

Memorandum 2017-61

**Relationship Between Mediation Confidentiality and Attorney Malpractice
and Other Misconduct: Further Analysis Requested by the Commission**

In September, the Commission began considering the comments on the Tentative Recommendation in this study, which proposes to create an attorney misconduct exception to California's mediation confidentiality statute.¹ After discussing the comments directed to the proposal as a whole,² the Commission decided to proceed with its general approach but explore the possibility of narrowing the proposed exception (proposed Evidence Code Section 1120.5).³ The Commission asked the staff to prepare a memorandum that does both of the following:

- (1) Analyzes the comments that focus on a specific aspect of the Tentative Recommendation, rather than the proposal as a whole.
- (2) Explores whether the proposed exception should apply only in a State Bar disciplinary proceeding and how to implement such an approach if the Commission decides to pursue it.⁴

This memorandum addresses those points.

The following materials are attached for convenient reference:

- | | |
|---------------------------------------------------------|-------------------|
| | <i>Exhibit p.</i> |
| • Kate Cleary, Consortium for Children (10/13/17) | 1 |

1. Tentative Recommendation on *Relationship Between Mediation Confidentiality and Attorney Malpractice and Other Misconduct* (June 2017) (hereafter, "Tentative Recommendation"). The Tentative Recommendation and any other California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

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

2. Almost all of the comments on the Tentative Recommendation are collected in Memorandum 2017-51. A few additional comments appear in the First Supplement to Memorandum 2017-51. For staff analysis of the comments directed to the Commission's proposal as a whole, see Memorandum 2017-52.

3. *Draft Minutes* (Sept. 2017), p. 5 (attached to Memorandum 2017-47).

4. *Id.*

• Larry Doyle, Conference of California Bar Ass'ns (9/21/17) (excerpt) ⁵	3
• Jeff Kichaven, <i>A California Correction? Legislature Will Consider Allowing Attorney Malpractice Proof from Mediation</i> , 35 Alternatives to the High Cost of Litigation 97, 106-08 (July-Aug. 2017) (excerpt) ⁶	6
• Hon. David W. Long (ret.), California Judges Ass'n (8/18/17) (excerpt) ⁷	7
• Charles Pereyra-Suarez, California Dispute Resolution Council (8/30/17) (excerpt) ⁸	9
• Raymond Ryan, Stanford, Ryan & Associates, APC (8/4/17)	11
• Jerome Sapiro, Jr., San Francisco (7/26/17)	17
• Jill Switzer, Pasadena (8/24/17)	19
• Revisions to Make Proposed Section 1120.5 Apply Only in a State Bar Disciplinary Proceeding	21
• Ron Kelly, Berkeley (11/10/17)	25

The memorandum begins by briefly summarizing the Tentative Recommendation. The remainder of the memorandum roughly tracks the structure of the proposed exception. It is organized as follows:

- A. Use of the phrase “professional requirement.”
- B. Issues regarding the types of claims to which the proposed exception would apply.
- C. Proposed treatment of mediator testimony and mediator communications and related issues.
- D. Notice requirement and related issues.
- E. Issues concerning the possibility of contracting around the proposed exception.
- F. Possible obligation to inform mediation participants about the exception.
- G. Retroactivity of the proposed exception.

Unless otherwise indicated, all further statutory references are to the Evidence Code.

5. For a complete copy of Larry Doyle’s letter on behalf of the Conference of California Bar Associations, see First Supplement to Memorandum 2017-51, Exhibit pp. 1-4.

6. For a complete copy of Mr. Kichaven’s article, see Memorandum 2017-51, Exhibit pp. 128-33. The Commission reprinted the article with permission from the author and the publisher.

7. For a complete copy of Judge Long’s letter on behalf of the California Judges Association, see Memorandum 2017-51, Exhibit pp. 12-14.

8. For a complete copy of Mr. Pereyra-Suarez’s letter on behalf of the California Dispute Resolution Council, see Memorandum 2017-51, Exhibit pp. 15-18.

SUMMARY OF THE TENTATIVE RECOMMENDATION

The Commission's Tentative Recommendation consists of three parts. Part I (pages 3-132) summarizes the Commission's research for this study, including the extensive background work requested by the Legislature.

Part II (pages 133-43) explains that the Commission tentatively recommends the creation of a new exception to California's mediation confidentiality law. The purpose of this exception would be to hold attorneys accountable for misconduct in the mediation process, while also allowing attorneys to effectively rebut meritless misconduct claims.

Part III (pages 145-48) presents the Commission's proposed legislation. The new exception and accompanying Comment would provide:

Evid. Code § 1120.5 (added). Alleged misconduct of lawyer when representing client in mediation context

SEC. _____. Section 1120.5 is added to the Evidence Code, to read:

1120.5. (a) A communication or a writing that is made or prepared for the purpose of, or in the course of, or pursuant to, a mediation or a mediation consultation, is not made inadmissible, or protected from disclosure, by provisions of this chapter if all of the following requirements are satisfied:

(1) The evidence is relevant to prove or disprove an allegation that a lawyer breached a professional requirement when representing a client in the context of a mediation or a mediation consultation.

(2) The evidence is sought or proffered in connection with, and is used pursuant to this section solely in resolving, one or more of the following:

(A) A disciplinary proceeding against the lawyer under the State Bar Act, Chapter 4 (commencing with Section 6000) of the Business and Professions Code, or a rule or regulation promulgated pursuant to the State Bar Act.

(B) A cause of action for damages against the lawyer based upon alleged malpractice.

(C) A dispute between the lawyer and client concerning fees, costs, or both, including, but not limited to, a proceeding under Article 13 (commencing with Section 6200) of Chapter 4 of the Business and Professions Code.

(3) The evidence does not constitute or disclose a writing of the mediator relating to a mediation conducted by the mediator.

(b) If a mediation communication or writing satisfies the requirements of subdivision (a), only the portion of it necessary for the application of subdivision (a) may be admitted or disclosed. Admission or disclosure of evidence under subdivision (a) does not

render the evidence, or any other mediation communication or writing, admissible or discoverable for any other purpose.

(c) In applying this section, a court may, but is not required to, use a sealing order, a protective order, a redaction requirement, an in camera hearing, or a similar judicial technique to prevent public disclosure of mediation evidence, consistent with the requirements of the First Amendment to the United States Constitution, Sections 2 and 3 of Article I of the California Constitution, Section 124 of the Code of Civil Procedure, and other provisions of law.

(d) Upon filing a complaint or a cross-complaint that includes a cause of action for damages against a lawyer based on alleged malpractice in the context of a mediation or a mediation consultation, the plaintiff or cross-complainant shall serve the complaint or cross-complaint by mail, in compliance with Sections 1013 and 1013a of the Code of Civil Procedure, on all of the mediation participants whose identities and addresses are reasonably ascertainable. This requirement is in addition to, not in lieu of, other requirements relating to service of the complaint or cross-complaint.

(e) No mediator shall be competent to provide evidence pursuant to this section, through oral or written testimony, production of documents, or otherwise, as to any statement, conduct, decision, or ruling, occurring at or in conjunction with a mediation that the mediator conducted, except as to a statement or conduct that could (a) give rise to civil or criminal contempt, (b) constitute a crime, (c) be the subject of investigation by the State Bar or Commission on Judicial Performance, or (d) give rise to disqualification proceedings under paragraph (1) or (6) of subdivision (a) of Section 170.1 of the Code of Civil Procedure.

(f) Nothing in this section is intended to alter or affect Section 703.5.

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

Comment. Section 1120.5 is added to promote attorney accountability in the mediation context, while also enabling an attorney to defend against a baseless allegation of mediation misconduct. It creates an exception to the general rule that makes mediation communications and writings confidential and protects them from admissibility and disclosure in a noncriminal proceeding (Section 1119). The exception is narrow and subject to specified limitations to avoid unnecessary impingement on the policy interests served by mediation confidentiality.

Under paragraph (1) of subdivision (a), this exception pertains to an attorney's conduct in a professional capacity. More precisely, the exception applies "when the merits of the claim will necessarily depend on proof that an attorney violated a professional obligation — that is, an obligation the attorney has *by virtue of* being an

attorney — in the course of providing professional services.” Lee v. Hanley, 61 Cal. 4th 1225, 1229, 34 P.3d 334, 191 Cal. Rptr. 3d 536 (2015) (emphasis in original); see also *id.* at 1239. “Misconduct does not ‘aris[e] in’ the performance of professional services ... merely because it occurs during the period of legal representation or because the representation brought the parties together and thus provided the attorney the opportunity to engage in the misconduct.” *Id.* at 1238. The exception applies only with respect to alleged misconduct of an attorney acting as an advocate, not with respect to alleged misconduct of an attorney-mediator.

Paragraph (1) also makes clear that the alleged misconduct must occur in the context of a mediation or a mediation consultation. 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 with the mediator and all parties present, a private caucus with or without the mediator, a mediation brief, a mediation-related phone call, or other mediation-related activity). The determinative factor is whether the misconduct allegedly occurred in a mediation context, not the time and date of the alleged misconduct.

Paragraph (1) further clarifies that the exception applies evenhandedly. It permits use of mediation evidence in specified circumstances to prove *or* disprove allegations against an attorney.

To be admissible or subject to disclosure under this section, however, mediation evidence must be relevant and must satisfy the other stated requirements. To safeguard the interests underlying mediation confidentiality, that is a stricter standard than the one governing a routine discovery request. *Cf.* Code Civ. Proc. § 2017.010 (“Unless otherwise limited by order of the court in accordance with this title, any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence *or appears reasonably calculated to lead to the discovery of admissible evidence.*” (emphasis added).)

Paragraph (2) of subdivision (a) specifies the types of claims in which the exception applies:

- A State Bar disciplinary proceeding, which focuses on protecting the public from attorney malfeasance.
- A legal malpractice claim, which further promotes attorney accountability and provides a means of compensating a client for damages from breach of an attorney’s professional duties in the mediation context.
- An attorney-client fee dispute, such as a mandatory fee arbitration under the State Bar Act, which is an effective, low-cost means to resolve fee issues in a confidential setting.

The exception does not apply for purposes of any other kind of claim. Of particular note, the exception does not apply in resolving a claim relating to enforcement of a mediated settlement agreement (e.g., a claim for rescission of a mediated settlement agreement or a claim for enforcement of a mediated settlement agreement). That restriction promotes finality in settling disputes and protects the policy interests underlying mediation confidentiality.

Subdivision (b) is modeled on Section 6(d) of the Uniform Mediation Act. It establishes an important limitation on the admissibility or disclosure of mediation communications pursuant to this section.

Subdivision (c) gives a court discretion to use existing procedural mechanisms to prevent widespread dissemination of mediation evidence that is admitted or disclosed pursuant to this section. For example, a party could seek a sealing order pursuant to the existing rules governing sealing of court records (Cal. R. Ct. 8.45-8.47, 2.550-2.552). Any restriction on public access must comply with constitutional constraints and other applicable law. See, e.g., *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court*, 20 Cal. 4th 1178, 980 P.2d 330, 86 Cal. Rptr. 2d 778 (1999).

Under subdivision (d), when a party files a legal malpractice case in which mediation communications or writings might be disclosed pursuant to this section, that party must promptly provide notice to the mediation participants regarding commencement of the case. Each mediation participant is entitled to such notice, so long as the participant's identity and address is reasonably ascertainable. This affords an opportunity for a mediation participant who would not otherwise be involved in the malpractice case to take steps to prevent improper disclosure of mediation communications or writings of particular consequence to that participant. For instance, a mediation participant could move to intervene and could then seek a protective order or oppose an overbroad discovery request.

Under subdivision (e), a mediator generally cannot testify or produce documents pursuant to this section, whether voluntarily or under compulsion of process, regarding a mediation that the mediator conducted. That general rule is subject to the same exceptions stated in Section 703.5, which does not expressly refer to documentary evidence.

For federal restrictions on obtaining a mediator's electronic records from the mediator's service provider, see 18 U.S.C. § 2702(a); *O'Grady v. Superior Court*, 139 Cal. App. 4th 1423, 44 Cal. Rptr. 3d 72 (2006).

Subdivision (f) makes clear that the enactment of this section in no way changes the effect of Section 703.5.

Subdivision (g) makes clear that the enactment of this section has no impact on the state of the law relating to mediator immunity.

See Sections 250 (“writing”), 1115(a), (c) (“mediation” and “mediation consultation”). For availability of sanctions, see, e.g., Section 1127; Code Civ. Proc. §§ 128.5, 128.7.

To protect the confidentiality expectations of persons who participate in a mediation under current law, the proposed exception would apply only prospectively. The following uncodified provision would make that point clear:

Uncodified (added). Operative date

SEC. _____. (a) This act shall become operative on January 1, 2019.

(b) This act only applies with respect to a mediation or a mediation consultation that commenced on or after January 1, 2019.

Comment. To avoid disrupting confidentiality expectations of mediation participants, this act only applies to evidence that relates to a mediation or a mediation consultation commencing on or after the operative date of the act.

A. USE OF THE PHRASE “PROFESSIONAL REQUIREMENT”
(SEE PROPOSED SECTION 1120.5(a)(1))

The Commission’s proposed new exception to California’s mediation confidentiality statute establishes three key requirements for admissibility or disclosure of a “communication or a writing that is made or prepared for the purpose of, or in the course of, or pursuant to, a mediation or a mediation consultation”⁹ All of those requirements must be met; otherwise the exception does not apply.¹⁰

The first key requirement is stated in paragraph (a)(1):

The evidence is relevant to prove or disprove an allegation that a lawyer breached a professional requirement when representing a client in the context of a mediation or a mediation consultation.

Two comments on the Tentative Recommendation express concern regarding use of the phrase “professional requirement.”

One of them is from the California Dispute Resolution Council (“CDRC”), which says that “[t]he word ‘requirement’ ... does not fit.”¹¹ CDRC suggests replacing “professional requirement” with “professional obligation.”¹²

9. See proposed Section 1120.5(a).

10. See *id.*

11. Exhibit p. 9.

12. *Id.*

Somewhat similarly, legal malpractice specialist Raymond Ryan cautions that “the phrase ‘professional requirement’ creates a heightened standard that is too narrow and is new law that will not be supported by California case law for guidance as to its meaning.”¹³ He explains:

What is a lawyer **required** to do? Not much more than comply with the Business and Professions Code. The California Rules of Professional Conduct are not statutes. They are merely guidelines. They do not establish requirements. For example CRPC 3-510 provides that a lawyer shall promptly convey the terms and conditions of a settlement offer to a client. But since CRPC is not a statute, it could be argued that it is not a requirement of a lawyer’s duties. In fact lawyers are not “required” to do very much as a matter of statute. Therefore, it makes much more sense to use “professional duty.”

In essence, by using “professional requirement” ... the proposed law will protect lawyers far more often than clients. By trying to parse out a lawyer’s required and non-required professional duties, it just causes another area of contention for lawyers being sued¹⁴

He suggests replacing “professional requirement” with “professional duty.”¹⁵ He says this approach “would be consistent with CACI instructions, and would naturally include the California Rules of Professional Conduct, Business and Professions Code and years of precedent in CA involving the standard of care.”¹⁶

CDRC and Mr. Ryan make a good point. Although the phrases “professional duty” and “professional obligation” are widely used in California case law, the phrase “professional requirement” is not.

In using the phrase “professional requirement,” the Commission did not intend to create a new standard. Rather, the Comment accompanying proposed Section 1120.5 quotes extensively from a recent California Supreme Court decision that uses the phrase “professional obligation”:

Under paragraph (1) of subdivision (a), this exception pertains to an attorney’s conduct in a professional capacity. More precisely, the exception applies “when the merits of the claim will necessarily depend on proof that an attorney violated a professional obligation — that is, an obligation the attorney has *by virtue of* being an attorney — in the course of providing professional services.” *Lee v. Hanley*, 61 Cal. 4th 1225, 1229, 34 P.3d 334, 191 Cal. Rptr. 3d 536

13. Exhibit p. 12.

14. *Id.* at 13 (boldface in original).

15. *Id.* at 12.

16. *Id.* at 12-13.

(2015) (emphasis in original); see also *id.* at 1239. “Misconduct does not ‘aris[e] in’ the performance of professional services ... merely because it occurs during the period of legal representation or because the representation brought the parties together and thus provided the attorney the opportunity to engage in the misconduct.” *Id.* at 1238. The exception applies only with respect to alleged misconduct of an attorney acting as an advocate, not with respect to alleged misconduct of an attorney-mediator.¹⁷

The Commission specifically directed the staff to put this language into the Comment.¹⁸

To match the language that the California Supreme Court used in the cited case, proposed Section 1120.5(a)(1) could be revised as follows:

1120.5. (a) A communication or a writing that is made or prepared for the purpose of, or in the course of, or pursuant to, a mediation or a mediation consultation, is not made inadmissible, or protected from disclosure, by provisions of this chapter if all of the following requirements are satisfied:

(1) The evidence is relevant to prove or disprove an allegation that a lawyer breached a professional ~~requirement~~ obligation when representing a client in the context of a mediation or a mediation consultation.

....

Would the Commission like to make this revision?

B. ISSUES REGARDING THE TYPES OF CLAIMS TO WHICH THE PROPOSED EXCEPTION WOULD APPLY (SEE PROPOSED SECTION 1120.5(a)(2))

The second key requirement of the proposed exception concerns the types of claims in which the exception would apply. Paragraph (a)(2) of proposed Section 1120.5 currently provides:

1120.5 (a) A communication or a writing that is made or prepared for the purpose of, or in the course of, or pursuant to, a mediation or a mediation consultation, is not made inadmissible, or protected from disclosure, by provisions of this chapter if *all* of the following requirements are satisfied:

....

(2) The evidence is sought or proffered in connection with, and is used pursuant to this section solely in resolving, one or more of the following:

17. Proposed Section 1120.5 Comment (emphasis in original).

18. See Minutes (Dec. 2016), p. 6; see also Minutes (April 2017), p. 4.

(A) A disciplinary proceeding against the lawyer under the State Bar Act, Chapter 4 (commencing with Section 6000) of the Business and Professions Code, or a rule or regulation promulgated pursuant to the State Bar Act.

(B) A cause of action for damages against the lawyer based upon alleged malpractice.

(C) A dispute between the lawyer and client concerning fees, costs, or both, including, but not limited to, a proceeding under Article 13 (commencing with Section 6200) of Chapter 4 of the Business and Professions Code.¹⁹

The accompanying Comment explains:

Paragraph (2) of subdivision (a) specifies the types of claims in which the exception applies:

- A State Bar disciplinary proceeding, which focuses on protecting the public from attorney malfeasance.
- A legal malpractice claim, which further promotes attorney accountability and provides a means of compensating a client for damages from breach of an attorney's professional duties in the mediation context.
- An attorney-client fee dispute, such as a mandatory fee arbitration under the State Bar Act, which is an effective, low-cost means to resolve fee issues in a confidential setting.

The exception does not apply for purposes of any other kind of claim. Of particular note, the exception does not apply in resolving a claim relating to enforcement of a mediated settlement agreement (e.g., a claim for rescission of a mediated settlement agreement or a claim for enforcement of a mediated settlement agreement). That restriction promotes finality in settling disputes and protects the policy interests underlying mediation confidentiality.

Many of the remaining issues in this study relate to paragraph (a)(2). Those issues are discussed below.

Application in a State Bar Disciplinary Proceeding Only

In response to the Tentative Recommendation, CDRC reaffirmed that it would like the Legislature to leave existing law intact, rather than create any new exception to mediation confidentiality.²⁰ James Madison of CDRC reiterated that position at the September meeting, but also raised the possibility of replacing the Commission's approach with an exception that would apply only in a State Bar disciplinary proceeding.

