup>93</sup> Likewise, the proper procedure for the statutorily required *in camera* hearing does not seem to have been fleshed out.

Still, the Wisconsin provision is potentially instructive to some extent. It focuses on whether admission of a mediation communication is “necessary,” requires a court to consider “the importance of protecting the principle of confidentiality in mediation proceedings generally,” and directs the court to balance that interest against an as-yet-ill-defined competing interest in preventing a “manifest injustice.” Those are all concepts that might warrant discussion in drafting the Commission’s proposed attorney misconduct exception to California’s mediation confidentiality statutes.

### **Uniform Mediation Act Section 6(b)**

The Uniform Mediation Act (“UMA”) has been enacted in the District of Columbia and eleven states.<sup>94</sup> Subject to certain exceptions and limitations, a mediation communication is privileged under the UMA and is not subject to discovery or admissible in evidence.<sup>95</sup>

Two of the exceptions to that general rule call for an *in camera* hearing. The first one (UMA Section 6(b)(1)) pertains to criminal cases:

(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

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92. Wis. Stat. § 904.085(e) (emphasis added).

93. See Memorandum 2014-35, Exhibit p. 41.

94. The UMA states are: Hawaii, Idaho, Illinois, Iowa, Nebraska, New Jersey, Ohio, South Dakota, Utah, Vermont, and Washington. See Memorandum 2014-24.

95. UMA § 4(a).

*need for the evidence that substantially outweighs the interest in protecting confidentiality, and that the mediation communication is sought or offered in:*

(1) a court proceeding involving a felony [or misdemeanor] ...<sup>96</sup>

This exception permits use of mediation communications in a felony case (or, in some jurisdictions, a misdemeanor case), but only if the party seeking to use that evidence shows at an *in camera* hearing that

- The evidence is not otherwise available, *and*
- There is a need for the evidence that “substantially outweighs” the interest in protecting confidentiality.

The other UMA exception that calls for an *in camera* hearing (UMA Section 6(b)(2)) uses exactly the same test for admissibility or disclosure of mediation communications. It applies in “a proceeding to prove a claim to rescind or reform or a defense to avoid liability on a contract arising out of the mediation.”<sup>97</sup> Unlike UMA Section 6(b)(1), a party may not invoke UMA Section 6(b)(2) to compel a mediator to testify.<sup>98</sup>

The UMA privilege is also subject to a number of other exceptions, which do not entail an *in camera* hearing. The exception relating to professional misconduct (UMA Section 6(a)(6)) falls into this category.

The drafters’ Comment to UMA Section 6 explains the reasoning behind the differing treatment of the various UMA exceptions:

This Section articulates specific and exclusive exceptions to the broad grant of privilege provided to mediation communications in Section 4....

The exceptions listed in Section 6(a) apply regardless of the need for the evidence because society’s interest in the information contained in the mediation communications may be said to *categorically outweigh* its interest in the confidentiality of mediation communications. In contrast, the exceptions under Section 6(b) would apply only in situations where the relative strengths of society’s interest in a mediation communication and mediation participant interest in confidentiality *can only be measured under the facts and circumstances of the particular case*. The Act places the burden on the proponent of the evidence to persuade the court in a non-public hearing that the evidence is not otherwise available, that the need for the evidence substantially outweighs the confidentiality interests and that the evidence comes within one of

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96. Emphasis added.

97. UMA § 6(b)(2).

98. See UMA § 6(b)(2), (c).

the exceptions listed under Section 6(b). In other words, the exceptions listed in 6(b) include situations that should remain confidential but for overriding concerns for justice.<sup>99</sup>

In other words, the UMA drafters concluded that the *in camera* screening test described above is appropriate in contexts where (in their opinion) there should be case-by-case balancing of the competing interests, but not where (in their opinion) “the justice system’s need for the evidence may be said to categorically outweigh its interest in the confidentiality of mediation communications such that it would be either unnecessary or impractical for the parties, and administratively inefficient for the court system to hold a full evidentiary hearing on the applicability of the exception.”<sup>100</sup>

Interestingly, several drafts of the UMA applied the *in camera* screening approach to the professional misconduct exception.<sup>101</sup> The UMA drafters later reversed course; they must have ultimately decided that case-by-case balancing of the competing interests was not necessary in that context.

The Commission should consider whether it agrees with that assessment. If a mediation communication is relevant to a claim of professional misconduct, is that necessarily sufficient reason to permit introduction of the communication? Do any other factors matter, such as:

- Whether the mediation communication is only marginally relevant to the professional misconduct claim;
- Whether other evidence could be used to make the same point in the professional misconduct case instead of the mediation communication; or
- Whether the mediation communication reveals highly sensitive information about a mediation participant who is not a party to the misconduct claim?

Assuming that the Commission continues to believe an *in camera* approach is worth exploring, it should consider whether its *in camera* approach should incorporate either of UMA Section 6(b)’s requirements for admission or disclosure of a mediation communication:

- The evidence is not otherwise available.

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99. Emphasis added.

100. Richard Reuben, *The Sound of Dust Settling: A Response to Criticisms of the UMA*, 2003 J. Disp. Resol. 99, 121 (2003).

101. See Jan. 2000 UMA Discussion Draft (§ 2(f)(4)); March 2000 UMA Discussion Draft (§ 8(b)(1)); Aug. 2000 UMA Revised Interim Draft (§ 9(b)(1)).

- There is a need for the evidence that “substantially outweighs” the interest in protecting confidentiality.

Those requirements are identical to the ones used in the Michigan provision discussed above. The requirement that the evidence “is not otherwise available” is also used in the New Mexico provision.

### **Federal Administrative Dispute Resolution Act of 1996**

The Federal Administrative Dispute Resolution Act of 1996 presents another possible model for *in camera* screening of mediation communications. 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.*<sup>102</sup>

This provision calls for an *in camera* hearing and establishes a stiff standard to meet at that hearing. For a mediation communication to be admissible or subject to disclosure, a court must determine that such use is:

- (1) *necessary to prevent harm,*
- (2) *the potential harm is “to the public health or safety,” and*
- (3) *the potential harm is “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.”*

Some time ago, mediator Ron Kelly expressed a preference for this standard, if the Commission concluded that weakening the mediation confidentiality statutes was absolutely necessary and it decided to use an *in camera* hearing process.<sup>103</sup> The Commission should keep this approach in mind going forward.

If the Commission decides to look hard at the approach, the staff would need to do some research on what constitutes a harm to “public health or safety.” We are not sure what would fall into that category, instead of being a harm to “public welfare.”

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102. Emphasis added.

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

### *Rinaker v. Superior Court*

Another *in camera* model comes from *Rinaker v. Superior Court*,<sup>104</sup> a California juvenile delinquency case in which the minors were charged with vandalism. To disprove the charges against them, the minors sought to compel the mediator of a related case to testify. They anticipated that the mediator would say their accuser admitted in the mediation that he did not actually see who committed the vandalism. The mediator objected to testifying, relying on California's mediation confidentiality statutes and constitutional right of privacy. The trial court ruled against her, and the mediator sought a writ in the court of appeal.

