Study K-402 July 23, 2013

Memorandum 2013-39

Relationship Between Mediation Confidentiality and Attorney Malpractice and Other Misconduct

Last year, the Legislature directed the Commission to analyze

> the relationship under current law between mediation confidentiality and attorney malpractice and other misconduct, and the purposes for, and impact of, those laws on public protection, professional ethics, attorney discipline, client rights, the willingness of parties to participate in voluntary and mandatory mediation, and the effectiveness of mediation, as well as any other issues the commission deems relevant.

2012 Cal. Stat. res. ch. 108 (ACR 98 (Wagner & Gorell)). This memorandum introduces that new study. It is primarily informational in nature, providing an overview of the history of mediation confidentiality in California and the circumstances that led to the study.

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

The memorandum begins by recounting the pertinent statutory developments, culminating in the enactment of California's current statutes governing mediation confidentiality (Evid. Code §§ 1115-1128; see also Evid. Code § 703.5). Next, the memorandum discusses the key cases interpreting those

Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

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

statutes. The most recent such case is *Cassel v. Superior Court*, 51 Cal. 4th 113, 244 P.3d 1080, 119 Cal. Rptr. 3d 437 (2011), which set in motion the events leading to this study. After explaining *Cassel*, the memorandum describes those events and then provides some preliminary information about this study and threshold questions the Commission will need to resolve as the study proceeds.

Unless otherwise indicated, all statutory references in this memorandum are to the Evidence Code.

HISTORY OF CALIFORNIA STATUTES ON MEDIATION CONFIDENTIALITY

California's statutory scheme governing mediation confidentiality developed gradually, becoming more extensive and detailed as mediation grew in popularity. The staff summarizes that history below. We will provide further information on these matters as needed in the course of this study.

Protection of Settlement Negotiations (Sections 1152 and 1154)

The California Evidence Code was enacted on Commission recommendation in 1965, a decade before the Federal Rules of Evidence were approved. 1965 Cal. Stat. ch. 299 (operative Jan. 1, 1967); see also *Recommendation Proposing an Evidence Code*, 7 Cal. L. Revision Comm'n Reports 1 (1965). From its inception, the Evidence Code has included some provisions that restrict the admissibility of evidence of settlement negotiations.

In particular, Section 1152(a) provides:

> Evidence that a person has, in compromise or from humanitarian motives, furnished or offered or promised to furnish money or any other thing, act, or service to another who has sustained or will sustain or claims that he or she has sustained or will sustain loss or damage, as well as any conduct or statements made in negotiation thereof, *is inadmissible to prove his or her liability* for the loss or damage or any part of it.

(Emphasis added.) As explained in the Commission's 1965 Comment, this provision "is based upon the public policy in favor of the settlement of disputes without litigation." It is intended to help foster "the complete candor between the parties that is most conducive to settlement." *Id.*

Section 1154 is a similar provision, which "stems from the same policy of encouraging settlement and compromise …." Section 1154 Comment. Instead of restricting the admissibility of evidence of an offer to *pay* a claim, it restricts the admissibility of evidence of an offer to *discount* a claim:

> Evidence that a person has accepted or offered or promised to accept a sum of money or any other thing, act, or service in satisfaction of a claim, as well as any conduct or statements made in negotiation thereof, *is inadmissible to prove the invalidity of the claim* or any part of it.

(Emphasis added.)

Although Sections 1152 and 1154 are intended to promote settlement by fostering candid negotiations, they provide only limited assurance that comments a party makes in such negotiations will not later be turned against the party. The provisions make evidence of such comments inadmissible to prove or disprove liability, but an opponent can still introduce the evidence for other purposes, such as to show bias, motive, undue delay, or knowledge. *See, e.g., White v. Western Title Ins. Co.*, 40 Cal. 3d 870, 889, 710 P.2d 309, 221 Cal. Rptr. 509 (1985); *Campisi v. Superior Court,* 17 Cal. App. 4th 1833, 1838, 22 Cal. Rptr. 2d 335 (1993); *Young v. Keele,* 188 Cal. App. 3d 1090, 1093-94, 233 Cal. Rptr. 850 (1987). This constitutes a significant limitation on the effectiveness of Sections 1152 and 1154, because opponents can be quite creative in conceiving purposes for introduction of such evidence, and, once admitted, the evidence might influence the determination of liability despite a limiting instruction. *See Admissibility, Discoverability, and Confidentiality of Settlement Negotiations,* 29 Cal. L. Revision Comm'n Reports 345, 353-54, 359-61 (1999) & sources cited therein.

The Advent of Special Evidentiary Protection for Mediation (Section 1152.5)

In the early 1980's, mediation was beginning to gain acceptance as a means of resolving disputes in California. As the Commission explained at the time, "[s]uccessful mediation of disputes is one way to reduce court congestion and to avoid the cost of litigation." *Recommendation Relating to Protection of Mediation Communications,* 18 Cal. L. Revision Comm'n Reports 241, 245 (1985) (hereafter, "*CLRC Mediation Recommendation #1*").

Accordingly, the Commission undertook a study to determine "whether legislation [was] needed to make mediation a more useful alternative to a court or jury trial." *Id.* After studying the matter, the Commission "concluded that legislation [was] needed to protect information disclosed in a mediation from later disclosure in a judicial proceeding." *Id.* It therefore recommended that "a new section be added to the Evidence Code to protect oral and written information disclosed in the course of a mediation from later disclosure in a civil action or proceeding." *Id.*

In particular, the Commission recommended the enactment of a provision that would protect mediation information from disclosure, but only if the mediation participants agreed in advance and in writing that the protection would apply to their mediation. *Id.* at 245-46. This provision would "supplement, not replace, the protection already given under Evidence Code Section 1152 …." *Id.* at 245.

As originally enacted on Commission recommendation, Section 1152.5 provided in key part:

> 1152.5. (a) Subject to the conditions and exceptions provided in this section, when persons agree to conduct and participate in a mediation for the purpose of compromising, settling, or resolving a dispute:
>
> (1) Evidence of anything said or of any admission made in the course of the mediation is not admissible in evidence, and disclosure of any such evidence shall not be compelled, in any civil action in which, pursuant to law, testimony can be compelled to be given.
>
> (2) Unless the document otherwise provides, no document prepared for the purpose of, or in the course of, or pursuant to, the mediation, or copy thereof, is admissible in evidence, and disclosure of any such document shall not be compelled in any civil action in which, pursuant to law, testimony can be compelled to be given.
>
> (b) Subdivision (a) does not limit the admissibility of evidence if all persons who conducted or otherwise participated in the mediation consent to its disclosure.
>
> (c) This section does not apply unless, before the mediation begins, the persons who agree to conduct and participate in the mediation execute an agreement in writing that sets out the text of subdivisions (a) and (b) and states that the persons agree that this section shall apply to the mediation.
>
> ….

1985 Cal. Stat. ch. 731, § 1.

This provision was intended to encourage the use of mediation as an alternative to judicial resolution of a dispute. As noted in the accompanying Comment, "[t]he same policy that protects offers to compromise (Section 1152) justifies protection to information disclosed in a mediation." *See Communication From California Law Revision Concerning Assembly Bill 1030,* 18 Cal. L. Revision Comm'n Reports 377, 378 (1985).

Notably, the provision did not attempt to define "mediator" or "mediation." That was deliberate. As the Commission explained,

> [t]he varied qualifications and lack of any requirement for licensing for mediators preclude providing a useful definition of "mediator." Because of the variety of methods and means of "mediation," the section does not define the term. The requirement of a written agreement … will limit the protection to cases where the parties have agreed that the protection should apply.

CLRC Mediation Recommendation #1, supra, at 246. The Commission was wary that enacting a comprehensive statute governing mediation might limit ongoing experimentation and "preclude the development of new or improved mediation techniques." *Id.* at 245 n.1.

Importantly, the new provision could not be used to exclude evidence offered in a criminal case. *Id.* at 243, 246; *see* former Section 1152.5(a). In addition, it could not be used in certain family law proceedings. *CLRC Mediation Recommendation #1, supra,* at 246; *see* former Section 1152.5(d).

A Comprehensive Scheme to Promote Use of Mediation (SB 401 (Lockyer))

In 1993, then-Senator Lockyer introduced Senate Bill 401 "to establish a comprehensive scheme to promote the use of mediation to resolve civil disputes." Senate Committee on Judiciary Analysis of SB 401 (May 25, 1993), p. 2. The bill was "the product of a series of discussions between the Judicial Council, the State Bar of California, the California Trial Lawyers Association [now known as the Consumer Attorneys of California], the California Judges Association, the California Defense Counsel, the Los Angeles County Bar Association, representatives of the mediation community, and the author's staff." *Id.* All of those groups "agree[d] that mediation can be an effective tool to resolve civil disputes in a fair, timely, and cost-effective manner." *Id.*

The bill was enacted after a number of amendments. See 1993 Cal. Stat. ch. 1261. Throughout the legislative process, not a single legislator voted against it. The Commission was not involved in the process; its role is to make recommendations for revision of California law, not to take positions on legislation crafted by others. See Gov't Code §§ 8280-8298.

As enacted, the bill made a number of important reforms relating to mediation, as well as some arbitration reforms that do not warrant discussion here. In particular, the bill established a mandatory mediation pilot project in Los Angeles County, and in any other county electing to participate. The pilot project permitted a trial court judge to order a civil case with an amount-in-controversy less than $50,000 to mediation in lieu of arbitration. See 1993 Cal. Stat. ch. 1261, §

4. The pilot project was scheduled to sunset on January 1, 1999, but the sunset provision was later repealed and the program continued in Los Angeles until it was discontinued due to budget cuts earlier this year. See *id.* (former Code Civ. Proc. § 1775.16); 1998 Cal. Stat. ch. 618, § 1 (repealing former Code Civ. Proc. § 1775.16).

For purposes of the pilot project, the Legislature defined "mediation" as "a process in which a neutral person or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement." Code Civ. Proc. § 1775.1(a). The Legislature made the following findings regarding mediation:

> (a) The peaceful resolution of disputes in a fair, timely, appropriate, and cost-effective manner is an essential function of the judicial branch of state government under Article VI of the California Constitution.
>
> (b) In the case of many disputes, litigation culminating in a trial is costly, time consuming, and stressful for the parties involved. Many disputes can be resolved in a fair and equitable manner through less formal processes.
>
> (c) Alternative processes for reducing the cost, time, and stress of dispute resolution, such as mediation, have been effectively used in California and elsewhere. In appropriate cases mediation provides parties with a simplified and economical procedure for obtaining prompt and equitable resolution of their disputes and a greater opportunity to participate directly in resolving these disputes. Mediation may also assist to reduce the backlog of cases burdening the judicial system. It is in the public interest for mediation to be encouraged and used where appropriate by the courts.
>
> (d) Mediation and similar alternative processes can have the greatest benefit for the parties in a civil action when used early, before substantial discovery and other litigation costs have been incurred. Where appropriate, participants in disputes should be encouraged to utilize mediation and other alternatives to trial for resolving their differences in the early stages of a civil action.

Code Civ. Proc. § 1775(a)-(d).

In addition to establishing the pilot project, the bill substantially revised Evidence Code Section 1152.5, the provision restricting use of mediation evidence. *See* 1993 Cal. Stat. ch. 1261, § 6. Most importantly, the bill eliminated the requirement of a written agreement to invoke the protection for evidence of a mediation. *See id.* Apparently, that requirement was considered onerous, particularly in disputes involving unsophisticated persons.

The bill also expressly protected mediation documents and communications from disclosure in civil discovery, not just from being admitted into evidence. *See id.* In addition, the bill made the mediation confidential:

> 1152.5. (a) ….
> (3) When persons agree to conduct or participate in mediation for the sole purpose of compromising, settling, or resolving a dispute, in whole or in part, all communications, negotiations, or settlement discussions by and between participants or mediators in the mediation *shall remain confidential*.

Id. (emphasis added).

The bill further revised Section 1152.5 to:

- Expressly extend its protection to a mediation that would partially rather than fully resolve a dispute.
- Make clear that "[a] written settlement agreement, or part thereof, is admissible to show fraud, duress, or illegality if relevant to an issue in dispute."
- Provide that "[e]vidence otherwise admissible or subject to discovery outside of mediation shall not be or become inadmissible or protected from disclosure solely by reason of its introduction or use in a mediation."
- Include an attorney's fee provision, applicable when a party seeks to compel a mediator to testify to matters made inadmissible by the section.

See id.

Finally, the bill revised another provision, Section 703.5, to apply to a mediator, as well as to an arbitrator or person presiding at a judicial or quasi-judicial proceeding. *See* 1993 Cal. Stat. ch. 1261, § 5. Under that section as so revised, a mediator is generally precluded from testifying about a mediation in any subsequent civil proceeding. It currently provides:

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

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

No Report by a Mediator to a Court (Section 1152.6)

In 1995, the Legislature enacted Section 1152.6, a new provision relating to mediation confidentiality. That provision prohibited a mediator from reporting to a court regarding a mediation unless the parties expressly agreed, in writing, to allow such a report before the mediation began:

> 1152.6. *A mediator may not file, and a court may not consider, any declaration or finding of any kind by the mediator,* other than a required statement of agreement or nonagreement, *unless all parties in the mediation expressly agree otherwise in writing prior to commencement of the mediation.* However, this section shall not apply to mediation under Chapter 11 (commencing with Section 3160) of Part 2 of Division 8 of the Family Code.

1995 Cal. Stat. ch. 576, § 8 (AB 1225 (Committee on Judiciary)) (emphasis added).

Section 1152.6 was intended to prevent a mediator from coercing a party to settle a case by threatening to tell the judge negative things about the party's behavior at a mediation (e.g., the party unreasonably refused to settle or took an untenable position on a particular issue). *See* R. Kelly, *New Law Takes Effect to Protect Mediation Rights,* N. Cal. Mediation Ass'n Newsl. (Spring 1996). It was prompted by concern that Section 1152.5 alone would not stop such conduct, because some local rules expressly deemed participation in a mediation program as a waiver of the protections of that section with regard to having the mediator submit an evaluation to the court. *See id.*; Contra Costa Sup. Ct., Loc. R. 207 (1996).

Protection of Mediation Intake Communications (SB 1522 (Greene))

In 1996, Section 1152.5 was amended to expressly apply not only when parties agree to mediate, but also when a person consults a mediator or mediation service for the purpose of retaining the mediator or mediation service. *See* 1996 Cal. Stat. ch. 174, § 1 (SB 1522 (Greene)). According to the author of the bill, this change was needed to fill a significant gap in coverage:

> In order to gauge a mediator's qualifications and qualities, it may be necessary to discuss certain aspects of the case in order to assess his or her expertise and sensitivity. From a literal technical sense, those discussions are not part of a mediation proceeding and could be subject to discovery by the opposing party. Left open, the gap could significantly chill the use of mediation services.

Senate Committee on Judiciary Analysis of SB 1522, p. 3 (May 14, 1996).

The Current Statutory Scheme Governing Mediation Confidentiality (Sections 1115-1128)

Also in 1996, the Commission began a study of mediation confidentiality. Mediator Ron Kelly of Berkeley, who had been actively involved in several of the legislative reforms relating to mediation confidentiality, served as an expert adviser to the Commission during the study (see Exhibit p. 21). The Commission followed its normal study process and eventually approved a final recommendation, which proposed to repeal Sections 1152.5 and 1152.6, recodify those provisions with revisions and new material in a new chapter of the Evidence Code, amend Section 703.5, and make conforming changes. See *Mediation Confidentiality,* 26 Cal. L. Revision Comm'n Reports 407 (1996) (hereafter, "*CLRC Mediation Recommendation #2*").

A bill to implement the proposed legislation was introduced in early 1997. From the outset, the bill had bipartisan support: It was authored by Assembly Member Ortiz (a Democrat), and co-authored by Assembly Member Ackerman (a Republican). The bill received extensive support, not a single vote was cast against it during the legislative process, and Governor Wilson signed it into law. *See* 1997 Cal. Stat. ch. 772 (AB 939 (Ortiz)); *see also* Assembly Committee on Judiciary Analysis of AB 939 (April 16, 1997); Senate Committee on Judiciary Analysis of AB 939 (Aug. 26, 1997).

Nonetheless, the proposal was not without controversy. The Commission received considerable input from a variety of sources in the course of its study, and refined its ideas throughout the process in response to suggestions received. Further revisions were made once the bill was introduced, to address concerns raised. In all, the bill was amended five times before it was enacted; the Commission made corresponding changes in its Comments. The content of the bill was closely watched by major stakeholders such as the Judicial Council, the State Bar, the California Dispute Resolution Council, the Civil Justice Association of California, the California Defense Counsel, and the Consumer Attorneys of California.

As enacted, the bill created a new chapter in the Evidence Code (Sections 1115-1128), entitled "Mediation." It also repealed Sections 1152.5 and 1152.6, continuing most of their substance, with revisions, in the new chapter. Section 703.5 was left unchanged. *See Report of the California Law Revision Commission on*

Chapter 722 of the Statutes of 1997 (Assembly Bill 939), 27 Cal. L. Revision Comm'n Reports 595 (1997).

Like most legislation, the new statute became operative on January 1 of the year following its enactment (i.e., Jan. 1, 1998). Aside from some technical revisions to Sections 1117 and 1118, the statutory scheme remains the same as when it was enacted.

That scheme and the impetus for it are described below. For convenient reference, the text of Sections 1115-1128 and the accompanying Commission Comments are attached as Exhibit pages 1-9.

Resolution of Conflicting Appellate Decisions on the Enforceability of an Oral Compromise Reached in Mediation

A major objective of the Commission's recommendation was to resolve a conflict between two court of appeal decisions on the enforceability of an oral compromise that parties reach in mediation but never convert to a fully executed settlement agreement because the parties cannot agree on the terms. One of those decisions held that such an oral compromise was inadmissible pursuant to Section 1152.5 and therefore unenforceable. *See Ryan v. Garcia*, 27 Cal. App. 4th 1006, 33 Cal. Rptr. 2d 158 (1994). The other decision held that mediation ended once the parties reached an oral compromise, so Section 1152.5 did not apply to the compromise and it was enforceable. *See Regents of the University of California v. Sumner*, 42 Cal. App. 4th 1209, 50 Cal. Rptr. 2d 200 (1996).