19. Emphasis added.

20. See Memorandum 2017-51, Exhibit pp. 15-16.

On hearing that idea, Judge David Long said that it might be of interest to the California Judges Association (“CJA”). The Commission decided to look into it further.²¹

The idea is discussed below. To help clarify the issues and relevant considerations, the discussion is organized as follows:

- Extent of confidentiality in a State Bar disciplinary proceeding.
- Potential to serve as a screening mechanism.
- Availability of relief in a State Bar disciplinary proceeding.
- Balancing the competing considerations.
- Implementation issues.

Extent of Confidentiality

In general, the negative comments on the Tentative Recommendation and prior drafts do not distinguish between using mediation evidence in a legal malpractice case and using such evidence in a State Bar disciplinary proceeding. Rather, the commenters warn against any dilution of existing mediation confidentiality protections.²²

With regard to confidentiality, however, there is a big difference between the two situations. A legal malpractice case is *generally open to the public*.²³ In contrast, a State Bar disciplinary investigation is “*confidential* until the time that formal charges are filed”²⁴ Such an investigation “shall not be disclosed pursuant to any state law, including, but not limited to, the California Public Records Act”²⁵

The attorney whose conduct is being investigated may, however, waive that confidentiality unless doing so would substantially prejudice an ongoing

21. See *Draft Minutes* (Sept. 2017), p. 5 (attached to Memorandum 2017-47).

22. See, e.g., Memorandum 2017-51, Exhibit pp. 5 (Consortium for Children expresses “strong opposition to the proposed Law Revision Commission recommendation to amend the Evidence Code to remove some of the protections for confidentiality as it pertains to mediation”), 7 (Consumer Attorneys of California and California Defense Counsel believe that “on balance, there is no compelling need to weaken California’s longstanding confidentiality protections”), 19 (Los Angeles County Bar Association Family Law Section voices “unanimous opposition to any exception to the absolute mediation confidentiality presently provided by Evidence Code secs. 1119 et seq.” (underscore in original)).

23. See, e.g., Code Civ. Proc. § 124 (“Except as provided in Section 214 of the Family Code or any other provision of law, the sittings of every court shall be public.”); see also U.S. Const. amend. I; Cal. Const. art. I, §§ 2(a), 3(b). For a detailed discussion of public access to judicial records and proceedings, see Memorandum 2016-18.

24. Bus. & Prof. Code § 6086.1(b); see also State Bar R. Proc. 2302(a).

25. Bus. & Prof. Code § 6086.1(b) (emphasis added).

investigation.²⁶ In addition, the Chief Trial Counsel or President of the State Bar may waive the confidentiality, “but only when warranted for the protection of the public.”²⁷ Under specified circumstances, the Chief Trial Counsel (or a designee) is also permitted, and in some instances required, to disclose information from an investigation *in confidence* to an agency responsible for enforcing civil or criminal laws, an out-of-state disciplinary agency, an agency responsible for professional licensing, or the Judicial Nominees Evaluation Commission.²⁸

Further, if a State Bar prosecutor files formal charges against an attorney in the State Bar Court, the disciplinary proceeding becomes public.²⁹ Under Business and Professions Code Section 6086.5, as just amended by Senate Bill 36 (Jackson), “[a]ccess to records of the State Bar Court shall be governed by *court rules and laws applicable to records of the judiciary* and not the California Public Records Act”³⁰ In other words, if a disciplinary proceeding reaches the State Bar Court, it is subject to the same rules governing public access that apply to a legal malpractice case.

Nonetheless, from the standpoint of protecting mediation communications, a mediation confidentiality exception for attorney misconduct may be less troubling with regard to a disciplinary proceeding than with regard to a legal malpractice case. At the investigation stage of a disciplinary proceeding, a relevant mediation communication might be disclosed to persons involved in the investigation, *but at least it generally would not become public*. Many State Bar complaints never proceed beyond that stage.³¹ The degree of intrusion on

26. Bus. & Prof. Code § 6086.1(b)(1); see also State Bar R. Proc. 2302(b)-(c).

27. Bus. & Prof. Code § 6806.1(b)(2); see also State Bar R. Proc. 2302(d) (permitting State Bar president and Chief Trial Counsel (or designee) to waive confidentiality “for the protection of the public when the necessity for disclosing information outweighs the necessity for preserving confidentiality”).

28. Bus. & Prof. Code §§ 6044.5, 6086.1(b)(3); see also State Bar R. Proc. 2302(e) (containing longer and more detailed list of disclosures permitted in confidence).

29. Bus. & Prof. Code § 6086.1(a); see also State Bar R. Proc. 5.9 (“Except as otherwise provided by law or by these rules, all State Bar Court proceedings must be public except settlement conferences and portions of the record sealed by court order under rule 5.12.”).

30. See 2017 Cal. Stat. ch. 422, § 28 (amending Bus. & Prof. Code § 6086.5, effective January 1, 2018) (emphasis added). That approach is consistent with characterization of the State Bar Court as a judicial branch entity. See generally *Sander v. State Bar of California*, 58 Cal. 4th 300, 304-05, 314 P.3d 488, 165 Cal. Rptr. 3d 250 (2013) (State Bar serves as administrative arm of California Supreme Court “for the purpose of assisting in matters of ... discipline of attorneys.”).

31. See, e.g., *Chronicle Publishing Co. v. Superior Court*, 54 Cal. 2d 548, 567, 354 P.2d 637, 7 Cal. Rptr. 109 (1960) (“[T]he vast majority of the charges made against attorneys are by disgruntled clients and completely without foundation”).

mediation confidentiality is thus likely to be less in a disciplinary proceeding than in a legal malpractice case.

Limiting the Commission's proposed exception to the disciplinary context might decrease the amount and intensity of opposition to the Commission's proposal, because it would better safeguard the policy interests underlying mediation confidentiality. That might be particularly true if the Commission also proposes to preclude an accused attorney from waiving the confidentiality of a disciplinary investigation that involves disclosure of mediation communications.³²

It is important to remember, however, that the Commission's proposed exception would currently apply not only in a State Bar disciplinary proceeding and a legal malpractice case, but also in a "dispute between the lawyer and client concerning fees, costs, or both, including, but not limited to, a [fee arbitration] proceeding under Article 13 (commencing with Section 6200) of Chapter 4 of the Business and Professions Code."³³ In general, a State Bar fee arbitration is confidential,³⁴ but a civil lawsuit with a fee-related claim is not confidential and thus poses a greater threat to mediation confidentiality.³⁵

32. That could be accomplished by revising Business and Professions Code Section 6086.1(b)(1) along the following lines:

(b) All disciplinary investigations are confidential until the time that formal charges are filed This confidentiality requirement may be waived under any of the following exceptions:

(1) The Except in an investigation involving disclosure of mediation communications, a member whose conduct is being investigated may waive confidentiality.

If the Commission proposes such a revision, its proposal might need to include legislative findings that demonstrate "the interest protected by the limitation [on public access] and the need for protecting that interest." See Cal. Const. art. I, § 3(b).

33. Proposed Evid. Code § 1120.5(a)(2)(C).

34. State Bar Rule 3.512 provides:

3.512. (A) A request for arbitration, a reply, a State Bar file, an exhibit, an award, and any other record of an arbitration proceeding are confidential and may not be disclosed by the State Bar unless disclosure is required by court order.

(B) The award is confidential except in a judicial challenge to, confirmation of, or enforcement of an award.

(C) Referral of an attorney for possible disciplinary investigation because of conduct disclosed in an arbitration proceeding does not violate the confidentiality required by these rules.

(D) Arbitration between an attorney and non-client does not abrogate an attorney's responsibility to exercise independent professional judgment on behalf of a client or to protect the client's confidential information, unless the law requires it or the client consents to allow the disclosure of confidential information for the purposes of the proceeding.

The Commission could eliminate that threat by proposing an exception that applies only in the disciplinary context, as CDRC suggested in September. Alternatively, the Commission could consider proposing an exception that applies only in (1) the disciplinary context and (2) a State Bar fee arbitration. Because a fee arbitration is generally kept confidential, such an approach might reduce the opposition to the Commission's proposal to some extent, because it would decrease the potential harm to the policy interests underlying mediation confidentiality. **It would be helpful to know CDRC's position on this alternative, and to hear the views of other groups and individuals on both possibilities.**

Screening Mechanism

Earlier in this study, the Commission put considerable effort into trying to develop a "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)."³⁶ The Commission eventually abandoned that effort because none of the approaches it examined was fully satisfactory.³⁷

In effect, a mediation confidentiality exception that applies only in a State Bar disciplinary proceeding would be a filtering mechanism similar to what the Commission sought. Mediation documents and communications would be subject to public disclosure *only if* a State Bar prosecutor decides there are sufficient grounds to initiate suit; public disclosure of such evidence *could not* be compelled on a mere whim of an unhappy mediation participant.

(E) A party's statement of financial status is confidential and is not provided to an opposing party.

See also Cal. State Bar R. 3.541(F) (fee arbitration hearing "is closed to the public; recording of any kind is prohibited; and any participant or attendee is bound by the confidentiality requirements of these rules."), Cal. State Bar R. 3.546 ("The State Bar or a sole arbitrator or panel appointed by the State Bar may refer an attorney to the State Bar Office of Chief Trial Counsel for possible disciplinary investigation because of conduct disclosed in an arbitration proceeding. Such a disclosure does not violate the confidentiality that otherwise applies to the proceeding.").

35. See, e.g., Code Civ. Proc. § 124 ("Except as provided in Section 214 of the Family Code or any other provision of law, the sittings of every court shall be public."); see also U.S. Const. amend. I; Cal. Const. art. I, §§ 2(a), 3(b). For a detailed discussion of public access to judicial records and proceedings, see Memorandum 2016-18.

36. Minutes (April 2016), p. 5; see also Memorandum 2016-27; Memorandum 2016-38 & First Supplement; Memorandum 2016-49 & First Supplement.

37. See Minutes (Sept. 2016), p. 5; Minutes (July 2016), pp. 3-4; Minutes (June 2016), pp. 4-5.

The filtering mechanism would apply only with respect to *public* disclosure; such a participant would still be able to trigger disclosure of mediation communications to a *small group* comprised of State Bar disciplinary authorities and others (if any) involved in the disciplinary investigation. But there would *at least be some significant screening of frivolous claims* before requiring any public disclosure of mediation communications.

Availability of Relief

At the September meeting, Chairperson Hallinan expressed concern about whether a client victimized by dishonest or incompetent counsel at a mediation could be made whole in a State Bar disciplinary proceeding. He pointed out that if such a client could not be made whole, the client might not have sufficient incentive to file a complaint with the State Bar and counsel might escape responsibility for the misconduct.

As several sources mentioned in September, restitution is awarded in some State Bar disciplinary proceedings. In *Bernstein v. State Bar*, for example, the California Supreme Court upheld a restitution award consisting of unearned attorney fees.³⁸ The Court rejected the attorney's argument that restitution is not a proper form of discipline, pointing out that "we have ourselves added the requirement of restitution to an attorney's discipline to protect the public and maintain high standards of professional conduct, and have consistently recognized and approved the State Bar's recommendation of such discipline."³⁹

Similarly, in *Coppock v. State Bar*, an attorney set up a trust account knowing that one of his clients planned to use it for fraudulent purposes. The client then misappropriated \$10,000 from a married couple, using the account. A disciplinary proceeding followed, and the California Supreme Court eventually upheld an award conditioning the attorney's probation on restitution of \$10,000 plus interest to the defrauded *non-clients*.

The Court observed that although restitution is "routinely required" in cases involving misappropriation of client funds, "[i]t does not follow that restitution is appropriate only in such cases"⁴⁰ The Court further explained that restitution was in order even though the attorney did not profit from the fraudulent transaction:

38. 50 Cal. 3d 221, 786 P.2d 352, 266 Cal. Rptr. 625 (1990).

39. *Id.* at 232 (citations omitted).

40. 44 Cal. 3d 665, 684, 749 P.2d 1317, 244 Cal. Rptr. 462 (1988).

Although part of the rationale for requiring restitution may be to prevent an attorney from profiting from his wrongdoing, restitution is *also intended to compensate the victim of wrongdoing, and to discourage dishonest and unprofessional conduct....* “[T]his court should have the power to impose discipline which encourages attorneys to act honestly and with integrity.”⁴¹

The Court also cited a prior decision in which it “requir[ed] \$186,000 in restitution to attorney coventurers, notwithstanding lack of any attorney-client relationship.”⁴²

Shortly after deciding *Bernstein* and *Coppock*, the Court issued *Sorensen v. State Bar*,⁴³ another important decision on the availability of restitution in a State Bar disciplinary proceeding. In *Sorensen*, an attorney and his associate disputed the amount that a court reporter charged for a transcript. Instead of trying to resolve the dispute in an efficient and inexpensive manner, they escalated it into a municipal court case, causing the court reporter to incur “well over \$4,000 in legal fees and expenses.”⁴⁴

Her attorney brought the matter to the attention of the State Bar, which investigated. The hearing department recommended reprovals and reimbursement of the court reporter’s attorney fees and expenses, but the review department imposed suspensions instead and declined to recommend reimbursement. It reasoned that reimbursement would be a damage award rather than restitution, and adjudication of a damage claim was not a function that the review department performed.⁴⁵

On further appeal, the Supreme Court approved the supervising attorney’s suspension,⁴⁶ concluding that “the sanction must reflect (i) the harm to [the court reporter]; (ii) assurance to the public and to the bar that such conduct will not be tolerated; and (iii) the lack of insight and remorse” shown by the supervising attorney.⁴⁷ The Court *also* ordered restitution of the court reporter’s attorney fees and expenses.⁴⁸

41. *Id.* at 685, *quoting* *Alberston v. State Bar*, 37 Cal. 3d 1, 7 n.4, 686 P.2d 1177, 206 Cal. Rptr. 373 (1984) (emphasis added).

42. *Coppock*, 44 Cal. 3d at 685, *citing to & describing* *Galardi v. State Bar*, 43 Cal. 3d 683, 694-95, 739 P.2d 134, 238 Cal. Rptr. 774 (1987).

43. 52 Cal. 3d 1036, 804 P.2d 44, 277 Cal. Rptr. 858 (1991).

44. *Id.* at 1040.

45. *Id.* at 1040-41.

46. The associate settled. See *id.* at 1041.

47. *Id.* at 1044.

48. *Id.* at 1044-45.

In so doing, however, it did not characterize the restitution award as “damages” or “compensation to the victim.” Instead, the Court explained:

[W]e do not view restitution in this context as a “damage award.” Nor do we approve imposition of restitution as a means of compensating the victim of wrongdoing. (See *McHugh v. Santa Monica Rent Control Bd.* (1989) 49 Cal. 3d 348, 374 Cal. Rptr. 318, 777 P.2d 911 [judicial powers clause precludes administrative agency from awarding traditional “damages,” but agency may award restitutive monetary relief when doing so is “merely incidental to a proper, primary regulatory purpose”].) Rather, we consider restitution a necessary condition of probation designed to effectuate [the attorney’s] rehabilitation and to protect the public from similar future misconduct. Although most of our previous cases requiring restitution as a condition of probation have involved misuse of client funds, we believe the same protective and rehabilitative principles apply in the case of a party who has been forced to incur legal fees as a result of an attorney’s violation of [statutory requirements to refrain from illegal, unjust, or corrupt activities]. In both instances, private persons have incurred *specific out-of-pocket losses directly resulting from attorney misconduct*. Restitution of these amounts emphasizes the professional responsibility of lawyers to account for their misconduct, and thereby serves to both protect the public and instill public confidence in the bar.⁴⁹

In subsequent cases, the State Bar Court has taken the position that “established law ... prohibits awarding damages in a disciplinary proceeding.”⁵⁰ It has typically limited restitution to “specific out-of-pocket losses directly resulting from attorney misconduct,” the phrase that the Supreme Court used to describe the losses in *Sorensen*.⁵¹

Thus, case authority suggests that a State Bar disciplinary proceeding might not be sufficient to fully compensate a victim of attorney misconduct, in the mediation context or otherwise. For several reasons, however, the situation does not seem altogether clear for purposes of the Commission’s study:

49. *Id.* (emphasis added; citations other than *McHugh* omitted).

50. *In the Matter of Kim*, 2017 Calif. Op. LEXIS 6, 29 (State Bar Ct. Review Dep’t 2017); see also *In the Matter of Bach*, 1991 Calif. Op. LEXIS 114, 49 (State Bar Ct. Review Dep’t 1991) (“It is inappropriate to use restitution as a means of awarding unliquidated tort damages for malpractice.... That is what malpractice actions are for, and Sampson has filed one.”).

51. See, e.g., *Kim*, 2017 Calif. Op. LEXIS at 29-30 (overturning hearing judge’s order requiring lawyer to reimburse fees that victims paid to other attorneys to assist in obtaining settlement funds, but ordering lawyer to “pay \$15,000 to his clients as restitution to provide them their 60 percent share of the final \$25,000 settlement check that he has refused to endorse.”).

- In *Sorensen*, the Court’s refusal to “approve imposition of restitution as a means of compensating the victim of wrongdoing” was dictum, not essential to its decision approving a restitution award on other grounds.
- In *Coppock*, the Court said that a purpose of restitution is “to compensate the victim of wrongdoing.”
- Unlike most regulatory agencies, the State Bar is considered a judicial branch entity.⁵² Its decisions are directly appealable to the Supreme Court,⁵³ not subject to a mandamus process,⁵⁴ and the Court exercises its independent judgment in determining appropriate discipline.⁵⁵ Thus, the State Bar might not be as restricted in its ability to award damages as other regulatory agencies; the judicial powers clause (Cal. Const. art. VI, § 1) may not apply to it in the same way.⁵⁶
- If the Legislature were to enact a mediation confidentiality exception that applies only in a State Bar disciplinary proceeding, the State Bar might have special latitude to compensate a victim of mediation misconduct (as opposed to other types of attorney misconduct), because the mediation confidentiality statute could still make it difficult to obtain relief through any other means.

It is also important to remember that the State Bar maintains a Client Security Fund, which may be used to reimburse a client up to \$100,000⁵⁷ for “dishonest conduct”⁵⁸ of an attorney who has (1) been disbarred, disciplined, or voluntarily

52. See, e.g., *Sander v. State Bar*, 58 Cal. 4th 300, 309, 314 P.3d 488, 165 Cal. Rptr. 3d 250 (2013).

53. See Bus. & Prof. Code § 6082.

54. For discussion of the judicial review processes that apply to adjudications by administrative agencies, see *Judicial Review of Agency Action*, 27 Cal. L. Revision Comm’n Reports 1 (1997); Michael Asimow, *A Modern Judicial Review Statute to Replace Administrative Mandamus*, 27 Cal. L. Revision Comm’n Reports 402 (1993).

55. See, e.g., *Sorensen*, 52 Cal. 3d at 1043; *Bernstein*, 50 Cal. 3d at 229.

56. In other words, *Sorenson*’s citation to *McHugh* might have been inapposite.

57. State Bar R. Proc. 3.434.

58. “Dishonest conduct” is defined as

(A) Theft or embezzlement of money, the wrongful taking or conversion of money or property, or a comparable act.

(B) Failure to refund unearned fees received in advance for services when the attorney performed an insignificant portion of the services or none at all. Such a failure constitutes a wrongful taking or conversion. All other instances of an attorney’s failure to return an unearned fee or the disputed portion of a fee are outside the scope of this provision and not reimbursable under these rules.

(C) Borrowing money from a client without the intention or reasonable ability, present or prospective, of repaying it.

(D) Obtaining money or property from a client for an investment that was not in fact made. Failure of an investment to perform as represented to or anticipated by a client is not dishonest conduct under these rules.

(E) An act of intentional dishonesty or deceit that proximately leads to the loss of money or property.

