Study K-402 May 20, 2016

Memorandum 2016-29

Relationship Between Mediation Confidentiality and Attorney Malpractice and Other Misconduct: Scope of Public Disclosure

At the April meeting, the Commission reacted negatively to the possibility of modeling its proposed new mediation confidentiality exception on the sealed records rules,[1] and directed the staff to explore

> whether there is any constitutionally permissible method of *in camera* screening or quasi-screening that a judicial officer could use as a filter at the inception of a legal malpractice case based on mediation misconduct (an early way to eliminate claims that have no basis and should not result in public disclosure of mediation communications).[2]

Memorandum 2016-27 will address that question.

Regardless of what the Commission decides about filtering of legal malpractice cases that allege mediation misconduct, it will also need to provide guidance on some other basic points before the staff can begin drafting proposed legislation, such as:

(1) The standard for *discovery* of mediation communications in a legal malpractice case that alleges mediation misconduct.
(2) The standard for *admissibility* of mediation communications in a legal malpractice case that alleges mediation misconduct.
(3) The extent to which alleged mediation communications will be *disclosed to the public* (as opposed to court personnel, the parties, and their attorneys) in such a case.

1. For discussion of that possibility, see Memorandum 2016-18, pp. 63-67, 77.

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. Draft Minutes (April 2016), p. 5.

(4) Whether, in such a case, to protect a mediation communication from *disclosure to a mediation participant who was not privy to it* during the mediation.[3]

This memorandum focuses on the third point: the proper scope of public disclosure.

We begin by trying to clearly state the issue for the Commission and describing three main options. We then discuss some factors for the Commission to consider in selecting an approach.

THE ISSUE AND MAIN OPTIONS

In a legal malpractice case that alleges mediation misconduct,

- The complaint, other pleadings, memoranda of points and authorities, or other court documents might contain allegations regarding mediation communications.
- A witness might testify, or be asked to testify, regarding mediation communications, and that testimony might be transcribed.
- At trial or in connection with a dispositive motion, a party might proffer evidence of mediation communications.
- In ruling on an issue, the court might refer to allegations or evidence regarding mediation communications.
- Mediation communications might be used or otherwise surface in other ways.

In other words, the court proceeding and record almost certainly will include mediation communications in some form or another, as well as requests for evidence of such communications. It seems improbable that a court could resolve a claim of mediation misconduct without that occurring.

As discussed at length in Memorandum 2016-18, however, judicial records and proceedings are presumptively open and accessible to the public. Consequently, without special rules, adjudicating a legal malpractice case that alleges mediation misconduct will result in disclosure of mediation communications not only to the parties, counsel, and court personnel, but also to the public generally.

3. As currently conceived, the Commission's proposed new mediation confidentiality exception would apply not only in a legal malpractice case that alleges mediation misconduct, but also in a State Bar disciplinary proceeding that alleges mediation misconduct. For the sake of simplicity, we have first been focusing on the legal malpractice context. Once the Commission provides guidance regarding that context, it will be important to examine whether adjustments are necessary to address a State Bar disciplinary proceeding.

The Commission could seek to avoid that result through special procedures designed to limit public access, such as sealing orders, protective orders, redaction requirements, *in camera* screening, and/or closed hearings. Last August, the Commission decided that its proposed new mediation confidentiality exception should utilize an *in camera* screening process.[4] The Commission did not resolve any details of the *in camera* screening process, or specify what it intends to achieve through use of that process.

Without knowing the Commission's objective, at least in general terms, the staff cannot draft legislation to achieve that objective. It is thus important for the Commission to give some basic guidance on what it hopes to achieve by limiting public access through the use of an *in camera* screening process.

In particular, it may be helpful to start by focusing on three main options regarding public access. Once the Commission chooses which main option to pursue, the staff could help the Commission flesh out the details of that concept.