Like the trial court, the appellate court concluded that "when balanced against the competing goals of preventing perjury and preserving the integrity of the truth-seeking process of trial in a juvenile delinquency proceeding, *the interest in promoting settlements ... through confidential mediation ... must yield to the constitutional right to effective impeachment.*"<sup>105</sup> The court of appeal agreed, however, with the mediator's argument that "before allowing the minors to question the mediator under oath ... concerning statements made during confidential mediation, *the juvenile court should have conducted an in camera hearing to weigh the 'constitutionally based claim of need against the statutory privilege' and determine whether the minors have established that [her] testimony is necessary to 'vindicate their rights of confrontation.'*"<sup>106</sup> The court explained that "[r]equiring an *in camera* hearing *maintains the confidentiality of the mediation process while the juvenile court considers factors bearing upon whether the minors' constitutional right of effective impeachment compels breach of the confidential mediation process.*"<sup>107</sup>

The court of appeal went on to provide some guidance about how to conduct the *in camera* hearing. It said:

- (1) During the *in camera* hearing, the juvenile court can determine whether the mediator is competent to testify regarding the accuser's alleged statement that he did not see who committed the vandalism. "If she denies that [the accuser] made the inconsistent statement attributed to him by the minors, or does not recall whether he made such a statement, that would *eliminate the need*

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104. 62 Cal. App. 4th 155, 74 Cal. Rptr. 2d 464 (1998).

105. *Id.* at 167-68.

106. *Id.* at 169 (emphasis added).

107. *Id.* at 169 (emphasis added).

for her to testify in open court during the juvenile delinquency proceeding.”<sup>108</sup>

- (2) Assuming the mediator acknowledges she heard the alleged inconsistent statement, “the juvenile court can *assess the statement’s probative value* for the purpose of impeachment.”<sup>109</sup> “If the circumstances under which [the accuser] made inconsistent statements during mediation convince the juvenile court that such statements were *untrustworthy* in the sense they were made for the purpose of compromise rather than as true allegations of the minors’ conduct, it follows that the minors’ constitutionally based claim of need for the evidence *would not outweigh the countervailing public interest in maintaining the confidential[ity] of the mediation process.*”<sup>110</sup>
- (3) “[D]uring the in camera hearing, the juvenile court may be able to determine whether the evidence sought by the minors can be introduced without breaching the confidentiality of mediation.”<sup>111</sup> For example, “the court could conclude [the mediator’s] testimony would be *cumulative* to other evidence reasonably available to the minors ... [and thus] “is *not necessary* to vindicate the minor’s constitutional right to confront and effectively cross-examine their accuser.”<sup>112</sup>
- (4) The minors should *not be required to demonstrate that there is no other evidence*, unrelated to the mediation, that could be used to undermine the accuser’s testimony that the minors were the culprits. The mediator is a disinterested witness and may therefore have more credibility than other witnesses. “Hence, even if other witnesses could testify to [the accuser’s] inconsistent statements or impeach his veracity in other ways, [the mediator’s] testimony could be necessary to vindicate the minors’ right of confrontation if the credibility of the other witnesses is suspect.”<sup>113</sup>

The court of appeal thus sought to carefully accommodate both of the competing policy interests, and remanded the case to the trial court for further proceedings consistent with its opinion.

*Rinaker* is quite different from the situation that the Commission is trying to address: alleged misconduct in the context of a mediation. While *Rinaker* involved only one statement allegedly made during a mediation, proving or disproving an allegation of mediation misconduct is likely to require a lot of mediation evidence. Further, *Rinaker* involved mediator testimony, but Evidence

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108. *Id.* at 170 (emphasis added).

109. *Id.* (emphasis added).

110. *Id.* (emphasis added).

111. *Id.*

112. *Id.* at 171 (emphasis added).

113. *Id.*



Code Section 703.5 seems to make a mediator incompetent to testify in a legal malpractice case, one of the contexts in which the Commission's proposed exception would apply.<sup>114</sup> *Rinaker* also involved the constitutional right of confrontation, which would not be at stake in a legal malpractice case or, in all likelihood, a State Bar disciplinary proceeding (the other context where a party could invoke the Commission's proposed exception).<sup>115</sup>

Despite these differences, the staff urges the Commission to pay close attention to *Rinaker*. What strikes us as most noteworthy about the case is that the court of appeal was so careful to try to accommodate both (1) the minors' constitutional right to confront their accuser with an inconsistent statement *and* (2) the policy interest in maintaining the confidentiality of mediation communications. That is especially striking when one considers that the court could have said a juvenile delinquency case is essentially criminal in nature and thus the mediation confidentiality statute does not apply at all. If the Commission shows a similar degree of sensitivity to the policy interest in mediation confidentiality in drafting its proposed exception, that might yield beneficial substantive results and help reduce the level of concern about creating the exception.

### ***Olam v. Congress Mortgage Co.***

U.S. Magistrate Judge Wayne Brazil's decision in *Olam v. Congress Mortgage Co.*<sup>116</sup> builds on *Rinaker's* model of *in camera* screening with regard to mediation communications. *Olam* is discussed at length in Memorandum 2014-45. We describe the case more briefly below, and then try to draw some lessons from it.

#### *Case Description*

*Olam* involved a dispute between a borrower and a lender, which Judge Brazil referred to mediation under the court-sponsored ADR program. After a long day of negotiations, the parties prepared and signed a Memorandum of Understanding ("MOU"), which "contemplated the subsequent preparation of a

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114. See Evid. Code § 703.5.

115. See, e.g., *Rosenthal v. State Bar*, 43 Cal. 3d 612, 634, 738 P. 2d 723, 238 Cal. Rptr. 377 (1987) ("Petitioner's citations to criminal cases and attempted invocation of a 'quasi-criminal' talisman do not support his confrontation-clause claims. Petitioner's only due process entitlement is a 'fair hearing,' and the rules of criminal procedure do not apply in State Bar disciplinary proceedings.").

116. 68 F. Supp. 2d 1110 (N.D. Cal. 1999).

formal settlement contract but expressly declared that it was ‘intended as a binding document itself.’”<sup>117</sup>

Months passed, but the borrower never signed the formal settlement contract contemplated in the MOU. Consequently, the lender and the other defendants filed a motion to enforce the settlement agreement and enter judgment accordingly. The borrower opposed the motion, alleging that when she signed the MOU she “was incapable (intellectually, emotionally, and physically) of giving legally viable consent.”<sup>118</sup> More specifically, she contended that she was subjected to “undue influence” under California law because “she was suffering from physical pain and emotional distress that rendered her incapable of exercising her own free will.”<sup>119</sup>

To facilitate resolution of the dispute over the enforceability of the MOU, all of the parties clearly and expressly waived any “mediation privilege” that might attach to communications that were made during the mediation (with some limitations that are not necessary to describe here).<sup>120</sup> To avoid putting the mediator “in an awkward position where he might have felt he had to choose between being a loyal employee of the court, on the one hand, and, on the other, asserting the mediator’s privilege under California law,” Judge Brazil “proceed[ed] on the assumption that [the mediator] was respectfully and appropriately asserting the mediator’s privilege and was formally objecting to being called to testify about anything said or done during the mediation.”<sup>121</sup>

As a preliminary matter, Judge Brazil determined that California law applied to the mediation confidentiality issues, but he was not bound to follow California’s procedural mechanisms relating to mediation confidentiality. Instead, as a federal magistrate judge, he could use a different procedure so long as it “would substantially parallel in *effect* the procedure adopted by the courts of California, and, in that parallelism, would cause no greater harm to substantive privilege interests than California courts would be prepared to cause.”<sup>122</sup>

In deciding whether to compel the mediator to testify, Judge Brazil viewed *Rinaker* as the “most important opinion by a California court in this arena.”<sup>123</sup> He explained that “the *Rinaker* court held that the mediator could be compelled to

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117. *Id.* at 1117.