State Bar R. Proc. 3.431, 3.430(D).

resigned from the State Bar, (2) died or been adjudicated mentally incompetent, or (3) because of the dishonest conduct become a judgment debtor of the client in a contested proceeding or been convicted of a crime.⁵⁹ Disbursements are discretionary⁶⁰ and the Fund “does not reimburse a loss if the lawyer acted incompetently or failed to take a certain action.”⁶¹ Other requirements and restrictions also apply.⁶²

Historically, the Client Security Fund has been underfunded,⁶³ even though every California attorney must contribute to it through annual bar dues.⁶⁴ Just this year, however, the Legislature enacted a bill (SB 36 (Jackson)) that will help strengthen the Fund in three ways. As one of the bill analyses explains:

[SB 36] provides three legally permissible changes to shore up the Client Security Fund. First, the Bar should be allowed to transfer *excess* LAP⁶⁵ funds not needed to support the LAP to the Client Security Fund, including any reserve funds, without legislative approval. Second, the bar should be required to conduct a thorough analysis of the Client Security Fund operations and shortfall, as well as a review of other Bar funds that could be used to shore up that fund and, when all sources of funds are considered, whether additional revenue may be necessary to protect the public from dishonest attorneys.... Last, the bill should require that half of any revenue from marketing various insurance programs to attorneys be used to fund the Bar’s discipline functions or to support the Client Security Fund These three changes would significantly help shore up the Client Security Fund and more timely compensate those who have been ripped off by dishonest attorneys.⁶⁶

The Client Security Fund may thus be a potential source of relief in some disciplinary proceedings involving mediation misconduct, in addition to the possibility of a restitution order. In addition, a disciplinary proceeding affords an opportunity for some types of relief *not available* in a legal malpractice case, such

59. State Bar R. Proc. 3.432.

60. State Bar R. Proc. 3.420.

61. See <http://www.calbar.ca.gov/Public/Free-Legal-Information/Legal-Guides/Client-Security-Fund>.

62. See, e.g., State Bar R. Proc. 3.434(B).

63. See, e.g. Assembly Committee on Judiciary Analysis of SB 36 (July 18, 2017), pp. 9-10.

64. See Bus. & Prof. Code § 6140.55.

65. “LAP” is an abbreviation for the Lawyer Assistance Program, which is also known as the Attorney Diversion and Assistance Program.

66. Assembly Committee on Judiciary Analysis of SB 36 (July 18, 2017), p. 10 (emphasis in original).

as disbarment or suspension of an errant attorney. Some clients may find such relief more satisfying than any monetary form of punishment.

Taken together, the various types of relief available in a disciplinary proceeding may give most aggrieved clients sufficient incentive to pursue a complaint with the State Bar and help hold counsel accountable for mediation misconduct. The set of available options may differ from what is available in a legal malpractice case, but it is not necessarily inferior.

Empirical Data

Another potential benefit of limiting the exception to State Bar disciplinary proceedings is that it would provide an opportunity to collect empirical data about the incidence of mediation misconduct, before deciding whether to create a broader exception that applies to malpractice actions. The State Bar could compile anonymized data about the number of discipline cases that involve mediation and how those cases are resolved. Such data could be taken into account in any future legislative reform efforts on this topic.

Balancing the Competing Considerations

The Commission needs to weigh the pros and cons of replacing its current approach with an exception that would apply only in a State Bar disciplinary proceeding (or only in a State Bar disciplinary proceeding and a State Bar fee arbitration). As discussed above, such an exception would intrude less deeply on mediation confidentiality and its underlying policies than the Commission's current proposal, and would function as a means of filtering out frivolous claims of mediation misconduct. Depending on the circumstances, relief in a disciplinary proceeding could include restitution of out-of-pocket expenses, recovery of up to \$100,000 from the Client Security Fund, and various other forms of attorney discipline, such as suspension, disbarment, or probation. Historically, the State Bar Court has not awarded damages in a disciplinary proceeding, but it is not certain whether that would be true in this context. **Comments regarding any other relevant considerations would be helpful.**

Implementation

If the Commission decides to propose an exception that would apply only in a State Bar disciplinary proceeding, **then the Commission will need to resolve how to implement that approach.**

At the September meeting, Mr. Madison of CDRC suggested simply adding four words (“State Bar disciplinary proceeding”) to Evidence Code Section 1120(b). Presumably, what he meant was something like the following:

1120....

(b) This chapter does not limit any of the following:

(1) The admissibility of an agreement to mediate a dispute.

(2) The effect of an agreement not to take a default or an agreement to extend the time within which to act or refrain from acting in a pending action.

(3) Disclosure of the mere fact that a mediator has served, is serving, will serve, or was contacted about serving as a mediator in a dispute.

(4) A disciplinary proceeding against a lawyer under the State Bar Act, Chapter 4 (commencing with Section 6000) of the Business and Professions Code, or a rule or regulation promulgated pursuant to the State Bar Act.

Such an approach would not incorporate the various protections and refinements that the Commission has crafted with much deliberation over the course of this study (e.g., the Commission’s exception would apply only to misconduct in a mediation context, the exception would apply evenhandedly, and the exception would not apply to conduct of an attorney acting as a mediator).

Another alternative would be to revise the Commission’s existing proposal. In so doing, an important question would be how to treat mediator testimony and communications. In the Tentative Recommendation, proposed Section 1120.5(e) provides:

(e) No mediator shall be competent to provide evidence pursuant to this section, through oral or written testimony, production of documents, or otherwise, as to any statement, conduct, decision, or ruling, occurring at or in conjunction with a mediation that the mediator conducted, *except as to a statement or conduct that could* (a) give rise to civil or criminal contempt, (b) constitute a crime, (c) *be the subject of investigation by the State Bar or Commission on Judicial Performance*, or (d) give rise to disqualification proceedings under paragraph (1) or (6) of subdivision (a) of Section 170.1 of the Code of Civil Procedure.⁶⁷

The accompanying Comment explains that the general prohibition on mediator testimony and document disclosure is “subject to the same exceptions stated in Section 703.5, which does not expressly refer to documentary evidence.”

67. Emphasis added.

In contrast to subdivision (e), paragraph (a)(3) of proposed Section 1120.5 would provide:

1120.5 (a) A communication or a writing that is made or prepared for the purpose of, or in the course of, or pursuant to, a mediation or a mediation consultation, is not made inadmissible, or protected from disclosure, by provisions of this chapter if all of the following requirements are satisfied:

....

(3) The evidence does not constitute or disclose a writing of the mediator relating to a mediation conducted by the mediator.

The preliminary part (narrative portion) of the Commission's proposal explains:

To bolster the ... restrictions on obtaining evidence from a mediator, the proposed new exception would be subject to another important limitation: It would not extend to any evidence that constitutes or discloses a writing of the mediator relating to a mediation conducted by the mediator. Thus, a litigant generally could neither obtain such a writing directly from a mediator, nor circumvent that restriction by obtaining such a writing from another source.

Further, a litigant could not learn the content of such a writing through other materials in the custody of another source. For instance, if the *response* to a mediator's email message reflects the content of that message, the response would not be discoverable under the proposed new exception unless the portion of it reflecting the content of the mediator's message could be effectively redacted. Otherwise, the response would impermissibly "disclose a writing of the mediator relating to a mediation conducted by the mediator."⁶⁸

Paragraph (a)(3) was a late addition to the Commission's proposal, inserted at the meeting when the Commission approved the Tentative Recommendation.⁶⁹ Unlike subdivision (e), it is not subject to any exceptions, at least not expressly. The Commission did not discuss whether to include any exceptions, and the staff did not want to add any without the Commission's approval.

Based on the Commission's prior discussions about the existing exceptions to Evidence Code Section 703.5 and incorporation of the same exceptions into proposed Section 1120.5(e),⁷⁰ the staff suspects that the Commission would also want to incorporate those exceptions into proposed Section 1120.5(a)(3). **Is that the Commission's view?**

68. Tentative Recommendation at 137-38 (emphasis in original; footnotes omitted).

69. See Minutes (June 2017), pp. 4-5.

70. See, e.g., Minutes (April 2017), p. 5.

If so, then paragraph (a)(3) and subdivision (e) would both be inapplicable to “a statement or conduct that could ... be the subject of investigation by the State Bar.” Consequently, the Commission may want to omit those provisions if it decides to revise proposed Section 1120.5 to apply only in a State Bar disciplinary proceeding. This may seem alarming to the mediation community, but due process *might to some extent already require* that an attorney facing possible suspension or disbarment be able to call the mediator in defense.⁷¹

Accordingly, proposed Section 1120.5 and the accompanying Comment could perhaps be simplified to read:⁷²

1120.5. (a) A communication or a writing that is made or prepared for the purpose of, or in the course of, or pursuant to, a mediation or a mediation consultation, is not made inadmissible, or protected from disclosure, by provisions of this chapter if both of the following requirements are satisfied:

(1) The evidence is relevant to prove or disprove an allegation that a lawyer breached a professional requirement when representing a client in the context of a mediation or a mediation consultation.

(2) The evidence is sought or proffered in connection with, and is used pursuant to this section solely in resolving, a disciplinary proceeding against the lawyer under the State Bar Act, Chapter 4 (commencing with Section 6000) of the Business and Professions Code, or a rule or regulation promulgated pursuant to the State Bar Act.

(b) If a mediation communication or writing satisfies the requirements of subdivision (a), only the portion of it necessary for the application of subdivision (a) may be admitted or disclosed. Admission or disclosure of evidence under subdivision (a) does not

71. Mr. Madison made this point at the September meeting. See generally *Milhouse v. Travelers Commercial Ins. Co.*, 982 F. Supp. 2d 1088, 1108 (C.D. Cal. 2013) (To exclude “crucial” mediation statement “would have been to deny [insurer] of its due process right to present a defense”), *aff’d on other grounds*, 2016 U.S. App. LEXIS 3145 (9th Cir., Feb. 23, 2016); *Rinaker v. Superior Court*, 62 Cal. App. 4th 155, 72 Cal. Rptr. 2d 464 (1998) (in specified circumstances, due process requires that defendant in juvenile delinquency case be permitted to confront accusations with mediator’s testimony); see also *The Grubb Co., Inc. v. Dep’t of Real Estate*, 194 Cal. App. 4th 1494, 1503, 124 Cal. Rptr. 3d 894 (2011) (“[P]rofessional licensees’ due process rights require that proof of misconduct be by clear and convincing evidence.”); *Ettinger v. Board of Medical Quality Assurance*, 135 Cal. App. 3d 853, 185 Cal. Rptr. 601, 603 (1982) (same); *id.* at 603 (“It is true that State Bar proceedings, although administrative, have been held to be of a nature all their own, neither civil nor criminal.”); 7 B. Witkin, *Summary of California Law Constitutional Law* § 664, p. 1078 (10th Ed. 2005) (Determination concerning professional license “cannot be based on confidential reports or independent information received by the administrative board and not known to an aggrieved party. He or she has a right to cross-examine witnesses and produce evidence in refutation.”).

72. For a mark-up showing the proposed revisions in strikeout and underscore, see Exhibit pp. 21-24.

render the evidence, or any other mediation communication or writing, admissible or discoverable for any other purpose.

(c) If the Office of Chief Trial Counsel files a complaint in a disciplinary proceeding, the hearing judge and any reviewing tribunal may, but are not required to, use a sealing order, a protective order, a redaction requirement, an in camera hearing, or a similar technique to prevent public disclosure of mediation evidence, consistent with the requirements of the First Amendment to the United States Constitution, Sections 2 and 3 of Article I of the California Constitution, Section 124 of the Code of Civil Procedure, and other provisions of law.

(d) Upon filing a complaint alleging that a lawyer breached a professional requirement when representing a client in the context of a mediation or a mediation consultation, the Office of Chief Trial Counsel shall serve the complaint by mail, in compliance with Sections 1013 and 1013a of the Code of Civil Procedure, on all of the mediation participants whose identities and addresses are reasonably ascertainable. This requirement is in addition to, not in lieu of, other requirements relating to service of the complaint.⁷³

(e) Nothing in this section is intended to alter or affect Section 703.5.

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

Comment. Section 1120.5 is added to promote attorney accountability in the mediation context, while also enabling an attorney to defend against a baseless allegation of mediation misconduct. It creates an exception to the general rule that makes mediation communications and writings confidential and protects them from admissibility and disclosure in a noncriminal proceeding (Section 1119). The exception is narrow and subject to specified limitations to avoid unnecessary impingement on the policy interests served by mediation confidentiality.

Under paragraph (1) of subdivision (a), this exception pertains to an attorney's conduct in a professional capacity. More precisely, the exception applies "when the merits of the claim will necessarily depend on proof that an attorney violated a professional obligation — that is, an obligation the attorney has *by virtue of* being an attorney — in the course of providing professional services." *Lee v. Hanley*, 61 Cal. 4th 1225, 1229, 34 P.3d 334, 191 Cal. Rptr. 3d 536 (2015) (emphasis in original); see also *id.* at 1239. "Misconduct does not 'aris[e]' in the performance of professional services ... merely because it occurs during the period of legal representation or because the representation brought the parties together and thus provided the attorney the opportunity to engage in the

73. For discussion of this notice requirement, see "The Staff's Concern Regarding Clarity of the Notice Requirement" *infra* (particularly n. 135).

misconduct.” *Id.* at 1238. The exception applies only with respect to alleged misconduct of an attorney acting as an advocate, not with respect to alleged misconduct of an attorney-mediator.

Paragraph (1) also makes clear that the alleged misconduct must occur in the context of a mediation or a mediation consultation. 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 with the mediator and all parties present, a private caucus with or without the mediator, a mediation brief, a mediation-related phone call, or other mediation-related activity). The determinative factor is whether the misconduct allegedly occurred in a mediation context, not the time and date of the alleged misconduct.

Paragraph (1) further clarifies that the exception applies evenhandedly. It permits use of mediation evidence in specified circumstances to prove *or* disprove allegations against an attorney.

To be admissible or subject to disclosure under this section, however, mediation evidence must be relevant and must satisfy the other stated requirements. To safeguard the interests underlying mediation confidentiality, that is a stricter standard than the one governing a routine discovery request in a civil case. *Cf.* Code Civ. Proc. § 2017.010 (“Unless otherwise limited by order of the court in accordance with this title, any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence *or appears reasonably calculated to lead to the discovery of admissible evidence*” (emphasis added).)

Under paragraph (2) of subdivision (a), the exception applies in a State Bar disciplinary proceeding. The exception does not apply for purposes of any other kind of claim. Of particular note, the exception does not apply in resolving a claim relating to enforcement of a mediated settlement agreement (e.g., a claim for rescission of a mediated settlement agreement or a claim for enforcement of a mediated settlement agreement). That restriction promotes finality in settling disputes and protects the policy interests underlying mediation confidentiality.

Subdivision (b) is modeled on Section 6(d) of the Uniform Mediation Act. It establishes an important limitation on the admissibility or disclosure of mediation communications pursuant to this section.

Subdivision (c) makes clear that a State Bar disciplinary tribunal has discretion to use existing procedural mechanisms to prevent widespread dissemination of mediation evidence that is admitted or disclosed pursuant to this section. Any restriction on public access must comply with constitutional constraints and other applicable law. See, e.g., NBC Subsidiary (KNBC-TV), Inc. v.

Superior Court, 20 Cal. 4th 1178, 980 P.2d 330, 86 Cal. Rptr. 2d 778 (1999).

Under subdivision (d), when the Office of Chief Trial Counsel files a complaint that may result in disclosure of mediation communications or writings pursuant to this section, the Office of Chief Trial Counsel must promptly provide notice to the mediation participants regarding commencement of the case. Each mediation participant is entitled to such notice, so long as the participant's identity and address is reasonably ascertainable. This affords an opportunity for a mediation participant who would not otherwise be involved in the case to take steps to prevent improper disclosure of mediation communications or writings of particular consequence to that participant. For instance, a mediation participant could move to intervene and could then seek a protective order or oppose an overbroad discovery request.

Subdivision (e) makes clear that the enactment of this section in no way changes the effect of Section 703.5.

Subdivision (f) makes clear that the enactment of this section has no impact on the state of the law relating to mediator immunity.

See Sections 250 ("writing"), 1115(a), (c) ("mediation" and "mediation consultation").

Would the Commission like to follow this type of approach?

There are, of course, other possibilities. Among other alternatives, the following ideas occurred to the staff:

- (1) **Similar to the version of proposed Section 1120.5 shown above, but the exception would apply only if all mediation participants other than the accused lawyer agree to using mediation communications in the disciplinary proceeding.**⁷⁴ This would be a very narrow exception,⁷⁵ but it would promote attorney accountability more than existing law. To ensure evenhanded application of the exception, it would need to expressly state that notwithstanding any other provision of law, (a) the client's assent to using mediation communications in the disciplinary proceeding (to prove *or disprove* the client's claims) is implied from the client's initiation of that proceeding, and (b) the accused lawyer's assent is not required. This would be somewhat similar to the treatment of a court-appointed mediator: Under California Rule of Court 3.860(b), a court-appointed mediator "*must* agree ... that if an inquiry or a complaint is made about the conduct of the mediator, mediation communications may be disclosed solely for purposes

74. Justice Chin raised this possibility in his concurrence in *Cassel v. Superior Court*, 51 Cal. 4th 113, 119, 244 P.3d 1080, 119 Cal. Rptr. 3d 437 (2011). It is Option B-1-a in the staff's compilation of possible approaches. See Memorandum 2015-33, Attachment T20. Ron Kelly brought up the idea at the September 2017 meeting and said that it would have "virtually no opposition."

75. See generally Memorandum 2015-22, pp. 15-16; see also *id.* at pp. 21-24.

of a complaint procedure ... to address that complaint or inquiry.”⁷⁶

- (2) **Similar to the version of proposed Section 1120.5 shown above, but if a State Bar prosecutor files a disciplinary complaint alleging mediation misconduct, parties could use mediation communications not only in the disciplinary proceeding but also in a legal malpractice case alleging the same misconduct.** Under this approach, the State Bar prosecutor would essentially screen both disciplinary proceedings and legal malpractice cases that involve alleged mediation misconduct. Such screening might be considered comparable to the screening of criminal cases routinely conducted by a criminal prosecutor.
- (3) **Use the version of proposed Section 1120.5 shown above, but also preclude an accused attorney from waiving the confidentiality of a disciplinary investigation that involves disclosure of mediation communications.** As discussed earlier, this two-prong approach would help safeguard the policy interests underlying mediation confidentiality, which might reduce the opposition to the Commission’s proposal.⁷⁷
- (4) **Use the version of proposed Section 1120.5 shown above, but also require the State Bar to collect data on the outcomes of cases involving the exception.** The Commission previously discussed and rejected the concept of requiring the State Bar to collect such data.⁷⁸ If the Commission restricts Section 1120.5 to a State Bar disciplinary proceeding, it might want to revisit that possibility. Data on how the provision operates might shed insight on whether to revise the provision in some manner.

76. Emphasis added. For further discussion of the procedure for complaining about a court-appointed mediator, see Memorandum 2015-22, pp. 19-21.

77. See *supra* p. 14 & n. 32.

78. Minutes (Dec. 2016), p. 7. For discussion of this concept, see Memorandum 2016-58, pp. 36-38. That memorandum suggests the following statutory language:

(e) Commencing on [date], the State Bar shall collect data on all of the following:

(1) The number of complaints under the State Bar Act, Chapter 4 (commencing with Section 6000) of the Business and Professions Code, or a rule or regulation promulgated pursuant to the State Bar Act, in which the complainant alleges that a lawyer breached a professional requirement when representing a client in the context of a mediation or a mediation consultation.

(2) The outcomes of those complaints.

(3) Whether, and to what extent, evidence of mediation communications or writings was admitted or disclosed pursuant to Section 1120.5 of the Evidence Code in the process of resolving those complaints.