The three main options are:

(1) **No special restrictions on public access.** The Commission could abandon the concept of *in camera* screening. No special judicial techniques would be used to limit public access to mediation communications that are disclosed in litigating a legal malpractice case based on mediation misconduct. If an alleged mediation communication is disclosed to the parties, court, and counsel during the case (whether as an allegation in a pleading, in an argument in a memorandum of points and authorities, in documentary evidence attached to a summary judgment motion, in an offer of proof, in witness testimony, or in some other form), the general public will also have access to that information.

(2) **Only restrict public access with regard to a determination of admissibility.** In a legal malpractice case that alleges mediation misconduct, if a party proffers evidence of a mediation communication, the party would have to do so at an *in camera* hearing (i.e., a hearing that is not open to the public). If the court rules that the evidence presented *in camera* is admissible, then the evidence and the transcript of the *in camera* hearing will become public. If the court rules that the evidence presented *in camera* is inadmissible, then that evidence and the transcript of the *in camera* hearing will not become public.[5]

4. Minutes (Aug. 2015), p. 5.

5. This is similar to Approach #4 in Memorandum 2016-18. See Memorandum 2016-18, Exhibit p. 20.

(A variation on this option would be to limit public disclosure only if the court rules that the evidence presented *in camera* is irrelevant.[6])

(3) **Require or permit a court to more broadly restrict public access.** Under this option, a court adjudicating a legal malpractice case that alleges mediation misconduct could not only restrict public access with regard to a determination of admissibility, but could also restrict public access in other contexts. To give just a few examples,

- The court could exclude the public from hearing a witness testify to a mediation communication that is admissible but contains highly sensitive business information;
- The court could require redaction of a mediation communication that is presented as an allegation in an unverified complaint, not in evidentiary form; or
- The court could seal a document that describes a significant but deeply embarrassing mediation conversation.

(The Commission could implement this option in a number of different ways. Some possibilities are described in the memorandum on *in camera* screening that the Commission considered in April.[7])

The Commission needs to weigh the advantages and disadvantages of these three different options.

---

6. This is similar to Approach #3 in Memorandum 2016-18. See Memorandum 2016-18, Exhibit p. 20.

7. This option would encompass the following approaches from Memorandum 2016-18:

- **Approach #1.** Insulate from public view all evidence or other material that discloses alleged mediation communications or information from which people could determine the likely content of alleged mediation communications.
- **Approach #2**. Similar to Approach #1, but the restriction on public access would not necessarily apply for the full duration of the case. In other words, the court would restrict public disclosure of alleged mediation communications during the initial stages of a case, but would need to revisit the extent of that restriction, and perhaps disclose more information, upon reaching an adjudicatory stage.
- **Approach #5.** Give a court *discretion* to restrict public access to any mediation communication, based on all of the facts and circumstances of a case, as long as that restriction is constitutional.
- **Approach #6.** *Require* a court to restrict public access to mediation communications to the greatest extent constitutionally permissible. This would be similar to Approach #1, but it would be expressly subject to the constitutional limitations.

See Memorandum 2016-18, Exhibit p. 20.

ADVANTAGES AND DISADVANTAGES

In weighing the advantages and disadvantages of the three options described above, it is important to consider what is and what is not at stake. Here, we are *not* talking about the standard governing the *admissibility* of evidence of a mediation communication.

Crafting the *admissibility* standard will require assessment of how far to go in using mediation communications to prove or disprove that an attorney engaged in mediation-related misconduct. Should parties be allowed to introduce *all* mediation communications that are relevant to such a claim? Should parties be required to meet a stiffer standard, such as one that requires a court to examine the materiality of a mediation communication, the downsides of allowing a party to use the communication, and the availability of other evidence on the same point?

How the Commission crafts the admissibility standard will affect attorney accountability. The stiffer the standard for using mediation communications to prove or disprove attorney accountability, the less information will be available to the trier-of-fact and the greater the potential for reaching an unjust result.

In contrast, the Commission's decision on the issue addressed in this memorandum will not affect the amount of information available to the trier-of-fact. Its decision on the point will only affect how much information is available to the general public. Because the decision will not affect the amount of information available to the trier-of-fact, there will be little to no impact on attorney accountability.