118. *Id.* at 1118.

119. *Id.*

120. *Id.* at 1118-19, 1129-30.

121. *Id.* at 1130.

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

123. *Id.* at 1131.

testify if, after *in camera* consideration of what her testimony would be, the trial judge determined that her testimony might well promote significantly the public interest in preventing perjury and the defendant's fundamental right to a fair judicial process."<sup>124</sup>

Judge Brazil then described in detail his view of the *Rinaker* procedure. He said that *Rinaker* calls for a two-stage balancing analysis, as follows:

In essence, the *Rinaker* court instructs California trial judges to 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 *in camera* 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 *in camera* 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 *in camera* 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.

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, *in camera*, what her testimony would be. A court that orders the *in camera* 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.<sup>125</sup>

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124. *Id.*

125. *Id.* at 1131-32.

Judge Brazil went on to conduct such a two-stage balancing analysis in *Olam*. In the first stage, he considered numerous factors bearing on whether to compel the mediator to appear at an *in camera* proceeding to determine precisely what her testimony would be.<sup>126</sup> Some of those factors were case-specific or only relevant to mediator testimony. Among the other factors he considered were:

- The legislative determination that “without the promise of confidentiality it would be appreciably more difficult to achieve the goals of mediation programs.”<sup>127</sup>
- The parties’ express waivers of mediation confidentiality, which he said reduced the force of the above legislative determination in the case at hand.<sup>128</sup>
- The nature of the testimony being sought, such as whether it would entail an effort to “nail down and dissect” a mediation participant’s specific words, as opposed to “assess[ing] at a more general and impressionistic level [the] condition and capacities” of a mediation participant.<sup>129</sup>
- The interest in doing justice. Justice Brazil deemed this “an interest of considerable magnitude” because “[c]onfidence in our system of justice as a whole, in our government as a whole, turns in no small measure on confidence in the courts’ ability to do justice in individual cases.”<sup>130</sup>
- The interest in “re-assur[ing] the community and the court about the integrity of the mediation process that the court sponsored.”<sup>131</sup>
- The potential impact of the proposed testimony on the attitudes and behavior of future participants in the court’s mediation program.<sup>132</sup>
- The likelihood that the proposed testimony would be probative, material, and reliable.<sup>133</sup>
- Whether the proposed testimony would be a “source of presumptively disinterested, neutral evidence,” and whether other such sources existed.<sup>134</sup>

Judge Brazil concluded that the first stage balancing test pointed in favor of requiring the mediator to testify privately. He explained:

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126. *Id.* at 1133-39.

127. *Id.* at 1133.

128. *Id.*

129. *Id.* at 1136; see also *id.* at 1134-36.

130. *Id.* at 1136.

131. *Id.* at 1137.

132. See *id.*

133. See *id.* at 1138-39.

134. *Id.* at 1138.

In short, there was a substantial likelihood that testimony from the mediator would be the most reliable and probative on the central issues raised by the plaintiff .... And there was no likely alternative source of evidence on these issues that would be of comparable probative utility. So it appeared that testimony from the mediator would be crucial to the court’s capacity to do its job — and that refusing to compel that testimony posed a serious threat to [key values]. California courts clearly would conclude the first stage balancing analysis by ordering the mediator to testify *in camera* ... so that the court ... could make a refined and reliable judgment about whether to use that testimony to help resolve the substantive issues ....”<sup>135</sup>

Instead of requiring the mediator to attend a separate *in camera* hearing, however, Judge Brazil called the mediator to testify at the same evidentiary hearing as the other witnesses in the case. But he took the mediator’s testimony only after all of the other key witnesses had testified, and he did so in closed proceedings, under seal. He chose that approach for several reasons, including a desire to avoid making the mediator testify twice, first *in camera* and then during the evidentiary hearing itself.<sup>136</sup>

Once the mediator testified under seal, Judge Brazil “gain[ed] precise and reliable knowledge of what the mediator’s testimony would be.”<sup>137</sup> Armed with that knowledge, he proceeded to the second stage of the analysis: whether to unseal and use the mediator’s testimony. Based on all of the information presented in the evidentiary hearing, he considered it “clear that the mediator’s testimony was essential to doing justice,” so he decided to unseal and use it.<sup>138</sup>

From that testimony and the other evidence in the case, Judge Brazil concluded that the plaintiff was not “subjected to anything remotely close to undue pressure.”<sup>139</sup> He thus granted the defendants’ motion to enforce the MOU reached in the mediation.<sup>140</sup>

His decision in *Olam* predated all of the California Supreme Court’s decisions on protection of mediation communications. Those decisions make clear that in general courts are to interpret the California statutes on mediation evidence

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135. *Id.* at 1139.

136. See *id.* at 1126-28.

137. *Id.* at 1132.

138. *Id.* at 1139.

139. *Id.* at 1150.

140. See *id.* at 1151.

strictly, without judicially creating any exceptions.<sup>141</sup> The Court has not overruled *Olam*, but it has narrowly limited its application.<sup>142</sup>

### *Lessons From the Olam Decision*

Several points come to mind in considering *Olam*. First, the case serves as an important reminder that an *in camera* screening approach would entail two different types of disclosure decisions: (1) whether to require disclosure of mediation communications to a judge or other decisionmaker *in camera*, and (2) whether to require disclosure of such communications more broadly after completion of an *in camera* review. In crafting an *in camera* procedure, the Commission will need to consider what rules should apply with regard to each type of disclosure decision.

Second, *Olam* demonstrates that conducting a separate *in camera* hearing is not the only means available to protect mediation communications from public scrutiny while a court evaluates whether public disclosure is appropriate. A court may be able to achieve the same sort of result through other judicial tools, such as sealing of testimony taken privately, as in *Olam*.

Third, *Olam* provides additional ideas regarding factors for a court to consider when it screens mediation evidence on an *in camera* basis (see the bulletpoint list on pages 27-28). The Commission might want to incorporate some or all of those factors into whatever screening test or standard it develops.