(f) On or before [date], the State Bar shall provide the data collected pursuant to subdivision (e), during the period from [date] to and including [date], to the Legislature in anonymized format. The State Bar shall continue to collect data pursuant to subdivision (e) afterwards and shall provide that additional data to the Legislature in anonymized format upon request.

Id. at 37.

Is the Commission interested in any of these possibilities? In some other means of implementing an exception that would apply only in a State Bar disciplinary proceeding? If so, the staff could present implementing language for the Commission to consider at a future meeting.

Claim Against an Attorney for Fraud or Breach of Fiduciary Duty (see Proposed Section 1120.5(a)(2)(B))

Instead of proposing to reduce the types of claims in which proposed Section 1120.5 would apply, Raymond Ryan proposes to revise subparagraph (a)(2)(B) to add “claims for breaches of fiduciary duty and fraud against the lawyer.”⁷⁹ That might look something like this:

1120.5 (a) A communication or a writing that is made or prepared for the purpose of, or in the course of, or pursuant to, a mediation or a mediation consultation, is not made inadmissible, or protected from disclosure, by provisions of this chapter if *all* of the following requirements are satisfied:

....
(2) The evidence is sought or proffered in connection with, and is used pursuant to this section solely in resolving, one or more of the following:

(A) A disciplinary proceeding against the lawyer under the State Bar Act, Chapter 4 (commencing with Section 6000) of the Business and Professions Code, or a rule or regulation promulgated pursuant to the State Bar Act.

(B) A cause of action for damages against the lawyer based upon alleged malpractice, fraud, or breach of fiduciary duty.

(C) A dispute between the lawyer and client concerning fees, costs, or both

In Mr. Ryan’s experience as a legal malpractice specialist, lawyers “sometimes hide behind the CEC §1119 mediation privilege and the effect prevents the client from producing critical evidence in support of their claims.”⁸⁰ He says that such misconduct includes:

1. Strong arming settlement by threats of withdrawing often just before trial or some critical aspect of the case such as expert designation or expert deposition.
2. Telling the client incorrect or exaggerated legal advice to obtain settlement authority.
3. Sometimes a mediator or lawyer will tell a client during the mediation that the client’s prior lawyer committed legal

79. Exhibit p. 12.

80. Exhibit p. 11.

malpractice and for that reason, the case being mediated must be settled rather than tried. This type of evidence is critical to the statute of limitations in a legal malpractice case. It is also critical to proving that but for the legal malpractice, the result could have been better. It is also critical to rebuke the “settle and sue” defense often raised by negligent lawyers under Filbin v. Fitzgerald (2012) 211 Cal.App.4th 154 and its progeny.⁸¹

Although Mr. Ryan raises these concerns and urges the Commission to address claims for fraud and breach of fiduciary duty, he also states that his legal malpractice firm has “never come across a situation where we were unable to prove our case because of the assertion of the mediation privilege.”⁸² He warns that the Commission’s intentions in proposing Section 1120.5 “do not necessarily match with what the outcome will be.”⁸³ His firm “see[s] little for clients to gain by amending the current mediation law.”⁸⁴ Rather, they foresee the Commission’s proposal “favoring defense lawyers and negligent lawyers being sued by clients far more often” and they “would discourage the proposed amendment.”⁸⁵

In other words, Mr. Ryan and his firm are unenthusiastic about the Commission’s proposal. It is unclear what position they would take if the Commission made the revisions they suggest.

More importantly, the Commission is seeking a way to reduce the intense and widespread opposition to its proposal, which stems primarily from strong beliefs in the importance of keeping mediation communications confidential. Broadening, rather than narrowing, the Commission’s proposed exception to mediation confidentiality is unlikely to help promote consensus.

Does the Commission have any interest in revising proposed Section 1120.5(a)(2)(B) to include claims against an attorney for fraud and breach of fiduciary duty?

Fee Disputes (see Proposed Section 1120.5(a)(2)(C))

As presently drafted, the Commission’s proposed exception would apply not only in a disciplinary proceeding and a legal malpractice case, but also in a “dispute between the lawyer and client concerning fees, costs, or both, including,

81. Exhibit pp. 11-12.

82. Exhibit p. 14.

83. Exhibit p. 12.

84. Exhibit pp. 14-15.

85. Exhibit p. 15.

but not limited to, a proceeding under Article 13 (commencing with Section 6200) of Chapter 4 of the Business and Professions Code.”⁸⁶ If the Commission decides to stick with that general approach, then it should consider a suggestion from CDRC regarding refinement of the language relating to fee disputes.

Specifically, CDRC notes that “[d]isputes between lawyers and clients concerning fees or costs or both *often do not involve* issues of lawyer malpractice.”⁸⁷ CDRC further states that “[a]rbitrators in mandatory fee arbitrations pursuant to Article 13 of Chapter 4 beginning with Section 6200 of the Business & Professions Code are to determine the reasonable value of services provided by the lawyer to the client involved and may consider claims of lawyer malpractice *only to the extent* they bear on reasonable value.”⁸⁸

CDRC therefore suggests revising proposed Section 1120.5(a)(2)(C) as follows:

(C) A dispute between the lawyer and client concerning fees, costs, or both, including, but not limited to, a proceeding under Article 13 (commencing with Section 6200) of Chapter 4 of the Business and Professions Code, provided the dispute raises an issue of malpractice by the lawyer.⁸⁹

Ron Kelly does not propose any specific language, but he too expresses concern that the provision on fee disputes, as currently drafted, “widened the scope well beyond malpractice lawsuits.”⁹⁰

Does the Commission want to make the change that CDRC suggests?

Enforcement of a Mediated Settlement Agreement (see Comment to Proposed Section 1120.5(a))

Several issues concern claims relating to enforcement of a mediated settlement agreement (e.g., an attempt to enforce or undo a mediated settlement agreement). Those issues are discussed below.

Statutory Text Expressly Addressing Claims Relating to Enforcement of a Mediated Settlement Agreement

In the tentative recommendation, the Comment to proposed Section 1120.5 includes the following paragraph:

86. Proposed Section 1120.5(a)(2)(C).

87. Exhibit p. 9 (emphasis added).

88. *Id.* (emphasis added).

89. *Id.*

90. Memorandum 2017-51, Exhibit p. 99.

Paragraph (2) of subdivision (a) specifies the types of claims in which the exception applies:

- A State Bar disciplinary proceeding, which focuses on protecting the public from attorney malfeasance.
- A legal malpractice claim, which further promotes attorney accountability and provides a means of compensating a client for damages from breach of an attorney's professional duties in the mediation context.
- An attorney-client fee dispute, such as a mandatory fee arbitration under the State Bar Act, which is an effective, low-cost means to resolve fee issues in a confidential setting.

*The exception does not apply for purposes of any other kind of claim. Of particular note, the exception does not apply in resolving a claim relating to enforcement of a mediated settlement agreement (e.g., a claim for rescission of a mediated settlement agreement or a claim for enforcement of a mediated settlement agreement). That restriction promotes finality in settling disputes and protects the policy interests underlying mediation confidentiality.*⁹¹

"To forestall any judicial expansion of the exceptions to confidentiality," CDRC urges the Commission to move the two italicized sentences into the text of Section 1120.5, as subparagraph (a)(2)(D).⁹² Attorney mediator Jill Switzer makes essentially the same point.⁹³

The text of proposed Section 1120.5 already expressly requires that evidence sought or proffered pursuant to the exception be "used ... *solely* in resolving" the types of claims specified in paragraph (a)(2).⁹⁴ In addition, subdivision (b) of Section 1120.5 states:

(b) If a mediation communication or writing satisfies the requirements of subdivision (a), only the portion of it necessary for the application of subdivision (a) may be admitted or disclosed. *Admission or disclosure of evidence under subdivision (a) does not render the evidence, or any other mediation communication or writing, admissible or discoverable for any other purpose.*⁹⁵

These statements in the statutory text, particularly when coupled with the italicized language in the Comment and similar language in the narrative portion

91. Emphasis added.

92. Exhibit p. 10. In making this suggestion, CDRC's letter mistakenly refers to page 146 of the tentative recommendation, instead of page 147. The intent was to refer to page 147. The staff confirmed as much with Mr. Madison of CDRC.

93. Exhibit p. 19.

94. See proposed Section 1120.5(a)(2) (emphasis added).

95. Emphasis added.

of the Commission's recommendation,⁹⁶ already seem to make quite clear that the exception can only be used in the types of proceedings enumerated in it.

The staff has some trepidation about inserting additional language into the statutory text to underscore that the current language really means what it says. Nonetheless, the situation of concern to CDRC and Ms. Switzer — an attempt to enforce or undo a mediated settlement agreement — is particularly important.

If the Commission wants to specifically address that situation in the statutory text, we suggest revising subdivision (b) as shown in underscore below:

Evid. Code § 1120.5 (added). Alleged misconduct of lawyer when representing client in mediation context

SEC. _____. Section 1120.5 is added to the Evidence Code, to read:

1120.5. (a) A communication or a writing that is made or prepared for the purpose of, or in the course of, or pursuant to, a mediation or a mediation consultation, is not made inadmissible, or protected from disclosure, by provisions of this chapter if all of the following requirements are satisfied:

(1) The evidence is relevant to prove or disprove an allegation that a lawyer breached a professional requirement when representing a client in the context of a mediation or a mediation consultation.

(2) The evidence is sought or proffered in connection with, and is used pursuant to this section solely in resolving, one or more of the following:

(A) A disciplinary proceeding against the lawyer under the State Bar Act, Chapter 4 (commencing with Section 6000) of the Business and Professions Code, or a rule or regulation promulgated pursuant to the State Bar Act.

(B) A cause of action for damages against the lawyer based upon alleged malpractice.

(C) A dispute between the lawyer and client concerning fees, costs, or both, including, but not limited to, a proceeding under Article 13 (commencing with Section 6200) of Chapter 4 of the Business and Professions Code.

(3) The evidence does not constitute or disclose a writing of the mediator relating to a mediation conducted by the mediator.

(b)(1) If a mediation communication or writing satisfies the requirements of subdivision (a), only the portion of it necessary for the application of subdivision (a) may be admitted or disclosed. Admission or disclosure of evidence under subdivision (a) does not render the evidence, or any other mediation communication or writing, admissible or discoverable for any other purpose.

96. See Tentative Recommendation at 134-35, 139.

(2) In no event may a mediation communication or writing be admitted or disclosed pursuant to this section for purposes of resolving a claim relating to enforcement of a mediated settlement agreement, such as a claim for rescission of a mediated settlement agreement or a claim for enforcement of a mediated settlement agreement.

....

In addition, the Comment could be revised as shown in strikeout and underscore below:

Comment. Section 1120.5 is added to promote attorney accountability in the mediation context

....

Paragraph (2) of subdivision (a) specifies the types of claims in which the exception applies:

- A State Bar disciplinary proceeding, which focuses on protecting the public from attorney malfeasance.
- A legal malpractice claim, which further promotes attorney accountability and provides a means of compensating a client for damages from breach of an attorney's professional duties in the mediation context.
- An attorney-client fee dispute, such as a mandatory fee arbitration under the State Bar Act, which is an effective, low-cost means to resolve fee issues in a confidential setting.

The exception does not apply for purposes of any other kind of claim. ~~Of particular note, the exception does not apply in resolving a claim relating to enforcement of a mediated settlement agreement (e.g., a claim for rescission of a mediated settlement agreement or a claim for enforcement of a mediated settlement agreement). That restriction promotes finality in settling disputes and protects the policy interests underlying mediation confidentiality.~~

~~Subdivision (b) Paragraph (1) of subdivision (b) is modeled on Section 6(d) of the Uniform Mediation Act. It establishes an important limitation on the admissibility or disclosure of mediation communications pursuant to this section.~~

Paragraph (2) underscores that the exception does not apply in resolving a claim relating to enforcement of a mediated settlement agreement (e.g., a claim for rescission of a mediated settlement agreement or a claim for enforcement of a mediated settlement agreement). That restriction promotes finality in settling disputes and protects the policy interests underlying mediation confidentiality.

....

Would the Commission like to make these changes?

Filing a Cross-Complaint for Legal Malpractice When a Party Moves for Enforcement of a Mediated Settlement Agreement

Jill Switzer points out that if a party moves for enforcement of a mediated settlement agreement pursuant to Code of Civil Procedure Section 664.6, the opponent might file a cross-complaint for mediation misconduct. She asks some questions about that situation:

The comment to the proposed legislation states that "... the exception does not apply in resolving a claim relating to enforcement of a mediated settlement agreement." What happens if a party moves for enforcement of the settlement agreement pursuant to Code of Civil Procedure section 664.6 and the defendant files a cross-complaint for malpractice arising out of something that occurred at the mediation, e.g. a breach of the attorney's professional duties in the mediation context? Would that cross-complaint be barred? Could the defendant file a separate action for malpractice?⁹⁷

In the situation Ms. Switzer describes, evidence of mediation communications would *not* be admissible or discoverable for purposes of the motion to enforce the mediated settlement agreement. Pursuant to the Commission's proposed exception, however, such evidence *might be* admissible and discoverable for purposes of the malpractice claim (unless the Commission revises the exception to apply only in a State Bar disciplinary proceeding).

If necessary to cope with these conflicting rules, a court could sever the claims. As amended on Commission recommendation in 1971, Code of Civil Procedure Section 1048(b) provides:

(b) The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any cause of action, including a cause of action asserted in a cross-complaint, or of any separate issue or of any number of causes of action or issues, preserving the right of trial by jury required by the Constitution or a statute of this state or of the United States.

The law thus already provides an effective mechanism for dealing with Ms. Switzer's concern. **It might be helpful to point this out in the Comment to Section 1120.5, perhaps by revising it along the following lines:**

97. Exhibit p. 19.

Comment....

Paragraph (2) of subdivision (a) specifies the types of claims in which the exception applies:

- A State Bar disciplinary proceeding, which focuses on protecting the public from attorney malfeasance.
- A legal malpractice claim, which further promotes attorney accountability and provides a means of compensating a client for damages from breach of an attorney's professional duties in the mediation context.
- An attorney-client fee dispute, such as a mandatory fee arbitration under the State Bar Act, which is an effective, low-cost means to resolve fee issues in a confidential setting.

The exception does not apply for purposes of any other kind of claim. If necessary to effectively implement this restriction, a court may sever an issue or a cause of action. See Code Civ. Proc. § 1048 & Comment.

Of particular note, the exception does not apply in resolving a claim relating to enforcement of a mediated settlement agreement (e.g., a claim for rescission of a mediated settlement agreement or a claim for enforcement of a mediated settlement agreement). That restriction promotes finality in settling disputes and protects the policy interests underlying mediation confidentiality.

....

Would the Commission like to make such a revision?

Impact of a Successful Legal Malpractice Suit for Mediation Misconduct

In a newly submitted comment, the Consortium for Children questions whether the Commission's proposal provides sufficient assurance that a mediated settlement agreement will remain enforceable if a client prevails in a legal malpractice suit alleging mediation misconduct:

The Commission argues its limitation on confidentiality is designed to preserve the finality of a mediated agreement and protects against buyer's remorse because it would not apply in resolving a claim relating to the enforcement of a mediated settlement, such as a claim for rescission or specific performance.

However, what happens when a party suing his or her attorney for malpractice that occurs during the mediation process is successful in the malpractice suit? Would that finding of malpractice support an argument that the suing party's consent to a mediated agreement was not valid? If so, where does that leave the non-involved party — who may be acting in accordance with the

mediated agreement for the period of time during which the suing party and his or her attorney are involved in their separate suit?⁹⁸

The group is concerned that a mediated settlement agreement may unravel following a successful legal malpractice suit based on mediation misconduct, causing harm to uninvolved mediation participants who acted in reliance on the agreement.

At first, their concern may seem much the same as the above-discussed concerns of CDRC and Ms. Switzer over potential misapplication of proposed Section 1120.5 — i.e., the concerns that the Commission could address by expressly stating:

In no event may a mediation communication or writing be admitted or disclosed pursuant to this section for purposes of resolving a claim relating to enforcement of a mediated settlement agreement, such as a claim for rescission of a mediated settlement agreement or a claim for enforcement of a mediated settlement agreement.⁹⁹

On closer examination, however, the Consortium for Children appears to be focusing on something different: the potential impact of a “finding of malpractice” and particularly whether such a finding would “support an argument that the [malpractice plaintiff’s] consent to a mediated agreement was not valid.”¹⁰⁰ The idea seems to be that a “finding of malpractice” might unwind a mediated settlement agreement because it could bar the party seeking enforcement, or defending against a rescission claim, from making a contrary showing — i.e., from proving that the other side (the malpractice victim) lawfully consented to the mediated settlement agreement. In other words, the group appears to be concerned about potential application of the doctrine of collateral estoppel on the issue of consent in an action to enforce or rescind a mediated settlement agreement.

There is no need for such concern, however, because the doctrine of collateral estoppel would not apply. A malpractice finding would necessarily occur in a lawsuit between an attorney and a client. The doctrine of collateral estoppel would preclude *the attorney and the client* (and their privies) from later relitigating the issue of malpractice and the related question of consent to the mediated

98. Exhibit p. 2.

99. See pp. 30-33 (emphasis added).

100. Exhibit p. 2.

settlement agreement, but the doctrine would *not* preclude *anyone else* from litigating those issues.¹⁰¹

Thus, the client *could not rely on findings in the malpractice case* to stop another signatory to the mediated settlement agreement from proving, in an enforcement or rescission case, that the client lawfully consented to that agreement and it is thus enforceable. Nor could the client *introduce mediation communications* to show a lack of consent, because proposed Section 1120.5 would not apply in the enforcement or rescission case (and the section would expressly state as much if revised as shown above to address the concerns raised by CDRC and Ms. Switzer).

The staff does not see a need to make additional revisions to address the collateral estoppel issue raised by the Consortium for Children. **Does the Commission see this differently?**

C. PROPOSED TREATMENT OF MEDIATOR TESTIMONY AND MEDIATOR
COMMUNICATIONS AND RELATED ISSUES (SEE PROPOSED SECTION
1120.5(a)(3), (e)-(f))

The third key requirement of the Commission's proposed exception concerns a mediator's written materials:

1120.5. (a) A communication or a writing that is made or prepared for the purpose of, or in the course of, or pursuant to, a mediation or a mediation consultation, is not made inadmissible, or protected from disclosure, by provisions of this chapter if all of the following requirements are satisfied:

....
(3) The evidence does not constitute or disclose a writing of the mediator relating to a mediation conducted by the mediator.

We already touched on this requirement in discussing whether the exception to mediation confidentiality should apply only in a State Bar disciplinary proceeding.

As previously mentioned, this third requirement was a late addition to the Commission's proposal. It is intended to reinforce the protection for a mediator that is provided in subdivision (e) of Section 1120.5:

101. See, e.g., 7 B. Witkin, *California Procedure Judgment* § 468, pp. 113-14 (5th ed. 2008) ("Apart from special circumstances, a stranger to an action, i.e., a person neither a party nor in privity, is not bound by the judgment.... [D]ue process requires that the person have his or her own day in court.").

(e) No mediator shall be competent to provide evidence pursuant to this section, through oral or written testimony, production of documents, or otherwise, as to any statement, conduct, decision, or ruling, occurring at or in conjunction with a mediation that the mediator conducted, except as to a statement or conduct that could (a) give rise to civil or criminal contempt, (b) constitute a crime, (c) be the subject of investigation by the State Bar or Commission on Judicial Performance, or (d) give rise to disqualification proceedings under paragraph (1) or (6) of subdivision (a) of Section 170.1 of the Code of Civil Procedure.