As the Commission explained in its report, prompt resolution of that conflict was crucial:

> Appellate courts have reached conflicting decisions on whether the confidentiality of Section 1152.5 extends to the process of converting an oral compromise to a definitive written agreement. If confidentiality applies, then parties cannot enforce the oral compromise, because evidence of it is inadmissible. If confidentiality does not apply, the oral compromise may be enforceable even if it is never reduced to writing. *Resolution of this uncertainty is critical: A disputant must be able to determine when the opponent is effectively bound.*

CLRC Mediation Recommendation #2, supra, at 422 (emphasis added; footnotes omitted).

The new chapter on mediation confidentiality addressed the conflict by (1) specifying a statutory procedure for orally memorializing an agreement, in the interest of efficiency (see Section 1118 & Comment), (2) creating an exception to

mediation confidentiality when parties follow that statutory procedure or certain other requirements are satisfied (see Section 1124 & Comment), (3) providing specific guidance on when mediation ends for purposes of applying mediation confidentiality (see Section 1125), and (4) making clear that "[a]nything said, any admission made, or any writing that is inadmissible, protected from disclosure, and confidential under this chapter before a mediation ends, shall remain inadmissible, protected from disclosure, and confidential to the same extent after the mediation ends" (Section 1126). The Commission's Comment to Section 1124 explains:

> Section 1124 sets forth specific circumstances under which mediation confidentiality is inapplicable to an oral agreement reached through mediation. Except in those circumstances, Sections 1119 (mediation confidentiality) and 1124 codify the rule of Ryan v. Garcia, 27 Cal. App. 4th 1006, 33 Cal. Rptr. 2d 158 (1994) (mediation confidentiality applies to oral statement of settlement terms), and reject the contrary approach of Regents of University of California v. Sumner, 42 Cal. App. 4th 1209, 50 Cal. Rptr. 2d 200 (1996) (mediation confidentiality does not protect oral statement of settlement terms).

Reforms Relating to the Enforceability of a Written Agreement Reached Through Mediation

The new chapter on mediation confidentiality also revised the law on the enforceability of a written agreement reached through mediation. Under prior law, unless it was offered to prove fraud, duress, or illegality, such an agreement was admissible and therefore enforceable only if it provided that it was admissible or subject to disclosure. See former Section 1152.5(a)(2). There was a danger that parties would overlook that requirement and "inadvertently enter into a written settlement agreement that is unenforceable because it is inadmissible." *CLRC Mediation Recommendation #2*, *supra,* at 422.

In its study, the Commission concluded that a written settlement agreement reached in mediation should also be admissible if it provides that it is "enforceable" or "binding" or words to that effect. As the Commission explained, there is a "likelihood that parties intending to be bound will use words to that effect, rather than saying their agreement is intended to be admissible or subject to disclosure." Section 1123 Comment; *see also CLRC Mediation Recommendation #2, supra,* at 423. Section 1123 implements that approach:

> 1123. A written settlement agreement prepared in the course of, or pursuant to, a mediation, is not made inadmissible, or protected from disclosure, by provisions of this chapter if the agreement is signed by the settling parties and any of the following conditions are satisfied:
>
> (a) The agreement provides that it is admissible or subject to disclosure, or words to that effect.
>
> *(b) The agreement provides that it is enforceable or binding or words to that effect.*
>
> (c) All parties to the agreement expressly agree in writing, or orally in accordance with Section 1118, to its disclosure.
>
> (d) The agreement is used to show fraud, duress, or illegality that is relevant to an issue in dispute.

(Emphasis added.)

Section 1123 also differs from prior law by clearly specifying whose assent must be obtained to disclose a written settlement agreement that does not contain the necessary language. "To facilitate enforceability of such agreements, disclosure pursuant to subdivision (c) requires only agreement of the parties." Section 1123 Comment. It is not necessary to obtain consent from the mediator or any other non-party who participated in the mediation. *Id; see also CLRC Mediation Recommendation #2, supra,* at 423.

These reforms relating to the enforceability of a written agreement reached through mediation, and the reforms relating the enforceability of an oral compromise reached in mediation, were the heart of the Commission's proposal. As the Commission explained:

> These recommended reforms on achieving an effective settlement are the most crucial element of the Commission's recommendation. They should enhance the effectiveness of mediation in promoting durable settlements. They will also reduce disputes over whether an oral compromise was reached in mediation, and whether a communication was a confidential mediation disclosure.

CLRC Mediation Recommendation #2, supra, at 424.

Addition of Definitions

In addition to the above-described reforms, the 1997 legislation added a definition of "mediation" for purposes of the mediation confidentiality provisions. As the Commission explained,

> Without such a definition, the extent of the protection is unclear.
>
> ….

> Given the broad array of current dispute resolution techniques, and the importance of confidentiality in promoting candor that may affect the success of those techniques, a participant needs to be able to assess whether the proceeding qualifies as a "mediation" for purposes of the provisions protecting mediation confidentiality.

Id. at 419 (footnote omitted). The chosen definition was drawn from the definition used for the mandatory mediation pilot project (Code Civ. Proc. § 1775.1). The definition is broad, encompassing a range of mediation techniques but emphasizing the importance of mediator impartiality and voluntary resolution: "'Mediation' means a process in which a neutral person or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement." Section 1115(a). This definition "focuses on the nature of a proceeding, not its label." Section 1115 Comment. The mediation confidentiality provisions apply to any "mediation" as so defined, except the family law proceedings previously excluded from coverage and a settlement conference conducted by the court. Section 1117 & Comment.

The 1997 legislation also added definitions of "mediator" and "mediation consultation." A "mediator" is "a neutral person who conducts a mediation, … includ[ing] any person designated by a mediator either to assist in the mediation or to communicate with the participants in preparation for a mediation." Section 1115(b). A "mediation consultation" means "a communication between a person and a mediator for the purpose of initiating, considering, or reconvening a mediation or retaining a mediator." Section 1115(c).

Other Reforms and Statutory Content

The new chapter on mediation confidentiality also made various other reforms to prior law on the subject, while retaining much of the substance of prior law.

The key provision governing mediation confidentiality is Section 1119, which provides:

> 1119. Except as otherwise provided in this chapter:
> (a) No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery, and disclosure of the evidence shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.

> (b) No writing, as defined in Section 250, that is prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation, is admissible or subject to discovery, and disclosure of the writing shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.
>
> (c) All communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential.

This provision continues prior law without substantive change, except that (1) the statutory protection applies in a subsequent arbitration or administrative adjudication, as well as in any civil action or proceeding, and (2) the protection extends to oral communications made for the purpose of or pursuant to a mediation, not just oral communications made in the course of the mediation. Section 1119 Comment. Due to the increasing use of electronic communications, the provision uses the phrase "writing, as defined in Section 250" instead of "document." *See CLRC Mediation Recommendation #2, supra,* at 428-29.

As before, "[e]vidence otherwise admissible or subject to discovery outside of a mediation or a mediation consultation shall not be or become inadmissible or protected from disclosure solely by reason of its introduction or use in a mediation or a mediation consultation" Section 1120(a). This rule "prevent[s] parties from using a mediation as a pretext to shield materials from disclosure." Section 1120 Comment.

The chapter on mediation confidentiality also continues a previously codified exception making mediation confidentiality inapplicable to an agreement not to take a default. Section 1120(b)(2). In addition, there are exceptions for an agreement to mediate a dispute, an agreement for an extension of time, and 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." Section 1120(b)(1)-(3).

Further, the chapter authorizes disclosure of mediation communications and writings by agreement in specified circumstances. Prior law on this point was ambiguous in some respects, so the 1997 legislation replaced that law with the following new provision:

> 1122. (a) A communication or a writing, as defined in Section 250, 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 either of the following conditions is satisfied:

(1) All persons who conduct or otherwise participate in the mediation expressly agree in writing, or orally in accordance with Section 1118, to disclosure of the communication, document, or writing.

(2) The communication, document, or writing was prepared by or on behalf of fewer than all the mediation participants, those participants expressly agree in writing, or orally in accordance with Section 1118, to its disclosure, and the communication, document, or writing does not disclose anything said or done or any admission made in the course of the mediation.

(b) For purposes of subdivision (a), if the neutral person who conducts a mediation expressly agrees to disclosure, that agreement also binds any other person described in subdivision (b) of Section 1115.

In proposing this approach, the Commission explained:

> [T]o waive the statutory protection for mediation confidentiality, all mediation participants must expressly agree to the disclosure, in writing or in accordance with a statutory procedure for memorializing an oral agreement. *All persons attending a mediation, parties as well as nonparties, should be able to speak frankly, without fear of having their words turned against them.* Because obtaining agreement from each of a mediator's assistants could be burdensome, however, if the person who conducts a mediation agrees to disclosure, that agreement binds the person's assistants.

CLRC Mediation Recommendation #2, supra, at 425 (emphasis added).

Finally, the chapter on mediation confidentiality recodified the attorney's fee provision with revisions (see Section 1127), added a provision making it an irregularity to refer to a mediation at a subsequent civil trial or other noncriminal proceeding (see Section 1128), and strengthened the rule preventing a mediator from reporting to a court regarding a mediation (see Section 1121 & Comment). As strengthened, the rule on mediator reporting reads:

> 1121. Neither a mediator nor anyone else may submit to a court or other adjudicative body, and a court or other adjudicative body may not consider, any report, assessment, evaluation, recommendation, or finding of any kind by the mediator concerning a mediation conducted by the mediator, other than a report that is mandated by court rule or other law and that states only whether an agreement was reached, unless all parties to the mediation expressly agree otherwise in writing, or orally in accordance with Section 1118.

Changes That Were Considered to Some Extent But Not Made

Many ideas were raised in the Commission study that resulted in enactment of the current mediation confidentiality statutes. The Commission pursued some of those ideas, but set aside other ideas for a variety of reasons.

Of the ideas the Commission set aside, the following are especially noteworthy:

- ***Making mediation communications and writings inadmissible and undiscoverable in a subsequent criminal case, not just in a subsequent noncriminal proceeding.*** The Commission concluded that "extending mediation confidentiality to a subsequent criminal case … might unduly hamper the pursuit of justice." *CLRC Mediation Recommendation #2, supra,* at 426; *see also* Memorandum 96-17, pp. 5-6; Minutes (April 1996), p. 7.
- ***Creating an exception to mediation confidentiality for threats of violence or criminal conduct.*** The Commission had already explored this concept in its 1980's study of mediation confidentiality, and the idea was extensively criticized at the time. The Commission did not think it worthwhile to reexamine the matter. *See* Memorandum 96-17, p. 11; Minutes (April 1996), p. 7.
- ***Creating an exception to mediation confidentiality for mediator misconduct or incompetence.*** In presenting this idea, the staff noted that it "may be premature," because "there are no licensing requirements or standards of conduct for California mediators, although these are under discussion." Memorandum 96-17, pp. 11-12. The Commission did not pursue the idea. See Minutes (April 1996), p. 7.
- ***Providing guidance on the meaning of the provision making mediation communications "confidential."*** Although former Section 1152.5(c) contained significant ambiguities, the staff warned that "attempting to flesh out its meaning may embroil this reform in controversy and delay or jeopardize it, leaving other serious ambiguities unaddressed, such as the conflicting decisions on enforceability of an oral mediation agreement …." Memorandum 96-75, pp. 15-17. The Commission decided to leave the provision alone and former Section 1152.5(c) was ultimately continued without substantive change in Section 1119(c). *See* Minutes (Nov. 1996), p. 11.

To the best of the staff's recollection, the possibility of attorney malpractice during mediation was not discussed by the Commission or raised in the Legislature. If we learn otherwise when reviewing material from the previous study, we will let the Commission know. Had the matter surfaced, it probably would have triggered the same reaction as the idea of providing guidance on the

meaning of the term "confidential" — i.e., concern that addressing the matter might be controversial and impede enactment of the proposal to resolve the conflict between *Ryan v. Garcia* and *Regents of the University of California v. Sumner*.

Other Sources of Protection for Mediation Communications

In addition to the rules described above, there are other evidentiary rules that may limit admissibility of mediation communications. Of particular note are the following:

The Constitutional Right of Privacy

The California Constitution includes a right to privacy (Cal. Const. art. I, § 1), which has been construed to provide protection of communications "tendered under a guaranty of privacy," such as communications made before an ombudsperson in an attempt to mediate an employee dispute. *See Garstang v. Superior Court*, 39 Cal. App. 4th 526, 532, 46 Cal. Rptr. 2d 84 (1995). This protection is qualified, not absolute; the interest in mediation confidentiality must be balanced against competing interests. *See id.* at 532-37.

Specialized Mediation Confidentiality Provisions

The California Codes also include a variety of specialized mediation confidentiality provisions. *See, e.g.,* Fam. Code §§ 1818 (family conciliation court), 3177 (child custody); Gov't Code § 12984-12985 (housing discrimination). The staff will provide further information about such provisions if needed in the course of this study.

Evidence Code Section 1160

In 2000, a new provision (Section 1160) was added to the Evidence Code, "in an attempt to reduce lawsuits and encourage settlements by fostering the use of apologies in connection with accident-related injuries or death." Assembly Committee on Judiciary Comment to Section 1160. That provision states:

> 1160. (a) The portion of statements, writings, or benevolent gestures expressing sympathy or a general sense of benevolence relating to the pain, suffering, or death of a person involved in an accident and made to that person or to the family of that person shall be inadmissible as evidence of an admission of liability in a civil action. A statement of fault, however, which is part of, or in addition to, any of the above shall not be inadmissible pursuant to this section.

(b) For purposes of this section:

(1) "Accident" means an occurrence resulting in injury or death to one or more persons which is not the result of willful action by a party.

(2) "Benevolent gestures" means actions which convey a sense of compassion or commiseration emanating from humane impulses.

(3) "Family" means the spouse, parent, grandparent, stepmother, stepfather, child, grandchild, brother, sister, half brother, half sister, adopted children of parent, or spouse's parents of an injured party.

Contractual Agreements

Mediation participants sometimes enter into contractual agreements restricting disclosure of mediation communications. Issues might arise, however, regarding enforcement as to third parties and protection of public policies. The staff will provide further information on, and analysis of, such arrangements later in this study.

CASE LAW INTERPRETING EVIDENCE CODE SECTIONS 1115-1128

Since the enactment of the chapter on mediation confidentiality, the California Supreme Court has issued five decisions interpreting provisions within the chapter. The staff discusses those decisions in chronological order below, referring to some court of appeal and federal court decisions in the course of the discussion.

These case descriptions are not meant to be comprehensive; they only provide an introduction to the relevant case law. The staff will analyze the circumstances and reasoning of the key cases more thoroughly as this study progresses.

Foxgate

In *Foxgate Homeowners' Ass'n, Inc. v. Bramalea California, Inc.*, 26 Cal. 4th 1, 25 P.3d 1117, 128 Cal. Rptr. 2d 642 (2001), the California Supreme Court "face[d] the intersection between court-ordered mediation, the confidentiality of which is mandated by law … and the power of a court to control proceedings before it and other persons 'in any manner connected with a judicial proceeding before it' (Code Civ. Proc. § 128, subd. (a)(5)), by imposing sanctions on a party or the party's attorney for statements or conduct during mediation …." *Id.* at 3. The cases involved a mediation conducted pursuant to a case management order, which said that confidentiality protections would apply to the mediation and

directed the parties to make their best efforts to cooperate during the mediation process. *Id.* at 4. The plaintiffs' attorney came to the mediation with nine experts, but the defense showed up late and without any experts, despite a court notice to bring experts along. *Id.* at 5. The mediation did not result in an agreement; the mediator ended it earlier than expected, concluding that mediation without defense experts would be fruitless. *Id.*

Thereafter, the plaintiff sought sanctions from the defense for failing to cooperate at the mediation. In particular, the plaintiff sought reimbursement of the mediator's fee, the cost of producing plaintiff's nine experts, and attorney's fees incurred in preparing for the mediation. *Id.* In connection with the plaintiff's motion, the mediator filed a report that described the mediation session in detail, accused the defense of obstructive and bad faith tactics, and recommended requiring the defense to provide reimbursement. *Id.* at 6. The trial court denied plaintiff's initial motion without prejudice, but the plaintiff renewed the motion and the defense contended that the mediation confidentiality statutes barred consideration of the mediator's report. *Id.* at 7-8. The trial court then granted the motion.

On appeal, the court of appeal created an implied exception to the mediation confidentiality statutes, concluding that "the Legislature did not intend statutory mandated confidentiality to create an immunity from sanctions that would shield parties who disobey valid orders governing the parties' participation." *Id.* at 9. Nonetheless, the court of appeal reversed and remanded the case to the trial court, with directions to consider only certain aspects of the mediator's report and disregard others. *Id.* at 9-10. The defense filed a petition for review in the California Supreme Court, which the Court granted.

Unlike the court of appeal, the California Supreme Court "conclude[d] that there are no exceptions to the confidentiality of mediation communications or to the statutory limits on the content of mediator's reports." *Id.* at 4. The Court explained:

> Because the language of sections 1119 and 1121 is clear and unambiguous, judicial construction of the statutes is not permitted unless they cannot be applied according to their terms or doing so would lead to absurd results, thereby violating the presumed intent of the Legislature. Moreover, a judicially crafted exception to the confidentiality mandated by sections 1119 and 1121 is not necessary either to carry out the legislative intent or to avoid an absurd result.
>
> The legislative intent underlying the mediation confidentiality provisions of the Evidence Code is clear. The parties and all amici

> curiae recognize the purpose of confidentiality is to promote "a candid and informal exchange regarding events in the past …. This frank exchange is achieved only if the participants know that what is said in the mediation will not be used to their detriment through later court proceedings and other adjudicatory processes."

Id. at 14 (citations omitted).

The Court also distinguished two decisions in which other courts found exceptions to mediation confidentiality: *Rinaker v. Superior Court,* 62 Cal. App. 4th 155, 74 Cal. Rptr. 2d 464 (1998), and *Olam v. Congress Mortgage Co.,* 68 F. Supp. 2d 1110 (N.D. Cal. 1999). The Court explained that in *Rinaker,* the statutory right of mediation confidentiality was trumped by a juvenile delinquency defendant's constitutional right to confront a witness with inconsistent mediation statements, but the present case involved "no comparable supervening due-process-based right to use evidence of statements and events at the mediation session. *Foxgate,* 26 Cal. 4th at 15-16. The Court further explained that in *Olam,* both sides (but not the mediator) had waived mediation confidentiality and mediation evidence was crucial to achieve justice, but the defendants in the present case "ha[d] not waived confidentiality." *Foxgate,* 26 Cal. 4th at 16-17. The Court therefore ruled that "the Court of Appeal did not err in setting aside the order imposing sanctions." *Id.* at 18.