Rather, the relevant competing considerations are:

- Constitutional requirements of public access and the values underlying those requirements.
- Mediation confidentiality and its benefits.
- Costs and burdens on courts and litigants in a legal malpractice case that alleges mediation misconduct.

We discuss each set of considerations in order below.

Constitutional Requirements of Public Access and the Values Underlying Those Requirements

As discussed at length in Memorandum 2016-18, the First Amendment to the United States Constitution creates a presumptive public right of access to certain court proceedings. Thus far, the United States Supreme Court, applying a two-

prong test that focuses on whether there is a tradition of public access and whether public access has "specific structural utility," has only found such a right of access to various criminal proceedings.[8] However, the California Supreme Court, applying the same two-prong test, has said that the First Amendment also creates a presumptive public right of access to an ordinary civil proceeding and to judicial records that are filed in court as a basis for adjudication in such a proceeding (but not to discovery-related materials).

It thus seems likely that California courts would find a presumptive First Amendment right of access to court proceedings and adjudication-related judicial records in a legal malpractice case. Of particular significance, that would even seem to be true with respect to a legal malpractice case that alleges mediation misconduct.[9]

Providing public access to court proceedings and judicial records serves a number of important functions. Among other things, it

- helps demonstrate that justice is meted out fairly, thus promoting public confidence in court proceedings;
- provides a means for citizens to scrutinize the use and possible abuse of judicial power; and
- enhances the truth-finding function of court proceedings.[10]

As the name implies, however, a presumptive First Amendment right of access is not absolute. The presumption of public access can be overcome through a showing, supported by specific findings, entered after notice and a hearing, that "(i) there exists an overriding interest supporting closure and/or sealing; (ii) there is a substantial probability that the interest will be prejudiced absent closure and/or sealing; (iii) the proposed closure and/or sealing is narrowly tailored to serve the overriding interest; and (iv) there is no less restrictive means of achieving the overriding interest."[11] California's sealed record rules were designed to implement these constitutional requirements.[12] For convenience, we will henceforth refer to those requirements as the "multi-part constitutional test for a limitation on public access."

---

8. See Memorandum 2016-18, pp. 7-15.
9. See *id.* at 42-45.
10. NBC Subsidiary (KNBC-TV) v. Superior Court, 20 Cal. 4th 1178, 1219, 980 P.2d 330, 86 Cal. Rptr. 2d 778 (1999). For further discussion of the policy considerations underlying the First Amendment right of access, see Memorandum 2016-18.
11. *NBC Subsidiary*, 20 Cal. 4th at 1218; see Memorandum 2016-18, pp. 11-13, 15-19, 23-28, 45-50.
12. See Memorandum 2016-18, pp. 32-35, Exhibit pp. 1-19.

How do the First Amendment constraints described above apply to the three main options under consideration here? The answer is easy with regard to Option #1 (no special restrictions on public access). Because that option would not entail any restrictions on public access to judicial records and proceedings in a legal malpractice case that alleges mediation misconduct, the option would clearly comply with the First Amendment right of access and would pose no threat to the values underlying that constitutional guarantee.

The answer is more complicated with regard to Option #2 (only restrict public access with regard to a determination of admissibility). Under this option, the only materials that would be excluded from public view would be ones that (1) the court rules inadmissible at an *in camera* hearing *and* (2) have not already become public (e.g., as an allegation in a complaint).

A presumptive First Amendment right of access does not seem to apply to irrelevant materials.[13] Whether a presumptive right of access would extend to evidence of a mediation communication that a court excludes on a basis *other than* relevancy is less clear.[14]

Some courts have said that inadmissible evidence is not subject to a presumptive First Amendment right of access.[15] Aside from irrelevant materials, that seems most likely to be true with regard to materials that are confidential by law.[16]

Other cases create some doubt about whether inadmissible evidence is subject to a presumptive First Amendment right of access.[17] Some of those cases involve privileged materials.[18]

---

13. The United States Supreme Court and the California Supreme Court have not yet addressed this point, but strong arguments appear elsewhere. See, e.g., Overstock.com, Inc. v. Goldman Sachs Group, Inc., 231 Cal. App. 4th 471, 492, 180 Cal. Rptr. 3d 234 (2014); see also *id.* at 497 & cases cited therein.