The Comment to proposed Section 1120.5 provides some background on subdivision (e):

Under subdivision (e), a mediator generally cannot testify or produce documents pursuant to this section, whether voluntarily or under compulsion of process, regarding a mediation that the mediator conducted. That general rule is subject to the same exceptions stated in Section 703.5, which does not expressly refer to documentary evidence.

For federal restrictions on obtaining a mediator's electronic records from the mediator's service provider, see 18 U.S.C. § 2702(a); *O'Grady v. Superior Court*, 139 Cal. App. 4th 1423, 44 Cal. Rptr. 3d 72 (2006).

The Comment does not say anything about paragraph (a)(3), but the preliminary part (narrative portion) of the Tentative Recommendation explains:

To bolster the ... restrictions on obtaining evidence from a mediator, the proposed new exception would be subject to another important limitation: It would not extend to any evidence that constitutes or discloses a writing of the mediator relating to a mediation conducted by the mediator. Thus, a litigant generally could neither obtain such a writing directly from a mediator, nor circumvent that restriction by obtaining such a writing from another source.

Further, a litigant could not learn the content of such a writing through other materials in the custody of another source. For instance, if the *response* to a mediator's email message reflects the content of that message, the response would not be discoverable under the proposed new exception unless the portion of it reflecting the content of the mediator's message could be effectively redacted. Otherwise, the response would impermissibly "disclose a writing of the mediator relating to a mediation conducted by the mediator."¹⁰²

102. Tentative Recommendation at 137-38 (emphasis in original; footnotes omitted).

A number of comments raise issues relating to the content of paragraph (a)(3) and subdivision (e). Those issues and related concerns are discussed below.

Although it may seem somewhat backwards, we begin by discussing some possible refinements of the Commission's current approach. We then turn to some more substantial suggestions. By addressing the possible refinements first, the Commission will be able to clarify its current approach before determining whether to substantially change that approach.

Exceptions to Paragraph (a)(3)

As discussed earlier in this memorandum, subdivision (e) of proposed Section 1120.5 is expressly subject to the same four exceptions as the existing provision governing a mediator's competency to testify (Section 703.5), but the version of paragraph (a)(3) in the Tentative Recommendation is not. If the Commission decides not to limit Section 1120.5 to a State Bar disciplinary proceeding, and it believes that paragraph (a)(3) should be subject to the same four exceptions as in Section 703.5, that could be accomplished as follows:

1120.5. (a) A communication or a writing that is made or prepared for the purpose of, or in the course of, or pursuant to, a mediation or a mediation consultation, is not made inadmissible, or protected from disclosure, by provisions of this chapter if all of the following requirements are satisfied:

....

(3) The evidence does not constitute or disclose a writing of the mediator relating to a mediation conducted by the mediator. This paragraph does not apply to a writing that could (i) give rise to civil or criminal contempt, (ii) constitute a crime, (iii) be the subject of investigation by the State Bar or Commission on Judicial Performance, or (d) give rise to disqualification proceedings under paragraph (1) or (6) of subdivision (a) of Section 170.1 of the Code of Civil Procedure.¹⁰³

Assuming that the Commission proceeds with its current approach to mediator testimony and materials, **would it like to revise paragraph (a)(3) in this manner?**

103. In Section 703.5, the four exceptions are labeled as (a), (b), (c), and (d). In drafting proposed Section 1120.5(e), the staff labeled those exceptions the same way. See Tentative Recommendation at 146.

In retrospect, that approach may be confusing, because proposed Section 1120.5 (unlike Section 703.5) also has subdivisions labeled (a), (b), (c), and (d). To prevent confusion, the Commission could relabel subdivision (e)'s four exceptions as (i), (ii), (iii), and (iv) (the same approach taken in the possible revision of proposed Section 1120.5(a)(3) shown above). Unless the Commission otherwise directs, the staff will make that technical revision.

Comment on Paragraph (a)(3)

To aid in understanding paragraph (a)(3), it might be helpful to discuss it in the Comment accompanying proposed Section 1120.5. The staff suggests adding the following new material to the Comment (the bracketed language should be included only if the Commission revises paragraph (a)(3) to include exceptions, as discussed above):

Under paragraph (3) of subdivision (a), the mediation confidentiality exception created by this section is inapplicable to evidence that constitutes or discloses a writing of a mediator relating to a mediation conducted by the mediator. This requirement complements the mediator competency restrictions stated in subdivision (e) and Section 703.5[, and it is subject to the same four exceptions as those provisions].

Thus, [unless one of the four exception applies,] a litigant could neither obtain a mediator's writing directly from the mediator nor circumvent that restriction by obtaining such a writing from another source. Further, a litigant could not learn the content of such a writing through other materials in the custody of another source. For instance, if the *response* to a mediator's email message reflects the content of that message, the response would not be discoverable under this section unless the portion of it reflecting the content of the mediator's message could be effectively redacted. Otherwise, the response would impermissibly "disclose a writing of the mediator relating to a mediation conducted by the mediator."

Assuming that the Commission proceeds with its current approach to mediator testimony and materials, **would it like to include this language in the Comment to proposed Section 1120.5?**

Definition of a "Writing"

Jill Switzer suggests revising paragraph (a)(3) to cross-refer to the provision that defines the term "writing":

1120.5. (a) A communication or a writing that is made or prepared for the purpose of, or in the course of, or pursuant to, a mediation or a mediation consultation, is not made inadmissible, or protected from disclosure, by provisions of this chapter if all of the following requirements are satisfied:

....
(3) The evidence does not constitute or disclose a writing, as defined in Section 250, of the mediator relating to a mediation conducted by the mediator.¹⁰⁴

104. See Exhibit p. 19.

Several provisions within the chapter on mediation confidentiality already use that approach.¹⁰⁵

In general, however, it is best to minimize the use of statutory cross-references. They can become outdated as statutes are revised, which can cause confusion.¹⁰⁶

Often, it is sufficient to include a cross-reference in a Commission Comment, rather than placing it in the statutory text.¹⁰⁷ Proposed Section 1120.5 and the accompanying Comment follow that approach (see the last paragraph of the Comment, which refers to Section 250's definition of "writing," as well as other defined terms used in Section 1120.5).

The staff recommends that the Commission **stick with that approach**.¹⁰⁸

Require Mediator Testimony

Mediator Jeff Kichaven suggests a major change in the Commission's proposed treatment of mediator testimony and materials. In his comments on the Tentative Recommendation, he refers to an article in which he suggests making a mediator competent to testify in a case that alleges mediation misconduct.¹⁰⁹

Similarly, attorney Jerome Sapiro, Jr., says that a mediator "should not be precluded from testifying in a dispute between attorney and client about statements made by them during the mediation if the mediator is the only percipient witness other than the attorney and client, and if the testimony of the mediator is not offered to attack an agreement between the parties to the mediation that resulted from the mediation."¹¹⁰ He points out that "[i]n some contexts, the testimony of a mediator may be the only objective evidence of

105. See Sections 1119(b), 1122(a), 1127.

106. See, e.g., Memorandum 2017-50 (CPRA cross-references); *Nonsubstantive Reorganization of Deadly Weapon Statutes*, 38 Cal. L. Revision Comm'n Reports 217, 250 (2009) (discussion of "Unnecessary Cross-References"); see also *id.* at 257-64 ("Appendix A: Corrected Cross-References").

107. See, e.g., *Nonsubstantive Reorganization of Deadly Weapon Statutes*, *supra* note 105, at 250 ("Each section that uses a defined term would have a Commission Comment directing the reader to the applicable definition. This obviates the need to include a statutory cross-reference whenever a defined term is used." (Footnote omitted.)).

108. Ideally, each of the existing cross-references to Section 250 in the chapter on mediation confidentiality would be moved from the statutory text into an accompanying Comment, which would explain that this is a nonsubstantive change. To avoid generating undue concern, however, it is probably best to leave those cross-references alone.

109. See Exhibit p. 6; see also Memorandum 2017-51, Exhibit pp. 127, 131-32.

110. Exhibit pp. 17-18.

whether attorney misconduct occurred.”¹¹¹ He also describes some hypothetical examples.¹¹²

The Commission has considered the possibility of requiring, or at least permitting, mediator testimony on multiple occasions in the past, because Mr. Kichaven has repeatedly raised the point. In fact, the discussion of it in his latest article is essentially the same as the one in an earlier article that he submitted to the Commission.¹¹³ The Commission’s decision on this point was based on preserving the existing policies that favor protecting mediators from being compelled to testify.

Moreover, as the Commission is well aware, reducing the protection for mediators would not be a step towards consensus. Rather, it would heighten the already intense opposition to its proposal. To give just a few examples, CJA and the Public Employment Relations Board (“PERB”) have particularly emphasized the importance of protecting mediators from testifying,¹¹⁴ and CDRC’s comments on the Tentative Recommendation specifically express support for proposed Section 1120.5(f), which preserves Section 703.5’s restrictions on mediator testimony.¹¹⁵ It is also worth noting that the Uniform Mediation Act (“UMA”), like the Commission’s current proposal, protects a mediator from being forced to testify about the substance of a mediation in a legal malpractice case that alleges mediation misconduct.¹¹⁶

Does the Commission have any interest in revising proposed Section 1120.5(e) to eliminate such protection?

Provide Additional Safeguards Relating to Mediator Testimony and Mediator Communications

A number of comments suggest that the Commission’s proposal does not go far enough in protecting mediators from testifying and ensuring the confidentiality of their mediation-related writings and communications. For

111. Exhibit p. 17.

112. *Id.*

113. Compare Exhibit p. 6 with First Supplement to Memorandum 2017-20, Exhibit pp. 11-12.

114. See Memorandum 2017-8, Exhibit pp. 1-5 (PERB comments); Memorandum 2016-19, Exhibit pp. 5-6 (CJA comments); Third Supplement to Memorandum 2015-46, Exhibit pp. 7-9 (PERB comments); see also Exhibit pp. 7-8 (CJA’s comments on the Tentative Recommendation, to be discussed later in this memorandum). PERB and CJA representatives have also testified to the Commission on several occasions regarding this matter.

115. See Exhibit p. 10. CDRC explained that “[i]ncompetency to testify is crucial to mediator neutrality, which is the foundation upon which the utility of involving a mediator in efforts to resolve disputes is based.” *Id.*

116. See UMA § 6(a)(6), (c).

example, Judge Long (writing on behalf of CJA) says the Tentative Recommendation is vague on this point and urges the Commission to be more specific about such protections:

Realizing that it was going to be probable that the Commission was going to make recommendations to the Legislature in some form that would at least in part abrogate mediation confidentiality, CJA then focused on protecting mediators' ... presently existing *legal incompetence* from being compelled to testify and otherwise protecting mediators' writings, documents and the like from discovery or trial.

On pages 9-11 of her *First Supplement to Memorandum 2017-30*, Ms. Gaal points out portions of *Staff Analysis* more articulately than I did in my numerous appearances before the Commission over the past two years. These are things that should bear strong consideration in formulating your final proposal. I attempted to also present the same thoughts to you. These include, **making sure a mediator is "left alone"** re not having to provide discovery or evidence at trial; **precluding a civil litigant from obtaining a mediator's electronic files from the mediator's ECS or RCS**, i.e. not allowing a litigant or counsel to **obtain through a back or side door what they cannot obtain through the front door**; **precluding disclosure of specific categories or evidence**, from: **all of a mediator's records relating to a mediation** conducted by the mediator, to **all oral or written communications made by a mediator in the course of a mediation** he or she ... conducted; to **all oral or written communications exchanged between a mediator and a mediation participant** in the course of a mediation conducted by the mediator.

In my discussions with you it was my sense that those concerns and the specificity needed to have them unambiguously set forth met favorably with recognition of their importance from a majority of the Commissioners if not all of you. However, the current *Tentative Recommendation*, for the most part, presents little more than vague and ambiguous language that, from a judicial perspective, provides no substantive guidance as to how it is to be implemented.

As I said to you on a number of the occasions I was before you, and I did so non-pejoratively, *lawyers are nothing if not creative!* Statutory protections of confidentiality, to be effective, must be articulated unambiguously so that the legislative intent as to the scope of those protections is not subject to reasonable debate. The current *Tentative Recommendation* fails to meet any such standard of specificity.¹¹⁷

117. Exhibit p. 7 (italics and boldface in original).

Judge Long does not suggest any specific language to resolve CJA's concerns about this matter.

In his comments on the Tentative Recommendation, however, Ron Kelly offers a specific proposal. He asks the Commission to expand Section 1120.5(a)(3) to refer to an oral communication of a mediator:

1120.5. (a) A communication or a writing that is made or prepared for the purpose of, or in the course of, or pursuant to, a mediation or a mediation consultation, is not made inadmissible, or protected from disclosure, by provisions of this chapter if all of the following requirements are satisfied:

....
(3) The evidence does not constitute or disclose a writing or oral communication of the mediator relating to a mediation conducted by the mediator.¹¹⁸

He explains:

Mediator's Oral Communications. The intent of the current draft's (a)(3) is to allow mediators to be candid in creating their own notes and in their written communications to the participants, knowing they are not creating new evidence. The same logic applies to allowing mediators to be candid in their oral communications with the participants.¹¹⁹

Alternatively, in a recent letter Mr. Kelly proposes a restriction that would apply not only to mediator communications, but also to communications of *all* mediation participants *other than* the attorney accused of misconduct and the client making that accusation. Specifically, to reduce the opposition to the Commission's proposal, he suggests adding the following new paragraph to proposed Section 1120.5:

118. See Memorandum 2017-51, Exhibit p. 98.

119. *Id.* (boldface and underscore in original).

Although Mr. Kelly equates disclosure of a mediator's writing with disclosure of a mediator's oral communications, there is a distinction the Commission may or may not find significant. Absent fraudulent revisions or other manipulation, the content of a mediator's writing will be *exactly* the same no matter who discloses it to the court — the mediator (who would be barred from making the disclosure under proposed Section 1120.5(e)) or anyone else. Thus, the bar on mediator disclosure would have little meaning without a supplemental bar on disclosure by others.

In contrast, even if other mediation participants do their best to be truthful and accurate, their accounts of what a mediator said during mediation will *not* be identical to a mediator's account of what the mediator said during mediation. There will necessarily be disparities due to differences in perception, memory, and other details.

Whether this distinction merits differing treatment for a mediator's oral communications, as opposed to written materials, is a question that warrants careful attention.

1120.5. (a) A communication or a writing that is made or prepared for the purpose of, or in the course of, or pursuant to, a mediation or a mediation consultation, is not made inadmissible, or protected from disclosure, by provisions of this chapter if all of the following requirements are satisfied:

....
(4) The evidence does not constitute or disclose a mediation communication of any mediation participant other than the client and attorney specified in subdivision (a).¹²⁰

Mr. Kelly is essentially proposing to preclude admissibility of any mediation communication *other than* a communication made *by* the accused attorney or the unhappy client (but not necessarily made *between* the accused attorney and the unhappy client). The goal is to protect the confidentiality interests of other mediation participants.¹²¹ He considers this new approach preferable to the one he suggested earlier, but he regards both of them as improvements over the Commission's current approach.¹²²

Mediation briefs are another area of concern. These are essentially communications *to* a mediator (and sometimes others), rather than communications *by* a mediator. At the September meeting, mediator Rachel Ehrlich expressed particular concern about potential disclosure of briefs that were intended for a mediator's eyes only.¹²³ Somewhat similarly, Raymond Ryan writes:

[O]ftentimes lawyers engage in puffery in mediation briefs and expect them to remain confidential. This is one of the reasons why CEC§1152 prevents settlement communications from entering into evidence. The proposed law seems to open the floodgates for mediation briefs to be admissible evidence in malpractice cases which will almost always have an effect on causation and damages in the malpractice case. Imagine a jury in a malpractice case having to read and analyze mediation briefs in a personal injury case. Does

120. Exhibit p. 25.

121. See *id.*

122. See *id.*

123. The Commission could protect such briefs from disclosure by revising proposed Section 1120.5 along the following lines:

1120.5. (a) A communication or a writing that is made or prepared for the purpose of, or in the course of, or pursuant to, a mediation or a mediation consultation, is not made inadmissible, or protected from disclosure, by provisions of this chapter if all of the following requirements are satisfied:

....
(4) The evidence does not constitute or disclose the content of a memorandum of points and authorities that was submitted solely to the mediator and labeled "FOR THE MEDIATOR ONLY" or words to that effect.

the disclosure of one brief for the client's lawyer automatically require the disclosure of the other mediation brief? Is this going to [a]ffect the efficacy of mediators?¹²⁴

The Commission needs to resolve whether to make any changes to address these types of concerns. In so doing, the Commission should **balance the competing policy considerations:**

- (1) **The importance of having a particular kind of evidence available in resolving a mediation misconduct claim.** Will it be possible, for example, to achieve justice without access to a brief prepared for the "mediator's eyes only"? Without access to any testimony about what the mediator said? Without access to any testimony about what people said to the mediator? Without access to any mediation communications other than ones made by the attorney accused of misconduct or the client making the accusation? If the lack of such evidence might cause an unjust result, how frequently will that type of problem occur?
- (2) **The potential harm to the interests underlying mediation confidentiality by disclosing the particular evidence in question.** The Commission should ask questions such as: Will participants continue to be candid with mediators if a brief prepared for the "mediator's eyes only" is disclosed to others? Will such a disclosure impede the effectiveness of mediation in resolving disputes? Will a mediator's reputation for neutrality be harmed by disclosing what the mediator said in a mediation? Will a chilling effect occur if participants' communications with a mediator are potentially subject to disclosure? If so, what impact will that have? How many people may be affected by the answers to these questions and how significant are the possible effects?

How would the Commission like to proceed on this point?

D. NOTICE REQUIREMENT AND RELATED ISSUES

Proposed Section 1120.5 includes the following notice requirement:

(d) Upon filing a complaint or a cross-complaint that includes a cause of action for damages against a lawyer based on alleged malpractice in the context of a mediation or a mediation consultation, the plaintiff or cross-complainant shall serve the complaint or cross-complaint by mail, in compliance with Sections 1013 and 1013a of the Code of Civil Procedure, on all of the mediation participants whose identities and addresses are reasonably ascertainable. This requirement is in addition to, not in

124. Exhibit p. 14.

lieu of, other requirements relating to service of the complaint or cross-complaint.

The accompanying Comment explains:

Under subdivision (d), when a party files a legal malpractice case in which mediation communications or writings might be disclosed pursuant to this section, that party must promptly provide notice to the mediation participants regarding commencement of the case. Each mediation participant is entitled to such notice, so long as the participant's identity and address is reasonably ascertainable. This affords an opportunity for a mediation participant who would not otherwise be involved in the malpractice case to take steps to prevent improper disclosure of mediation communications or writings of particular consequence to that participant. For instance, a mediation participant could move to intervene and could then seek a protective order or oppose an overbroad discovery request.

Several sources commented on this notice requirement. A few of their concerns interrelate to some extent, so we begin by discussing those concerns collectively. Next, we turn to the other criticisms of the notice requirement. Afterwards, we discuss a related issue raised by the Consortium for Children.

Interrelated Concerns About the Notice Requirement

In the course of urging the Commission to drop its proposal, mediator Jeanne Behling says that "the notice provisions alone breach the confidentiality"¹²⁵ She is presumably concerned that by serving a mediation participant with a complaint or a cross-complaint that "includes a cause of action for damages against a lawyer based on alleged malpractice in the context of a mediation or a mediation consultation,"¹²⁶ the participant receiving the pleading might learn confidential information that the participant did not have access to during the mediation.

CDRC does not make exactly the same point as Ms. Behling, but it too voices concern about the potential impact on a mediation participant who receives such a pleading. It states:

The CDRC agrees with the concern ... that participants in mediation who are not involved in a malpractice dispute should have an opportunity to seek a protective order or oppose an overbroad discovery request before evidence involving them is

125. Memorandum 2017-51, Exhibit p. 72.

126. Proposed Section 1120.5(d).

sought. However, CDRC believes that a provision requiring that notice be given to such third party participants at the outset of a case involving a malpractice claim is premature.