Rojas

Three years after *Foxgate,* the California Supreme Court again considered the mediation confidentiality statutes, in *Rojas v. Superior Court,* 33 Cal. 4th 407, 93 P.3d 260, 15 Cal. Rptr. 3d 643 (2004). This time, the case concerned materials (particularly photographs) that had been prepared in connection with a construction defect dispute between the owner and the builders of an apartment complex. That dispute settled at mediation, but tenants of the apartment complex later sued the owner for health problems due to toxic molds and sought disclosure of the materials that had been prepared in connection with the earlier dispute. The trial court denied disclosure of certain materials on grounds of mediation confidentiality. *Id.* at 413-14.

In a split decision, the court of appeal reached a different result. Like the trial court, it interpreted Section 1119(b), which provides that "[n]o writing, as defined in Section 250, that is prepared for the purpose of, in the course of, or pursuant to, a mediation … is admissible or subject to discovery …." As the California Supreme Court later recounted,

> a majority of the Court of Appeal held that application of this statute is governed by the same principles that govern application of the work product privilege under Code of Civil Procedure section 2018. Applying those principles, the majority classified raw test data, photographs, and witness statements as nonderivative material that is not protected. By contrast, the majority held, material reflecting *only* an attorney's impressions, conclusions, opinions, or legal research or theories is absolutely protected. Finally, the majority held that derivative materials — amalgamations of factual information and attorney thoughts, impressions, and conclusions — are qualifiedly protected; they are discoverable only upon a showing of good cause, which involves a balancing of the need for the materials and the purposes served by mediation confidentiality.

Rojas, 33 Cal. 4th at 411 (emphasis in original).

The California Supreme Court reversed, "conclud[ing] that that Court of Appeal's interpretation of section 1119, subdivision (b), is contrary to both the statutory language and the Legislature's intent." *Id.* The Court's lengthy analysis quoted heavily from *Foxgate*, and relied extensively on Commission materials. *See id.* at 415-24. We do not attempt to repeat all of the Court's reasoning here.

Importantly, the Court noted that physical samples collected at the apartment complex were not "writings" and thus were not protected by Section 1119(b). *Id.* at 416. The Court also considered the impact of Section 1120(a), which provides that "[e]vidence otherwise admissible or subject to discovery outside of a mediation … shall not be or become inadmissible or protected from disclosure solely by reason of its introduction or use in a mediation …." The Court concluded that

> under section 1120, a party cannot secure protection for a writing — including a photograph, a witness statement, or an analysis of a test sample — that was not "prepared for the purpose of, in the course of, or pursuant to, a mediation" … simply by using or introducing it in a mediation or even including it as part of a writing — such as a brief or a declaration or a consultant's report — that was "prepared for the purpose of, in the course of, or pursuant to, a mediation."

Id. at 417.

While recognizing those statutory limitations on mediation confidentiality, the Court rejected the notion of judicially narrowing mediation confidentiality by treating mediation materials the same way as attorney work product. It explained:

> In *Foxgate,* we stated that "to carry out the purpose of encouraging mediation by ensuring confidentiality, [our] statutory scheme … unqualifiedly bars disclosure of" specified communications and writings associated with a mediation "absent an *express statutory* exception." We also found that the "judicially crafted exception" to section 1119 there at issue was "not necessary either to carry out the legislative intent or to avoid an absurd result." We reach the same conclusion here; as [the trial judge] observed, "the mediation privilege is an important one, and if courts start dispensing with it by using the [test governing the work-product privilege], you may have people less willing to mediate."

Id. at 424 (citations omitted; emphasis in *Rojas*).

Fair

The next California Supreme Court decision relating to mediation confidentiality was *Fair v. Bakhtiari,* 40 Cal. 4th 189, 147 P.3d 653, 51 Cal. Rptr. 3d 871 (2006), in which the Court construed the exception provided in Section 1123(b) for a written settlement agreement:

> 1123. A written settlement agreement prepared in the course of, or pursuant to, a mediation, is not made inadmissible, or protected from disclosure, by provisions of this chapter if the agreement is signed by the settling parties and …
>
> ….
>
> (b) The agreement provides that it is enforceable or binding or words to that effect.

The *Fair* case arose when parties concluded a mediation by signing a handwritten, single-page memorandum that included a provision stating: "Any and all disputes subject to JAMS arbitration rules." The parties were unable to finalize their settlement; thereafter, one side sought to resolve the dispute through litigation, while the other side demanded arbitration pursuant to the mediation memorandum.

The question that eventually reached the California Supreme Court was whether inclusion of the arbitration clause in the mediation memorandum satisfied Section 1123(b)'s requirement of an agreement that "provides that it is enforceable or binding or words to that effect." The Court's answer was "no": "[W]e hold that to satisfy the 'words to that effect' provision of section 1123(b), a writing must directly express the parties' agreement to be bound by the document they sign." 40 Cal. 4th at 197.

The Court's opinion noted that in enacting Section 1123(b),

> [t]he Legislature's goal was to allow parties to express their intent to be bound in words they were likely to use, rather than requiring a legalistic formulation. The Legislature also meant to clarify the rules governing admissibility and reduce the likelihood that parties would overlook those rules.

Id. at 197. The Court said that to meet those objectives, "we must balance the requirements of flexibility and clarity, without eroding the confidentiality that is essential to effective mediation." *Id., quoting Foxgate,* 26 Cal. 4th at 14.

The Court then explained:

> A tentative working document may include an arbitration provision, without reflecting an actual agreement to be bound. If such a typical settlement provision were to trigger admissibility, parties might inadvertently give up the protection of mediation confidentiality during their negotiations over the terms of settlement. Disputes over those terms would then erupt in litigation, escaping the process of resolution through mediation. Durable settlements are more likely to result if the statute is applied to require language directly reflecting the parties' awareness that they are executing an "enforceable or binding" agreement.

Fair, 40 Cal. 4th at 197-98. The Court further explained that "[u]nder our interpretation of section 1123(b), the parties are free to draft and discuss enforcement terms such as arbitration clauses *without worrying that those provisions will destroy the confidentiality that protects mediation discussions.*" *Id.* at 199 (emphasis added). Thus, as in *Foxgate* and *Rojas,* the Court was sensitive to the legislative policy of protecting mediation confidentiality, and careful to interpret the statutory protection so as to be effective.

Simmons

In 2008, the California Supreme Court considered mediation confidentiality yet again, and stuck to its firm approach prohibiting courts from crafting judicial exceptions to the statutory rules. *See Simmons v. Ghaderi,* 44 Cal. 4th 570, 187 P.3d 934, 80 Cal. Rptr. 3d 83 (2008). The Court emphasized that "[e]xcept in cases of express waiver or where due process is implicated, … mediation confidentiality is to be strictly enforced." *Id.* at 582.

The *Simmons* case started as a medical malpractice suit, which was mediated. The mediation resulted in an oral agreement between the plaintiffs and the defendant doctor's insurer, which was never reduced to writing because the doctor revoked her previous consent to settle.

After the mediation, the plaintiffs filed a motion to enforce the settlement under Code of Civil Procedure Section 664.6. At first, the doctor opposed the motion on the ground that the requirements of that statute had not been satisfied. At trial, however, she contended for the first time that the mediation confidentiality statutes precluded the plaintiffs from proving the existence of an oral settlement agreement.

The trial court rejected the doctor's arguments and ordered specific performance of the settlement agreement. The court of appeal affirmed, holding that the doctor was estopped from asserting mediation confidentiality. But the decision was not unanimous: "Justice Aldrich maintained that the mediation confidentiality statutes prevented plaintiffs from proving the existence of an oral settlement agreement, that the majority's focus on estoppel was 'a veiled attempt at relabeling waiver as estoppel,' and that a party cannot impliedly waive mediation confidentiality through litigation conduct." *Id.* at 577.

The California Supreme Court agreed with Justice Aldrich's analysis. *See id.* at 578-88. It explained that "Evidence Code section 1115 *et seq.* sets forth an extensive statutory scheme protecting the confidentiality of mediation proceedings, with narrowly delineated exceptions." *Id.* at 574. The Court carefully described the content of the key statutes, and then said that "[i]n addition to the unambiguous language of the mediation confidentiality statutes, the Commission's comments further demonstrate that the Legislature intended to apply confidentiality broadly and to limit any exceptions to confidentiality to narrowly prescribed statutory exceptions." *Id.* at 580.

In particular, the Court referred to the Commission's Comment to Section 1124:

> The Commission's comment to section 1124 states explicitly that the section sets forth specific circumstances under which mediation confidentiality is inapplicable to an oral agreement reached in mediation. Except in those circumstances, sections 1119 and 1125 codify the rule of *Ryan v. Garcia* (mediation confidentiality applies to oral statement of settlement terms) and reject the contrary approach of *Regents of University of California v. Sumner* (mediation confidentiality does not protect oral statement of settlement terms).

Id. (citations omitted). The Court pointed out that the parties had not followed the statutory procedures that would have made their oral agreement admissible. *Id.* at 581-82.

The Court further explained that the court of appeal was wrong to rely on the doctrine of estoppel, because that doctrine was factually inapplicable. *Id.* at 584-85. As for the doctrine of waiver, the Court observed that in *Eisendrath v. Superior Court*, 109 Cal. App. 4th 351, 134 Cal. Rptr. 2d 716 (2003), "[t]he Court of Appeal concluded that the implied waiver provisions in Section 910 et seq., by their plain language, are limited to the particular privileges enumerated therein and therefore do not extend to mediation confidentiality." *Simmons*, 44 Cal. 4th at 586. The Court said that this conclusion was correct. *Id.* The Court further stated that the mediation confidentiality statutes unambiguously require that any waiver of mediation confidentiality be express, not implied. *Id.* Lastly, the Court refused to judicially create a waiver-by-conduct exception to the mediation confidentiality statutes:

> [T]he legislative history of the mediation confidentiality statutes as a whole reflects a desire that section 1115 et seq. be strictly followed in the interest of efficiency. By laying down clear rules, the Legislature intended to reduce litigation over the admissibility and disclosure of evidence regarding settlements and communications that occur during mediation. (Recommendation on Mediation Confidentiality (Jan. 1997) 26 Cal. Law Revision Com. Rep. (1996) p. 424.) Allowing courts to craft judicial exceptions to the statutory rules would run counter to that intent.
>
> Both the clear language of the mediation statutes and our prior rulings support the preclusion of an implied waiver exception. *The Legislature chose to promote mediation by ensuring confidentiality rather than adopt a scheme to ensure good behavior in the mediation and litigation process. The mediation statutes provide clear and comprehensive rules reflecting that policy choice.*

Id. at 588 (emphasis added).

For all of the above reasons, the Court reversed the judgment of the court of appeal and found that there was no enforceable settlement of the medical malpractice claim. *Id.*

Cassel

The most recent California Supreme Court decision on mediation confidentiality is *Cassel v. Superior Court*, 51 Cal. 4th 113, 244 P.3d 1080, 119 Cal. Rptr. 3d 437 (2011), which prompted the Commission's current study. The staff will examine *Cassel* and the relevant policy interests more extensively it its next memorandum for the Commission, as well as several similar disputes arising in California: *Wimsatt v. Superior Court*, 152 Cal. App. 4th 137, 61 Cal. Rptr. 3d 200

(2007); *Porter v. Wyner,* 107 Cal. Rptr. 3d 653 (2010) (formerly published at 183 Cal. App. 4th 949); *Hadley v. The Cochran Firm,* 2012 Cal. Unpub. LEXIS 5743 (Aug. 3, 2012); *Benesch v. Green,* 2009 U.S. Dist. LEXIS 117641 (Dec. 17, 2009). For now, we discuss *Cassel* only briefly and then describe its aftermath.

In *Cassel,* a man agreed in mediation to settle a lawsuit to which he was a party. He later sued his attorneys for malpractice, breach of fiduciary duty, fraud, and breach of contract. He claimed that at the mediation, his attorneys "by bad advice, deception, and coercion … induced him to settle for a lower amount than he had told them he would accept, and for less than the case was worth." 51 Cal. 4th at 118.

The defendant attorneys "moved, under the statutes governing mediation confidentiality, to exclude all evidence of private attorney-client discussions immediately preceding, and during, the mediation concerning mediation settlement strategies and defendants' efforts to persuade [their client] to reach a settlement in the mediation." *Id.* The trial court granted the motion and an appeal was taken. *Id.*

In a split decision, the court of appeal reversed, ruling that mediation confidentiality did not apply. The majority reasoned that the mediation confidentiality statutes are "not intended to prevent a client from proving, through private communications outside the presence of all other mediation participants, a case of legal malpractice against the client's own lawyers." *Id.* at 122. The majority further reasoned that an attorney and client are a single "participant" for purposes of mediation confidentiality, and thus the attorney cannot preclude the client from waiving the statutory protection. *Id.* Justice Perluss dissented, "argu[ing] that the majority had crafted a forbidden judicial exception to the clear requirements of mediation confidentiality." *Id.*

The defendant attorneys petitioned for review in the California Supreme Court, maintaining that "under the plain language of the mediation confidentiality statutes, their mediation-related discussions with [their client were] inadmissible in his malpractice action against them, even if those discussions occurred in private, away from any other mediation participant." *Id.* at 123. The Court granted review and, consistent with its previous decisions, held that the mediation confidentiality statutes must be strictly construed and are not subject to a judicially crafted exception where a client sues for legal malpractice and seeks disclosure of private attorney-client discussions relating to a mediation. *Id.* at 123-33.

Preliminarily, the Court explained that it "must apply the plain terms of the mediation confidentiality statutes to the facts of this case unless such a result would violate due process, or would lead to absurd results that clearly undermine the statutory purpose." *Id.* at 119.

Examining the plain language of Section 1119(a)-(b), the Court noted that "[a]ll oral or written communications are covered, if they are made 'for the purpose of' or 'pursuant to' a mediation." *Id.* at 128. It thus concluded that "[p]lainly, such communications include those between a mediation disputant and his or her own counsel, even if these do not occur in the presence of the mediator or other disputants." *Id.*

The Court also explained that an attorney and client are not a single "participant" for purposes of the mediation confidentiality statutes, because "participants" are "mentioned at several points in the statutory scheme, under circumstances making clear that the term 'participants' includes more than the mediation parties or disputants." *Id.* at 130. Consequently, the Court ruled that under Section 1122(a)(2), the mediation confidentiality protection could not be waived without the attorney's consent; the client's consent alone was not sufficient. *Id.* at 131.

The Court also rejected the idea that Section 958, which expressly creates an exception to the attorney-client privilege for legal malpractice suits, compels recognition of a similar exception to mediation confidentiality. *Id.* at 131-33. The Court explained:

> [T]he mediation confidentiality statutes do not create a "privilege" in favor of any particular person. Instead, they serve the public policy of encouraging the resolution of disputes by means short of litigation. The mediation confidentiality statutes govern only the narrow category of mediation-related communications, but they apply broadly within that category, and are designed to provide maximum protection for the privacy of communications in the mediation context. A principal purpose is to assure prospective participants that their interests will not be damaged, first, by attempting this alternative means of resolution, and then, once mediation is chosen, by making and communicating the candid disclosures and assessments that are most likely to produce a fair and reasonable mediation settlement. To assure this maximum privacy protection, the Legislature has specified that all mediation participants involved in a mediation-related communication must agree to its disclosure.
>
> Neither the language nor the purpose of the mediation confidentiality statutes supports a conclusion that they are subject

> to an exception, similar to that provided for the attorney-client privilege, for lawsuits between attorney and client. The instant Court of Appeal's contrary conclusion is nothing more than a judicially crafted exception to the unambiguous language of the mediation confidentiality statutes in order to accommodate a competing policy concern — here, protection of a client's right to sue his or her attorney. We and the Courts of Appeal have consistently disallowed such exceptions, even when the equities appeared to favor them.

Id. at 131 (citations & footnotes omitted).

The Court further explained that "application of the mediation confidentiality statutes to legal malpractice actions does not implicate due process concerns so fundamental that they might warrant an exception on constitutional grounds." *Id.* at 135. In its view, "the mere loss of evidence pertinent to the prosecution of a lawsuit for civil damages does not implicate such a fundamental interest." *Id.*

Finally, the Court concluded that "while we pass no judgment on the wisdom of the mediation confidentiality statutes, we cannot say that applying the plain terms of those statutes to the circumstances of this case produces a result that is either absurd or contrary to the legislative intent." *Id.* at 136. The Court explained:

> Inclusion of private attorney-client discussions in the mediation confidentiality scheme addresses several issues about which the Legislature could rationally be concerned. At the outset, the Legislature might determine, such an inclusion gives maximum assurance that disclosure of an ancillary mediation-related communication will not, perhaps inadvertently, breach the confidentiality of the mediation proceedings themselves, to the damage of one of the mediation disputants.
>
> Moreover, as real parties observe, the Legislature might reasonably believe that protecting attorney-client conversations in this context facilitates the use of mediation as a means of dispute resolution by allowing frank discussions between a mediation disputant and the disputant's counsel about the strengths and weaknesses of the case, the progress of negotiations, and the terms of a fair settlement, without concern that the things said by either the client or the lawyers will become the subjects of later litigation against either. The Legislature also could rationally decide that it would not be fair to allow a client to support a malpractice claim with excerpts from private discussions with counsel concerning the mediation, while barring the attorneys from placing such discussions in context by citing communications within the mediation proceedings themselves.

Id. at 136. The Court therefore reversed the decision of the court of appeal, but noted that "the Legislature is free to reconsider whether the mediation confidentiality statutes should preclude the use of mediation-related attorney-client discussions to support a client's civil claims of malpractice against his or her attorneys." *Id.* at 137.

Justice Chin concurred in the result, "but reluctantly." *Id.* at 138 (Chin, J., concurring). He warned that the court's holding would

> effectively shield an attorney's actions during mediation, including advising the client, from a malpractice action even if those actions are incompetent or even deceptive. Attorneys participating in mediation will not be held accountable for any incompetent or fraudulent actions during that mediation unless the actions are so extreme as to engender a *criminal* prosecution against the attorney. *This is a high price to pay to preserve total confidentiality in the mediation process.*

Id. (citations and footnotes omitted; emphasis added).