14. See Memorandum 2016-18, pp. 61-63.

15. See, e.g., Apple, Inc. v. Samsung Electronics Co., Ltd., 727 F.3d 1214, 1222-23 (Fed. Cir. 2013) ("[E]vidence which a trial court rules inadmissible — either as irrelevant or inappropriate — seems particularly unnecessary to the public's understanding of the court's judgment."); *Overstock.com,* 231 Cal. App. 4th at 492 ("[M]aterials as to which evidentiary objections are sustained are not 'submitted as a basis for adjudication' and thus are not within the ambit of the constitutional right of access …."); E.E.O.C. v. Dial Corp., 2000 U.S. Dist. LEXIS 22149, *3 (N.D. Ill. 2000) ("The public has no interest in gaining access to information that has failed to pass the threshold tests of relevance and admissibility.").

16. See Memorandum 2016-18, p. 62.

17. See, e.g., *NBC Subsidiary,* 20 Cal. 4th at 1181 (upholding First Amendment challenge to blanket closure of non-jury proceedings despite claim that access to those proceedings might "increase 'the risk that jurors will be exposed to the very information that was held from them ….'"); People v. Jackson, 128 Cal. App. 4th 1009, 1017, 1021-29, 27 Cal. Rptr. 3d 596 (2005) (upholding sealing order, which would "prevent exposure to inadmissible items of evidence,"

From a constitutional standpoint, the safest course would be to insist on satisfaction of the multi-part constitutional test, even though that would impose burdens on courts and litigants. It might, however, be constitutionally permissible to restrict access to inadmissible mediation communications without satisfying all elements of that test. If so, it probably would still be necessary for a statutory procedure to satisfy the less demanding requirements that apply to a limitation on the common law right of access to judicial records and proceedings.[19]

If the Commission chooses the safe course (requiring the court and litigants to satisfy the multi-part constitutional test for a limitation on public access), Option #2 would more burdensome than Option #1. Otherwise, Option #2 would be more constitutionally risky than Option #1, and would be less protective of the values underlying the First Amendment right of access. The degree of risk will vary depending on whether the Commission's proposal limits access to all types of *inadmissible* materials (Option #2 in pure form), or only limits access to *irrelevant* materials (Variation on Option #2).

As for Option #3 (require or permit a court to more broadly restrict public access), this option, however framed, would potentially limit public access not only to inadmissible materials, but also to some court documents and testimony that may serve as the basis for adjudication in a legal malpractice case that alleges mediation misconduct. With regard to the latter type of materials, it almost certainly will be necessary to comply with the multi-part constitutional test for a limitation on public access, perhaps by using an approach similar to the sealed record rules.[20]

That would impose burdens on courts and litigants. In addition, if a court approves a limitation on access to adjudication-related judicial records and proceedings, the policy interests underlying the First Amendment right of access will be undermined to some extent. The degree of harm will depend on the circumstances of the particular case and the specific way in which the Commission decides to implement this option.[21]

---

only after making findings required by multi-part constitutional test for a limitation on public access); see also Memorandum 2016-18, pp. 61-62.

18. See Memorandum 2016-18, pp. 25-27 & nn. 150 & 154 & cases described therein.

19. See, e.g., Sander v. State Bar of California, 58 Cal. 4th 300, 314 P.3d 488, 165 Cal. Rptr. 3d 250 (2013); Copley Press, Inc. v. Superior Court, 6 Cal. App. 4th 106 (1992).