Third party participants in mediation expect that by settling a dispute they have made peace. Their lives should not be disturbed unnecessarily. Even if a malpractice claim alleges mediation-related conduct, the case might well go away before there is any occasion to seek evidence from or about third party participants. Premature notice would unduly alarm them and be inconsistent with their interest in having achieved peace as the result of mediation. Moreover, the phrase “filing a complaint or cross-complaint” does not address the situation in which a malpractice dispute is the subject of arbitration, not litigation.

For all of the foregoing reasons, the CDRC believes proposed Section 1120.5(d) should be *revised to delete the requirement for giving notice at the time of filing and instead require that, before a party to a malpractice dispute may seek discovery from or offer evidence about or from a third party participant that would otherwise be protected by mediation confidentiality, the party must serve notice upon the third party participant and the third party participant must be afforded a reasonable opportunity to take steps to prevent improper disclosure of the mediation communications involved.*¹²⁷

CDRC’s suggestion to delay the time of notification and reframe the notice requirement is intended to alleviate its concerns about (1) the possibility of prematurely alarming a mediation participant who sought peace and (2) the importance of squarely addressing the arbitration context. CDRC’s suggested approach would also partially address Ms. Behling’s concern about spreading confidential information to a person not previously privy to it: As CDRC points out, if notification is delayed, “the case might well go away,”¹²⁸ and thus the need to spread confidential information might disappear, before reaching the time for notification. What’s more, limiting notice to those whose information is sought would further limit the spread of confidential information.

CDRC’s suggestion could perhaps be implemented by replacing the current version of subdivision (d) with the following new version:

(d)(1) Before a party to a dispute over mediation malpractice or other mediation misconduct may seek discovery pursuant to this section from, or proffer evidence pursuant to this section about or from, a third party participant that would otherwise be protected by Section 1119, the party shall notify the third party participant and afford the third party participant a reasonable opportunity to

127. Exhibit pp. 9-10 (emphasis added).

128. Exhibit p. 10.

take steps to prevent improper disclosure of the mediation communication or writing in question. This requirement applies only when the identity and address of a third party participant are reasonably ascertainable.

(2) As used in this subdivision, “third party participant” means a mediation participant who is not a party to the mediation misconduct dispute described in paragraph (1).

(3) The notice requirement of paragraph (1) is in addition to, not in lieu of, other applicable rules and requirements.

The accompanying Comment could be revised to say:

Subdivision (d) affords an opportunity for a mediation participant who would not otherwise be involved in a mediation misconduct dispute to take steps to prevent improper disclosure of mediation communications or writings of particular consequence to that participant. For instance, a mediation participant could move to intervene in a malpractice case and could then seek a protective order or oppose an overbroad discovery request.

Would the Commission like to make revisions along these lines?

Robert Flack’s Criticisms of the Notice Requirement

Further criticism of the notice requirement comes from mediator Robert Flack. He writes:

Those not involved in the [lawyer-client] accusation are also subject to a GOTCHA! ... [T]hey get a chance to protect themselves after they receive notice; *by the way, there is no real requirement to give notice.* GOTCHA!¹²⁹

In asserting that “there is no real requirement to give notice,” Mr. Flack presumably is referring to the Commission’s decision to limit the notice requirement to mediation participants “whose identities and addresses are reasonably ascertainable.” **Does the Commission have any interest in deleting that limitation?**

Mr. Flack also says:

Even Mediators, who are nominally protected have their own GOTCHA! Information that Mediators have in their files or have transmitted to the Parties may not be protected. GOTCHA! And, *Mediators who might like to protect this confidential information and the integrity of the process need not be provided notice.* GOTCHA!¹³⁰

129. Memorandum 2017-51, Exhibit p. 78 (emphasis added).

130. *Id.* (emphasis added).

Although proposed Section 1120.5(d) would require notice to “*all of the mediation participants* whose identities and addresses are reasonably ascertainable,”¹³¹ Mr. Flack is apparently interpreting the term “mediation participant” to exclude the mediator.

The staff does not think that was the Commission’s intent. It seems more natural to interpret the term “mediation participant” to encompass everyone who participates in a mediation, including the mediator.

However, Mr. Flack’s concern about including mediators would be easy to address. The Commission could revise subdivision (d) as follows:

(d) Upon filing a complaint or a cross-complaint that includes a cause of action for damages against a lawyer based on alleged malpractice in the context of a mediation or a mediation consultation, the plaintiff or cross-complainant shall serve the complaint or cross-complaint by mail, in compliance with Sections 1013 and 1013a of the Code of Civil Procedure, on all of the mediation participants whose identities and addresses are reasonably ascertainable, including, but not limited to, the mediator. This requirement is in addition to, not in lieu of, other requirements relating to service of the complaint or cross-complaint.¹³²

....

The staff sees no harm in making such a clarification. **Would the Commission like to do so?**

Jill Switzer’s Criticism of the Notice Requirement

Jill Switzer says:

Subsection (d) requires that notice of the complaint or cross-complaint be “served” on all mediation participants. The comment talks of “providing notice” to mediation participants. Notice and service are two different concepts. I would suggest that “notice” to mediation participants be substituted for “service.” “Service” implies that a responsive pleading must be filed by all mediation

131. Emphasis added.

132. Alternatively, the Commission could make a similar change in the possible replacement for subdivision (d) shown above:

(d)

(2) As used, in this subdivision, “third party participant” means a mediation participant, including, but not limited to, the mediator, who is not a party to the dispute described in paragraph (1).

....

participants, thus embroiling participants who otherwise would not and should not be involved.¹³³

The distinction between “notice” and “service” is perhaps not as stark as Ms. Switzer describes it, but her concern nonetheless makes sense as a matter of tone.

In the staff’s experience, “service” of a document (such as a reply brief) does not necessarily “impl[y] that a responsive pleading must be filed” We think it unlikely that a court would interpret proposed Section 1120.5(d) to require a responsive pleading from each mediation participant who is served pursuant to the provision.

But the purpose of the requirement is to notify the mediation participants and give them *the option* of taking steps to protect their interests if they see a need to do so. The current text of subdivision (d) may not make that sufficiently clear.

The Commission could perhaps address that problem by revising subdivision (d) along the following lines:

(d) Upon filing a complaint or a cross-complaint that includes a cause of action for damages against a lawyer based on alleged malpractice in the context of a mediation or a mediation consultation, the plaintiff or cross-complainant shall ~~serve the complaint or cross-complaint by mail, in compliance with Sections 1013 and 1013a of the Code of Civil Procedure, or~~ provide notice of the dispute to all of the mediation participants whose identities and addresses are reasonably ascertainable. The plaintiff or cross-complainant shall send this notice in compliance with Sections 1013 and 1013a of the Code of Civil Procedure, and shall include a copy of the complaint or cross-complaint. This notice requirement is in addition to, not in lieu of, ~~other~~ the applicable requirements relating to service of the complaint or cross-complaint.¹³⁴

If the Commission would prefer not to specify the notification details by statute, it could omit the sentence about complying with Code of Civil Procedure Sections 1013 and 1013a and including a copy of the complaint or cross-complaint.

133. Exhibit p. 19.

134. If the Commission decides to replace the current version of subdivision (d) with the alternative version shown on pages 48-49 (the version that addresses the concerns raised by CDRC and Jeanne Behling), it would not be necessary to make any further changes to address Ms. Switzer’s concern. The alternative version shown on pages 48-49 already requires the complaining party to “notify,” not to “serve,” the mediation participants. The Commission may want to consider, however, whether to specify any of the notification details by statute, which is not done in the alternative version shown on pages 48-49, but could be incorporated if the Commission so desires.

Does the Commission want to make revisions like the ones shown here? If so, does it want to include the sentence specifying the notification details?

The Staff's Concern Regarding Clarity of the Notice Requirement

A final concern about the notice requirement comes from the staff. When we drafted proposed Section 1120.5(d), we envisioned it applying only to a legal malpractice lawsuit that “includes a cause of action for damages against a lawyer based on alleged malpractice in the context of a mediation or a mediation consultation.” In considering the comments on the Tentative Recommendation, however, we realized that the Commission has not yet squarely addressed whether to extend the notice requirement to other contexts, such as:

- The investigation stage of a State Bar disciplinary proceeding involving alleged mediation misconduct.
- Such a disciplinary proceeding after a State Bar prosecutor files a formal charge.
- An attorney-client fee dispute that involves mediation issues. Under the current version of the Commission’s proposal, such a dispute could be pending either as a State Bar fee arbitration or in another forum.
- An arbitration that seeks to resolve a cause of action for damages against a lawyer based on alleged mediation misconduct.

The Commission should consider this point and make sure that its proposal provides clear guidance on when the notice requirement does and does not apply. Because there are many possibilities regarding how the Commission will resolve the various issues discussed in this memorandum, the staff is not able to provide possible statutory language on the matter at this time.¹³⁵ **Comments on it would be particularly helpful.**

135. In drafting the version of proposed Section 1120.5 that would apply only in a State Bar disciplinary proceeding (see pages 23-26), the staff assumed that there *would be* a notice requirement but the requirement would only be triggered if the Office of Chief Trial Counsel files a complaint. See subdivision (d) of that draft. The Commission could delete or modify that subdivision if it reaches a different conclusion regarding the proper scope of the notice requirement.

In drafting the version of proposed Section 1120.5(d) shown on pages 48-49 (the version that addresses the concern raised by CDRC and Jeanne Behling), the staff assumed that the notice requirement should apply to *all* of the settings listed in proposed Section 1120.5(a)(2). Revisions may be necessary if that assumption is incorrect or the drafting does not seem sufficiently clear on this point.

Related Concern Raised by the Consortium for Children

Despite the notice provision designed to permit all mediation participants to “speak up and guard against any improper disclosures,”¹³⁶ the Consortium for Children believes the Commission’s proposal does not do enough to protect “uninvolved mediation participants” — i.e., mediation participants other than an attorney accused of mediation misconduct and the client making the accusation. In particular, the Consortium for Children says the proposal does not do enough to protect an uninvolved mediation participant who is not represented by counsel and not sophisticated enough to seek a protective order or invoke similar protections built into the Tentative Recommendation.¹³⁷

According to the Consortium for Children, “[a]t a minimum, the non-involved party should have all of the costs associated with the suing party’s claims reimbursed.”¹³⁸ The Commission considered but rejected a similar idea earlier in this study.

In particular, the staff wrote the following shortly after the Commission decided to propose a new mediation confidentiality exception:

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

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

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

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

One idea would be to statutorily require the losing party to reimburse all costs, attorney’s fees, and other expenses incurred by

136. Tentative Recommendation at 140.

137. Exhibit p. 1.

138. Exhibit pp. 1-2.

any person that objected to admissibility or disclosure of the mediation evidence. The statute could perhaps also give the court discretion to impose additional sanctions that it finds just and proper.¹³⁹

Upon considering those comments, the Commission decided “not to specify a particular sanction to impose” in the circumstances the staff described.¹⁴⁰

Given the intense opposition to the Tentative Recommendation,¹⁴¹ **perhaps the Commission should revisit the idea of requiring a party who requested evidence under the proposed new exception to reimburse expenses that others incurred in responding to the request.** Such reimbursement may at least be appropriate if the request was directed to an “uninvolved mediation participant” and the requesting party was not entitled to the requested evidence, or that party requested the evidence to support a claim or defense that proved to be meritless.

The Commission could frame a reimbursement requirement in many ways. One possibility would be to add provisions like the following to proposed Section 1120.5:

(h) In either of the following circumstances, a person who sought or proffered evidence from a third party participant pursuant to this section shall reimburse any costs, attorney’s fees, and other expenses that the third party participant incurred in responding to the request:

(1) A court or other tribunal determined that the request was improper.

(2) The request was made in pursuing a claim or defense that proved to be meritless.

(i) As used in this section, “third party participant” means a mediation participant who was not a party to the mediation misconduct dispute in which evidence was sought or proffered pursuant to this section.

The accompanying Comment could state:

Subdivisions (h) and (i) serve to discourage, and provide a remedy for, abusive use of the exception created by this section.

Is the Commission interested in this general concept? If so, is the above language satisfactory or would the Commission prefer to implement the concept differently?

139. Memorandum 2015-45, pp. 43-44.

140. Minutes (Oct. 2015), pp. 6-7.

141. See Memorandum 2017-51; First Supplement to Memorandum 2017-51; Memorandum 2017-52.

E. ISSUES CONCERNING THE POSSIBILITY OF CONTRACTING AROUND THE
PROPOSED EXCEPTION

In a letter submitted on behalf of the Conference of California Bar Associations (“CCBA”), Larry Doyle says “if the Tentative Recommendation were adopted and its language enacted, there is absolutely nothing to prevent the parties to the mediation to agree among themselves that everything connected with the mediation shall be kept confidential and not used in a subsequent court proceeding, just as the law is now.”¹⁴² He acknowledges that some opponents of the Commission’s proposal have argued otherwise, relying on California Rule of Professional Conduct 3-400.¹⁴³ He thinks they are mistaken.¹⁴⁴

The Commission need not resolve that dispute, because Rule 3-400 could be overridden by statute. As discussed to some extent at the September meeting, the key question instead seems to be: Should mediation participants be permitted to contract around the Commission’s proposed new exception to the mediation confidentiality statute?

Regardless of how the Commission answers that question, proposed Section 1120.5 should expressly address the matter. Otherwise, extensive and costly litigation on it is inevitable.

The Commission thus needs to balance the competing interests and determine how to proceed. Does (1) the policy interest in holding attorneys accountable for mediation misconduct outweigh (2) the interest in allowing mediation participants to assure confidentiality by voluntarily overriding proposed Section 1120.5?¹⁴⁵

If the Commission decides to prohibit such a contractual agreement, it could add a statement along the following lines to proposed Section 1120.5:

(h) Any agreement purporting to override this section is null and void.

142. Exhibit p. 4.

143. California Rule of Professional Conduct 3-400(A) provides:

A member shall not:

(A) Contract with a client prospectively limiting the member’s liability to the client for the member’s professional malpractice

144. See Exhibit pp. 4-5.

145. As in similar situations throughout this study, the staff makes no recommendation and leaves this controversial balancing to the Commission. See, e.g., Memorandum 2015-33, p. 4.

The accompanying Comment could state:

To help ensure that attorneys are held accountable for mediation misconduct, subdivision (h) prevents mediation participants from contractually avoiding the impact of this section.

If instead the Commission decides to give mediation participants the option to contractually preserve the current level of mediation confidentiality, it could add a provision along the following lines to proposed Section 1120.5:

(h) If all of the following conditions are satisfied, mediation participants may contractually agree that this section does not apply to their mediation:

(1) The agreement is in writing.

[(2) The agreement includes the complete text of this section.]

[(3) The agreement expressly states that the mediation participants desire a greater degree of confidentiality and have voluntarily agreed that this section will not apply to their mediation, or words to that effect.]

(4) The agreement is signed by all of the mediation participants [and their counsel] before the mediation commences.

[(5) All of the mediation participants are represented by counsel when they sign the agreement.]

The Commission could **omit some or all of the bracketed language** if it sees fit.

The accompanying Comment could state:

Due to the important policy interests underlying mediation confidentiality, subdivision (h) permits mediation participants to contractually agree that this section will not apply to their mediation. To be effective, such an agreement must satisfy all five of the statutory safeguards.

Which approach would the Commission like to take? Is the staff's proposed implementation of that approach acceptable?

F. POSSIBLE OBLIGATION TO INFORM MEDIATION PARTICIPANTS ABOUT THE EXCEPTION

Jill Switzer assumes that if proposed Section 1120.5 is enacted, someone will have to inform mediation participants about it. She asks a number of questions regarding that situation:

Whose obligation will it be to advise mediation participants that confidentiality is not guaranteed? Will it be the mediator who must advise the participants that mediation confidentiality will not exist among the participants should one party or another sue their

lawyer for malpractice? Will that be the responsibility of parties' counsel? At what point should that advisement be given? In advance of the mediation date?¹⁴⁶

It seems only fair to inform mediation parties regarding the extent of confidentiality before a mediation commences. It is worth noting, however, that California's mediation confidentiality law is already subject to various exceptions and limitations (e.g., it does not apply in a criminal case), yet that law does not address the kinds of details Ms. Switzer raises.

Guidance on such issues might be useful, but it does not necessarily have to be part of the Commission's proposal. Some relevant guidance might already exist (e.g., an attorney already has a fiduciary duty to competently represent a client; a court-appointed mediator is already required to provide "a general explanation of the confidentiality of mediation proceedings").¹⁴⁷ If additional guidance proves necessary, it could perhaps be provided in court rules or case law, rather than legislation.

Does the Commission want to address these types of issues by statute in its current proposal? If so, what specific guidance would it like to provide?

G. RETROACTIVITY OF THE PROPOSED EXCEPTION

One final suggestion comes from John and Debora Blair Porter, who support the Tentative Recommendation. "The only change [they] would suggest at this time is that the effect of this legislation be grandfathered for those cases which began before the Study but which are still pending when the law eventually takes effect."¹⁴⁸ The staff presumes the Porters would like the proposed law to apply to cases that are pending at the time of enactment but involve allegations of mediation misconduct occurring earlier.

The Tentative Recommendation would not allow such application. The proposed legislation includes the following uncodified provision:

Uncodified (added). Operative date

SEC. _____. (a) This act shall become operative on January 1, 2019.

(b) *This act only applies with respect to a mediation or a mediation consultation that commenced on or after January 1, 2019.*¹⁴⁹

146. Exhibit p. 19.

147. Cal. R. Ct. 3.854.

148. Memorandum 2017-51, Exhibit p. 135.

149. Emphasis added.

The accompanying Comment explains:

Comment. *To avoid disrupting confidentiality expectations of mediation participants, this act only applies to evidence that relates to a mediation or a mediation consultation commencing on or after the operative date of the act.*¹⁵⁰

Changing the confidentiality rules for a mediation after-the-fact seems patently unfair to participants who may have divulged information during the mediation in reliance on those rules. As currently drafted, the Commission's proposal would only apply prospectively. **Does the Commission want to stick with that approach?**

APPROVAL OF A FINAL RECOMMENDATION

After considering the issues in this memorandum, and any other issues that are raised at or before the upcoming meeting,¹⁵¹ the Commission should **decide whether it is ready to approve a final recommendation (with or without revisions) for printing and submission to the Legislature and Governor.** If the Commission would like to see another draft of its proposal before taking that step, the staff could prepare a new draft for the February meeting. An intermediate alternative would be to approve a final recommendation, subject to revisions and submission of a new draft for review and approval by the Chair and Vice Chair.

How would the Commission like to proceed?

Respectfully submitted,

Barbara Gaal
Chief Deputy Counsel

150. Emphasis added.

151. Footnote 677 in the Tentative Recommendation refers "n.461." The proper reference is "n.643," not "n.461." Unless the Commission otherwise directs, the staff will correct this error in the next draft of the Commission's proposal.

EMAIL FROM KATE CLEARY, CONSORTIUM FOR CHILDREN (10/13/17)

Re: Mediation Confidentiality

It is our understanding that the California Law Revision Commission intends to proceed with its attempt to amend the mediation privacy statute to better enable mediation parties to sue their attorneys for malpractice and challenges to their billing. The Consortium for Children and their Permanency Planning Mediation program will continue to oppose this proposed law revision.

That being said, we would like to point out a serious omission in your suggested revision to the California Evidence Code. The proposed language addresses the attorney in question and the party suing them. It provides some protections for mediators and their writings. What it doesn't provide, however, is any *meaningful* protection for the party not suing his or her attorney — the “non-involved” party.