Justice Chin regarded it as a close call whether the result required by the literal language of the mediation confidentiality statutes was so absurd as to warrant a judicial deviation from the literal language. *Id.* at 139. For several reasons, he agreed with the majority that the Court had to give effect to the statutory language. *Id.* But he was "not completely satisfied that the Legislature has fully considered whether attorneys should be shielded from accountability in this way." *Id.*

In his estimation, "[t]here may be better ways to balance the competing interests than simply providing that an attorney's statements during mediation may never be disclosed." *Id.* In particular, he suggested that "it may be appropriate to provide that communications during mediation may be used in a malpractice action between an attorney and a client to the extent they are relevant to that action, but they may not be used by anyone for any other purpose." *Id.* After making this suggestion, he said the Legislature "may well wish" to reconsider the statutory scheme. *Id.*

ASSEMBLY BILL 2025 (WAGNER) AND RELATED MATTERS

Reaction to the *Cassel* decision was decidedly mixed. Some groups and individuals praised the decision, while others sharply criticized it. In particular, the Beverly Hills Bar Association urged the introduction of legislation to create a new exception to the mediation confidentiality statutes, along the lines suggested

by Justice Chin. It persuaded the Conference of California Bar Associations ("CCBA") (a group of attorneys from local, specialty, and minority bar associations across the state) to pass a resolution recommending the following amendment of Section 1120:

> 1120. (a) Evidence otherwise admissible or subject to discovery outside of a mediation or a mediation consultation shall not be or become inadmissible or protected from disclosure solely by reason of its introduction or use in a mediation or a mediation consultation.
>
> (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 civil 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) The admissibility, in a State Bar disciplinary action, an action for legal malpractice, and/or an action for breach of fiduciary duty, of communications directly between the client and his or her attorney, only, where professional negligence or misconduct form the basis of the client's allegations against the client's attorney.

See Exhibit pp. 11-12. The resolution says that this revision is needed because otherwise the *Cassel* doctrine

> would seriously impair and undermine not only the attorney-client relationship but would likewise create a chilling effect on the use of mediations. In fact, clients would be precluded from pursuing any remedy against their own counsel for professional deficiencies occurring during the mediation process as well as representations made to the client to induce settlement.

Id. at 11.

In February 2012, Assembly Member Wagner introduced a bill to amend Section 1120 in essentially the manner proposed by the Conference of California Bar Associations. See AB 2025 (Wagner), as introduced on Feb. 23, 2012 (attached as Exhibit pp. 13-14). A background information sheet, prepared by the author's office for the Assembly Judiciary Committee to use in analyzing the bill, is attached for the Commission's reference (Exhibit pp. 15-18). In that document, the author states:

> The purpose of AB 2025 is to specify that communications between a client and his or her attorney during mediation are admissible in an action for legal malpractice or breach of fiduciary

> duty, or both, and in a State Bar disciplinary action, if the attorney's professional negligence or misconduct forms the basis of the client's allegations against the attorney. The bill responds to the California Supreme Court's decision in Cassel v. Superior Court (2011) 51 Cal. 4th 113, which held that the plain language of Evidence Code §1120 compelled it to find that attorney-client confidentiality in a mediation was absolute, but strongly suggested that the Legislature change the statute.

Id. at 16.

As introduced, the bill prompted significant opposition, from sources such as the California Employment Lawyers Association (Exhibit pp. 28-29), the Southern California Mediation Association (Exhibit pp. 30-31), the Association for Dispute Resolution of Northern California (Exhibit pp. 32-33), the California Lawyers for the Arts (Exhibit pp. 34-35), the Presiding Judge of the Civil Division of the San Francisco Superior Court (Exhibit p. 39), mediator Ron Kelly (Exhibit pp. 40-41), and many other individuals (see, e.g., Exhibit pp. 22-26, 27, 36-39). Mr. Kelly has provided what he understands to be a complete set of all statements of support and opposition to the original version of the bill, which will be posted and available for downloading from the Commission's website at http://www.clrc.ca.gov/K402.html. Only one of those letters (from mediator Nancy Yeend) expresses support for the bill as introduced. See Exhibit p. 42. The numerous opposition letters raise a variety of arguments against the bill, which the staff will explore as this study progresses.

In light of the opposition, the bill was amended to direct the Commission to conduct this study. See AB 2025 (Gorell), as amended on May 10, 2012. The content of the bill was later transferred to the Commission's annual resolution of authority, which was passed by the Legislature. See 2012 Cal. Stat. res. ch. 108 (ACR 98 (Wagner & Gorell)). The resolution states in pertinent part:

> *Resolved.* That the Legislature approves for study by the California Law Revision Commission the new topic listed below:
>
> (a) Analysis of the relationship under current law between mediation confidentiality and attorney malpractice and other misconduct, and the purposes for, and impact of, those laws on public protection, professional ethics, attorney discipline, client rights, the willingness of parties to participate in voluntary and mandatory mediation, and the effectiveness of mediation, as well as any other issues that the commission deems relevant. Among other matters, the commission shall consider the following:
>
> (1) Sections 703.5, 958, and 1119 of the Evidence Code and predecessor provisions, as well as California court rulings,

including, but not limited to, Cassel v. Superior Court (2011) 51 Cal.4th 113, Porter v. Wyner (2010) 183 Cal.App.4th 949, and Wimsatt v. Superior Court (2007) 152 Cal.App.4th 137.

(2) The availability and propriety of contractual waivers.

(3) The law in other jurisdictions, including the Uniform Mediation Act, as it has been adopted in other states, other statutory acts, scholarly commentary, judicial decisions, and any data regarding the impact of differing confidentiality rules on the use of mediation.

(b) In studying this matter, the commission shall request input from experts and interested parties, including, but not limited to, representatives from the California Supreme Court, the State Bar of California, legal malpractice defense counsel, other attorney groups and individuals, mediators, and mediation trade associations. The commission shall make any recommendations that it deems appropriate for the revision of California law to balance the competing public interests between confidentiality and accountability.

Although the resolution does not specify a deadline for completion of the Commission's study, the Legislature presumably would like the study completed promptly. The Commission should act accordingly, while following its normal study process, thoroughly exploring the issues, and affording ample opportunities for interested individuals and organizations to express their views.

THE COMMISSION'S NEW STUDY

Now that the staff has provided a history of California's laws governing mediation confidentiality, a description of the current statutory scheme and the case law interpreting it, and an explanation of the origin of this study, it may be helpful to make some preliminary remarks about the new study.

Methodology

The Commission's study process is careful, deliberative, and transparent. The Commission conducts a series of public meetings, at which interested persons are welcome and encouraged to participate in the discussion. Before each meeting, the staff prepares a memorandum, which is posted to the Commission's website (www.clrc.ca.gov) and sent to the Commission's traditional and electronic mail lists for the study. The Commission is still building its mail lists for this study; **interested persons can electronically subscribe at http://www.clrc.ca.gov/K402.html.** Written comments from interested persons are welcome at any time.

After conducting preliminary research and analysis, the Commission begins to prepare a tentative recommendation, consisting of proposed legislation, accompanying Commission Comments, and a narrative explanation of the proposed reform. Upon approval, the tentative recommendation is broadly circulated for comment for an extended period. When the comment period ends, the Commission considers the input received, revises its proposal in response to the input if appropriate, and, in most instances, eventually approves a final recommendation for submission to the Legislature and the Governor. The proposal must then go through the normal legislative process if it is to become law.

Further information on the Commission's study process is available on the Commission's website at http://www.clrc.ca.gov/Mbg-history.html; see also Memorandum 2012-1; B. Gaal, *Evidence Legislation in California*, 36 Southwestern Univ. L. Rev. 561 (2008). For a detailed discussion about the use of Commission materials to determine legislative intent, see the Commission's most recent annual report at http://www.clrc.ca.gov/pub/Printed-Reports/Pub236-AR.pdf.

Communication from Ron Kelly

As previously mentioned, Mr. Kelly has provided the Commission with a set of the opposition and support letters on AB 2025 as introduced. Together with that submission, he sent a cover letter directed to the Commission and staff (Exhibit pp. 19-20), as well as a copy of a 1996 letter from the Commission's former Executive Secretary, thanking Mr. Kelly for serving as the Commission's expert adviser (Exhibit p. 21).

In his cover letter, Mr. Kelly again offers to be of assistance to the Commission. The staff appreciates his offer to help and looks forward to working with him on this study.

Mr. Kelly also raises some questions about the scope of the Commission's new study:

> **Scope of Referral?** A threshold question for the Commission is the scope of its study. ACR 98 begins describing this new topic as "Analysis of the relationship under current law between mediation confidentiality and attorney malpractice and other misconduct…." Given the background of AB 2025, it seems clear that this phrase refers to alleged attorney malpractice and other *attorney* misconduct, rather than a much wider scope involving possible later allegations of misconduct in mediation against any party, accompanying family member, expert witness, or other participant.

> Mediation is now used very widely in California, thanks in part to the protections for candid communication which Evidence Code sections 1115-1128 together provide. If the Commission were to open up the study to cover the much larger scope of whether mediation communications should be admissible in later actions against any and all participants, it would almost certainly require the allocation of a great deal more resources and time. The Commission might be well served to decide this scope question as early as possible so as not to unnecessarily alarm and draw in all those who currently use, conduct, or benefit from mediations conducted under the current statutory protections.

Exhibit p. 19.

The staff does not think it is immediately necessary to resolve the precise scope of the Commission's study. The resolution referring the study to the Commission is susceptible to several possibilities. Attorney misconduct is certainly included, but what about mediator misconduct? Misconduct by other professionals who attend a mediation, such as an accountant, doctor, or engineer? Misconduct by a mediation party? Misconduct by a nonparty who attends a mediation, such as a spouse? The staff suggests that the Commission **start with a narrow focus on attorney misconduct, give interested persons time to comment on the proper scope of the study, and adjust the scope later if that appears appropriate.**

We feel compelled to warn the Commission, however, that mediation confidentiality is a controversial and complex area. A broad study will not only consume more Commission resources and take longer than a narrow one, but is also more likely to generate opposition that might sink the Commission's entire proposal.

In addition to commenting on the scope of the Commission's study, Mr. Kelly urges the Commission to investigate the magnitude of the problem referred to it for study:

> Is there evidence that actual attorney misconduct in California mediations happens significantly often where a remedy is unavailable because of the current statutes? If so, what is the nature of the actual problem? Does it happen often enough that this harm outweighs the public benefit of all participants in knowing they're able to talk off the record in mediation? John Blackman's March 15 letter [Exhibit pp. 22-26], Richard Collier's March 30 letter [Exhibit p. 27], and the April 11 letter from the California Employment Lawyers Association [Exhibit pp. 28-29] are representative of those

> with significant relevant experience who believe the problem is very small and the public benefit that will be lost is very large.

Exhibit p. 20. These are good questions that lie at the heart of this study. **Input on them, or advice on how to obtain relevant data, would be very helpful.**

Other Input Received

The Commission has also received other materials relating to this study, such as a comparison of federal and California law on mediation confidentiality. The staff will present that information when it appears appropriate to do so.

Next Steps

The resolution referring this study to the Commission makes clear that the Legislature expects the Commission to examine:

- California statutory and decisional law on the intersection of mediation confidentiality and attorney misconduct.
- Scholarly writings on the subject.
- The approach used in the Uniform Mediation Act.
- Statutory and decisional law from other jurisdictions on the same subject.
- Any empirical and anecdotal evidence available.
- Information about the availability and propriety of contractual waivers.

In addition, the staff is interested in information about specific mechanisms (e.g., in camera hearings) used to accommodate competing interests with respect to other types of confidential information.

We encourage input on any of the above matters, or any other aspect of this study. Unless otherwise instructed, **our next memorandum will provide a preliminary discussion of the policy interests at stake in *Cassel* and similar disputes.**

A FEW PARTING THOUGHTS

In conclusion, the staff respectfully offers two points of advice. First, numerous cases are mediated in California on a daily basis, and some of the participants might choose to become actively involved in the Commission's study. **The Commission must be extremely cautious to avoid any appearance**

of taking sides in or in any way influencing the outcome of pending or prospective litigation.

Second, the topic of mediation confidentiality is contentious, as evidenced by the abundance of split decisions and reversals, multiple cases in which major stakeholder groups (e.g., the California Dispute Resolution Council and the Consumer Attorneys of California) have filed amicus briefs on opposite sides, and the clash of views over the approach suggested by Justice Chin in his *Cassel* concurrence. Achieving consensus on any reform is likely to be difficult at best. **The Commission should approach the topic with an open mind and thoroughly gather and evaluate pertinent information from as many sources as reasonably possible before beginning to craft any proposal.**

Respectfully submitted,

Barbara Gaal
Chief Deputy Counsel

EVIDENCE CODE SECTIONS 1115-1128 & COMMENTS

§ 1115. Definitions

1115. For purposes of this chapter:

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

(b) "Mediator" means a neutral person who conducts a mediation. "Mediator" includes any person designated by a mediator either to assist in the mediation or to communicate with the participants in preparation for a mediation.

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

Comment. Subdivision (a) of Section 1115 is drawn from Code of Civil Procedure Section 1775.1. To accommodate a wide range of mediation styles, the definition is broad, without specific limitations on format. For example, it would include a mediation conducted as a number of sessions, only some of which involve the mediator. The definition focuses on the nature of a proceeding, not its label. A proceeding may be a "mediation" for purposes of this chapter, even though it is denominated differently.

Under subdivision (b), a mediator must be neutral. The neutrality requirement is drawn from Code of Civil Procedure Section 1775.1. An attorney or other representative of a party is not neutral and so does not qualify as a "mediator" for purposes of this chapter.

A "mediator" may be an individual, group of individuals, or entity. See Section 175 ("person" defined). See also Section 10 (singular includes the plural). This definition of mediator encompasses not only the neutral person who takes the lead in conducting a mediation, but also any neutral who assists in the mediation, such as a case-developer, interpreter, or secretary. The definition focuses on a person's role, not the person's title. A person may be a "mediator" under this chapter even though the person has a different title, such as "ombudsperson." Any person who meets the definition of "mediator" must comply with Section 1121 (mediator reports and communications), which generally prohibits a mediator from reporting to a court or other tribunal concerning the mediated dispute.

Subdivision (c) is drawn from former Section 1152.5, which was amended in 1996 to explicitly protect mediation intake communications. See 1996 Cal. Stat. ch. 174, § 1. Subdivision (c) is not limited to communications to retain a mediator. It also encompasses contacts concerning whether to mediate, such as where a mediator contacts a disputant because another disputant desires to mediate, and contacts concerning initiation or recommencement of mediation, such as where a case-developer meets with a disputant before mediation.

For the scope of this chapter, see Section 1117.

§ 1116. Effect of chapter

1116. (a) Nothing in this chapter expands or limits a court's authority to order participation in a dispute resolution proceeding. Nothing in this chapter authorizes or affects the enforceability of a contract clause in which parties agree to the use of mediation.

(b) Nothing in this chapter makes admissible evidence that is inadmissible under Section 1152 or any other statute.

Comment. Subdivision (a) of Section 1116 establishes guiding principles for applying this chapter.

Subdivision (b) continues the first sentence of former Section 1152.5 without substantive change.

§ 1117. Scope of chapter

1117. (a) Except as provided in subdivision (b), this chapter applies to a mediation as defined in Section 1115.

(b) This chapter does not apply to either of the following:

(1) A proceeding under Part 1 (commencing with Section 1800) of Division 5 of the Family Code or Chapter 11 (commencing with Section 3160) of Part 2 of Division 8 of the Family Code.

(2) A settlement conference pursuant to Rule 3.1380 of the California Rules of Court.

Comment. Under subdivision (a) of Section 1117, mediation confidentiality and the other safeguards of this chapter apply to a broad range of mediations. See Section 1115 Comment.

Subdivision (b) sets forth two exceptions. Section 1117(b)(1) continues without substantive change former Section 1152.5(b). Special confidentiality rules apply to a proceeding in family conciliation court or a mediation of child custody or visitation issues. See Section 1040; Fam. Code §§ 1818, 3177.

Section 1117(b)(2) establishes that a court settlement conference is not a mediation within the scope of this chapter. A settlement conference is conducted under the aura of the court and is subject to special rules.

§ 1118. Recorded oral agreement

1118. An oral agreement "in accordance with Section 1118" means an oral agreement that satisfies all of the following conditions:

(a) The oral agreement is recorded by a court reporter or reliable means of audio recording.

(b) The terms of the oral agreement are recited on the record in the presence of the parties and the mediator, and the parties express on the record that they agree to the terms recited.

(c) The parties to the oral agreement expressly state on the record that the agreement is enforceable or binding, or words to that effect.

(d) The recording is reduced to writing and the writing is signed by the parties within 72 hours after it is recorded.

Comment. Section 1118 establishes a procedure for orally memorializing an agreement, in the interest of efficiency. Provisions permitting use of that procedure for certain purposes include Sections 1121 (mediator reports and communications), 1122 (disclosure by agreement), 1123 (written settlement agreements reached through mediation), and 1124 (oral agreements reached through mediation). See also Section 1125 (when mediation ends). For guidance on authority to bind a litigant, see Williams v. Saunders, 55 Cal. App. 4th 1158, 64 Cal. Rptr. 2d 571 (1997) ("The litigants' direct participation tends to ensure that the settlement is the result of their mature reflection and deliberate assent.").

§ 1119. Mediation confidentiality

1119. Except as otherwise provided in this chapter:

(a) No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery, and disclosure of the evidence shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.

(b) No writing, as defined in Section 250, that is prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation, is admissible or subject to discovery, and disclosure of the writing shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.

(c) All communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential.

Comment. Subdivision (a) of Section 1119 continues without substantive change former Section 1152.5(a)(1), except that its protection explicitly applies in a subsequent arbitration or administrative adjudication, as well as in any civil action or proceeding. See Section 120 ("civil action" includes civil proceedings). In addition, the protection of Section 1119(a) extends to oral communications made for the purpose of or pursuant to a mediation, not just oral communications made in the course of the mediation.

Subdivision (b) continues without substantive change former Section 1152.5(a)(2), except that its protection explicitly applies in a subsequent arbitration or administrative adjudication, as well as in any civil action or proceeding. See Section 120 ("civil action" includes civil proceedings). In addition, subdivision (b) expressly encompasses any type of "writing" as defined in Section 250, regardless of whether the representations are on paper or on some other medium.

