Study K-402 May 20, 2015

Memorandum 2015-22

Relationship Between Mediation Confidentiality and Attorney Malpractice and Other Misconduct: Further Discussion of California Law

Among other things, the legislative resolution relating to this study directs the Commission[1] to consider (1) Evidence Code Section 958 and its predecessors and (2) the "availability and propriety of contractual waivers."[2] This memorandum provides background information on those topics. The memorandum also discusses a few other aspects of California law that are relevant to the ongoing study and were not included in previous memoranda.

The memorandum is organized as follows:

The following materials are attached as Exhibits:

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

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

2. 2012 Cal. Stat. res. ch. 108 (ACR 98 (Wagner)).

EVIDENCE CODE SECTION 958

Evidence Code Section 958 is an exception to the lawyer-client privilege.[3] We describe the basic contours of the exception below. Next, we examine complications that have arisen in applying the exception to situations other than a simple bilateral lawyer-client relationship. We then report what courts have said about application of Section 958 in the mediation context. Finally, we explore its implications for the present study.

Basic Contours of the Exception

Section 958 says that there is no privilege "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." In other words, "[i]n a lawsuit between an attorney and a client based on an alleged breach of a duty arising from the attorney-client relationship, attorney-client communications relevant to the breach are not protected by the attorney-client privilege."[4]

The Law Revision Commission's Comment to Section 958 explains that the exception is intended to prevent the unfairness that would result if a client could use evidence of confidential lawyer-client communications against a lawyer but the lawyer could not use such evidence in response:

> It would be unjust to permit a client either to accuse his attorney of a breach of duty and to invoke the privilege to prevent the attorney from bringing forth evidence in defense of the charge or to refuse to pay his attorney's fee and invoke the privilege to defeat the attorney's claim. Thus, for example, if the defendant in a criminal action claims that his lawyer did not provide him with an adequate defense, communications between the lawyer and client relevant to that issue are not privileged. The duty involved must, of course, be one arising out of the lawyer-client relationship, *e.g.*, the duty of the lawyer to exercise reasonable diligence on behalf of his client, the duty of the lawyer to care faithfully and account for his

3. Subject to certain exceptions and limitations, the lawyer-client privilege permits a client to refuse to disclose, and to prevent another from disclosing, a confidential lawyer-client communication. See Evid. Code §§ 950-962. A lawyer who received or made such a communication is obligated to claim the privilege "whenever he is present when the communication is sought to be disclosed and is authorized to claim the privilege …." Evid. Code § 955.

A lawyer also has an ethical duty to "maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." Bus. & Prof. Code § 6068. "The duty of confidentiality is broader than the attorney-client privilege." Dietz v. Meisenheimer & Herron, 177 Cal. App. 4th 771, 786, 99 Cal. Rptr. 3d 464 (2009). But a lawyer can reveal confidences when there is a fee dispute or a malpractice claim. *Id.*; see also Styles v. Mumbert, 164 Cal. App. 4th 1163, 1168, 79 Cal. Rptr. 3d 880 (2008).

4. Anten v. Superior Court, 233 Cal. App. 4th 1254, 1256, 183 Cal. Rptr. 3d 422 (2015).

> client's property, or the client's duty to pay for the lawyer's services.[5]

The client typically (though not invariably) has less need for this exception, because the client is the holder of the lawyer-client privilege and thus can waive the privilege if the client wants to use privileged communications against a lawyer.[6]

"The wording of section 958 is broad, but case law has clarified that the exception is limited to communications between the lawyer charging or charged with a breach of duty, on the one hand, and the client charging or charged with a breach of duty, on the other."[7] The provision does *not* abrogate the privilege as to communications between the client and the lawyer who is representing the client in the legal malpractice suit or other proceeding alleging breach of duty.[8]

Nor does Section 958 permit a lawyer to use confidential lawyer-client communications for a purpose *other than* protection of the attorney's own rights. The provision is intended for situations such as when the attorney seeks payment for services rendered or "the attorney's integrity, good faith, authority or performance of duties is questioned."[9] When "there is no breach of duty by the client, and no claim against the attorney which the attorney must in fairness be permitted to defend, the exception … does not apply."[10] Thus, a lawyer "is not ethically permitted to exploit … confidential information disclosed in [a] malpractice action for other, unrelated purposes, whether it be public disclosure outside the confines of the malpractice litigation proceedings, or use in connection with other third party initiated litigation …."[11]