The Commission does attempt to address the concern regarding disclosure of confidential information in the mediation — a concern that could impact the non-involved party as well as the suing party. The Commission also proposes to provide notice to all parties to the mediation so that “participants would thus have an opportunity to speak up and guard against any improper disclosures.” The proposed language states that parties would protect against disclosure of confidential information provided during the mediation by the following means:

- (1) Only the information necessary for application for the exception could be admitted or disclosed;
- (2) That evidence which is disclosed may not be used for any other purpose; and
- (3) A court may use a sealing order, protective order, a redaction agreement or an *in camera* hearing to limit disclosure.

The problem with these “protections” is that they are beyond the scope of most *pro per* parties — the very parties for whom mediation may be their sole realistic access to enforce and protect their rights. This non-involved party will now be pulled into a complicated process in which they may be required to testify about matters that do not involve them directly, but that are designed solely for the benefit of the suing party.

If the suing party is acting as part of a fee dispute with his or her attorney, you would have the anomalous result that in order to protect the economic interest of the suing party, the non-involved party may incur costs for legal representation for a dispute in which they are not directly involved. This is patently unfair. At a minimum, the non-involved party should have all of the costs associated with the suing party's claims reimbursed. To

do otherwise is to disrupt the mediation process for a claimed harm of one party, while creating a specific and real harm to the non-involved party.

Further, could this action negate an already in-place agreement between the original mediation parties if the suing party prevails in court? The Commission argues its limitation on confidentiality is designed to preserve the finality of a mediated agreement and protects against buyer's remorse because it would not apply in resolving a claim relating to the enforcement of a mediated settlement, such as a claim for recession or specific performance.

However, what happens when a party suing his or her attorney for malpractice that occurs during the mediation process is successful in the malpractice suit? Would that finding of malpractice support an argument that the suing party's consent to a mediated agreement was not valid? If so, where does that leave the non-involved party — who may be acting in accordance with the mediated agreement for the period of time during which the suing party and his or her attorney are involved in their separate suit?

The Consortium for Children urges the California Law Revision Commission to define and support the needs of the uninvolved party in a mediation.

We feel it imperative that the Commission address this issue if they fully intend to move forward with this amendment. The unintended consequences could be devastating to the third (or fourth or fifth) party to the mediation.

Kate Cleary
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Consortium for Children
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Excerpt of comments from the Conference of California Bar Associations (“CCBA”):



Justice Through Laws

LARRY DOYLE, LEGISLATIVE REPRESENTATIVE
TELEPHONE: 916-761-8959
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September 21, 2017

The Hon. Chair and Members
California Law Revision Commission
c/o UC Davis School of Law
400 Mrak Hall Drive
Davis, CA 95616

**Study K-402 – Relationship Between Mediation Confidentiality and
Attorney Malpractice and Other Misconduct
Further Comments in Support of Tentative Recommendation**

Dear Chair Lee and CLRC Members and Staff:

....

2. The opponents of the Tentative Recommendation have mischaracterized it as removing a current “right to confidential mediation.” This is inaccurate in two respects:
 - a. First, the current system does not provide consumers with a “right to choose” confidential mediation, but rather forces absolutely confidential mediation upon them, whether they wish it or no – unless they have the sophistication, foresight and bargaining power to obtain agreement from all other mediation participants to permit the parties to protect themselves from attorney malpractice by removing the current shield on evidence of that malpractice. And even then, any effort by a consumer to protect him/herself in this manner almost certainly would be rejected by the mediator.

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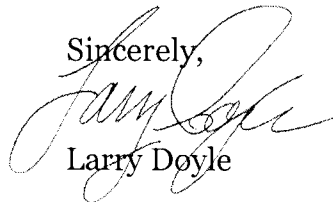
- b. Second, if the Tentative Recommendation were adopted and its language enacted, there is absolutely nothing to prevent the parties to the mediation to agree among themselves that everything connected with the mediation shall be kept confidential and not used in a subsequent court proceeding, just as the law is now. The difference would be that the validity of such a contractual agreement would be contingent upon the truly informed consent of the parties. That is, the parties would have to be aware that they were waiving their rights and knowingly agree to such a waiver – rather than finding, as under current law, that those rights have been waived for them by statute.
- i. Opponents of the TR (and any exception to absolute mediation confidentiality) have cited this ability to “contract around” the exceptions to mediation confidentiality in other states such as New York as the reason why mediation continues to exist in those states notwithstanding the absence of California-like absolute confidentiality. These opponents have argued that the option is not available in California because ethical constraints on California lawyers prohibit it. This is wrong for several reasons:
1. The ethical constraint cited by opponents is supposedly California Rule of Professional Conduct 3-400, which prohibits an attorney from “contract(ing) with a client prospectively limiting the member's liability to the client for the member's professional malpractice.” But this rule is limited in its application to specific contract provisions between attorney and client proposing to limit legal liability; it has no relationship to provisions in a mediation contract (even if signed by both client and attorney) specifying that all parties to the mediation agree that nothing relating to the mediation can be used in a subsequent court proceeding. Clients can always agree on protocols or procedures; they can contract around the Statute of Limitations (tolling agreements), about procedures (claw back agreements), and about confidentiality. Fraud would break open the agreement, but that is a good thing.
 - a. Note that New York's corresponding Rule of Professional Conduct, 1.8(h)(1), is even tougher than California's in this regard, providing that: “A lawyer shall not: (1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice.” This presumably would apply to contracts signed by both lawyer and client, not simply contracts between lawyer and client, per CRPC 3-400. So if mediators and parties in New York (or any other state whose rule is based on the Model Rules of Professional Conduct) can include confidentiality agreements in their contracts, there's no reason they can't do so in California.

2. The ability of parties to contract for absolute confidentiality was expressed clearly by the 9th Circuit in Facebook, Inc. v. Pacific Northwest Software, Inc. (2011), 640 F. 3d 1034, which held that a “Confidentiality Agreement stipulating that all statements made during mediation were privileged, non-discoverable and inadmissible ‘in any arbitral, judicial, or other proceeding’” was binding and valid to exclude evidence of what was said and not said during the mediation. The court held that the Confidentiality Agreement was valid, in part because it “merely precludes both parties from introducing evidence of a certain kind. Although this frustrates the securities claims the Winklevosses chose to bring, the Confidentiality Agreement doesn’t purport to limit or waive their right to sue . . .” or other rights. The court did emphasize that the parties to the Confidentiality Agreement were sophisticated and represented by counsel, and thus went into the agreement with their eyes open. Again, this *de facto* requirement that absolute confidentiality agreements can be entered into – but only with the knowing consent of all participants – is a good thing.

....

Thank you again for your valuable efforts on this important issue. Please contact me at (916) 761-8959 or Larry@LarryDoyleLaw.com if I can be of assistance.

Sincerely,

A handwritten signature in cursive script, appearing to read "Larry Doyle", is written over the printed name.

Larry Doyle

Excerpt of article by Jeff Kichaven entitled "*A California Correction? Legislature Will Consider Allowing Attorney Malpractice Proof from Mediation*," which was published in the July-August 2017 issue of *Alternatives to the High Cost of Litigation*:

....

ONE MORE CHANGE

The California Law Revision Commission has not yet included in its recommendation any proposed changes to California Evidence Code Section 703.5. If it would do so, consumers would be more completely protected and the rule of law would be more completely promoted, all without doing any harm to the efficacy of mediation.

The commission should take this step.

California Evidence Code Section 703.5 provides, in pertinent part:

No person presiding at any judicial or quasi-judicial proceeding, and no arbitrator or mediator, shall be competent to testify, in any subsequent civil proceeding, as to any statement, conduct, decision, or ruling, occurring at or in conjunction with the prior proceeding, except as to a statement or conduct that could (a) give rise to civil or criminal contempt, (b) constitute a crime, (c) be the subject of investigation by the State Bar or Commission on Judicial Performance, or (d) give rise to disqualification proceedings under paragraph (1) or (6) of subdivision (a) of Section 170.1 of the Code of Civil Procedure. ...

So, under the commission's draft tentative recommendation, the Cassels ~~of the future~~ could testify. They could subpoena their former lawyers to testify. But they could not obtain the testimony of their mediators, even if their mediators volunteered to come forward.

Their mediators would not be competent to testify. This could frustrate the administration of justice in at least two situations.

First, consider the classic "he said/she said" scenario. A future Cassel testifies, truthfully, that his lawyer gave him negligent advice "X" at a mediation. His lawyer denies it. The mediator heard the advice given, and would so testify, if given the chance.

For the plaintiff, this is an anxious situation. He has the burden of proof. His evidence must preponderate. While a jury might find his testimony more persuasive than that of his former lawyer, it also might not.

How dearly this plaintiff wants, indeed needs, the mediator to testify. But California Evidence Code Section 703.5 denies the plaintiff that proof. There's a need to amend Evidence Code Section 703.5 to help make sure that all relevant evidence is admissible so that cases are correctly decided, consumers are protected, and the rule of law promoted.

And, on the flip side of this same coin, a defendant might need a mediator's testimony to rebut incorrect or opportunistic testimony given by a former client who is now suing her. Due process has to work in both directions.

Second, consider the situation where an opportunistic defendant throws a mediator under the bus. Assume that our future Cassel testifies that his lawyer gave him advice "X" and that the advice was negligent. The lawyer testifies that advice "X" was indeed given, and goes on to testify that the advice was not negligent, but rather was reasonable.

Why? Because, in a private conversation with the mediator during the mediation, the mediator told him to give that very advice. Is this lawyer lying? Can this lawyer get away with it if he is? Maybe.

Section 703.5 bars our future Cassel from calling that mediator as a witness to test the veracity of the lawyer's defense. A future Cassel might well find justice denied as a result.

Particularly in the second situation, one would think that mediators would want, even insist on, the chance to testify and set the record straight. Otherwise, opportunistic witnesses could offer (imaginary) hearsay testimony of all sorts of foolishness attributed to mediators.

This could damage a mediator's reputation for wisdom and integrity, with the mediator defenseless to respond. Unable to testify in the proceeding in which the hearsay is offered, what is the mediator to do to protect herself and her reputation?

Instead, the commission proposes building a fence around 703.5, so that mediators will participate in these follow-on legal malpractice cases even less than they otherwise might. (See proposed Evidence Code sections 1120(5)(a)(3) and 120.5(e).) This is supposedly "to safeguard perceptions of mediator impartiality and protect [] a mediator from burdensome requests for testimony." (Tentative Recommendation at p. 137.) But there is no evidence from other jurisdictions with lesser confidentiality that, without this fence, California mediators, or mediation, would suffer in these regards, either.

....

Excerpt of comments from the California Judges Association ("CJA"):



CALIFORNIA JUDGES ASSOCIATION

The Voice of the Judiciary

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STANLEY S. BISSEY
EXECUTIVE DIRECTOR & CEO

August 18, 2017

California Law Revision Commission
C/o Barbara Gaal, Chief Deputy Counsel
4000 Middlefield Road, Room D-2
Palo Alto, CA 94303

Re: Study K-402 – Mediation Confidentiality – Presently Proposed Legislation

Dear Commission & Ms. Gaal:

....

Realizing that it was going to be probable that the Commission was going to make recommendations to the Legislature in some form that would at least in part abrogate mediation confidentiality, CJA then focused on protecting mediators' (retired judges or otherwise) presently existing *legal incompetence* from being compelled to testify and otherwise protecting mediators' writings, documents and the like from discovery or trial.

On pages 9 – 11 of her *First Supplement to Memorandum 2017-30*, Ms. Gaal points out portions of *Staff Analysis* more articulately than I did in my numerous appearances before the Commission over the past two years. These are things that should bear strong consideration in formulating your final proposal. I attempted to also present the same thoughts to you. These include, **making sure a mediator is "left alone"** re not having to provide discovery or evidence at trial; **precluding a civil litigant from obtaining a mediator's electronic files from the mediator's ECS or RCS**, i.e. not allowing a litigant or counsel to **obtain through a back or side door what they cannot obtain through the front door**; **precluding disclosure of specific categories or evidence, from: all of a mediator's records relating to a mediation conducted by the mediator, to all oral or written communications made by a mediator in the course of a mediation he or she is/has conducted; to all oral or written communications exchanged between a mediator and a mediation participant in the course of a mediation conducted by the mediator.**

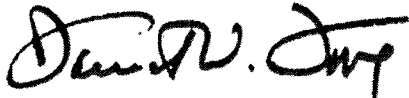
In my discussions with you it was my sense that those concerns and the specificity needed to have them unambiguously set forth met favorably with recognition of their importance from a majority of the Commissioners if not all of you. However, the current *Tentative Recommendation*, for the most part, presents little more than vague and ambiguous language that, from a judicial perspective, provides no substantive guidance as to how it is to be implemented.

As I said to you on a number of the occasions I was before you, and I did so non-pejoratively, **lawyers are nothing if not creative!** Statutory protections of confidentiality, to be effective, must be articulated unambiguously so that the legislative intent as to the scope of those protections is not subject to reasonable debate. The current *Tentative Recommendation* fails to meet any such standard of specificity.

....

Thank you again for considering our views.

Yours very truly,

A handwritten signature in black ink, appearing to read "David W. Long". The signature is fluid and cursive, with a long horizontal stroke at the end.

David W. Long
Judge of the Superior Court (Ret.)
Member CJA Executive Board



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August 30, 2017

Barbara Gaal
Chief Deputy Counsel
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, CA 94303-4739
Also via email: bgaal@clrc.ca.gov

Dear Ms. Gaal:

....

Comments specifically concerning the tentative recommendation

If further consideration is to be given to the legislation proposed in the tentative recommendation, the CDRC believes the following modifications should be made.

1. The word "requirement" in line 9 on page 145 does not fit. It should be changed to "obligation."

2. Disputes between lawyers and clients concerning fees or costs or both often do not involve issues of lawyer malpractice. Arbitrators in mandatory fee arbitrations pursuant to Article 13 of Chapter 4 beginning with Section 6200 of the Business & Professions Code are to determine the reasonable value of services provided by the lawyer to the client involved and may consider claims of lawyer malpractice only to the extent they bear on reasonable value. Thus, the period at the end of proposed section 1120.5(a)(2)(C) on line 20 of page 145 should be deleted and the following clause should be added: ", provided the dispute raises an issue of malpractice by the lawyer."

3. The CDRC agrees with the concern described in the comments on lines 23-31 of page 146 that participants in mediation who are not involved in a malpractice dispute should have an opportunity to seek a protective order or oppose an overbroad discovery request before evidence involving them is sought. However, CDRC believes that a provision requiring that notice be given to such third party participants at the outset of a case involving a malpractice claim is premature.

CDRC Administration

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Third party participants in mediation expect that by settling a dispute they have made peace. Their lives should not be disturbed unnecessarily. Even if a malpractice claim alleges mediation-related conduct, the case might well go away before there is any occasion to seek evidence from or about third party participants. Premature notice would unduly alarm them and be inconsistent with their interest in having achieved peace as the result of mediation. Moreover, the phrase "filing a complaint or cross-complaint" does not address the situation in which a malpractice dispute is the subject of arbitration, not litigation.

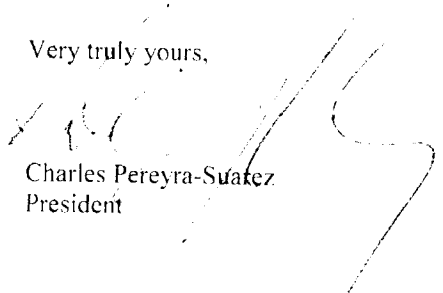
For all of the foregoing reasons, the CDRC believes proposed Section 1120.5(d) should be revised to delete the requirement for giving notice at the time of filing and instead to require that, before a party to a malpractice dispute may seek discovery from or offer evidence about or from a third party participant that would otherwise be protected by mediation confidentiality, the party must serve notice upon the third party participant and the third party participant must be afforded a reasonable opportunity to take steps to prevent improper disclosure of the mediation communications involved.

4. To forestall any judicial expansion of the exceptions to confidentiality, CDRC urges that the two sentences on lines 9-12 of page 146 be shifted from the proposed comments and inserted into the proposed legislation as Section 1120.5(a)(2)(D).

5. Finally, CDRC supports Section 1120.5(f). Incompetency to testify is crucial to mediator neutrality, which is the foundation upon which the utility of involving a mediator in efforts to resolve disputes is based.

Confidentiality has proved its value to helping parties resolve disputes, make peace, restore relations, and relieve court burdens in California through mediation for the past 20 years or more. Efforts to reduce its value should be approached with caution.

Very truly yours,



Charles Pereyra-Suarez
President



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August 4, 2017

California Law Review Commission

4000 Middlefield Rd Room D-2

Palo Alto, CA 94303-4739

Sent Via Email to BGAAL@clrc.ca.gov

RE: Request for Public Comment regarding Relationship Between Mediation Confidentiality and Attorney Malpractice and Other Misconduct

Dear Commissioners:

Thank you kindly for allowing us the opportunity to comment on this matter. Dan Stanford and I focus almost exclusively on bringing malpractice claims against negligent lawyers and law firms on behalf of bereaved legal consumers throughout California. Our firm's entire practice involves legal malpractice, breach of fiduciary duty, and representing clients who are in fee disputes against their former lawyers. We have some particular insight based upon experience on the issue at hand.

Lawyers sometimes hide behind the CEC §1119 mediation privilege and the effect prevents the client from producing critical evidence in support of their claims. Such misconduct includes:

1. Strong arming settlement by threats of withdrawing often just before trial or some critical aspect of the case such as expert designation or expert deposition.

2. Telling the client incorrect or exaggerated legal advice to obtain settlement authority.
3. Sometimes, a mediator or lawyer will tell a client during the mediation that the client's prior lawyer committed legal malpractice and for that reason, the case being mediated must be settled rather than tried. This type of evidence is critical to the statute of limitations in a legal malpractice case. It is also critical to proving that but for the legal malpractice, the result could have been better. It is also critical to rebuke the "settle and sue" defense often raised by negligent lawyers under Filbin v. Fitzgerald (2012) 211 Cal.App. 4th 154 and its progeny.

We believe overall that your intentions of creating this law do not necessarily match with what the outcome will be. The proposed mediation carve out exception will just raise another potential defense for negligent lawyers rather than assist victimized clients as written. Specifically, claims for fraud and breach of fiduciary duty should be included in

We suggest the following amendment to Proposed Evidence Code § 1120.5(a)(2)(B) should include claims for breaches of fiduciary duty and fraud against the lawyer.

We also believe that the phrase "professional requirement" creates a heightened standard that is too narrow and is new law that will not be supported by California case law for guidance as to its meaning.

In section (a)(1) we recommend that the code read "...relevant to prove or disprove an allegation that a lawyer breached a **professional duty**..." This would be consistent with CACI instructions, and would naturally include the California Rules of Professional Conduct, Business and Professions Code and years of precedent in CA

involving the standard of care. Creating a new heightened category by forcing parties to litigate what a “professional requirement” will simply be yet another point of contention in legal malpractice cases. If the goal of the committee is to protect consumers, the scope fo the lawyers’ duties should not be artificially narrowed by the term “professional requirement”. This begs the question: What is a lawyer **required** to do? Not much more than comply with the Business and Professions Code. The California Rules of Professional Conduct are not statutes. They are merely guidelines. They do not establish requirements. For example CRPC 3-510 provides that a lawyer shall promptly convey the terms and conditions of a settlement offer to a client. But since CRPC is not a statute, it could be argued that it is not a requirement of a lawyer’s duties. In fact lawyers are not “required” to do very much as a matter of statute. Therefore, it makes much more sense to use “professional duty.”