Subdivision (c) continues former Section 1152.5(a)(3) without substantive change. A mediation is confidential notwithstanding the presence of an observer, such as a person evaluating or training the mediator or studying the mediation process.

See Sections 1115(a) ("mediation" defined), 1115(c) ("mediation consultation" defined). See also Section 703.5 (testimony by a judge, arbitrator, or mediator).

For examples of specialized mediation confidentiality provisions, see Bus. & Prof. Code §§ 467.4-467.5 (community dispute resolution programs), 6200 (attorney-client fee disputes); Code Civ. Proc. §§ 1297.371 (international commercial disputes), 1775.10 (civil action mediation in participating courts); Fam. Code §§ 1818 (family conciliation court), 3177 (child custody); Food & Agric. Code § 54453 (agricultural cooperative bargaining associations); Gov't code §§ 11420.20-11420.30 (administrative adjudication), 12984-12985 (housing discrimination), 66032-66033 (land use); Ins. Code § 10089.80 (earthquake insurance); Lab. Code § 65 (labor disputes); Welf. & Inst. Code § 350 (dependency mediation). See also Cal. Const. art. I, § 1 (right to privacy); Garstang v. Superior Court, 39 Cal. App. 4th 526, 46 Cal. Rptr. 2d 84, 88 (1995) (constitutional right of privacy protected communications made during mediation sessions before an ombudsperson).

§ 1120. Types of evidence not covered

1120. (a) Evidence otherwise admissible or subject to discovery outside of a mediation or a mediation consultation shall not be or become inadmissible or

protected from disclosure solely by reason of its introduction or use in a mediation or a mediation consultation.

(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 civil 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.

Comment. Subdivision (a) of Section 1120 continues former Section 1152.6(a)(6) without change. It limits the scope of Section 1119 (mediation confidentiality), preventing parties from using a mediation as a pretext to shield materials from disclosure.

Subdivision (b)(1) makes explicit that Section 1119 does not restrict the admissibility of an agreement to mediate. Subdivision (b)(2) continues former Section 1152.5(e) without substantive change, but also includes an express exception for extensions of litigation deadlines. Subdivision (b)(3) makes clear that Section 1119 does not preclude a disputant from obtaining basic information about a mediator's track record, which may be significant in selecting an impartial mediator. Similarly, mediation participants may express their views on a mediator's performance, so long as they do not disclose anything said or done at the mediation.

See Sections 1115(a) ("mediation" defined), 1115(b) ("mediator" defined), 1115(c) ("mediation consultation" defined).

§ 1121. Mediator reports and communications

1121. Neither a mediator nor anyone else may submit to a court or other adjudicative body, and a court or other adjudicative body may not consider, any report, assessment, evaluation, recommendation, or finding of any kind by the mediator concerning a mediation conducted by the mediator, other than a report that is mandated by court rule or other law and that states only whether an agreement was reached, unless all parties to the mediation expressly agree otherwise in writing, or orally in accordance with Section 1118.

Comment. Section 1121 continues the first sentence of former Section 1152.6 without substantive change, except to make clear that (1) the section applies to all submissions, not just filings, (2) the section is not limited to court proceedings, but rather applies to all types of adjudications, including arbitrations and administrative adjudications, (3) the section applies to any report or statement of opinion, however denominated, and (4) neither a mediator nor anyone else may submit the prohibited information. The section does not prohibit a mediator from providing a mediation participant with feedback on the dispute in the course of the mediation.

Rather, the focus is on preventing coercion. As Section 1121 recognizes, a mediator should not be able to influence the result of a mediation or adjudication by reporting or threatening to report to the decisionmaker on the merits of the dispute or reasons why mediation failed to resolve it. Similarly, a mediator should not have authority to resolve or decide the mediated dispute, and should not have any function for the adjudicating tribunal with regard to the dispute, except as a non-decisionmaking neutral. See Section 1117 (scope of chapter), which excludes settlement conferences from this chapter.

The exception to Section 1121 (permitting submission and consideration of a mediator's report where "all parties to the mediation expressly agree" in writing) is modified to allow use of the oral procedure in Section 1118 (recorded oral agreement) and to permit making of the agreement at any time, not just before the mediation. A mediator's report to a court may disclose mediation communications only if all parties to the mediation agree to the reporting and all persons who participate in the mediation agree to the disclosure. See Section 1122 (disclosure by agreement).

The second sentence of former Section 1152.6 is continued without substantive change in Section 1117 (scope of chapter), except that Section 1117 excludes proceedings under Part 1 (commencing with Section 1800) of Division 5 of the Family Code, as well as proceedings under Chapter 11 (commencing with Section 3160) of Part 2 of Division 8 of the Family Code.

See Sections 1115(a) ("mediation" defined), 1115(b) ("mediator" defined). See also Sections 703.5 (testimony by a judge, arbitrator, or mediator), 1127 (attorney's fees), 1128 (irregularity in proceedings).

§ 1122. Disclosure by agreement

1122. (a) A communication or a writing, as defined in Section 250, 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 either of the following conditions is satisfied:

(1) All persons who conduct or otherwise participate in the mediation expressly agree in writing, or orally in accordance with Section 1118, to disclosure of the communication, document, or writing.

(2) The communication, document, or writing was prepared by or on behalf of fewer than all the mediation participants, those participants expressly agree in writing, or orally in accordance with Section 1118, to its disclosure, and the communication, document, or writing does not disclose anything said or done or any admission made in the course of the mediation.

(b) For purposes of subdivision (a), if the neutral person who conducts a mediation expressly agrees to disclosure, that agreement also binds any other person described in subdivision (b) of Section 1115.

Comment. Section 1122 supersedes former Section 1152.5(a)(4) and part of former Section 1152.5(a)(2), which were unclear regarding precisely whose agreement was required for admissibility or disclosure of mediation communications and documents.

Subdivision (a)(1) states the general rule that mediation documents and communications may be admitted or disclosed only upon agreement of all participants, including not only parties but also the mediator and other nonparties attending the mediation (e.g., a disputant not involved in litigation, a spouse, an accountant, an insurance representative, or an employee of a corporate affiliate). Agreement must be express, not implied. For example, parties cannot be deemed to have agreed in advance to disclosure merely because they agreed to participate in a particular dispute resolution program.

Subdivision (a)(2) facilitates admissibility and disclosure of unilaterally prepared materials, but it only applies so long as those materials may be produced in a manner revealing nothing about the mediation discussion. Materials that necessarily disclose mediation communications may be admitted or disclosed only upon satisfying the general rule of subdivision (a)(1).

Mediation materials that satisfy the requirements of subdivisions (a)(1) or (a)(2) are not necessarily admissible or subject to disclosure. Although the provisions on mediation confidentiality do not bar admissibility or disclosure, there may be other bases for exclusion.

Subdivision (b) makes clear that if the person who takes the lead in conducting a mediation agrees to disclosure, it is unnecessary to seek out and obtain assent from each assistant to that person, such as a case developer, interpreter, or secretary.

For exceptions to Section 1122, see Sections 1123 (written settlement agreements reached through mediation) and 1124 (oral agreements reached through mediation) & Comments.

See Section 1115(a) ("mediation" defined), 1115(c) ("mediation consultation" defined). See also Sections 703.5 (testimony by a judge, arbitrator, or mediator), 1119 (mediation confidentiality), 1121 (mediator reports and communications).

§ 1123. Written settlement agreements reached through mediation

1123. A written settlement agreement prepared in the course of, or pursuant to, a mediation, is not made inadmissible, or protected from disclosure, by provisions of this chapter if the agreement is signed by the settling parties and any of the following conditions are satisfied:

(a) The agreement provides that it is admissible or subject to disclosure, or words to that effect.

(b) The agreement provides that it is enforceable or binding or words to that effect.

(c) All parties to the agreement expressly agree in writing, or orally in accordance with Section 1118, to its disclosure.

(d) The agreement is used to show fraud, duress, or illegality that is relevant to an issue in dispute.

Comment. Section 1123 consolidates and clarifies provisions governing written settlements reached through mediation. For guidance on binding a disputant to a written settlement agreement, see Williams v. Saunders, 55 Cal. App. 4th 1158, 64 Cal. Rptr. 2d 571 (1997) ("The litigants' direct participation tends to ensure that the settlement is the result of their mature reflection and deliberate assent.").

As to an executed written settlement agreement, subdivision (a) continues part of former Section 1152.5(a)(2). See also Ryan v. Garcia, 27 Cal. App. 4th 1006, 1012, 33 Cal. Rptr. 2d 158, 162 (1994) (Section 1152.5 "provides a simple means by which settlement agreements executed during mediation can be made admissible in later proceedings," i.e., the "parties may consent, as part of a writing, to subsequent admissibility of the agreement").

Subdivision (b) is new. It is added due to the likelihood that parties intending to be bound will use words to that effect, rather than saying their agreement is intended to be admissible or subject to disclosure.

As to fully executed written settlement agreements, subdivision (c) supersedes former Section 1152.5(a)(4). To facilitate enforceability of such agreements, disclosure pursuant to subdivision (c) requires only agreement of the parties. Agreement of the mediator and other mediation participants is not necessary. Subdivision (c) is thus an exception to the general rule governing disclosure of mediation communications by agreement. See Section 1122.

Subdivision (d) continues former Section 1152.5(a)(5) without substantive change.

A written settlement agreement that satisfies the requirements of subdivision (a), (b), (c), or (d) is not necessarily admissible or subject to disclosure. Although the provisions on mediation confidentiality do not bar admissibility or disclosure, there may be other bases for exclusion.

See Section 1115(a) ("mediation" defined).

§ 1124. Oral agreements reached through mediation

1124. An oral agreement made in the course of, or pursuant to, a mediation is not made inadmissible, or protected from disclosure, by the provisions of this chapter if any of the following conditions are satisfied:

(a) The agreement is in accordance with Section 1118.

(b) The agreement is in accordance with subdivisions (a), (b), and (d) of Section 1118, and all parties to the agreement expressly agree, in writing or orally in accordance with Section 1118, to disclosure of the agreement.

(c) The agreement is in accordance with subdivisions (a), (b), and (d) of Section 1118, and the agreement is used to show fraud, duress, or illegality that is relevant to an issue in dispute.

Comment. Section 1124 sets forth specific circumstances under which mediation confidentiality is inapplicable to an oral agreement reached through mediation. Except in those circumstances, Sections 1119 (mediation confidentiality) and 1124 codify the rule of Ryan v. Garcia, 27 Cal. App. 4th 1006, 33 Cal. Rptr. 2d 158 (1994) (mediation confidentiality applies to oral statement of settlement terms), and reject the contrary approach of Regents of University of California v. Sumner, 42 Cal. App. 4th 1209, 50 Cal. Rptr. 2d 200 (1996) (mediation confidentiality does not protect oral statement of settlement terms).

Subdivision (a) of Section 1124 facilitates enforcement of an oral agreement that is recorded and memorialized in writing in accordance with Section 1118. For guidance in applying subdivision (a), see Section 1125 (when mediation ends) & Comment.

Subdivision (b) parallels Section 1123(c).

Subdivision (c) parallels Section 1123(d).

An oral agreement that satisfies the requirements of subdivision (a), (b), or (c) is not necessarily admissible or subject to disclosure. Although the provisions on mediation confidentiality do not bar admissibility or disclosure, there may be other bases for exclusion. For guidance on binding a disputant to a settlement agreement, see Williams v. Saunders, 55 Cal. App. 4th 1158, 64 Cal. Rptr. 2d 571 (1997) ("The litigants' direct participation tends to ensure that the settlement is the result of their mature reflection and deliberate assent.").

See Section 1115(a) ("mediation" defined).

§ 1125. When mediation ends

1125. (a) For purposes of confidentiality under this chapter, a mediation ends when any one of the following conditions is satisfied:

(1) The parties execute a written settlement agreement that fully resolves the dispute.

(2) An oral agreement that fully resolves the dispute is reached in accordance with Section 1118.

(3) The mediator provides the mediation participants with a writing signed by the mediator that states that the mediation is terminated, or words to that effect, which shall be consistent with Section 1121.

(4) A party provides the mediator and the other mediation participants with a writing stating that the mediation is terminated, or words to that effect, which shall be consistent with Section 1121. In a mediation involving more than two parties, the mediation may continue as to the remaining parties or be terminated in accordance with this section.

(5) For 10 calendar days, there is no communication between the mediator and any of the parties to the mediation relating to the dispute. The mediator and the parties may shorten or extend this time by agreement.

(b) For purposes of confidentiality under this chapter, if a mediation partially resolves a dispute, mediation ends when either of the following conditions is satisfied:

(1) The parties execute a written settlement agreement that partially resolves the dispute.

(2) An oral agreement that partially resolves the dispute is reached in accordance with Section 1118.

(c) This section does not preclude a party from ending a mediation without reaching an agreement. This section does not otherwise affect the extent to which a party may terminate a mediation.

Comment. By specifying when a mediation ends, Section 1125 provides guidance on which communications are protected by Section 1119 (mediation confidentiality).

Under subdivision (a)(1), if mediation participants reach an oral compromise and reduce it to a written settlement fully resolving their dispute, confidentiality extends until the agreement is signed by all the parties. For guidance on binding a disputant to a settlement agreement, see Williams v. Saunders, 55 Cal. App. 4th 1158, 64 Cal. Rptr. 2d 571 (1997) ("The litigants' direct participation tends to ensure that the settlement is the result of their mature reflection and deliberate assent.").

Subdivision (a)(2) applies where mediation participants fully resolve their dispute by an oral agreement that is recorded and memorialized in writing in accordance with Section 1118. The mediation is over upon completion of that procedure, and the confidentiality protections of this chapter do not apply to any later proceedings, such as attempts to further refine the content of the agreement. See Section 1124 (oral agreements reached through mediation). Subdivisions (a)(3) and (a)(4) are drawn from Rule 14 of the American Arbitration Association's Commercial Mediation Rules (as amended, Jan. 1, 1992). Subdivision (a)(5) applies where an affirmative act terminating a mediation for purposes of this chapter does not occur.

Subdivision (b) applies where mediation partially resolves a dispute, such as when the disputants resolve only some of the issues (e.g., contract, but not tort, liability) or when only some of the disputants settle.

Subdivision (c) limits the effect of Section 1125.

See Sections 1115(a) ("mediation" defined), 1115(b) ("mediator" defined).

§ 1126. Effect of end of mediation

1126. Anything said, any admission made, or any writing that is inadmissible, protected from disclosure, and confidential under this chapter before a mediation ends, shall remain inadmissible, protected from disclosure, and confidential to the same extent after the mediation ends.

Comment. Section 1126 clarifies that mediation materials are confidential not only during a mediation, but also after the mediation ends pursuant to Section 1125 (when mediation ends).

See Section 1115(a) ("mediation" defined).

§ 1127. Attorney's fees

1127. If a person subpoenas or otherwise seeks to compel a mediator to testify or produce a writing, as defined in Section 250, and the court or other adjudicative body determines that the testimony or writing is inadmissible under this chapter, or protected from disclosure under this chapter, the court or adjudicative body making the determination shall award reasonable attorney's fees and costs to the mediator against the person seeking the testimony or writing.

Comment. Section 1127 continues former Section 1152.5(d) without substantive change, except to clarify that either a court or another adjudicative body (e.g., an arbitrator or administrative tribunal) may award the fees and costs. Because Section 1115 (definitions) defines "mediator" to include not only the neutral person who takes the lead in conducting a mediation,

but also any neutral who assists in the mediation, fees are available regardless of the role played by the person subjected to discovery.

See Section 1115(b) ("mediator" defined).

§ 1128. Irregularity in proceedings

1128. Any reference to a mediation during any subsequent trial is an irregularity in the proceedings of the trial for the purposes of Section 657 of the Code of Civil Procedure. Any reference to a mediation during any other subsequent noncriminal proceeding is grounds for vacating or modifying the decision in that proceeding, in whole or in part, and granting a new or further hearing on all or part of the issues, if the reference materially affected the substantial rights of the party requesting relief.

Comment. Section 1128 is drawn from Code of Civil Procedure Section 1775.12. The first sentence makes it an irregularity to refer to a mediation in a subsequent civil trial; the second sentence extends that rule to other noncriminal proceedings, such as an administrative adjudication. An appropriate situation for invoking this section is where a party urges the trier of fact to draw an adverse inference from an adversary's refusal to disclose mediation communications.

See Section 1115 ("mediation" defined).

RESOLUTION 10-06-2011
(Revised to Reflect Amendments Taken At Conference)

DIGEST

Evidence: Disclosure of Mediation Communications for Professional Negligence or Misconduct
Amends Evidence Code section 1120 to permit use of attorney-client communications made during mediation in a subsequent professional negligence or State Bar disciplinary action.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE WITH RECOMMENDED AMENDMENT

History:
No similar resolutions found.

Reasons:
This resolution amends Evidence Code section 1120 to permit use of attorney-client communications made during mediation in a subsequent professional negligence or State Bar disciplinary action. This resolution should be approved in principle with recommended amendment because it would allow evidence of malpractice during a mediation to be used in a subsequent action based on that malpractice.

Existing law holds that the attorney-client privilege does not extend to communications relevant to actions for breach of contract between the attorney and client. (Evid. Code, § 958.) But a recent California Supreme Court case held that such communications that occurred during a mediation in which the lawyer was representing the client were inadmissible. (*Cassel v. Superior Court* (2011) 51 Cal.4th 113.) The court recognized that the Legislature might wish to change this outcome. This resolution would do so, by exempting from the mediation confidentiality provisions communications directly between client and attorney where the attorney's malpractice forms the basis for the client's allegations against the attorney.

However, the language of the resolution is somewhat ambiguous, in that it does not explain in which types of cases the exemption would apply. The resolution would benefit from an amendment adding the following clarifying language after the inserted words "The admissibility:" ", in a State Bar disciplinary action, an action for legal malpractice and/or an action for breach of fiduciary duty, "

TEXT OF RESOLUTION

RESOLVED, that the Conference of California Bar Associations recommends that legislation be sponsored to amend Section 1120 of the Evidence code to read as follows:

§ 1120

(a) Evidence otherwise admissible or subject to discovery outside of a mediation or a mediation consultation shall not be or become inadmissible or protected from disclosure solely by reason of its introduction or use in mediation or a mediation consultation.