Finally, it is worth noting that Judge Brazil weighed the facts and circumstances in *Olam* without “putting a thumb on the scale” in any express manner. In contrast, the UMA’s *in camera* exceptions require a showing that the “need for the evidence *substantially outweighs* the interest in protecting confidentiality.”<sup>143</sup> It is also notable that the UMA’s *in camera* approach only allows use of mediation communications if the evidence is “not otherwise available,” while *Olam* lacks such a restriction.<sup>144</sup> The Commission should bear these distinctions in mind.

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141. See Memorandum 2013-39, pp. 18-29.

142. See Memorandum 2014-45, pp. 12-13.

143. UMA § 6(b).

144. See John Lande, *Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs*, 50 U.C.L.A. L. Rev. 69, 105-06 (2002).

## QUESTIONS AND ADVICE FROM THE STAFF IN OCTOBER

In October, the staff pointed out that numerous commenters had expressed concern that the Commission's proposed new exception to the mediation confidentiality statutes would disrupt mediation confidentiality based on a "mere allegation" of attorney misconduct.<sup>145</sup> The staff noted that "[b]y 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."<sup>146</sup> The staff cautioned, however, that such an endeavor would "require particularly careful drafting."<sup>147</sup>

The staff further observed that the existing statutes calling for *in camera* screening of mediation communications "provide relatively little detail regarding the in camera screening process,"<sup>148</sup> and the court decisions in *Rinaker* and *Olam* "do not address the full spectrum of possible scenarios; the guidance they provide is to some extent fact-specific."<sup>149</sup> For those reasons, the staff encouraged the Commission to think creatively in developing the *in camera* screening process for its proposed new exception:

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.**<sup>150</sup>

In particular, the staff urged 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.<sup>151</sup>

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145. See Memorandum 2015-45, pp. 28-29.

146. *Id.* at 30.

147. *Id.*

148. *Id.* at 34.

149. *Id.* at 35.

150. *Id.* at 36.

151. *Id.* at 36.

The staff had in mind an effort similar to, but more extensive than, a discussion the Commission had in August about how, under the legislation it is drafting, a plaintiff would plead a claim of mediation misconduct by an attorney without running afoul of the mediation confidentiality statutes.

As we noted in October,<sup>152</sup> 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?
- 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*”?<sup>153</sup>
- What rules governing the use of mediation communications should apply when a defendant responds to a complaint alleging mediation misconduct by an attorney?
- 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?<sup>154</sup> 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?

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152. See Memorandum 2015-45, pp. 36-37.

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

154. 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).



The staff encouraged the Commission to pose and attempt to answer similar sets of questions regarding the other stages of a malpractice case or disciplinary proceeding (e.g., the discovery process, motion practice, trial), in hopes of gaining 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).

The staff also raised some questions focusing more specifically on the mechanics of an *in camera* screening process:<sup>155</sup>

- ***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?<sup>156</sup>
- ***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 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."<sup>157</sup> If a court can condition admissibility on the contemporaneous admission of additional

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155. See Memorandum 2015-45, pp. 38-41.

156. See, e.g., *United States v. Zolin*, 491 U.S. 554, 572 (1989) ("Before 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.").

157. Fed. R. Evid. 106.

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 public 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, such as the UMA approach and the *Olam* approach.

- **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”<sup>158</sup> and eliminate the “need to worry about the judge becoming prejudiced against one of the disputing parties”<sup>159</sup>? 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.<sup>160</sup>

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158. *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.*

159. Zimmerman, *supra* note 47, at 383.

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

- **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?

The Commission has not yet resolved any of the above questions.

#### RECENT INPUT ON USING AN *IN CAMERA* SCREENING PROCESS

Since August, when the Commission decided to explore the idea of creating a new exception to the mediation confidentiality statutes and to utilize an *in camera* screening process in that exception, a few sources have commented on the use of *in camera* screening. For example, Larry Doyle reported in October that the Conference of California Bar Associations (“CCBA”) “has not taken a position on this issue, but has no objection.”<sup>161</sup>

Mediators Jeff Kichaven and Lee Blackman provided more extensive comments on the use of an *in camera* screening process. Their comments are discussed below.

#### Comments of Jeff Kichaven

Jeff Kichaven urges the Commission to abandon the concept of *in camera* screening. He says that “such review really would serve no purpose in the current context” and “the need to conduct *in camera* reviews would produce just the sort of burden on courts which the proponents of Absolute Mediation Confidentiality profess to disapprove.”<sup>162</sup> He explains:

Traditionally, the purpose of *in camera* review is to test an asserted claim of privilege or confidentiality. So, if a party responding to discovery objects to the production of documents on the grounds that those documents contain trade secrets or attorney-client privileged information, that responding party may be able to obtain *in camera* review before the requested documents must be produced....

Here, though, *in camera* review would not be necessary. There is no need for a court to test whether the mediation communications come within the ambit of mediation confidentiality; by definition,

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161. Third Supplement to Memorandum 2015-46, Exhibit p. 3.

162. First Supplement to Memorandum 2015-46, Exhibit pp. 45-46. Mr. Kichaven testified at the Commission meetings in August 2013 and August 2015. For an article he wrote on mediation confidentiality, see Memorandum 2014-14, Exhibit pp. 96-98.

they do, but the new statute will provide that the confidentiality rules may not be used to exclude this evidence in the subsequent malpractice case.

Moreover, saddling courts with the need to conduct these *in camera* reviews would create just the sort of unnecessary burden on courts which the proponents of Absolute Mediation Confidentiality say they seek to avoid. We all agree that the workload of our busy courts should not be unnecessarily burdened; it seems that, upon further scrutiny, the idea of *in camera* review should not be part of the proposed legislation.<sup>163</sup>

Mr. Kichaven assumes that the *in camera* screening contemplated by the Commission would merely entail testing whether evidence claimed to be mediation-related is in fact mediation-related. The staff suspects that the Commission had in mind something different, more like the balancing of competing interests that Judge Brazil undertook in *Olam*, the UMA's *in camera* test (examining whether the evidence is "not otherwise available" and whether there is a need for the evidence that "substantially outweighs" the interest in protecting confidentiality), or one of the other approaches discussed earlier in this memorandum. In that case, *in camera* screening would serve an important purpose: It would be a means of seeking to accommodate competing policy considerations in an optimal manner.

### **Comments of Lee Blackman**

The Commission also recently received a letter from Lee Blackman, who took the time to provide a detailed explanation of his views on *in camera* screening.<sup>164</sup> Mr. Blackman values "the important role that mediation confidentiality plays in achieving successful settlements."<sup>165</sup> He believes that "[t]his compelling interest in mediation candor should continue to be protected even if the Law Revision Commission concludes that mediation communications and conduct should be admissible in malpractice cases."<sup>166</sup>

Pointing to the *in camera* procedures used in *Olam*, the UMA, and Texas, as well as to other settings in which courts have used *in camera* procedures and similar mechanisms, Mr. Blackman presents "one set of proposals to protect mediation confidentiality, in order to encourage mediation candor, where

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163. *Id.* at Exhibit p. 46.