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5. Citation omitted; see also People v. Ledesma, 39 Cal. 4th 641, 694, 140 P.3d 657, 47 Cal. Rptr. 3d 326 (2006) (quoting Law Revision Commission Comment); *Dietz*, 177 Cal. App. 4th at 793 (explaining that lawyer-client privilege may not be used as both sword and shield).
6. See Evid. Code §§ 953, 954; but see discussion of "Application of Section 958 to Joint Clients and Other Complex Relationships" *infra.*
7. *Anten*, 233 Cal. App. 4th at 1259; see also Travelers Ins. Cos. v. Superior Court, 143 Cal. App. 3d 436, 445, 191 Cal. Rptr. 871 (1983); Schlumberger Ltd. v. Superior Court, 115 Cal. App. 3d 386, 392, 171 Cal. Rptr. 413 (1981).
8. *Schlumberger*, 115 Cal. App. 3d at 392.
9. Dubrow v. Rindlisbacher, 225 B.R. 180, 183 (9th Cir. B.A.P. 1998).
10. *Id.*
11. L.A. County Bar Ass'n Professional Responsibility & Ethics Committee, *Ethics Opinion No. 519: Whether There Is a Self-Defense Exception to an Attorney's Duty to Protect and Preserve Confidential Client Information in Order to Permit the Attorney to Defend Against Third Party Claims*, 30 L.A. Lawyer 76, 77 (April 2007).

Application of Section 958 to Joint Clients and Other Complex Relationships

In a simple bilateral lawyer-client relationship, the application of Section 958 is relatively straightforward. Complications can arise, however, when there is more than one client or the lawyer-client relationship is otherwise complex.

In a few instances, a court even dismissed a legal malpractice suit because the lawyer-client privilege precluded the defendant from effectively presenting a defense and the plaintiff could not provide the necessary privilege waiver. We describe those cases first, and then discuss some other cases involving application of Section 958 to a lawyer-client relationship with multiple players. Finally, we examine a California Supreme Court decision involving application of Section 958 to a lawyer who had two types of relationships with the client.

Cases In Which the Lawyer-Client Privilege Necessitated Dismissal of a Legal Malpractice Claim

If the client is a corporation, the corporation holds the lawyer-client privilege, not the shareholders.[12] Thus, when shareholders filed a derivative suit alleging legal malpractice in *McDermott, Will & Emery v. Superior Court*,[13] the court of appeal concluded that Section 958 did not apply: The shareholders were not the "client" within the meaning of the statute.[14] The court further determined that the resulting situation was fundamentally unfair to the defendants:

> [B]ecause a derivative action does not result in the corporation's waiver of the privilege, *such a lawsuit against the corporation's outside counsel has the dangerous potential for robbing the attorney defendant of the only means he or she may have to mount any meaningful defense*. It effectively places the defendant attorney in the untenable position of having to "preserve the attorney client privilege (the client having done nothing to waive the privilege) while trying to show that his representation of the client was not negligent."[15]

Consequently, the court held that "this derivative action, necessarily brought in equity, *cannot go forward*."[16]

Similarly, the claim in *Solin v. O'Melveny & Myers*[17] could not proceed on the merits. There, an attorney (Solin) retained a law firm to advise him about risks he

12. National Football League Properties, Inc. v. Superior Court, 65 Cal. App. 4th 100, 109, 75 Cal. Rptr. 2d 893 (1998).
13. 83 Cal. App. 4th 378, 99 Cal. Rptr. 2d 622 (2000).
14. *Id.* at 383-84.
15. *Id.* at 384 (emphasis added), *quoting* Kracht v. Perrin, Gartland & Doyle, 219 Cal. App. 3d 1019, 1024, 268 Cal. Rptr. 637 (1990).
16. *Id.* at 385 (emphasis added).
17. 89 Cal. App. 4th 451, 107 Cal. Rptr. 456 (2001).

faced in connection with a matter he was handling for certain clients. Solin later sued the law firm for malpractice, but the trial court dismissed the claim and the court of appeal affirmed without reaching the merits. As in *McDermott*, the court of appeal explained that despite Section 958, it would be unfair to allow the suit go forward:

> It strikes us as fundamentally unfair for a client to sue a law firm for the advice obtained and then to seek to forbid the attorney who gave that advice from reciting verbatim, as nearly as memory permits, the words spoken by his accuser during the consultation. Simple notions of due process counsel against such a procedure. Evidence Code section 958 codifies this sentiment.…
>
> Here, of course, Solin maintains that he is not invoking his attorney-client privilege vis-a-vis [the law firm]. However, the fact that [his] Clients' Secrets must be protected from disclosure would yield precisely the same result: Solin would be permitted to sue his lawyers for malpractice, yet gag [the law firm] in defending the charge by preventing full disclosure of all matters counseled upon.[18]

The abrupt dismissals in *McDermott* and *Solin* arose because there were multiple players on the client side of a lawyer-client relationship, and a key one of those players had not waived the lawyer-client privilege. In *McDermott*, the shareholders owned the corporation and thus were aligned with it, yet they were unable to waive its lawyer-client privilege. In *Solin*, the client (Solin) had his own clients, whose lawyer-client privilege he could not waive.

Other Cases Involving Application of Section 958 to a Lawyer-Client Relationship with Multiple Players

Like *McDermott* and *Solin*, *Anten* involved multiple players on the client side of a lawyer-client relationship, but the result in that case was different. There, a group of clients retained a lawyer to represent them jointly. One of them later sued the lawyer for malpractice, but the others did not. That raised the following question: "When joint clients do not sue each other but one of them sues their former attorney, can the nonsuing client[s] prevent the parties to the lawsuit from discovering or introducing otherwise privileged attorney-client communications made in the course of the joint representation?"[19]

18. *Id.* at 466.
19. 233 Cal. App. 4th at 1256.

The court of appeal concluded that the nonsuing clients could not preclude discovery of the lawyer-client communications because Section 958 applied.[20] It explained:

> [C]onsiderations of fundamental fairness that are similar to those underlying section 958 as a whole weigh strongly in favor of applying the statute in this context. For example, if one of two joint clients breached an attorney fee agreement but the other joint client did not, and the attorney sued the breaching client, then it would be unjust to allow the nonbreaching client to thwart the attorney's suit by invoking the privilege to prevent introduction of the fee agreement itself. Moreover, the risk of collusion between the joint clients would be substantial. Similarly, if an attorney breached a duty to one of two joint clients but breached no duties to the other, and the wronged client sued the attorney, then it would be unjust to allow the nonsuing client to thwart the other client's suit by invoking the privilege to prevent introduction of relevant attorney-client communications made in the course of the joint representation. Again, the risk of collusion between the attorney and the nonsuing client would be substantial — indeed, the risk would be particularly significant if the alleged breach were that the attorney had favored the interests of the nonsuing client over those of the suing client.
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> For all of these reasons, *we conclude that section 958 prohibits the [nonsuing clients in this case] … from invoking the attorney-client privilege in [the other client's] lawsuit against [their joint attorney] with respect to relevant attorney-client communications made in the course of the joint representation*.[21]

The result, but not the court's position on whether Section 958 applied, was similar in *Dietz*. That case involved a dispute between multiple players on the lawyer side of a lawyer-client relationship: (1) a law firm and (2) a lawyer who referred a bad faith insurance claim to the law firm. The lawyer who made the referral later sued the law firm for breaching an agreement to pay him a percentage of any contingency fee recovered in the matter. Relying on *McDermott* and *Solin*, the law firm contended that the suit had to be dismissed because the client in question had refused to waive the lawyer-client privilege and the firm "could not present a complete defense to [the] claims without violating ethical

20. *Id.* at 1256, 1259-60.

21. *Id.* at 1260 (emphasis added). This approach applies only with respect to joint clients. The *Anten* court was careful to point out that "a legal malpractice plaintiff cannot invoke the exception in order to permit discovery of communications between the defendant attorney 'and other clients of his not privy to the relationship between' the defendant and the plaintiff." *Id.* at 1259, *quoting* Glade v. Superior Court, 76 Cal. App. 3d 738, 746-47, 143 Cal. Rptr. 119 (1978).

duties that it owed to [the client], including the attorney-client privilege."[22] But the trial court disagreed and the court of appeal affirmed.