(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 civil 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) The admissibility, in a State Bar disciplinary action, an action for legal malpractice, and/or an action for breach of fiduciary duty, of communications directly between the client and his or her attorney, only, where professional negligence or misconduct form the basis of the client's allegations against the client's attorney.

(Proposed new language underlined, language to be deleted stricken)

PROPONENT: Beverly Hills Bar Association

STATEMENT OF REASONS

Existing Law: All communications, negotiations, or settlement discussions by and between participants, including the attorney and his/her client in the course of mediation shall remain confidential and are inadmissible in any civil action.

This Resolution: Would craft an exception to the admissibility of evidence during mediation and mediation consultation. Communications directly between an attorney and client, only, may be admissible if it forms the basis of a professional misconduct or professional negligence action.

The Problem: The California Supreme Court in *Cassel v. Superior Court* (2011) 51 Cal.4th 113 holds that mediation confidentiality applies to communications between lawyer and his/her client during the mediation process. However, in the concurring opinion Justice Chin states that he questions whether the Legislature fully considered whether attorneys should be shielded from accountability this way. He invites the Legislature to consider better ways to balance the competing interests rather than simply providing that an attorney's statements made during mediation to the client may never be disclosed. As the majority notes, the Legislature remains free to reconsider this question and it may well wish to do so.

Communications directly between a client and an attorney only, should be admissible and subject to disclosure if there is a pending malpractice or disciplinary action against the attorney. Only those communications between the client and attorney, means that opposing counsel and mediator shall not be subpoenaed as provided for in Evidence Code sections 1119 and 1127. This section will not create an exception to the confidentiality provisions, but address the admissibility of such communications between attorney and client to form the basis of a malpractice action. To hold otherwise, would seriously impair and undermine not only the attorney-client relationship but would likewise create a chilling effect on the use of mediations. In fact, clients would be precluded from pursuing any remedy against their own counsel for professional deficiencies occurring during the mediation process as well as representations made to the client to induce settlement.

The court in Porter *v. Wyner* (2010) 183 Cal.App.4th 949 reasoned that, "If the mediation confidentiality sphere were to be extended to the attorney-client relationship it would render

[Evidence Code] section 958 a nullity. Evidence Code section 958 provides that there is no privilege under this article as to a communication relevant to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship. The mediation process and its attendant confidentiality would trump the attorney-client privilege and preclude the waiver of it by the very holder of the privilege. This would create a rather anomalous situation wherein a well-established and recognized privilege and waiver process is thwarted by a nonprivileged statutory scheme designed to protect a wholly different set of disputants. This resolution will clarify *Cassel* regarding the admissibility of attorney-client communications during the mediation process in a subsequent legal malpractice action.

IMPACT STATEMENT
The proposed resolution does not affect other law, statute or rule.

AUTHOR AND/OR PRMANENT CONTACT: Elizabeth A. Moreno, 6080 Center Drive, Ste. 600, Los Angeles, CA 90045, emoreno@eampc.com, (310) 444-3804

RESPONSIBLE FLOOR DELEGATE: Elizabeth A. Moreno

* * * * * *

AMENDING GROUP: Los Angeles County Bar Association

- Inserted the phrase "<u>, in a State Bar disciplinary action, an action for legal malpractice, and/or an action for breach of fiduciary duty,</u>" into the original resolution
- Did not delete or alter any language

ASSEMBLY BILL No. 2025

Introduced by Assembly Member Wagner

February 23, 2012

An act to amend Section 1120 of the Evidence Code, relating to evidence.

LEGISLATIVE COUNSEL'S DIGEST

AB 2025, as introduced, Wagner. Evidence: admissibility.

Under existing law, when a person consults a mediator or mediation service for the purpose of retaining mediation services, or when parties agree to conduct and participate in a mediation for the purpose of compromising, settling, or resolving a civil dispute, anything said in the course of the consultation for mediation services or in the course of the mediation is not admissible in evidence nor subject to discovery in any other action or proceeding. Existing law provides that evidence that is otherwise admissible is not inadmissible solely because it was introduced or used in a mediation or mediation consultation. Additionally, existing law provides that an agreement to mediate a dispute or to extend the time within which to act or refrain from acting in a civil action is admissible, as is the mere fact that a mediator served, is serving, will serve, or was contacted about serving as a mediator in the dispute.

This bill would provide that communications between a client and his or her attorney during mediation are admissible in an action for legal malpractice or breach of fiduciary duty, or both, and in a State Bar disciplinary action, if the attorney's professional negligence or misconduct forms the basis of the client's allegations against the attorney.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

The people of the State of California do enact as follows:

SECTION 1. Section 1120 of the Evidence Code is amended to read:

1120. (a) Evidence otherwise admissible or subject to discovery outside of a mediation or a mediation consultation shall not be or become inadmissible or protected from disclosure solely by reason of its introduction or use in a mediation or a mediation consultation.

(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 civil 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) The admissibility in an action for legal malpractice, an action for breach of fiduciary duty, or both, or in a State Bar disciplinary action, of communications directly between the client and his or her attorney during mediation if professional negligence or misconduct forms the basis of the client's allegations against the attorney.

O

ASSEMBLY JUDICIARY COMMITTEE
MANDATORY INFORMATION WORKSHEET

*****IMPORTANT NOTE*****

THIS FORM MUST BE FULLY COMPLETED AND HAND-DELIVERED TO THE COMMITTEE NO LATER THAN SEVEN (7) CALENDAR DAYS AFTER IT IS INITIALLY DELIVERED TO THE AUTHOR'S OFFICE. IF THE BILL HAS BEEN SET FOR HEARING, IT SHALL CONSTITUTE AN AUTHOR'S RESET IF A SATISFACTORY WORKSHEET OR OTHER REQUESTED INFORMATION HAS NOT BEEN TIMELY RECEIVED BY THE COMMITTEE.

ALL SUBSTANTIVE AUTHOR'S AMENDMENTS MUST BE HAND-DELIVERED TO THE COMMITTEE IN LEGISLATIVE COUNSEL FORM (ORIGINAL AND EIGHT COPIES) WITHIN SEVEN (7) CALENDAR DAYS PRIOR TO THE HEARING. FAILURE TO DO SO MAY RESULT IN AN AUTHOR'S RESET.

THE COMMITTEE RECORDS THE DATE THIS WORKSHEET IS DELIVERED, THE DATE IT IS RETURNED, AND THE DATE THE COMMITTEE RECEIVES AMENDMENTS.

PLEASE RETURN COMPLETED WORKSHEETS TO THE COMMITTEE BY EMAIL TO SABA.HASHMAT@ASM.CA.GOV. PLEASE ALSO HAND-DELIVER TWO (2) COPIES OF THIS WORKSHEET AND ANY SUPPORTING DOCUMENTS TO THE COMMITTEE.

ASSEMBLY JUDICIARY COMMITTEE, 1020 N Street (LOB), Room 104

Bill Number: AB 2025 Author: Gorell/Wagner

Author's staff person: Sam Chung (Gorell) phone: 319-2037
e-mail: Samuel.Chung@asm.ca.gov

1. What do you see as the key issue(s) raised by the bill.

   SHOULD AN EXCEPTION BE CREATED TO THE ABSOLUTE GRANT OF CONFIDENTIALITY CURRENTLY CONTAINED IN EVIDENCE CODE §1120 TO PERMIT USE OF ATTORNEY-CLIENT COMMUNICATIONS MADE DURING MEDIATION IN SUBSEQUENT PROFESSIONAL NEGLIGENCE OR STATE BAR DISCIPLINARY ACTIONS, TO PROTECT THE PUBLIC BY PERMITTING ATTORNEYS PARTICIPATING IN MEDIATION TO BE HELD ACCOUNTABLE FOR INCOMPETENT OR FRAUDULENT ACTIONS DURING THAT MEDIATION?

2. Please provide a statement of the author's purpose for the bill, which may be used in the Committee's analysis, including *in detail* the problem or deficiency in the current law that the bill seeks to remedy, and how the bill resolves the problem.

   The purpose of AB 2025 is to specify that communications between a client and his or her attorney during mediation are admissible in an action for legal malpractice or breach of fiduciary duty, or both, and in a State Bar disciplinary action, if the attorney's professional negligence or misconduct forms the basis of

the client's allegations against the attorney. The bill responds to the California Supreme Court's decision in Cassel v. Superior Court *(2011) 51 Cal.4th 113, which held that the plain language of Evidence Code §1120 compelled it to find that attorney-client confidentiality in a mediation was absolute, but strongly suggested that the Legislature change the statute.*

The problems absolute confidentiality creates were identified by California Supreme Court Justice Ming Chin in his concurring opinion in Cassel:

> *"The court holds today that private communications between an attorney and a client related to mediation remain confidential even in a lawsuit between the two. This holding will effectively shield an attorney's actions during mediation, including advising the client, from a malpractice action even if those actions are incompetent or even deceptive. Attorneys participating in mediation will not be held accountable for any incompetent or fraudulent actions during that mediation unless the actions are so extreme as to engender a criminal prosecution against the attorney. . . This is a high price to pay to preserve total confidentiality in the mediation process.*
>
> *"Accordingly, I agree with the majority that we have to give effect to the literal statutory language. But I am not completely satisfied that the Legislature has fully considered whether attorneys should be shielded from accountability in this way. There may be better ways to balance the competing interests than simply providing that an attorney's statements during mediation may never be disclosed. For example, it may be appropriate to provide that communications during mediation may be used in a malpractice action between an attorney and a client to the extent they are relevant to that action, but they may not be used by anyone for any other purpose. Such a provision might sufficiently protect other participants in the mediation and also make attorneys accountable for their actions. . .*

AB 2025 responds to the dangers outlined by Justice Chin in the manner he outlined as a way to address the issue.

The effect of Cassel *is exactly what the court warned against in Porter v. Wyner (2010) 183 Cal.App.4th 949, "If the mediation confidentiality sphere were to be extended to the attorney-client relationship it would render [Evidence Code] section 958 a nullity Evidence Code section 958 provides that there is no privilege under this article as to a communication relevant to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship. The mediation process and its attendant confidentiality would trump the attorney-client privilege and preclude the waiver of it by the very holder of the privilege. This would create a rather anomalous situation wherein a well-established and recognized privilege and waiver process is thwarted by a nonprivileged statutory scheme designed to protect a wholly different set of disputants."*

3. Who is the sponsor of the bill? If there is no sponsor, what person or entity requested that the bill be introduced? Please provide the name and telephone number of any sponsor or other person who may be contacted by the Committee for information regarding the bill.

Conference of California Bar Associations
Larry Doyle, Legislative Representative
Phone: (916) 761-8959

Fax: (916) 583-7672
Email: Larry@larrydoylelaw.com)

4. Please show the results of an Inquiry search regarding each similar and/or related bill (for example, same key words and/or code section) that has been introduced in this legislative session, or in any prior legislative session covered by the Inquiry system. (When using the Bill Search function in Inquiry, be sure to check the "all versions" button in the dialog box that appears after you choose the "word" search criterion.) Please include the bill number and year, a summary of the bill's contents, and the disposition of each bill.

Code section added by Stats. 1997, Ch. 772, (AB 939, Ortiz), Sec. 3. Effective January 1, 1998.

5. Please identify and summarize all similar or related pending federal legislation (see http://thomas.loc.gov/home/thomas2.html) and any bills or existing laws you are aware of in other states.

None known.

6. Please summarize and show the results (by citation) of a computer search regarding all existing California statutes (http://www.leginfo.ca.gov/calaw.html) and all existing federal statutes (http://www4.law.cornell.edu/uscode/) relevant to this bill. Please also indicate any relevant court decisions.

AB 2025 responds to the California Supreme Court's decision in Cassel v. Superior Court (2011), 51 Cal.4th 113, where the court found that the plain language of Evidence Code §1120 compelled it to find that confidentiality between mediator and client was absolute, but strongly suggested that the Legislature change the statute.

According to the Senate Judiciary Committee analysis of the bill, AB 939 of 1997-98, which added Evidence Code §1120, arose out of a conflict among two appellate court decisions which created confusion in the enforcement of oral settlement agreements in mediation proceedings and left uncertain the confidentiality of those proceedings. See Regents of UC v. Sumner *(1996), 42 Cal.App.4th 1006, and* Ryan v. Garcia *(1994), 27 Cal.App.4th 1006. The California Law Revision Commission studied the conflict and determined that evidentiary provisions governing mediation confidentiality needed reform in order to eliminate ambiguities. See Mediation Confidentiality -- (January 1997) [Pub. #193].*

7. Are the issues addressed by the bill the subject of pending litigation? If yes, please indicate the status of the pending litigation and how the bill would affect the pending litigation. Please also provide the case citation and any relevant documents.

No. Cassel (mentioned in #6 above) was decided in 2011.

8. Have there been any informational hearings on the subject matter of the bill? If so, when? Please attach all information distributed by the Committee that held the hearing.

No.

9. Please describe all amendments the author currently wishes to make before this bill is heard in Committee. (Please recall that amendments must be hand-delivered to the Committee in Leg Counsel form at least 7 calendar days before the bill is to be heard.)

The author is considering amendments that would more closely conform California's standard to the provisions of the Uniform Mediation Act developed by the National Conference of Commissioners on Uniform State Laws (NCCUSL). See UMA Section 4 and comments.

10. Please summarize any studies, reports, statistics or other evidence showing that the problem exists and that the bill will properly address the problem. Please also attach copies of all such evidence and/or state where such material is available for reference by Committee counsel.

See Cassel *above. See also Section 4 of Uniform Mediation Act developed by the National Conference of Commissioners on Uniform State Laws (NCCUSL).*

11. Please list all groups, agencies or persons that have contacted you in support or in opposition to the bill. Please attach copies of all letters of support and opposition.

Conference of California Bar Associations supports the bill. No other formal support as yet received.

No letters of opposition have yet been received, though we have received notice that the California Dispute Resolution Council is opposed to the bill.

12. Please describe any concerns that you anticipate may be raised in opposition to your bill, and state your response to those concerns.

We have not yet received an articulation of the concerns that CDRC proposes to raise against the bill.

13. Please list the name, organization and telephone number of all witnesses that you anticipate will testify in support or opposition to the bill. (Please note that the Committee limits the number of testifying witnesses to 2 per side. Additional witnesses may identify themselves for the record.)

Larry Doyle, Conference of California Bar Associations, 916.761.8959
Elizabeth A. Moreno, Beverly Hills Bar Association, 310.444.3804

PLEASE REMEMBER TO EMAIL THIS COMPLETED WORKSHEET, AND ALSO DROP OFF 2 HARD COPIES TO THE COMMITTEE. TYPE AS DETAILED RESPONSES AS POSSIBLE. THANK YOU VERY MUCH FOR YOUR ASSISTANCE.

California Law Revision Commission
Attn: Barbara S. Gaal, Staff Counsel
4000 Middlefield Road, Room D-2
Palo Alto, CA 94303-4739

September 21, 2012

Re: Study on Mediation Confidentiality

Dear Commission Members and Staff,

Purpose. This letter is intended to assist the Commission in its initial work of deciding the scope of its study and allocation of resources in response to the new topic of mediation confidentiality in the Legislature's regular Commission authorization resolution, ACR 98 of 2012.

History of Referral. This topic was added to ACR 98 by incorporating the language of AB 2025 as amended May 10, 2012. This language in turn was compromise language entirely replacing the original text of AB 2025, which would have added a new exception to mediation confidentiality by amending section 1120 of the Evidence Code. Section 1120 was part of a set of fourteen interrelated Evidence Code sections, 1115-1128, sponsored by the Commission in 1997 to define and govern mediation in California.

These fourteen statutes were adopted unanimously by the Legislature and later upheld unanimously five times in challenges heard by the California Supreme Court. They have been in force unamended since they took effect January 1, 1998. AB 2025 as introduced would have amended them to allow use of mediation communications between attorney and client in later actions against the attorney.

Scope of Referral? A threshold question for the Commission is the scope of its study. ACR 98 begins describing this new topic as "Analysis of the relationship under current law between mediation confidentiality and attorney malpractice and other misconduct...". Given the background of AB 2025, it seems clear that this phrase refers to alleged attorney malpractice and other attorney misconduct, rather than a much wider scope involving possible later allegations of misconduct in mediation against any party, accompanying family member, expert witness, or other participant.

Mediation is now used very widely in California, thanks in part to the protections for candid communication which Evidence Code sections 1115-1128 together provide. If the Commission were to open up the study to cover the much larger scope of whether mediation communications should be admissible in later actions against any and all participants, it would almost certainly require the allocation of a great deal more resources and time. The Commission might be well served to decide this scope question as early as possible so as not to unnecessarily alarm and draw in all those who currently use, conduct, or benefit from mediations conducted under the current statutory protections.

Resources - Opposition to Amendment. The standard legislative history record for AB 2025 could be misleading. For instance, the Bill Analysis states there was no registered support or opposition to AB 2025 as amended to refer this matter to the Commission. Respectfully submitted for the Commission's study are copies of all statements of support and opposition to the original introduced version of AB 2025 in the Assembly Judiciary Committee files (as supplied by the Committee Secretary, and which includies the bound sampling submitted).

There was a single letter of support from one individual. There were more than sixty statements of opposition to the original bill submitted to the Legislature. These were from the California Employment Lawyers Association, California Lawyers for the Arts, the Southern California Mediation Association, the Association for Dispute Resolution of Northern California, and dozens of lawyers, court personnel, mediators, mediation program directors, and others.

In allocating resources for this study, the Commission could reasonably expect there to be significant opposition to amending the current statutes. Since their enactment all mediation participants, including attorneys, have been free to speak candidly in mediation without fear that their words might be used against them in any later non-criminal proceeding. In the submitted statements, those involved in mediation affirmed that this has been centrally important to the effectiveness of mediation. Echoed in many of the submitted statements, my own view was that proponents had not adequately considered the complexity of this area and the consequences of their proposed amendment.

Evidence? Initial Study. This current system has been operating for fourteen years. Has attorney misconduct now become a significantly large problem in the real world that revision of these statutes is in the public interest?