164. See Exhibit pp. 1-6. For prior input from Mr. Blackman, see Memorandum 2015-46, Exhibit pp. 20-21; see also *id.* at Exhibit p. 22 (providing information on Mr. Blackman's qualifications).

165. Memorandum 2015-46, Exhibit p. 21.

166. Exhibit p. 2.

evidence of mediation communications becomes admissible in cases claiming lawyer malpractice.”<sup>167</sup> In developing his proposed legislation, Mr. Blackman sought “to integrate a number of protections currently used in the mediation context and protections that have been adopted in analogous circumstances where privacy or other interests have led the legislature to impose special burdens and restrictions shielding confidential information from potentially burdensome discovery and unnecessary disclosure.”<sup>168</sup>

“[T]o protect mediation confidentiality, in order to encourage mediation candor, if evidence of mediation communications becomes admissible in cases claiming lawyer malpractice,” Mr. Blackman recommends the following measures:

(a) Any complaint, pleading, petition, request for arbitration, or subsequent submission to a court, arbitrator, or administrative body of the state that discloses documents, communications, or conduct in or in connection with a mediation shall be filed or submitted under seal unless the standing rules or procedures of the body to which the evidence is submitted assure continuing confidentiality without special treatment.

(b) No order allowing or compelling discovery or disclosure of mediation communications or conduct may be entered before the court, arbitrator, or administrative agency finds, after a hearing in camera, that the party seeking discovery or the proponent of the evidence has shown by *clear and convincing evidence* (1) that the proponent has a *substantial likelihood of prevailing* on the claim that is the basis of the proceeding, (2) that the evidence is *not otherwise available*, and (3) that *there is a need for the evidence that substantially outweighs the interest in protecting confidentiality*.

(c) If the court, arbitrator, or other authority determines that the required showing has been made under subsection (b), the proponent of disclosure may seek *only relevant and admissible evidence that has a substantial tendency to prove or disprove one or more elements of the claim or cause of action at issue*. Mediation communications and conduct that are not relevant and admissible may not be sought or compelled. Mediation communications and conduct disclosed in discovery shall be protected from third party disclosure as provided in subsection (e).

(d) No ruling or order allowing the admission into evidence of mediation communications or conduct shall be made or entered before the requirements of subsection (b) have been satisfied. Only the portion of mediation communications or conduct necessary to the determination of the issue to which it is relevant may be admitted. Admission of evidence under this section does not

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167. Exhibit p. 1.

168. *Id.*

render the evidence, or any other mediation communications or conduct, discoverable or admissible for any other purpose.

(e) Mediation communications and conduct revealed in discovery or admitted into evidence shall be kept confidential by the parties and the court, arbitrator, or agency, which shall enter an appropriate protective order or make such evidence subject to other rules, orders, or procedures of the court, arbitrator, or agency assuring continuing confidentiality. Such orders or procedures shall require all individuals and entities to whom confidential mediation communications or conduct are disclosed to refrain from disclosing such material to individuals or entities not designated as entitled to access. The court, arbitrator, or other body shall have authority to enter such other and further orders regarding compliance with its protective orders or other orders or procedures relating to confidentiality, including monetary sanctions, as the court, arbitrator, or other body with jurisdiction, in its discretion, deems appropriate to maintain the confidentiality of mediation communications and conduct and remedy unauthorized disclosures.

(f) The allowance of discovery or the admission of mediation communications and conduct into evidence does not affect privileges or immunities that may be available to a party or to a mediator. In particular, but only by way of example:

(1) Nothing in this Section [or in the pertinent Chapter of the Evidence Code] is intended to affect the extent to which a mediator is, or is not, immune from liability under existing law.

(2) A mediator may not be compelled to provide evidence of mediation communications or conduct except as allowed by Evidence Code Section 703.5.<sup>169</sup>

The key provision in this proposal is subdivision (b), which would establish three criteria for disclosure of a mediation communication. Through subdivision (d), those criteria would also govern the admissibility of a mediation communication.

Two of the criteria in Mr. Blackman's proposed subdivision (b) appear in UMA Section 6(b) and the Michigan provision previously discussed:

- The requirement that the evidence "is not otherwise available."
- The requirement that "there is a need for the evidence that substantially outweighs the interest in protecting confidentiality."

Here, however, the proponent of the evidence would have to establish those requirements "clear and convincing evidence," which is not required under the UMA or in Michigan.

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169. Exhibit pp. 4-6 (emphasis added).

The third requirement in Mr. Blackman’s proposed subdivision (b) is that “the proponent has a substantial likelihood of prevailing on the claim that is the basis of the proceeding.” Again, the proponent of the evidence would have to show this by clear and convincing evidence. The staff suspects that this would be a difficult requirement to satisfy.

Another key aspect of Mr. Blackman’s proposal is subdivision (c), which says that if the three requirements of subdivision (b) are met, “the proponent of disclosure may seek only relevant and admissible evidence that has a substantial tendency to prove or disprove one or more elements of the claim or cause of action at issue.” Mr. Blackman says the purpose of that restriction is “to limit discovery to evidence that is both relevant and admissible in order to avoid overbroad inquiries into presumptively sensitive and confidential communications.”<sup>170</sup>

Mr. Blackman’s proposal would not only call for an *in camera* hearing under subdivision (b), but would also employ other judicial techniques to protect the privacy of mediation communications, such as sealing documents (see subdivision (a)) and entering a protective order (see subdivision (e)). He believes it is important for the Commission to “consider not just the screening process but also other appropriate measures and procedures to limit unnecessary disclosure of mediation communications that become admissible under the new exception and avoid unnecessary and burdensome discovery into mediation communications.”<sup>171</sup>

Mr. Blackman further says that “[s]ince California law, and the Commission’s preliminary determinations, recognize that mediation confidentiality should not be diluted or compromised except as is necessary to serve other compelling interests (like lawyer accountability for mediation misconduct), the *only* argument against procedural protections such as *in camera* proceedings and protective orders to limit the disclosure of mediation communications is *concern for administrative convenience*.”<sup>172</sup> He does not think concerns about administrative convenience should preclude the use of *in camera* screening and similar procedures:

[O]ur courts are experienced and equipped to comply with these sorts of procedures. No undue burden will be placed on the courts or the litigants if procedural safeguards are implemented to protect

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170. Exhibit p. 5 n.9.

171. Exhibit p. 1.

172. Exhibit p. 4 (emphasis added).

mediation confidentiality and mediation candor in the sorts of cases envisioned by the Commission's preliminary determinations. And the special interest that the courts have in encouraging successful mediations makes it unlikely that judges will find procedural rules intended to encourage mediation candor unduly burdensome.<sup>173</sup>

#### PUBLIC ACCESS TO JUDICIAL RECORDS AND PROCEEDINGS

The potential impact on administrative convenience is an important consideration with regard to *in camera* screening, but the staff sees another important consideration as well. A substantial body of case law, both from the federal courts and from the state courts, establishes that citizens have rights to observe their courts in action. As the United States Supreme Court said in *Press-Enterprise Co. v. Superior Court*,<sup>174</sup>

“People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.” ... Closed proceedings, although not absolutely precluded, must be rare and only for cause shown that outweighs the value of openness.<sup>175</sup>

These rights of access to judicial proceedings are grounded in constitutional provisions,<sup>176</sup> common law,<sup>177</sup> statute,<sup>178</sup> and court rules.<sup>179</sup> They are not absolute in nature, but instead entail a balancing of competing interests, yielding in some circumstances.<sup>180</sup>

Judicial use of *in camera* screening, sealed records, and similar techniques is obviously at odds with the concept of public access to judicial proceedings. The staff was aware early on that the Commission would need to take this matter into account if it chose to pursue such approaches with regard to mediation communications. In suggesting a possible project for Stanford law students, we wrote:

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173. *Id.*

174. 464 U.S. 501, 509 (1983).