20. See Memorandum 2016-18, pp. 63-67, 77-79.

21. For some of the possible ways to implement Option #3, see note 7 *supra*.

Mediation Confidentiality and Its Benefits

Like the First Amendment guarantee of free speech, California's mediation confidentiality statute is designed to promote an "uninhibited, robust, and wide open"[22] exchange of ideas, and thereby serve socially useful ends.[23] Unlike the free speech guarantee, however, the statute seeks to promote circulation of such ideas within a small circle, not among the public at large. The statute is based on the premise that providing an assurance of confidentiality to a select group of people (some or all persons involved in a dispute and those assisting them in resolving the matter) will help them be frank with each other and thus increase the likelihood of achieving a settlement that furthers the public interest.

As discussed in previous memoranda, this phenomenon (like the benefits of free speech) is inherently difficult to prove, much less to quantify.[24] But it is grounded in commonsense and has widespread support from courts, commentators, practitioners, and legislative bodies across the country.[25]

Creating a new exception to mediation confidentiality, as the Commission proposes, will decrease the level of protection for mediation communications in California. The full impact of such a reform on the objectives of the mediation confidentiality statute is impossible to predict with any degree of certainty. Experience in other jurisdictions suggests that creating a new exception to promote attorney accountability will not cause mediation to disappear from California. There is, however, a significant danger of comparing apples to oranges, making it difficult to predict the potential effect more precisely.[26]

Nonetheless, some observations are in order here. Under Option #1 (no special restrictions on public access), if a mediation communication was disclosed in a legal malpractice case, the communication would become public knowledge. The possibility of public disclosure might inhibit free-flowing mediation communications, but the magnitude of that potential effect is difficult to estimate.

Most likely, the chilling effect would be more significant under Option #1 than under Option #2 (only restrict public access with regard to a determination of admissibility). That is because Option #2, unlike Option #1, would require a

22. New York Times v. Sullivan, 376 U.S. 254, 270 (1964).
23. See, e.g., Rojas v. Superior Court, 33 Cal. 4th 407, 415-16, 93 P.2d 260, 15 Cal. Rptr. 3d 643 (2004); Foxgate Homeowners' Ass'n, Inc. v. Bramalea California, Inc., 26 Cal. 4th 1, 14, 25 P.3d 1117, 108 Cal. Rptr. 2d 642 (2001).
24. See Memorandum 2015-5, pp. 4-8.
25. See, e.g., *id.* at 46-50; Memorandum 2016-18, p. 46 & sources cited therein.
26. See, e.g., Memorandum 2015-5.

court to shelter inadmissible mediation communications from public disclosure (or at least irrelevant mediation communications, under the Variation on Option #2).

To at least some mediation participants, the reduced risk of public disclosure under Option #2 as compared to Option #1 might affect their willingness to speak freely at a mediation, even though there would be no impact on the potential for disclosure to a smaller group consisting of court personnel, litigants, and their counsel. In all probability, relatively few participants would be familiar enough with the details of the mediation confidentiality statute to precisely grasp the legal distinction, but this effect might nevertheless occur, due to general perceptions regarding the likelihood of public disclosure that would develop over time once the statutory reform was implemented.

The effect just described may occur to an even greater degree with regard to Option #3 (require or permit a court to more broadly restrict public access) than with regard to Option #2. Stated differently, Option #3 would entail less risk of publicly disclosing a mediation communication than Option #1 or Option #2, so mediation participants might be more inclined to speak frankly under that type of approach and realize the benefits of doing so.

Another way of looking at the situation is to consider the predictability of mediation confidentiality. As compared to existing law, all three options would involve the creation of a new mediation confidentiality exception and thus would entail an increased risk of disclosure to a relatively small group that consists of litigants, their counsel, and court personnel in a legal malpractice case that alleges mediation misconduct. The magnitude of this increased risk would be the same for all three options. Due to the increased risk of disclosure, mediation confidentiality would be less predictable than under existing law and mediation participants could not be as confident that their mediation communications would remain confidential.

All three options would also entail a greater risk of *public* disclosure than existing law. Among the three options, Option #3 would provide the greatest likelihood of protection from *public* disclosure,[27] Option #1 would be least protective, and Option #2 would fall somewhere in-between.