The Commission might also be well served by an initial investigation. Is there evidence that actual attorney misconduct in California mediations happens significantly often where a remedy is unavailable because of the current statutes? If so, what is the nature of the actual problem? Does it happen often enough that this harm outweighs the public benefit of all participants knowing they're able to talk off the record in mediation? John Blackman's March 15 letter, Richard Collier's March 30 letter, and the April 11 letter from the California Employment Lawyers Association (enclosed) are representative of those with significant relevant experience who believe the problem is very small and the public benefit that will be lost is very large.

Offer. I've been regularly leading discussions of the public policy questions involved in mediation confidentiality for over twenty years. I served as an expert advisor to the Commission in its study and drafting of the current mediation statutes. I was actively involved in nearly all of the drafting meetings for the Uniform Mediation Act. Enclosed is a 1996 letter from the Commission's Executive Director on my work with the Commission. He states in part:

> Your assistance in this project has been critical. You have brought problems to our attention, suggested solutions, provided background on issues, and analyzed proposals. You have always been fair and even-handed in this effort.

I hope to again be of assistance to the Commission in its study of this topic.

Respectfully submitted,

Ron Kelly

Ron Kelly
2731 Webster St.
Berkeley CA 94705
510-843-6074

CALIFORNIA LAW REVISION COMMISSION
4000 MIDDLEFIELD ROAD, ROOM D-1
PALO ALTO, CA 94303-4739
(415) 494-1335 Fax: (415) 494-1827
Email: *addressee*@clrc.ca.gov

December 18, 1996

Ron Kelly, Mediator
2731 Webster Street
Berkeley, CA 94705

Re: Mediation law

Dear Ron:

I want to thank you for your participation as an expert adviser in the Law Revision Commission's project to revise California mediation law.

As you know, our basic Evidence Code mediation protections were enacted a number of years ago on recommendation of this Commission. Since that time mediation has grown tremendously in importance. The Commission is now recommending to the Governor and the Legislature revisions of the law intended to preserve the effectiveness of mediation for dispute resolution.

Your assistance in this project has been critical. You have brought problems to our attention, suggested solutions, provided background on issues, and analyzed proposals. You have always been fair and even-handed in this effort. Your experience as a mediator, your background as a drafter and sponsor of several of the current code sections, and your knowledge of the legislative history of the current law in this area have been a tremendous resource to us.

Thank you again for all your help and many hours of dedicated work to improve the California law of mediation.

Sincerely,

Nathaniel Sterling
Executive Secretary

File: K-401

DONALD F. FARBSTEIN
MICHAEL A. FARBSTEIN
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MAR 19 2012

March 15, 2012

Assemblyman Mike Feuer
Chair, Assembly Judiciary Committee
P.O. Box 942849, Room 2013
Sacramento, CA 94249-0042

Via U.S. Mail and Fax at 916-319-2188

Re: **Opposition to AB 2025**
(Amendment to Evid. Code § 1120, Mediation Confidentiality)

Dear Assemblyman Feuer and Other Committee Members:

I write to register my strong opposition to AB 2025.

I have specialized in handling professional liability cases throughout my 27-year career as a trial attorney, including hundreds of legal malpractice cases. I have acted as a mediator in over 400 disputes. I was a member of the Judicial Council working group that drafted the ethical standards for mediators in court-connected mediation programs (Cal. Rules of Court 3.850 *et seq.*). I was President of the California Dispute Resolution Council (CDRC) in 2006. I was President of the San Mateo County Bar Association in 2003, and from 1992 to 2002 I was Chair of that Bar Association's ADR Section. As a member of CDRC's Public Policy Committee and as a member of its Board of Directors, I have studied the issue of mediation confidentiality for many years, and I have co-authored and advised on several amicus briefs and amicus letters to the California Supreme Court on that subject.

AB 2025 must be rejected, and here is why.

AB 2025 provides an extraordinarily broad exception to mediation confidentiality, way out of proportion to the perceived injustice it is designed to overcome. It would create more opportunities for unfairness than it would alleviate, at a brutal cost to the effectiveness of mediation overall.

In all the legal malpractice cases I have handled in the last 27 years, either for a party or as a mediator, I can think of only two situations where mediation confidentiality might have

impaired a party's ability to prosecute or defend a potential legal malpractice claim. Ironically, the only situation I have ever encountered where the situation was serious was a case where *the attorney* might have been precluded from defending himself against a bogus legal malpractice claim – not the other way around as AB 2025 has it.

So how unfair would AB 2025 be *to attorneys* who, for example, suffer harm from reasonably relying on things a client tells them during a mediation, or who suffer the fate of the attorney described above, only to find themselves unable to defend themselves or enforce a right against a client because the mediation communication is inadmissible. (Although to be honest, that probably doesn't happen much more often than the situation AB 2025 purports to address, and I don't recommend amending AB 2025 to include even more exceptions to Evidence Code § 1120.)

It is not as if malpractice occurring exclusively during a mediation session is a common occurrence that is crying out to be addressed. And it is not as if there are hordes of attorneys out there just waiting to take advantage of clients during mediations so they can get away with malpractice, armed with the knowledge that what they say to their client will never be admissible against them. Have I ever witnessed malpractice being committed in a mediation? Yes, but I can count these instances on one hand. On the other hand, have I ever witnessed malpractice being committed in a mediation that could not also easily be proven with evidence of events outside the mediation? No.

Mediation is by far and away the best and most effective process we have as a society for getting disputes resolved. A huge part of the power and efficacy of mediation revolves around the trust that is created between the mediator and the participants, and ultimately among the participants themselves. Mediation also derives much of its power from the fact that participants can be candid, and can open up to the mediator and others without fear that something they say might come back to haunt them, or get them sued, or lead to yet more litigation, or undo the settlement agreement they reach, and so on.

If I had to open my mediations not with a speech about strict confidentiality and the power of candor and trust, but instead with having to warn participants that what they say might be used against them in a court of law someday – or worse, having to warn participants that if the *other* guy gets into a spat with his attorney they too might be dragged into that battle, and they could be sued or subpoenaed to testify in court about it, and so on – that would cast a pall over the process from the very outset, and mediation would lose one of its most powerful qualities. Mediation would turn from a very valuable healing process into just one more divisive game that could be played, one more grenade to launch on the litigation

playing field.

While the intention behind AB 2025 is well-taken (it is based on a desire to be fair, and who can argue with that?) – nonetheless exceptions like the one that would be created under AB 2025 can easily become tools for the unscrupulous. Do you have settlor's remorse? Just allege that your attorney did something wrong; all of a sudden, because testimony about what was said in mediation is admissible, the client can now say, oh boy, look what power and leverage I now have to upset this settlement, or to get what I want – this new Evidence Code section says I can sue people and issue subpoenas, and my opponents won't like that, so they'll cave in to my demands. True, AB 2025 as currently written does not open other mediation participants to having to give testimony, but you know that would be coming next.

Proponents of AB 2025 could ask me, 'How could you possibly be against the ability to bring relevant evidence into a legal proceeding, which could help the trier of fact see what really happened, and help them reach a just result?' My response is to point out a parallel situation which is familiar to us all: the attorney-client privilege. How many times would 'justice have been served,' or would 'the truth have come out' if only attorneys could be forced to testify as to exactly what their client told them had actually happened? Too many times to count. Yet we have no problem at all with the exclusion of this evidence from trial, even though everyone knows that it baldly 'prevents the truth from coming out.' Why do we put up with that? Because the public policy of allowing *complete confidentiality* between attorneys and their clients is what makes the legal system work, and it wouldn't work without it. Although mediation confidentiality is not a privilege, for purposes of our analysis the principle is not that much different: the vital public good served by it far outweighs the rare instances where it might work some degree of unfairness in a particular individual case.

Mediation confidentiality leads to far fewer 'casualties to truth and fairness' than does the attorney-client privilege or other similar evidentiary privileges which we happily tolerate day in and day out. Certainly we can allow Evidence Code section 1120 to stay as it is, without causing harm to society. Not only does the situation AB 2025 purports to address barely exist, but we already allow similar exclusions on a much grander scale, even in the context of high crimes and matters of life and death.

To follow up on a point made above, if the proposed amendment were to become law, I guarantee you there would be many more instances of people using such an exception to threaten or to file litigation, to bully other people into changing agreements, or into

bending over and succumbing to threats, than there would be instances of 'the truth' winning out over unfairness when an attorney commits malpractice against their client during a mediation, and that malpractice could not be proven with evidence outside the mediation.

And here is an even stronger point: While abuse of this exception by unscrupulous people could present a problem, I think the greater danger could come from the possibly well-intentioned but uninformed client. Attorneys can all tell many tales about how many times they have had to try to talk a client out of an unreasonable position, or how many times they have had to 'pressure' their client not to shoot themselves in the foot, and to make or accept a particular settlement that the client doesn't really like, or isn't emotionally ready to accept. Do you really want to have AB 2025 give *carte blanche* for litigation every time a client is supposedly 'pressured' by an attorney to take less or pay more in a settlement than they want to? The transference phenomenon, where the upset client in litigation blames his or her attorney or someone else for their predicament is something we have all experienced. Do we really need to add more fuel to that flame?

Here is a perfect example of the slippery slope this amendment would put us on: Recently I presided as arbitrator in a Mandatory Fee Arbitration in which the client claimed the attorney should disgorge her contingent fee because the attorney had supposedly pressured the client into taking a settlement that was too small. I denied the client's claim for other reasons, but it was painfully apparent to me that the client – who actually was quite intelligent, well-meaning and in no way malicious or conniving – had managed to convince himself that he would have been such a powerful witness, and the facts of his case were so shockingly in his favor, that certainly the attorney should have gotten him at least $800,000 for his (lousy) wrongful termination case instead of the 'measly' $200,000 that she got for him. From my standpoint it was clear that the attorney had actually done a huge favor to this somewhat surly, unlikeable client by getting him a settlement that was quite grand given the circumstances. There was no way the unsophisticated and very angry client could appreciate just how lucky he was – yet there he was, trying to sue the lawyer for 'forcing' him to settle for 'only' $200,000, when the case probably could have been defensed if the defendant had held out and taken it to trial.

In considering the potential effect of AB 2025, we need to be aware of the fact that as many times as an injured client might be able to fairly introduce mediation communications against his or her attorney in a subsequent legal malpractice case, there would be even more instances where an uninformed or unscrupulous client would be able to use this new law as a wedge or cudgel to bring yet *more* litigation, or to gain more unfair leverage or

advantage.

But the purpose of mediation confidentiality in California is not to prevent unjust lawsuits, it is to give power and integrity to the mediation process. Mediation has flourished in the State of California in the last 20 years, leading to a veritable renaissance in the ability of people of all stations, all incomes, to get a decent shot at justice. Mediation has become a healthy, vital branch of our judicial system, both in the public and private sector. Mediation has been incredibly successful in clearing court dockets by preventing more cases from going to trial, and doing it sooner and without involving as many court resources as in the past.

Why would we want to jeopardize the efficacy of mediation for everyone, simply in order to provide a theoretical remedy for a potential injustice that almost never actually happens? AB 2025 is a bomb designed to swat a fly, and the collateral damage it would cause to the effectiveness of mediation could never be justified.

I emphatically ask the Assembly Judiciary Committee to say "No" to AB 2025. The very future of mediation depends upon it.

Very truly yours,

JOHN SOMERS BLACKMAN

cc: Ron Kelly
Doug Noll, President, CDRC

COOPER WHITE & COOPER

Direct Line: (415) 765-6220
E-Mail: rcollier@cwclaw.com

March 30, 2012

Assemblyman Mike Feuer
Chair, Assembly Judiciary Committee
Room 2013 State Capitol
Sacramento, CA 95814

Re: **AB 2025**

Dear Assemblyman Feuer:

I write as someone who offers mediation services to express my opposition to Assembly Bill 2025.

The premise of my opposition is the critical importance of confidentiality to the effectiveness of the mediation process. I always have participants sign a Confidentiality Agreement to emphasize that while they are working with me we can probe, challenge, change positions without fear of having to account for our words or conduct outside the mediation. Because I can thus create a safe place for negotiation, some 90% of my mediations produce settlements. Other than the few publicized situations in the court cases, I have never encountered conduct that might lead to a malpractice case. The need for AB 2025 is not there.

Moreover, rather than curing a perceived injustice, AB 2025 causes one. By allowing testimony in a professional malpractice case regarding exchanges between an attorney and a client at a mediation, the proposed exception to confidentiality distorts what happened by presenting that testimony out of the essential context of exchanges with the mediator or with the other parties.

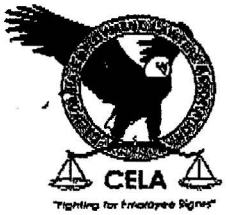
Mediation works. It saves participants and the court system time and money. Disincentives to mediation should be discouraged. If I have to begin every mediation by explaining the possibility raised by AB2025 that the confidentiality we all want and agree to may be breached, my commitment to the process and its effectiveness will be seriously compromised.

Yours sincerely,

Richard J. Collier

Richard J. Collier

RJC:jd
683471.1



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manko@cela.org

April 11, 2012

Honorable Mike Feuer, Chair
Assembly Judiciary Committee
State Capitol, Room 2013
Sacramento, CA 95814

RE: AB 2025 (Wagner) – OPPOSE

Dear Chairperson Feuer:

The California Employment Lawyers Association ("CELA") strongly opposes AB 2025 (Wagner), which will soon be heard in the Assembly Judiciary Committee. This bill would provide that communications between a client and his or her attorney during mediation are admissible in an action for legal malpractice or breach of fiduciary duty, or in a State Bar disciplinary action, if the attorney's professional negligence or misconduct forms the basis of the client's allegations against the attorney.

This bill would undo the California Supreme Court decision in *Cassel v. Superior Court, 51 Cal. 4th 113 (2011)*. As stated by the Court in *Cassel*, "Section 1119 governs the general admissibility of oral and written communications generated during the mediation process. Subdivision (a) provides in pertinent part that "[n]o evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation . . . is admissible or subject to discovery, and disclosure of the evidence shall not be compelled, in any . . . civil action . . . ." (Italics added.) Subdivision (b) similarly bars discovery or admission in evidence of any "writing . . . prepared for the purpose of, in the course of, or pursuant to, a mediation . . . ." Subdivision (c) of section 1119 further provides that "[a]ll communications, negotiations, or settlement discussions by and between participants in the course of a mediation . . . shall remain confidential." (Italics added.) Exceptions are made for oral or written settlement agreements reached in mediation if the statutory requirements for disclosure are met. (§§ 1118, 1123, 1124.)

The court went on to state, ". . .[T]he purpose of these provisions is to encourage the mediation of disputes by eliminating a concern that things said or written in connection with such a proceeding will later be used against a participant."

Assembly Bill 2025 would change the statute so that conversations and writings between a litigant and counsel in mediation would be admissible in a malpractice lawsuit between that litigant and counsel. We believe that this would be counter-productive, hinder settlement prospect and add to the workload of a court system that is both underfunded and overburdened.

Our membership (over 1000 strong) consists of attorneys in California who represent employees' interests. As a group we have litigated tens of thousands of cases over the years. Many of these cases were settled through mediation. For a mediation to be successful, each side participating in it must be able to freely discuss its case without fear that what is said will come back to hurt them in later proceedings. This freedom is

not only necessary when conveying proposals arguments ideas and positions across the table – it is just as important that there be a free exchange of ideas on the same side of the table.

If an attorney is to participate with one eye looking backward at a possible malpractice lawsuit from his or her own client, this will hamper the freedom to communicate to the mediator and to the other side. Rarely, if ever, are communications between attorney and client in a mediation setting reduced to a writing. If such communications are fair game for a later malpractice action, an attorney will be extremely circumspect in what is discussed with a client. It will be necessary for an attorney to bring a recording device to the mediation in order to have a record of what had been said in that party's room, because sometimes buyer's or seller's remorse can cause a client to later reject what that client originally agreed to and blame the attorney. It is not beyond contemplation that, based on memory alone, a client's version of what was said by an attorney will be different from an attorney's memory, especially when there is a conflict between them.

If this is the way mediations are to be conducted, it is easy to predict that the sleeves-rolled-up, informal nature of mediation will change, and for the worst. From experience, we believe if this bill is enacted into law, mediation proceedings will be far less successful than before because participants will reluctant to explore various methods of settlement without making sure the record is protected. Free-ranging discussions of a case's weaknesses and strengths, and the client's prospects will come to an end. They very possibility of a party or attorney recording everything that is said in a mediation caucus room will chill the entire proceeding.

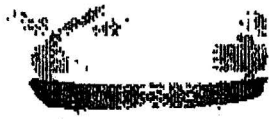
This change in the fundamental nature of mediation will, of course, lead to less success in the settlement of cases. That in turn will lead to more cases going to trial, increasing the burden on California's already burdened trial courts. In these days of decreased funding for the court system, it would be unwise to further encumber the courts in this way.

We firmly believe that the laws protecting mediation confidentiality are strongly beneficial and are important to the success of mediation in settling cases, and thus strongly oppose AB 2025.

Sincerely,

MARIKO YOSHIHARA
CELA Political Director

CC: Members of the Assembly Labor Committee



SCMA
Southern California Mediation Association

May 3, 2012

Assembly Member Mike Feuer, Chair
Assembly Judiciary Committee
State Capitol
Sacramento, CA 95814
Fax No. (916) 319-2188

Assembly Member Jeff Gorell
State Capitol
Sacramento, CA 95814
Fax No. (916) 319-2137

Re: Southern California Mediation Association - Oppose AB 2025

Dear Chairman Feuer and Assembly Member Jeff Gorell:

The Southern California Mediation Association (SCMA) is California's largest professional association of mediators, founded over 20 years ago as a non-profit organization to promote and support mediation. Its members have a unique breadth and depth of experience with mediation, which renders especially thoughtful and compelling their views on pending legislation which affects their field. As SCMA's president I write to express its strong opposition to AB 2025.

One of the hallmarks of mediation is that resolution of the dispute is voluntary: the mediator does not decide the matter, issue any orders, declare who is right or wrong, or tell the parties what to do, let alone give legal advice. Another hallmark of mediation is that the process is confidential: the parties - and their counsel - can be as candid as they want to be with each other and with the mediator in an effort to hammer out a resolution, without fear that their settlement efforts can be used against them later. The goal here must be to encourage people and institutions to use this process to address their disputes, not only to resolve their own conflicts but also to relieve the already overburdened court system.