175. *Id.*, quoting *Richmond Newspapers v. Virginia*, 448 U.S. 555, 572 (1980).

176. U.S. Const. amend. I; Cal. Const. art. I, § 3(b); Cal. Const. art. I, § 2(a); see, e.g., *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986); *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court*, 20 Cal. 4th 1178, 980 P.2d 337, 86 Cal. Rptr. 2d 778 (1999).

177. See, e.g., *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978); *Sander v. State Bar of California*, 58 Cal. 4th 300, 314 P.3d 488, 165 Cal. Rptr. 3d 250 (2013).

178. See Code Civ. Proc. § 124.

179. See Cal. R. Ct. 2.550-2.551.

180. See, e.g., *KNBC-TV*, 20 Cal. 4th at 360.



If an option would entail disclosing mediation communications to a court, or to court-affiliated or court-appointed personnel, what are the constitutional implications? Would it be possible to disclose such information to any person connected with the court without triggering a public right of access to that information? See, e.g., *NBC Subsidiary (KNBC-TV) v. Superior Court*, 20 Cal. 4th 1178, 980 P.2d 337, 86 Cal. Rptr. 2d 778 (1999); *Wilson v. Science Applications Int'l Corp.*, 52 Cal. App. 4th 1025, 60 Cal. Rptr. 2d 883 (1997); *Copley Press, Inc. v. Superior Court*, 6 Cal. App. 4th 106, 111 (1992); see also U.S. Const. amend. I (free speech & press); Cal. Const. art. I, § 1 (right of privacy); Cal. Const. art. I, § 2(a) (free speech & press); Cal. Const. art. I, § 3(b) (public right of access); *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978) (common law right of access to judicial records); B. Witkin, Summary of California Law, *Constitutional Law* §§ 419-423 (10th ed. 2005 & 2013 Supp.). If a public right of access would exist, please take this into account in evaluating the potential advantages and disadvantages of the option.<sup>181</sup>

Since the October meeting, the staff has done extensive research into the case law on public rights of access to judicial records and proceedings. The deeper we dug, the more questions we had about how to properly coordinate the Commission's proposed mediation confidentiality exception utilizing *in camera* screening with that body of case law. We do not believe that achieving such coordination is impossible, but we do think that the case law on public rights of access imposes constraints on how to draft an exception that employs an *in camera* screening approach.

The Commission could avoid these issues by abandoning the concept of using an *in camera* approach in its proposed new exception to the mediation confidentiality statutes. But that would mean, as dozens of commenters already fear,<sup>182</sup> that the protections of mediation confidentiality would essentially evaporate upon a "mere allegation" that an attorney committed misconduct in a mediation. In other words, the policy of promoting accountability for attorney misconduct would completely override the policy interests underlying mediation confidentiality.

Assuming the Commission intends to pursue more of a compromise approach, it will need to use tools such as *in camera* screening, as it tentatively decided to do in August. If so, it will need to understand and take into account the case law on public access to judicial records and proceedings.

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181. See Memorandum 2013-47, Exhibit p. 7.

182. See Memorandum 2015-45, pp. 28-29 & n. 102.

The staff cannot do justice to that topic in this memorandum. Unless the Commission otherwise directs, we will explore that topic in a memorandum for the next Commission meeting.

Respectfully submitted,

Barbara Gaal  
Chief Deputy Counsel

**EMAIL FROM LEE BLACKMAN (10/30/15)**

**Re: Study K-402**

Ms. Gaal —

I understand that the Commission has asked the staff to provide further analysis of an *in camera* review procedure, such as is included in the Uniform Mediation Act, for inclusion with an exception to the mediation confidentiality statute to address alleged misconduct of an attorney acting as an advocate. The UMA procedure, as you know, provides that in appropriate cases “the court, administrative agency, or arbitrator [must first find], after a hearing *in camera*, that the party seeking discovery or the proponent of the evidence [revealing mediation communications] has shown that the evidence is not otherwise available [and] that there is a need for the evidence that substantially outweighs the interest in protecting confidentiality . . . .” UMA Section 6(b). Section 6(d) of the UMA, which the Commission also embraces, contains additional protections against unnecessary disclosure of mediation communications.

As the staff considers the *in camera* procedure, I hope the staff will consider not just the screening process but also other appropriate measures and procedures to limit unnecessary disclosure of mediation communications that become admissible under the new exception and avoid unnecessary and burdensome discovery into mediation communications. The staff’s Memoranda have already identified and carefully categorized a number of state and federal law provisions that supply useful models.

The attached discussion is intended to present and discuss one set of proposals to protect mediation confidentiality, in order to encourage mediation candor, where evidence of mediation communications becomes admissible in cases claiming lawyer malpractice. The objective is to integrate a number of protections currently used in the mediation context and protections that have been adopted in analogous circumstances where privacy or other interests have led the legislature to impose special burdens and restrictions shielding confidential information from potentially burdensome discovery and unnecessary disclosure.

Please feel free to let me know if you have any questions or would like clarification.

Thank you.

Lee Blackman

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**Should The Law Revision Commission Decide That Evidence Of Mediation Communications Ought To Be Allowed In Attorney Malpractice Cases, The Commission Should Adopt Procedural Requirements To Assure That Disclosure Does Not Occur Without Good Cause, That Disclosure Is Limited To Parties And The Court, And That Other Protections Of The Mediation Process Are Not Unnecessarily Compromised.**

From its inception in 1965, California’s Evidence Code limited the admissibility of evidence of settlement negotiations. Supported by “the public policy in favor of the settlement of disputes without litigation,” the provisions barred the admission (to prove liability) of “conduct or statements made in [settlement] negotiation[s]” in order to encourage “the complete candor between the parties that is most conducive to settlement.”<sup>1</sup> This compelling interest in mediation candor should continue to be protected even if the Law Revision Commission concludes that mediation communications and conduct should be admissible in malpractice cases. The drafters of the UMA recognized the importance of protecting mediation candor by permitting the parties to agree that mediation communications would receive confidential treatment whether or not categorically privileged. UMA Section 8. The UMA drafters also recognized that allowing confidential mediation communications to be disclosed in certain proceedings ought not to result in unnecessary disclosure of such communications or conduct to third parties. As stated in Comment 1 to UMA Section 6 (Exceptions to Privilege):

As with other privileges, when it is necessary to consider evidence in order to determine if an exception applies, the Act contemplates that a court will hold an *in camera* proceeding at which the claim for exemption from the privilege can be confidentially asserted and defended. *See, e.g., Rinaker v. Superior Court*, 74 Cal. Rptr.2d 464, 466 (Ct. App. 1998); *Olam v. Congress Mortgage Co.*, 68 F.Supp.2d 1110, 1131-33 (N.D. Cal. 1999) (discussing whether an *in camera* hearing is necessary).