In essence, by using “professional requirement” rather than “professional duty” the proposed law will protect lawyers far more often than clients. By trying to parse out a lawyer’s required and non-required professional duties, it just causes another area of contention for lawyers being sued who already enjoy very favorable statute of limitations laws, laws that do not require lawyers to carry errors and omissions insurance, case law regarding speculative damages, settle and sue cases, and a lawyer’s ability to apportion fault to subsequent lawyers without actually suing them or even worse to their own clients who are laypersons (which medical doctors are prevented from doing in medical malpractice cases).

This terminology of a “professional requirement” is always going to leave room for argument about whether the particular advice or conduct was a “professional

requirement". For example, lawyers sometimes tell a client to accept a settlement or they will quit. It would then be argued in every case that the lawyer was not "professionally required" to continue to represent the settling client and that the continuance of the attorney client relationship was not legal advice. The proposed language makes the rule very narrow and favors the lawyer heavily in that regard because the lawyer will always be able to argue the advice to the client was professionally required but the client asserting malpractice will not be able to easily make that argument unless there is some precedent out there regarding the definition of a lawyers' professional "duties" which has been addressed by a body of case law versus "professional requirements" which is an invented and heightened standard of care.

Finally, oftentimes lawyers engage in puffery in mediation briefs and expect them to remain confidential. This is one of the reasons why CEC§1152 prevents settlement communications from entering into evidence. The proposed law seems to open the floodgates for mediation briefs to be admissible evidence in malpractice cases which will almost always have an effect on causation and damages in the malpractice case. Imagine a jury in a malpractice case having to read and analyze mediation briefs in a personal injury case. Does the disclosure of one brief for the client's lawyer automatically require the disclosure of the other mediation brief? Is this going to effect the efficacy of mediators?

To date, we have never come across a situation where we were unable to prove our case because of the assertion of the mediation privilege. If it is an important enough issue, both parties could waive the privilege, or a judge could rule on it on a case by case basis rather than carving out a statutory exclusion. We see little for clients to gain by

amending the current mediation law. Instead, we foresee this law favoring defense lawyers and negligent lawyers being sued by clients far more often and would discourage the proposed amendment.

If you want to change the laws in a way that help legal consumers you should focus on CCP§340.6 which is in desperate need of attention. The exceptions to the rule have swallowed the rule. The case law has created the “constructive knowledge” exception or the “discovery rule”. The result is that grossly negligent lawyers, and their carriers are allowed to squirm out of liability based on when the client “should have known” of the lawyer’s malpractice by conducting a “reasonable investigation” after suspecting that the lawyer committed malpractice. Further, this knowledge may be imputed to the client from their subsequent lawyer. This exception is so ambiguous, it allows the negligent lawyers an opportunity to create a statute of limitations argument at trial and file MSJs in almost every single legal malpractice claim. The CCP §340.6 should be changed back to a clearly written two year statute of limitations on legal malpractice claims based upon the actual discovery of the lawyer’s malpractice. Further, errors and omissions insurance should be mandatory for lawyers. If there were more policies sold, the rates would go down and clients would be protected from lawyers who intentionally stop carrying insurance after they get sued and move their assets to shell entities which prevents most plaintiff’s malpractice lawyers from pursuing claims against uninsured lawyers. This generally hurts the lower economic class of clients because they can only afford sole practitioners who often do not have insurance, are new lawyers or are otherwise judgment proof. This is especially something to consider now that CalBar

is making the Bar exam easier by eliminating the performance aspect of the exam and lowering the passing score threshold.

Kind Regards,

STANFORD, RYAN & ASSOCIATES, APC

A handwritten signature in blue ink, appearing to read 'Ray Ryan', with a long horizontal flourish extending to the right.

Raymond Y. Ryan

THE SAPIRO LAW FIRM

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JEROME SAPIRO, JR.
DAVID A. SAUERS
GARY ALABASTER
JOHN FINBARR HAYES (1932-2016)

July 26, 2017

California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, CA 94303-4739

re: Relationship between Mediation Confidentiality and Attorney Malpractice and Other Misconduct

Ladies and Gentlemen:

Thank you for publishing your tentative recommendation on the relationship between mediation confidentiality and attorney malpractice and other misconduct. You and your staff have accomplished a thorough and thoughtful recommendation.

I offer a comment on one aspect of the tentative recommendation, namely paragraph (e) of the proposed Section 1120.5.

In some contexts, the testimony of a mediator may be the only objective evidence of whether attorney misconduct occurred. For example, suppose that, during a breakout session, the mediator meets with one party and that party's attorney. During that breakout session, the attorney tells her client that she will reduce her contingent fee to 20% if the client accepts the other party's latest settlement offer. The client accepts. Later, after the settlement with the other party has been consummated, the attorney demands a contingent fee of 33% in accordance with the original, written fee agreement with the client. In the fee dispute, unless the mediator can testify, the mediator may be the only objective witness to the communications between the attorney and client. The client is disadvantaged by being precluded from calling the mediator to testify.

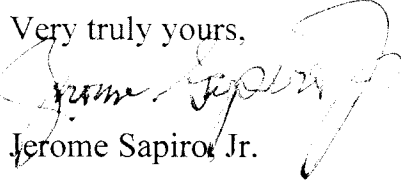
Conversely, suppose the same scenario, but the fee dispute arises because the client contends that the attorney agreed to reduce her fee to 15%, while the attorney contends that the agreement was to reduce it to 20%. The attorney is disadvantaged by being precluded from calling the mediator to testify.

I can posit other hypotheticals, such as attorney malpractice that occurs during the breakout session, but that would waste your time. My point is that the mediator should

not be precluded from testifying in a dispute between attorney and client about statements made by them during the mediation if the mediator is the only percipient witness other than the attorney and client, and if the testimony of the mediator is not offered to attack an agreement between the parties to the mediation that resulted from the mediation.

Thank you for considering this comment.

Very truly yours,

A handwritten signature in dark ink, appearing to read "Jerome Sapiro, Jr.", written over the printed name.

Jerome Sapiro, Jr.

js:1112

EMAIL FROM JILL SWITZER (8/24/17)

Re: Proposed Evidence Code Section 1120.5

I write to the Commission in my personal capacity as an attorney mediator and not as a representative of ARC or any other entity.

I have reviewed proposed Evidence Code section 1120.5 and I have some questions and concerns:

1. The comment to the proposed legislation states that "...the exception does not apply in resolving a claim relating to enforcement of a mediated settlement agreement." What happens if a party moves for enforcement of the settlement agreement pursuant to Code of Civil Procedure section 664.6 and the defendant files a cross-complaint for malpractice arising out of something that occurred at the mediation, e.g. a breach of the attorney's professional duties in the mediation context? Would that cross-complaint be barred? Could the defendant file a separate action for malpractice?
2. I think the Commission should make it clear that that "...the exception does not apply in resolving a claim relating to enforcement of a mediated settlement agreement, such as a claim for rescission of such an agreement or a suit for specific performance" by including that language in the proposed legislation, not merely in the comment.
3. Subsection (d) requires that notice of the complaint or cross-complaint be "served" on all mediation participants. The comment talks of "providing notice" to mediation participants. Notice and service are two different concepts. I would suggest that "notice" to mediation participants be substituted for "service." "Service" implies that a responsive pleading must be filed by all mediation participants, thus embroiling participants who otherwise would not and should not be involved.
4. Whose obligation will it be to advise mediation participants that confidentiality is not guaranteed? Will it be the mediator who must advise the participants that mediation confidentiality will not exist among the participants should one party or another sue their lawyer for malpractice? Will that be the responsibility of parties' counsel? At what point should that advisement be given? In advance of the mediation date?
5. In response to the Commission's request for input on the content and wording of paragraph (a)(3), I would suggest a slight addition (in italics) as follows: "The evidence does not constitute or disclose a writing, *as defined in Evidence Code section 250*, of the mediator relating to a mediation conducted by the mediator."

While I well understand that the Commission is trying to balance the equities, so to speak, between lawyer and client, I think that adding this exception will result in a situation of "be careful what you wish for." I think there will be a rise in legal

malpractice claims based on attorney mediation conduct and a reduction in cases mediated.

Although at the end of the day there may be no more settlements and/or verdicts for legal malpractice than there are today, I think the disruption to the sanctity of mediation confidentiality cannot be overstated.

Thank you for the opportunity to comment.

Jill Switzer, Esq.
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jillswitzer@sbcglobal.net

REVISIONS TO MAKE PROPOSED SECTION 1120.5 APPLY ONLY
IN A STATE BAR DISCIPLINARY PROCEEDING

1120.5. (a) A communication or a writing that is made or prepared for the purpose of, or in the course of, or pursuant to, a mediation or a mediation consultation, is not made inadmissible, or protected from disclosure, by provisions of this chapter if ~~all~~ both of the following requirements are satisfied:

(1) The evidence is relevant to prove or disprove an allegation that a lawyer breached a professional requirement when representing a client in the context of a mediation or a mediation consultation.

(2) The evidence is sought or proffered in connection with, and is used pursuant to this section solely in resolving, ~~one or more of the following:~~

~~(A) A disciplinary proceeding against the lawyer under the State Bar Act, Chapter 4 (commencing with Section 6000) of the Business and Professions Code, or a rule or regulation promulgated pursuant to the State Bar Act.~~

~~(B) A cause of action for damages against the lawyer based upon alleged malpractice.~~

~~(C) A dispute between the lawyer and client concerning fees, costs, or both, including, but not limited to, a proceeding under Article 13 (commencing with Section 6200) of Chapter 4 of the Business and Professions Code.~~

~~(3) The evidence does not constitute or disclose a writing of the mediator relating to a mediation conducted by the mediator.~~

(b) If a mediation communication or writing satisfies the requirements of subdivision (a), only the portion of it necessary for the application of subdivision (a) may be admitted or disclosed. Admission or disclosure of evidence under subdivision (a) does not render the evidence, or any other mediation communication or writing, admissible or discoverable for any other purpose.

~~(c) In applying this section, a court~~ If the Office of Chief Trial Counsel files a complaint in a disciplinary proceeding, the hearing judge and any reviewing tribunal may, but is are not required to, use a sealing order, a protective order, a redaction requirement, an in camera hearing, or a similar ~~judicial~~ technique to prevent public disclosure of mediation evidence, consistent with the requirements of the First Amendment to the United States Constitution, Sections 2 and 3 of Article I of the California Constitution, Section 124 of the Code of Civil Procedure, and other provisions of law.

~~(d) Upon filing a complaint or a cross-complaint that includes a cause of action for damages against a lawyer based on alleged malpractice~~ alleging that a lawyer breached a professional requirement when representing a client in the context of a mediation or a mediation consultation, the plaintiff or cross-

~~complainant~~ Office of Chief Trial Counsel shall serve the complaint ~~or cross-complaint~~ by mail, in compliance with Sections 1013 and 1013a of the Code of Civil Procedure, on all of the mediation participants whose identities and addresses are reasonably ascertainable. This requirement is in addition to, not in lieu of, other requirements relating to service of the complaint ~~or cross-complaint~~.

~~(e) No mediator shall be competent to provide evidence pursuant to this section, through oral or written testimony, production of documents, or otherwise, as to any statement, conduct, decision, or ruling, occurring at or in conjunction with a mediation that the mediator conducted, except as to a statement or conduct that could (a) give rise to civil or criminal contempt, (b) constitute a crime, (c) be the subject of investigation by the State Bar or Commission on Judicial Performance, or (d) give rise to disqualification proceedings under paragraph (1) or (6) of subdivision (a) of Section 170.1 of the Code of Civil Procedure.~~

~~(f)~~ (e) Nothing in this section is intended to alter or affect Section 703.5.

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

Comment. Section 1120.5 is added to promote attorney accountability in the mediation context, while also enabling an attorney to defend against a baseless allegation of mediation misconduct. It creates an exception to the general rule that makes mediation communications and writings confidential and protects them from admissibility and disclosure in a noncriminal proceeding (Section 1119). The exception is narrow and subject to specified limitations to avoid unnecessary impingement on the policy interests served by mediation confidentiality.

Under paragraph (1) of subdivision (a), this exception pertains to an attorney's conduct in a professional capacity. More precisely, the exception applies "when the merits of the claim will necessarily depend on proof that an attorney violated a professional obligation — that is, an obligation the attorney has *by virtue of* being an attorney — in the course of providing professional services." *Lee v. Hanley*, 61 Cal. 4th 1225, 1229, 34 P.3d 334, 191 Cal. Rptr. 3d 536 (2015) (emphasis in original); see also *id.* at 1239. "Misconduct does not 'aris[e]' in' the performance of professional services ... merely because it occurs during the period of legal representation or because the representation brought the parties together and thus provided the attorney the opportunity to engage in the misconduct." *Id.* at 1238. The exception applies only with respect to alleged misconduct of an attorney acting as an advocate, not with respect to alleged misconduct of an attorney-mediator.

Paragraph (1) also makes clear that the alleged misconduct must occur in the context of a mediation or a mediation consultation.

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 with the mediator and all parties present, a private caucus with or without the mediator, a mediation brief, a mediation-related phone call, or other mediation-related activity). The determinative factor is whether the misconduct allegedly occurred in a mediation context, not the time and date of the alleged misconduct.

Paragraph (1) further clarifies that the exception applies evenhandedly. It permits use of mediation evidence in specified circumstances to prove *or* disprove allegations against an attorney.

To be admissible or subject to disclosure under this section, however, mediation evidence must be relevant and must satisfy the other stated requirements. To safeguard the interests underlying mediation confidentiality, that is a stricter standard than the one governing a routine discovery request in a civil case. Cf. Code Civ. Proc. § 2017.010 (“Unless otherwise limited by order of the court in accordance with this title, any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence *or appears reasonably calculated to lead to the discovery of admissible evidence*.” (emphasis added).)

~~Paragraph (2) of subdivision (a), specifies the types of claims in which the exception applies:~~

- ~~• A State Bar disciplinary proceeding, which focuses on protecting the public from attorney malfeasance.~~
- ~~• A legal malpractice claim, which further promotes attorney accountability and provides a means of compensating a client for damages from breach of an attorney’s professional duties in the mediation context.~~
- ~~• An attorney client fee dispute, such as a mandatory fee arbitration under the State Bar Act, which is an effective, low-cost means to resolve fee issues in a confidential setting.~~

Under paragraph (2) of subdivision (a), the exception applies in a State Bar disciplinary proceeding. The exception does not apply for purposes of any other kind of claim. Of particular note, the exception does not apply in resolving a claim relating to enforcement of a mediated settlement agreement (e.g., a claim for rescission of a mediated settlement agreement or a claim for enforcement of a mediated settlement agreement). That restriction promotes finality in settling disputes and protects the policy interests underlying mediation confidentiality.

Subdivision (b) is modeled on Section 6(d) of the Uniform Mediation Act. It establishes an important limitation on the

admissibility or disclosure of mediation communications pursuant to this section.

Subdivision (c) ~~gives a court~~ makes clear that a State Bar disciplinary tribunal has discretion to use existing procedural mechanisms to prevent widespread dissemination of mediation evidence that is admitted or disclosed pursuant to this section. For example, a party could seek a sealing order pursuant to the existing rules governing sealing of court records (Cal. R. Ct. 8.45-8.47, 2.550-2.552). Any restriction on public access must comply with constitutional constraints and other applicable law. See, e.g., NBC Subsidiary (KNBC-TV), Inc. v. Superior Court, 20 Cal. 4th 1178, 980 P.2d 330, 86 Cal. Rptr. 2d 778 (1999).

Under subdivision (d), when ~~a party~~ the Office of Chief Trial Counsel files a ~~legal malpractice case in which~~ complaint that may result in disclosure of mediation communications or writings might be disclosed pursuant to this section, that party the Office of Chief Trial Counsel must promptly provide notice to the mediation participants regarding commencement of the case. Each mediation participant is entitled to such notice, so long as the participant's identity and address is reasonably ascertainable. This affords an opportunity for a mediation participant who would not otherwise be involved in the ~~malpractice~~ case to take steps to prevent improper disclosure of mediation communications or writings of particular consequence to that participant. For instance, a mediation participant could move to intervene and could then seek a protective order or oppose an overbroad discovery request.

~~Under subdivision (e), a mediator generally cannot testify or produce documents pursuant to this section, whether voluntarily or under compulsion of process, regarding a mediation that the mediator conducted. That general rule is subject to the same exceptions stated in Section 703.5, which does not expressly refer to documentary evidence.~~

~~For federal restrictions on obtaining a mediator's electronic records from the mediator's service provider, see 18 U.S.C. § 2702(a); O'Grady v. Superior Court, 139 Cal. App. 4th 1423, 44 Cal. Rptr. 3d 72 (2006).~~

Subdivision ~~(f)~~ (e) makes clear that the enactment of this section in no way changes the effect of Section 703.5.

Subdivision ~~(g)~~ (f) makes clear that the enactment of this section has no impact on the state of the law relating to mediator immunity.

See Sections 250 ("writing"), 1115(a), (c) ("mediation" and "mediation consultation"). ~~For availability of sanctions, see, e.g., Section 1127; Code Civ. Proc. §§ 128.5, 128.7.~~

Re: Study K-402 - Potential Amendment of Tentative Recommendation

Dear Chairperson Hallinan, Commissioners, and Staff,

Minimizing Stakeholder Opposition. In the past, the Commission has collected the input of affected stakeholders and the public, and crafted proposed legislation that minimized legitimate stakeholder opposition. Thirty-two stakeholder organizations with direct experience in mediation either wrote letters directly opposing the TR or had already written similar letters to the Commission in the course of its Study K-402. (Please see list starting at page 6 of Commission Memo 17-52) Commission staff stated in this Memo, "The opposition to the Commission's tentative recommendation can only be described as overwhelming." (page 33) Many of these stakeholder organizations pointed out that there is no reliable evidence that the problem identified in this study happens frequently enough to justify the widespread public costs of making confidentiality unpredictable.

An ideal solution would address the problem targeted in this study while still preserving the public benefits of predictable confidentiality these stakeholders describe. **IF** the Commission decides to proceed with its recommendation to the Legislature to create the new exception, then I urge the Commission to make the amendment below.

Exception for Specific Mediation Communications. There is a legitimate argument that a client should be able to bring in evidence that their attorney advised them in error on factual matters - for example, that a proposed settlement payment would be tax-deductible or tax-exempt. There is a legitimate argument that a client should be able to bring in evidence that their attorney agreed to cut their fees if the client signed a settlement. There is a legitimate argument that a client should be able to bring in evidence that does not "disclose what others have said during the mediation", to quote Justice Chin.

Justice Chin identified this key factor clearly in his reluctant concurrence in the unanimous California Supreme Court decision in the *Casse/* case which initiated this study.

Unlike the attorney-client privilege — which the client alone holds and may waive (Evid. Code, sections 953, 954) — mediation confidentiality implicates interests beyond those of the client. Other participants in the mediation also have an interest in confidentiality. This interest may extend to private communications between the attorney and the client because those communications themselves will often disclose what others have said during the mediation.

The following amendment to the Tentative Recommendation will help minimize the current overwhelming opposition from affected stakeholders.

Add paragraph (a)(4) to read: "The evidence does not constitute or disclose a mediation communication of any mediation participant other than the client and attorney specified in subdivision (a)."

Alternative Amendment Regarding Mediator's Oral Communications. The intent of the current draft's paragraph (a)(3) is to allow mediators to be candid in creating their own notes and in their written communications to the participants, knowing they are not creating new evidence. The same logic applies to allowing mediators to be candid in their oral communications with the participants. **IF** the Commission decides not to adopt the amendment recommended above, then the following alternative amendment to the Tentative Recommendation will at least address this specific omission.

Add three words to paragraph (a)(3) to read: "The evidence does not constitute or disclose a writing or oral communication of the mediator relating to a mediation conducted by the mediator."

cc Hon. David W. Long, California Judges Association
Ms. Heather Anderson, California Judicial Council

Respectfully submitted,
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