The concept of AB 2025 is superficially appealing, and we applaud the legislature's desire to protect the public: no one wants unscrupulous attorneys to get away with malpractice just because it occurs in the context of a mediation. This has hardly been a pressing problem in our state, however; and the bill as drafted potentially does way more harm than good by eroding mediation confidentiality. This impact should not be taken lightly, and the bill certainly should not be rushed. The ramifications of this proposed legislative change were not thought through by the drafter. Unless the Judiciary Committee gives this bill more time for research and analysis, the bill may become law without having been thought through by the legislature either. The bill raises many questions and answers none. Consider:

1. The bill as drafted makes an exception to mediation confidentiality for "communications directly between the client and his or her attorney" in a subsequent malpractice or disciplinary action. It does not specify whether it is only the client who can testify to these communications or whether the attorney can also testify. If this bill, alone or in combination with other statutes, is interpreted to allow only the client to testify to these communications and the attorney cannot defend himself or herself, doesn't it violate due process?

2. The bill also does not state who else might be called to testify about the communications. If the communications at issue were made in front of other parties to the mediation or opposing counsel, does the bill contemplate that they can be brought in to testify in support of either the client or the attorney?

3. Does it matter whether the communications were made in front of the mediator? If they were, does the bill contemplate that the *mediator* could be called to testify? What, then, would be the relationship between this bill and Evidence Code Section 703.5, which provides that, with certain exceptions, mediators may not testify in subsequent civil proceedings?

4. If all percipient witnesses can be summoned to testify about what happened at the mediation, is there any mediation confidentiality left? If parties and counsel can no longer count on mediation confidentiality, will they not be less willing to participate in mediation? If mediators have to face the specter of being called as witnesses, will they not be less willing to serve on court mediation panels?

5. If parties are less willing to participate in mediation and mediators are less willing to serve, what is the impact on the court system? The Los Angeles County court system is the largest in the country. Last year tens of thousands of mediations were handled by members of the County's court mediator panels.

In a recent survey of SCMA members, 83% of the respondents said that SCMA should oppose this bill. Listen to the mediators, who up and down the state are telling you that this bill as drafted is a bad idea, which most certainly should not leave your committee until the above issues have been thoroughly analyzed and the language revised accordingly.

Respectfully submitted,

Barbara Brown

Barbara Brown
President
Southern California Mediation Association
1430 S. Grand Avenue, # 256, Glendora, CA 91740
Ph: 877-9-Mediate * Email: scmaoffice@yahoo.com * www.scmediation.org

Association for Dispute Resolution of Northern California
a chapter of ACR
601 Van Ness Ave. #E3-102 | San Francisco, CA | 94102-6300
Phone & Fax Message Line 650.745.3842 | www.adrnc.net | Email: adr@adrnc.net

March 26, 2012

VIA FAX

Assembly Member Mike Feuer, Chair
Assembly Judiciary Committee
1020 N Street, Room 104
Sacramento, CA 95814

Assembly Member Donald P. Wagner, Vice-Chair
Assembly Judiciary Committee
1020 N Street, Room 104
Sacramento, CA 95814

Re: AB 2025

Dear Chairman Feuer and Vice Chairman Wagner,

The Association for Dispute Resolution of Northern California (ADRNC) is a member-based organization which promotes alternative disputes resolution in the courts, the community and the broader society. We were initially founded in 1983. Hundreds of practitioners have been among our membership over the years.

I have been requested by the Board of Directors to express our opposition to AB 2025. We believe that the adoption of evidentiary rules making mediation confidential was an important milestone in California jurisprudence. Those rules were the result of extensive discussions and involved public policy tradeoffs. Amending those rules should not be done casually.

The proposed legislation has a well-intentioned purpose: making redress possible for a person whose interests were not well served by their counsel. However, this is a case where the cure is worse than the disease. The effect of this legislation is to: (1) permit an aggrieved client to selectively disclose details of mediation without the consent of other parties, and (2) require the defendant to obtain consent from all the other parties to place in evidence facts that demonstrate that advice given was within the bounds of ethical and competent practice.

If this legislation passes clients represented by attorneys will participate in mediation far less frequently and mediated agreements will be more difficult to reach. Even a very competent attorney who has nothing but the best interests of a client in mind would now be prudent to be cautious about entering into mediation or working to persuade a client of the merits of a mediated agreement; the new legislation places the attorney at substantial risk in the event of a disagreement with the client, unsure as the attorney must be of what information would be available in a disciplinary or other hearing.

As mentioned above, public policy tradeoffs are considered in the current rules. The legal system does not and cannot provide perfect redress for every wrong. Nor does the proposed legislation offer perfect redress for incompetent or unethical counsel. This legislation would compound the existing over burdening of the court. And, most importantly, as it is a well-known fact that a mediated agreement has a much higher compliancy rate than do court orders, this legislation will actually make more work for the courts.

Should the proposed legislation be passed, it will make it even more difficult than at present for mediators and competent and ethical attorneys to work with clients to arrive at agreements that best serve the clients: agreements achieved in consideration of all the circumstances and which help the clients move beyond conflict. On balance, more is achieved by a larger number of individuals participating in mediation than is lost by some number of individuals agreeing to ill-advised resolutions.

We hope that the proposed legislation is not adopted and that the evidentiary rules remain as currently written.

Sincerely,

Ronald A. Nelson, President

California Lawyers for the Arts
Sacramento Mediation Center
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Phone: 916.442.7979
Fax: 916.442.1270
www.calawyersforthearts.org
www.sacmediation.org

APR 11 2012

April 10, 2012

Assembly Member Mike Feuer
Assembly Judiciary Committee
1020 N Street, Room 104
Sacramento, CA 95814

Re: Opposition to AB 2025

Dear Assembly Member Feuer:

California Lawyers for the Arts (CLA) would like to express its opposition to AB 2025, which would amend the Evidence Code to allow communications between attorneys and their clients to be disclosed in malpractice litigation or State Bar disciplinary proceedings.

CLA was founded in 1974 and is a 501(c)(3) non-profit organization that provides legal services, educational programs, and dispute resolutions for artists. CLA also operates the Sacramento Mediation Center, which provides mediation services to the entire Sacramento community. We believe that AB 2025 sets a dangerous precedent that will erode the long-established firewall of mediation confidentiality, ultimately undermining the efficacy and benefits of mediation.

Mediation confidentiality is intended to serve the dispute resolution process by allowing an open discussion on disputed issues and potential solutions. Confidentiality allows parties to be open about these issues, knowing that information shared during mediation will not later become public and cannot be used against them in later proceedings. None of the current exceptions under California Evidence Code 1120 allow content regarding the items discussed during a mediation to become admissible in later proceedings – these exceptions only allow discovery of the most basic information.

AB 2025 would change this by allowing communications between a participant in this mediation and his attorney to be used in a later attorney malpractice suit or State Bar disciplinary proceeding. AB 2025 does not indicate whether this will be limited to private discussions away from other mediation participants, whether this will include discussions in front of other mediation participants, or who or what can be subpoenaed during a later proceeding to provide information regarding communications between the mediation participant and his attorney.

This will also present a question of how a judge can determine which communications from a mediation to disclose, and which communications will remain confidential. Partial admissions of mediation discussions may be unfair to the accused attorney, while complete admissions of mediation communications would undermine all protection of mediation discussions. Currently, mediation is a cost-efficient alternative to court that encourages parties to settle their cases in ways that are acceptable to all parties to the mediation. Without confidentiality provisions, mediation will cease to be a productive way to settle disputes.

Best practices in the mediation field emphasize that, in order to be meaningful and upheld through the parties' commitments, resolutions reached in mediation must be entirely voluntary. There is no place for coercion in the mediation process. CLA follows the California Dispute Resolution Council's Standards of Practice for California Mediators on this point: "If a Mediator believes that the continuation of the process would harm any participant or a third party (such as children in a marital dissolution matter), or that the integrity of the process has been compromised, then the Mediator shall inform the parties and shall discontinue the mediation, without violating the obligation of confidentiality."

AB 2025 is a dangerous step towards eroding the long-established firewall of mediation confidentiality. Allowing exceptions to mediation confidentiality such as the exception for attorney malpractice and State Bar disciplinary proceedings in AB 2025 will make it more difficult for parties to effectively mediate their disputes. Open discussion of issues is necessary for a successful mediation. Parties to mediation will be less likely to discuss their issues freely if statements made during confidential mediation proceedings may later be heard by the public without the consent of everyone involved in the mediation.

CLA respectfully asks that this bill not be passed and not be enacted into law. If you have any questions or if we can provide any further information, please do not hesitate to contact us.

Respectfully submitted,

MJ Bogatin,
Co-President of the Board of Directors

cc: Assembly Member Don Wagner
Assembly Judiciary Committee

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March 25, 2012

Mike Feuer
Chair
Assembly Committee on Judiciary
P.O. Box 942849
Room 2013
Sacramento, CA 94249-0042

Donald P. Wagner
Vice Chair
Assembly Committee on Judiciary
State Capitol
Room 2153
Sacramento, CA 94248-0001

Re: Opposition to AB 2025

Gentlemen:

I write you in opposition to the passage of AB 2025, as a person with 24 years experience mediating cases; 15 years as a litigator who learned the merit of settling cases through mediation and the last nine years as the person in the middle, the mediator of hundreds of cases in the service of our courts here in the Bay Area. I am disturbed with the facility that AB 2025 has been brought to your committee with little, if any, vetting by its proponents. I urge you give it that vetting, seeking the advice and counsel of those individuals best in a position to provide that advice and counsel on the harmful effects AB 2025 will have on our already burdened courts and one of the best tools our courts currently have of keeping their backlog of cases growing even worse during this time of financial stress.

As you are well aware, our courts already are suffering a crushing scarcity of resources. During my 24 years experience, mediation has helped lighten that burden. Mediation produces voluntary resolutions, in line with our democratic ideals of self-determination. With tens of thousands of mediations taking place in California every year, our courts rely heavily on the mediation process to keep from returning to the days when parties were not

likely to see their case come to trial for several years after the filing.

The passage of AB 2025, however, threatens the success of mediation by cutting a hole in our legal protections for mediation communications, specifically, the confidentiality of those communications.

It has been my experience, both as a litigator and later as a mediator, that the ability of any party to the mediation to communicate openly in mediation without fear of their communication being used against them in later court proceedings promotes the success of the mediation process. Everyone can talk frankly because they can be sure they are not creating more evidence to be used against them later, unless, of course, it's a later criminal proceeding, as the law now provides.

It also is my experience that parties often enter negotiations with what they soon realize are unrealistic expectations. Only when faced with the understanding not only of their own strengths and weaknesses, but of the strengths and weaknesses of their opposing parties, learned through the open negotiations guaranteed by the confidentiality of communications, do individuals often realize the folly of their continuing to hold on to positions that are tenuous at best should they continue to trial where 12 strangers then will decide the fate of their dispute. Consequently, lawyers in mediation, through their own experience, often urge their own clients to end their fight. Lawyers often urge their clients to settle for less than the clients believed they could and would get before entering mediation. Currently, lawyers are free to be honest in mediation, even if their clients don't like what they hear; and they very often don't.

If AB 2025 passes, however, a client who does not like hearing his or her attorney tell them their case is worth less than they believed when they entered a mediation will then be able to sue their lawyer for urging them to settle instead of continuing the fight. The client will be free to use these communications between client and attorney as the basis for claims of perceived attorney malpractice merely because the client no longer appreciates the attorney's apparent lack of zeal for the client's cause. The accused lawyer, however, will not be able adequately to defend his or her actions, either by explaining what the mediator or the client's opponents may have said to bring the attorney to conclude settlement at the new terms were in the client's best interests or even by

calling as witnesses in his or her defense the mediator or the client's opponents.

AB 2025 will set up a miserable situation in any later malpractice or State Bar disciplinary claims by a client against his attorney. A trial judge or State Bar tribunal either will have to conduct a completely unfair process or find a way to ignore our current confidentiality protections. Either way is wrong.

In the first instance, a judge might decide that in order to run a fair hearing he or she has to admit into evidence all communications between lawyer and client discussing what they heard from the mediator or other participants, many of which are not permitted even by AB 2025. Thus, confidentiality is destroyed. In the second instance, when the judge lets in only selective mediation communications, i.e., the communications only between attorney and client, the attorney is deprived of those communications that may be necessary to a successful defense.

This is why our current laws were written the way they were and is why they have worked well. Don't change them. Everyone in our state has benefited from the current confidentiality protections for mediation.

Respectfully,

Michael G. Malone

Michael G. Malone
MGM:mgm

From: James McBride <jmcbride@sftc.org>
Date: Wed, 14 Mar 2012 16:07:34 -0700
Subject: AB 2025- OPPOSE

AB 2025 OPPOSE

Dear Chairman Feuer,

I am the Supervising Judge of the Civil Division of the San Francisco Superior Court and a former Presiding Judge. AB 2025 would jeopardize the very sound system of protections that enhance the success of mediation in California. AB2025 poses a serious threat that mediation would become a less successful method of reducing the number of cases brought to resolution by our Courts. As you well know, we are hard pressed to deal with current case loads (San Francisco for one can no loner provide a settlement conference with a judge) and any increase in the cases sent to trial could be the proverbial last straw. I oppose AB 2025 for all the same reasons stated in Ron Kelly's March 13, 2012 letter to the Assembly Judiciary Committee on file.

Respectfully,

James J. McBride
Superior Court Judge
County of San Francisco

[Referenced March 13, 2012 letter to the Assembly Judiciary Committee from Ron Kelly is on following page]

AB 2025 - Want to Make Our Mediations Fail?

Most mediations are already hard for everyone involved. Want to make them fail? They will, if lawyers can't safely urge their clients to settle.

Our courts are already suffering a crushing scarcity of resources. For decades, mediation has helped lighten that burden. Mediation produces voluntary resolutions, in line with our democratic ideals of self-determination. Hundreds of thousands of mediations take place in California every year.

Now AB 2025 threatens that by cutting a hole in our legal protections for mediation communications (proposed change below).

For fourteen years, everyone in a mediation has been able to take a time out from the battle - to talk frankly and off the record - to try to reach a voluntary settlement. Parties, lawyers, witnesses, mediators, experts - everyone can talk off the record. They can talk frankly because they can be sure they are not creating more evidence to be used against them later (unless it's a later criminal proceeding).

Based on what they hear, lawyers in mediation often urge their own clients to end the fight. They often urge their clients to settle for less than the clients believed they could get going in. Lawyers are now free to be honest in mediation, even if their clients don't like what they hear - and they very often don't. This is really important.

If AB 2025 passes, a client who didn't like hearing this could sue their lawyer for urging them to settle instead of continuing the fight. The client would be free to use these communications. But the accused lawyer could not explain what the mediator or the other side said that caused the lawyer to push their client to settle.

AB 2025 would set up a miserable situation in any later malpractice claim. A trial judge or State Bar tribunal would have to either conduct a completely unfair process, or find a way to ignore our current confidentiality protections. Either way is wrong. A judge might decide that to run a fair hearing he or she had to admit into evidence all communications between lawyer and client discussing what they heard from the mediator or other participants.

** If you let in only selective mediation communications, it's completely unfair to the accused. If you let them all in, there's no more confidentiality.** That's why our current laws were written the way they were. That's why they've worked well for fourteen years. Don't change them. Everyone in our state has benefited from the current confidentiality protections for mediation.

As the California Supreme Court found in its recent unanimous Cassel decision upholding our current laws:

...the Legislature might reasonably believe that protecting attorney-client conversations in this context facilitates the use of mediation as a means of dispute resolution by allowing frank discussions between a mediation disputant and the disputant's counsel about the strengths and weaknesses of the case, the progress of negotiations, and the terms of a fair settlement, without concern that the things said by either the client or the lawyers will become the subjects of later litigation against either. The Legislature also could rationally decide that it would not be fair to allow a client to support a malpractice claim with excerpts from private discussions with counsel concerning the mediation, while barring the attorneys from placing such discussions in context by citing communications within the mediation proceedings themselves.

Yes this is formal judicial language, but it hits the nail right on the head.

Thank you,
Ron Kelly, Mediator
2731 Webster St.
Berkeley CA 94705
510-843-6074
ronkelly@ronkelly.com
March 13, 2012

AB 2025 would cut a hole in current mediation confidentiality protections by adding 1120 (b)(4):

Section 1120 of the Evidence Code is amended to read:... (b) This chapter does not limit any of the following: ... (4) The admissibility in an action for legal malpractice, an action for breach of fiduciary duty, or both, or in a State Bar disciplinary action, of communications directly between the client and his or her attorney during mediation if professional negligence or misconduct forms the basis of the client's allegations against the attorney.

NANCY NEAL YEEND

March 21, 2012

Assemblyman Mike Feuer, Chair
Assembly Judiciary Committee
PO Box 942849, Room 2012
Sacramento, CA 94249-0042

Re: Support of AB2025

Dear Assemblyman Feuer and Other Committee Members:

As an introduction, I serve as faculty at the National Judicial College and have for the last 18 years. In addition, I have been mediating civil, non-family, cases for 30 years, and serve on the Court of Appeal, First District's Mediation Program. During my tenure at the National Judicial College, I have worked with judges from every state, and I believe that I have a significant grasp of what is happening nationally with respect to mediation confidentiality, specific exceptions to confidentiality, and what has happened in the many states, which have integrated exceptions into their statutes and rules.

I support the concept of an exception to mediation confidentiality for attorney malpractice. Actually, I could more enthusiastically support AB2025, if it included an additional exception for ***mediator*** malpractice!

Those opposing AB2025 have presented a "parade of horribles," but there is no evidence from any state that has created exceptions for attorney malpractice and/or mediator malpractice to support their speculative claims. I have direct experience mediating in Florida, which has malpractice exceptions—the bill's opponents' claims are not supported by reality. The specious argument that there is no need for AB2025 is also unproven.

Last year's Supreme Court decision: *Cassel v. Superior Court, S178914,* essentially says that attorney malpractice is protected under portions of California Evidence Code 1120 et seq. With malpractice being shielded, one must ask these naysayers, "Does an attorney have an obligation (morally, ethically or legally) to disclose to his/her client that malpractice is protected by the mediation confidentiality statute?" They cannot have it both ways: either create the exception as stated in AB2025, or disclose the fact that malpractice is protected.

If you need a resource on the topic of mediation confidentiality and its exceptions, please know and I will make myself available to the Committee.

Very truly yours,

Nancy Neal Yeend

Nancy Neal Yeend

nny:dlg

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