The conclusion that mediation communications should be protected against unnecessary disclosure was implemented, among other places, in procedures to be followed when a party seeks to use evidence of mediation communications or conduct in a criminal proceeding or to rescind, reform, or avoid liability on a contract arising out of the mediation. For those types of cases, UMA Section 6(b) provides that before concluding that mediation communications are not privileged, “the court, administrative agency, or arbitrator [must first find], 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 [and] that there is a need for the evidence that substantially outweighs the interest in protecting confidentiality . . . .” UMA Section 6(b).

This procedure avoids unnecessary disclosure of confidential mediation communications and provides an appropriate model for prophylactic procedures to be employed – with other appropriate measures – to limit unnecessary adverse effects on mediation candor if the Commission elects to allow the admission of otherwise confidential mediation communications in malpractice cases. This procedure is also suitable to protect mediation communications from unnecessary disclosure during discovery.

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<sup>1</sup> California Law Revision Commission Study K-402, Relationship Between Mediation Confidentiality and Attorney Malpractice and Other Misconduct, Staff Memorandum 2013-39 at 2.

The CLRC Staff has identified numerous examples of case law and statutory authority that support the protection of confidential mediation communications from unnecessary disclosure in discovery and when admitted into evidence in proceedings where such disclosure is allowed. Like the UMA drafters, the CLRC Staff has appropriately highlighted the seminal decision of Magistrate Judge Brazil in *Olam v. Congress Mortgage Co.*, 68 F. Supp. 2d 1110 (N.D. Cal. 1999), which details a careful process to resolve disputes over confidentiality of mediation communications without allowing the disclosure of those communications to third parties. CLRC Staff Memorandum 2015-33 at T15.<sup>2</sup> Texas law similarly requires the court to determine *in camera* whether the facts, circumstances, and context of mediation communications or materials sought to be disclosed are subject to disclosure and whether a protective order of the court is warranted. Texas Civ. & Rem. Code § 154.073(e). *Id.* at 14. The Commission’s Staff has also identified “[c]losely similar provisions” in state statutes and under federal law.<sup>3</sup>

These authorities, the interests supporting mediation candor, and the absence of any countervailing interest in the general disclosure of otherwise confidential mediation communications support adopting prophylactic measures to limit the disclosure of mediation communications if revisions are made to the Evidence Code in order to facilitate legal malpractice cases that arise from mediation conduct.

It is not unusual under California law for parties to be required to meet special standards or show good cause before discovery of certain subject matter may be commenced. And *in camera* procedures and the use of protective orders have been prevalent in California litigation for decades. There are many examples of rules and procedures in California to preserve confidentiality and avoid the chilling effect that disclosure of confidences can have on interests and rights that California has policies to protect. Plaintiffs seeking punitive damages, for example, may not conduct discovery related a defendant’s private financial condition unless “the court finds, on the basis of the supporting and opposing affidavits presented, that the plaintiff has established that there is a substantial probability that the plaintiff will prevail on the claim . . . .” California Civil Code Section 3295. Where such discovery is permitted, “[t]he court may, for good cause, grant any defendant a protective order requiring the plaintiff to produce evidence of a prima facie case of liability for [punitive] damages . . . prior to the introduction of such evidence.” Civil Code Section 3295(b). Similar privacy rights are protected by a host of California procedural rules limiting discovery, use, and disclosure of information that should remain confidential.<sup>4</sup>

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<sup>2</sup> And, as presented by the Staff, *see* CLRC Staff Memorandum 2014-6, Exhibit p. 3 (comments of Ron Kelly); CLRC Staff Memorandum 2014-24, pp. 21-23 (discussing practicalities of UMA’s *in camera* approach for certain exceptions); CLRC Staff Memorandum 2014-43, pp. 9-10 (discussing *in camera* issue raised in Pennsylvania case law); CLRC Staff Memorandum 2015-13, p. 2 & Exhibit pp. 1-2 (paper by Amelia Green); and CLRC Staff Memorandum 2015-35, pp. 34-36 (summarizing scholarly views on use of *in camera* hearings).

<sup>3</sup> CLRC Staff Memorandum 2015-13 at T15, finding similar protections in Arkansas (Ark. Code Ann. § 16-7-206(c)); Louisiana (La. Rev. Stat. § 9:4112(D)); Mississippi (Miss. Ct. Annexed Mediation R. VII(D)); Alabama (Comment to Ala. Civ. Ct. Mediation R. 11(b)(3)); New Mexico (N.M. Stat. Ann. § 44-7B-5(A)(8)); Wisconsin (Wis. Stat. § 904.085(4)(e)); and in Section 574(a)(4)(C) of the Federal Administrative Dispute Resolution Act of 1996. *Id.* at 14-17.

<sup>4</sup> Where privacy rights are implicated, the evidence sought must be directly relevant and essential to the fair resolution of the case and orders compelling discovery should be narrow and specific. *See e.g., Palay v. Superior Court* (1993), 18 Cal.App.4th 919, 934; *Wood v. Superior Court* (1985) 166 Cal.App.3d 1138, 1149. *In camera* proceedings and protective orders are to be used to limit disclosure and use of evidence. *See Palay v. Superior Court, supra*, 18 Cal.App.4th at 935; *Save Open Space Santa Monica Mountains v. Superior Court* (2000), 84 Cal.App.4th 235.

California’s Anti-SLAPP statute also establishes procedural protections where litigation may “chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances.” Code of Civil Procedure Section 425.16. Plaintiffs pursuing suits that may inhibit the exercise of these constitutional rights are subject to a motion to strike that imposes on the plaintiff the preliminary burden of showing that the plaintiff will probably prevail in the case before discovery may commence and the action may proceed.<sup>5</sup> Fraud claims are subject to heightened pleading standards requiring specific details of the alleged fraudulent statements, not the usual sort of general allegations that are sufficient to state other causes of action.<sup>6</sup>

Since California law, and the Commission’s preliminary determinations, recognize that mediation confidentiality should not be diluted or compromised except as is necessary to serve other compelling interests (like lawyer accountability for mediation misconduct), the only argument against procedural protections such as *in camera* proceedings and protective orders to limit the disclosure of mediation communications is concern for administrative convenience. But our courts are experienced and equipped to comply with these sorts of procedures. No undue burden will be placed on the courts or the litigants if procedural safeguards are implemented to protect mediation confidentiality and mediation candor in the sorts of cases envisioned by the Commission’s preliminary determinations. And the special interest that the courts have in encouraging successful mediations makes it unlikely that judges will find procedural rules intended to encourage mediation candor unduly burdensome.