It follows that protection of mediation confidentiality would be most predictable under existing law and least predictable under Option #1. In terms of

27. See, e.g., Memorandum 2015-5.

predictability, Option #2 and Option #3 would fall in the middle, with Option #3 providing greater predictability than Option #2.

The degree of predictability is of concern, because the United States Supreme Court has said that "'[a]n uncertain privilege, or one that purports to be certain but results in widely varying application by the courts, is little better than no privilege at all.'"[28] It is important to bear in mind, however, that a measure of unpredictability already exists with regard to mediation confidentiality in California, due to existing exceptions and limitations on the applicability of California's mediation confidentiality statute.[29]

Costs and Burdens on Courts and Litigants in a Legal Malpractice Case That Alleges Mediation Misconduct

As previously noted, any limitation on public access to adjudication-related records and court proceedings in a legal malpractice case that alleges mediation misconduct probably will have to comply with the multi-part constitutional test for a limitation on public access — i.e., the limitation on public access will survive constitutional scrutiny only upon a showing, supported by specific findings, entered after notice and a hearing, that (i) there is an overriding interest supporting the limitation on public access; (ii) there is a substantial probability that the overriding interest will be prejudiced absent the limitation on public access; (iii) the limitation on public access is narrowly tailored to serve the overriding interest; and (iv) there is no less restrictive means of achieving the overriding interest.

---

28. Jaffee v. Redmond, 518 U.S. 1, 18 (1986), *quoting* Upjohn Co. v. United States, 449 U.S. 383, 393 (1981).

29. Option #3 could be implemented in a number of different ways. For some examples, see *supra* note 7. Of the approaches described there, two of them would come close to providing the same level of protection from *public* disclosure as existing law:

- **Approach #1.** Insulate from public view all evidence or other material that discloses alleged mediation communications or information from which people could determine the likely content of alleged mediation communications.
- **Approach #6.** *Require* a court to restrict public access to mediation communications to the greatest extent constitutionally permissible. This would be similar to Approach #1, but it would be expressly subject to the constitutional limitations.

Like any other statute (including a hypothetical statute implementing Approach #1), the existing mediation confidentiality statute is already implicitly subject to constitutional constraints. Unlike Approach #1 and Approach #6, however, existing law does not include an exception for attorney misconduct. Consequently, in contrast to Approach #1 or Approach #6, existing law involves few occasions in which a court uses mediation communications in the adjudicatory phase of a case and such communications become subject to the First Amendment right of access and possible *public* disclosure.

Complying with this set of constitutional requirements would impose some costs and burdens on courts and litigants, as the laborious redaction approach in California's sealed records rules reflects.[30] Providing the requisite notice, holding the necessary hearing, presenting and considering arguments regarding satisfaction of the four substantive requirements, preparing and distributing the necessary court findings, and implementing the court's decision would take time and effort, at considerable expense to the parties, the court system, and perhaps other people involved in the process (such as a witness, whose witness fee may not fully cover the actual expense of testifying).

The extent of those costs and burdens would vary depending upon which of the three options the Commission chooses, and the specifics of how it pursues that option. For example, there would be no such costs associated with Option #1 (no special restrictions on public access), because that option would not entail any limitation on public access.

Option #2 (only restrict public access with regard to a determination of admissibility) presents a more complex picture. As previously explained, a court probably could withhold *irrelevant* mediation communications from public scrutiny without satisfying the multi-part constitutional test, but it might not be able to do so with regard to mediation communications that it excludes on other grounds.

If the Commission's proposal would limit public access to all types of inadmissible mediation communications (Option #2 in pure form), then the safest course would be to require that each specific access limitation satisfy the multi-part constitutional test. That would impose some costs and burdens on courts and litigants.

Option #2 would be less burdensome without incorporating all of the constitutional requirements, and it might still survive constitutional scrutiny. That seems particularly likely if the Commission decides to limit public access only to *irrelevant* mediation communications (Variation on Option #2).