Accordingly, the following measures are recommended to protect mediation confidentiality, in order to encourage mediation candor, if evidence of mediation communications becomes admissible in cases claiming lawyer malpractice:

- (a) Any complaint, pleading, petition, request for arbitration, or subsequent submission to a court, arbitrator, or administrative body of the state that discloses documents, communications, or conduct in or in connection with a mediation shall be filed or submitted under seal unless the standing rules or procedures of the body to which the evidence is submitted assure continuing confidentiality without special treatment.<sup>7</sup>

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<sup>5</sup> “A cause of action against a person arising from any act of that person in furtherance of the person’s right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.” Code of Civil Procedure Section 425.16(b)(1). Discovery is stayed pending the resolution of the special motion to strike (Code of Civil Procedure Section 425.16 (g)) and attorneys’ fee provisions afford defendants relief from the burden of such suits where the plaintiff cannot show probability of success (Code of Civil Procedure Section 425.16 (c)(1)).

<sup>6</sup> Plaintiffs must plead “facts which show how, when, where, to whom, and by what means the representations were tendered.” *Stansfield v. Starkey* (1990) 220 Cal.App.3d 59, 73; *Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645. This rule protects defendants from unnecessary reputational damage, limits claims that could discourage free speech, and discourages suits that are used to conduct discovery without a substantial basis.

<sup>7</sup> The focus of these proposed procedures is to implement effectively the tentative determination of the Commission to allow parties to present evidence in malpractice cases and other proceedings intended to make attorneys accountable for malpractice or other misconduct in a mediation while preserving as much as possible the confidentiality of mediation communications and conduct in order to encourage mediation candor. These proposed procedures have been drafted so as to

- (b) No order allowing or compelling discovery or disclosure of mediation communications or conduct may be entered before the court, arbitrator, or administrative agency finds, after a hearing *in camera*, that the party seeking discovery or the proponent of the evidence has shown by clear and convincing evidence (1) that the proponent has a substantial likelihood of prevailing on the claim that is the basis of the proceeding, (2) that the evidence is not otherwise available, and (3) that there is a need for the evidence that substantially outweighs the interest in protecting confidentiality.<sup>8</sup>
- (c) If the court, arbitrator, or other authority determines that the required showing has been made under subsection (b), the proponent of disclosure may seek only relevant and admissible evidence that has a substantial tendency to prove or disprove one or more elements of the claim or cause of action at issue. Mediation communications and conduct that are not relevant and admissible may not be sought or compelled.<sup>9</sup> Mediation communications and conduct disclosed in discovery shall be protected from third party disclosure as provided in subsection (e).
- (d) No ruling or order allowing the admission into evidence of mediation communications or conduct shall be made or entered before the requirements of subsection (b) have been satisfied. Only the portion of mediation communications or conduct necessary to the determination of the issue to which it is relevant may be admitted. Admission of evidence under this section does not render the evidence, or any other mediation

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cover all proceedings where presumptively confidential mediation communications may be the subject of compelled disclosure or be offered into evidence.

<sup>8</sup> Section (b) employs the procedure of the UMA Section 6(b) for an *in camera* hearing before mediation communications may be discovered in a criminal proceeding or to rescind, reform, or avoid liability on a contract arising out of the mediation. But it extends this confidentiality procedure to all mediation communications (not just communications relevant to criminal proceedings or proceeding relating to the enforcement of mediated settlement agreements). This extension is necessary because California law, unlike the UMA, treats all mediation communications as confidential (whether or not the parties have entered an agreement to that effect). This section also relies on the policy underlying California’s Anti-SLAPP statute (Code of Civil Procedure Section 425.16) requiring a preliminary determination, before discovery is allowed, that the plaintiff is likely to prevail on the claim for which discovery is sought. This is appropriate because of the public interest in mediation candor and the ease with which a claim of malpractice or other overreaching in mediation can be asserted. If the Commission dilutes mediation confidentiality to allow malpractice cases, it should impose a reasonable burden on plaintiffs to present evidence that the underlying claim is substantial and likely to succeed before putting the parties through the discovery and evidentiary process (with its inherent adverse impacts on candor in mediation).

<sup>9</sup> Section (c) provides a limitation on the scope of discovery once the court or agency determines to allow discovery into mediation communications and conduct. The purpose of the section is to limit discovery to evidence that is both relevant and admissible in order to avoid overbroad inquiries into presumptively sensitive and confidential communications. It is consistent with the requirements of section (b), as articulated by the authors of the UMA, that “there [must be] a need for the evidence that substantially outweighs the interest in protecting confidentiality” before such evidence may be admitted. UMA Section 6(b). *Also*, Draft Minutes of October 8, 2015, p. 6 (“In Camera Screening Process”).

communications or conduct, discoverable or admissible for any other purpose.<sup>10</sup>

- (e) Mediation communications and conduct revealed in discovery or admitted into evidence shall be kept confidential by the parties and the court, arbitrator, or agency, which shall enter an appropriate protective order or make such evidence subject to other rules, orders, or procedures of the court, arbitrator, or agency assuring continuing confidentiality. Such orders or procedures shall require all individuals and entities to whom confidential mediation communications or conduct are disclosed to refrain from disclosing such material to individuals or entities not designated as entitled to access. The court, arbitrator, or other body shall have authority to enter such other and further orders regarding compliance with its protective orders or other orders or procedures relating to confidentiality, including monetary sanctions, as the court, arbitrator, or other body with jurisdiction, in its discretion, deems appropriate to maintain the confidentiality of mediation communications and conduct and remedy unauthorized disclosures.<sup>11</sup>
  
- (f) The allowance of discovery or the admission of mediation communications and conduct into evidence does not affect privileges or immunities that may be available to a party or to a mediator. In particular, but only by way of example:
  - (1) Nothing in this Section [or in the pertinent Chapter of the Evidence Code] is intended to affect the extent to which a mediator is, or is not, immune from liability under existing law.<sup>12</sup>
  
  - (2) A mediator may not be compelled to provide evidence of mediation communications or conduct except as allowed by Evidence Code Section 703.5.<sup>13</sup>

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<sup>10</sup> This subsection follows the language tentatively adopted by the Commission on October 8, 2015. Draft Minutes p. 6 (“Limitation on Extent of Disclosure of Mediation Communications”).

<sup>11</sup> This subsection is necessary to assure that mediation communications revealed in legal malpractice proceedings and other proceedings are accorded the same protections against unnecessary disclosure as exist for other confidential or proprietary information revealed in litigation. Provisions allowing enforcement proceedings and discretionary sanctions confirm the court, arbitrator, or agency’s inherent authority to enforce its protective orders and procedures.

<sup>12</sup> This subsection follows the language tentative adopted by the Commission on October 8, 2015. Draft Minutes p. 4-5 (“Mediator Immunity”).

<sup>13</sup> This subsection follows the language tentatively adopted by the Commission on October 8, 2015. Draft Minutes p. 6 (“Mediator Testimony”).