Option #3 (require or permit a court to more broadly restrict public access) would be the most burdensome of the three options. Because it would potentially limit public access to some testimony or materials that serve as a basis for adjudication, there is little doubt that satisfaction of the multi-part constitutional

30. See Cal. R. Ct. 2.550-2.552, 8.45-8.47. These rules are reproduced at Exhibit pages 1-19 of Memorandum 2016-18.

test would be necessary for each specific limitation on public access to such items.

The extent of that burden would depend on how the Commission decides to implement Option #3. For example, an approach that *requires* a court to limit public access to mediation communications to the greatest extent constitutionally permissible would be more burdensome than an approach that gives a court *discretion* to limit such access within constitutional bounds. If the Commission decides to pursue Option #3, we will further explore the implications of the various implementation alternatives, so that the Commission can select the one that would best achieve its objectives.

Two more points are worth making regarding the burdens associated with limiting public access. First, the California Supreme Court considered such burdens to some extent in *NBC Subsidiary,* which concerned closure of non-jury proceedings in an ordinary civil case to ensure a fair trial. After explaining the applicable constitutional constraints, the Court rejected an argument that compliance with those requirements would be overly burdensome. It said:

> Respondent asserts that "[r]equiring individualized justification as to each matter to be discussed during the non-jury conferences, with notice to the press of intention to exclude them, permitting a hearing thereon, and presumably appellate review thereof by extraordinary writ, squanders scarce judicial resources to secondary due process trials." Respondent's concerns are misplaced and overstated.
>
> The decisions of the United States Supreme Court and numerous lower courts establish that notice is required in order for substantive trial or chambers proceedings to be closed in a manner comporting with the Constitution but … contrary to respondent's assertion, no special "notice to the press" generally is required. As explained, *ante,* … the notice requirement will not impose an undue burden on trial courts.
>
> The need to comply with the requirements of the First Amendment right of access may impose some burdens on trial courts. But courts can and should minimize such inconveniences by proposing to close proceedings only in the rarest of circumstances, as explained above. Accordingly, the burden imposed by requiring trial courts to give notice of a closure hearing and make the constitutionally required findings, and the ensuring burden imposed by permitting review of closure orders by extraordinary writ, will not unduly encumber our trial and appellate courts.[31]

31. 20 Cal. 4th at 1226 (citations omitted).

A similar argument might apply in the context at hand, depending on how the Commission decides to proceed.

Second, the First Amendment right of access is of constitutional stature and the statutory protection for mediation confidentiality is based on weighty substantive policy considerations. In general, administrative burdens (like those inherent in the multi-part constitutional test for a limitation on public access) do not receive much deference when courts weigh them against constitutional rights or other weighty substantive policy considerations.[32]

Weighing the Competing Considerations

The Commission needs to **weigh the risks and competing policy considerations described above and determine which of the following options would best achieve its objectives in this study:**

- Option #1 (no special restrictions on public access).
- Option #2 (only restrict public access with regard to a determination of admissibility).
- Option #3 (require or permit a court to more broadly restrict public access).

The staff makes no recommendation on this matter, because it calls for balancing of important, conflicting interests in a controversial area. That type of key policy decision should be left to the members of the Commission. The staff will reserve its advice for more technical matters, such as the existence of analytical flaws in approaches under consideration.

Respectfully submitted,

Barbara Gaal
Chief Deputy Counsel

32. See, e.g., Gresher v. Anderson, 127 Cal. App. 4th 88, 109, 25 Cal. Rptr. 3d 408 (2005) ("It is difficult to imagine that the administrative burden of providing this information would outweigh the obvious benefits flowing from increasing the openness and efficiency of the exemption process."); Central Valley Chapter of the 7th Step Foundation, Inc. v. Younger, 214 Cal. App. 3d 145, 162, 262 Cal. Rptr. 496 (1989), *quoting* Central Valley Chapter of the 7th Step Foundation v. Younger, 95 Cal. App. 3d 212, 238, 157 Cal. Rptr. 117 (1979) ("'It is now well-settled that administrative burden does not constitute a compelling state interest which would justify the infringement of a fundamental right.'").