In so doing, the court of appeal *assumed* that there is "*no* exception to the duty to preserve client confidences in a case brought against an attorney *by a third party*."[23] It explained, however, that under the line of cases including *McDermott* and *Solin*, "only in the *rarest* of cases" may a court "take the *extraordinary* step of dismissing a plaintiff's claim on the ground that an attorney defendant's due process right to present a defense is compromised by the defendant's inability to present confidential information …."[24] The court of appeal identified certain factors bearing on the appropriateness of such a dismissal, and concluded that those factors did not support dismissal of the case before it.[25]

Application of Section 958 to a Lawyer Who Had Two Types of Relationships With the Client

McDermott, *Solin*, *Anten*, and *Dietz* involved the application of Section 958 to multiple clients, or to a client-like or lawyer-like player in addition to a typical lawyer-client relationship. *General Dynamics Corp. v. Superior Court*[26] involved a different type of complication in applying the lawyer-client privilege to a lawyer-client dispute: A lawyer who had two types of relationships with the client: (1) a traditional lawyer-client relationship and (2) an employment relationship stemming from the lawyer's status as in-house counsel.

More specifically, the California Supreme Court granted review in *General Dynamics* "to consider an attorney's status as 'in-house' counsel as it affects the right to pursue claims for damages following an allegedly wrongful termination of employment."[27] The Court concluded that "there is no reason inherent in the nature of an attorney's role as in-house counsel to a corporation that in itself precludes the maintenance of a retaliatory discharge claim, *provided* it can be established without breaching the attorney-client privilege or unduly endangering the values lying at the heart of the professional relationship." [28]

In reaching that result, the Court cautioned that "the in-house attorney who publicly exposes the client's secrets will usually find no sanctuary in the

22. *Dietz*, 177 Cal. App. 4th at 776 (emphasis added).
23. *Id.* at 786.
24. *Id.* at 794 (emphasis added).
25. *Id.* at 792-98.
26. 7 Cal. 4th 1164, 876 P.2d 487, 32 Cal. Rptr. 2d 1 (1994).
27. *Id.* at 1169.
28. *Id.* (emphasis in original).

courts."[29] The Court noted that "[e]xcept in those rare instances when disclosure is explicitly permitted or mandated by an ethics code provision or statute, it is never the business of the lawyer to disclose publicly the secrets of the client."[30] The Court then ruled that where the elements of a claim for wrongful discharge in violation of fundamental public policy "cannot, for reasons peculiar to the case, be fully established without breaching the attorney-client privilege, *the suit must be dismissed in the interest of preserving the privilege*."[31]

The Court went on to observe that "such drastic action will seldom if ever be appropriate at the demurrer stage of litigation."[32] The Court also considered it likely that "many of the cases in which in-house counsel is faced with an ethical dilemma will lie outside the scope of the statutory privilege."[33]

The Court encouraged the trial courts to be creative in using equitable tools to address such cases:

> [T]he trial courts can and should apply an array of ad hoc measures from their equitable arsenal designed to permit the attorney plaintiff to attempt to make the necessary proof while protecting from disclosure client confidences subject to the privilege. *The use of sealing and protective orders, limited admissibility of evidence, orders restricting the use of testimony in successive proceedings, and, where appropriate, in camera proceedings, are but some of a number of measures that might usefully be explored by the trial courts as circumstances warrant.* We are confident that by taking an aggressive managerial role, judges can minimize the dangers to the legitimate privilege interests the trial of such cases may present.
>
> …. Moreover, an attorney who unsuccessfully pursues a retaliatory discharge suit, and in doing so discloses privileged client confidences, may be subject to State Bar disciplinary proceedings.[34]

The Court thus recognized the complexity of the situation and sought to accommodate both the lawyer's interest in pursuing a retaliatory discharge claim and the corporate client's interest in maintaining the confidentiality of lawyer-client communications.

29. *Id.* at 1190.
30. *Id.*
31. *Id.* (emphasis added).
32. *Id.*
33. *Id.*
34. *Id.* at 1191 (emphasis added).

Cases Examining Section 958 in the Mediation Context

The superseded majority opinion in *Porter v. Wyner*[35] and the majority and concurring opinions in *Cassel v. Superior Court*[36] consider how Section 958 applies in the mediation context. The staff has previously described those discussions for the Commission, but it may be helpful to reiterate them here.

The Majority Opinion in Porter

Porter was a 2-1 decision in which the majority determined that the statutory protection for mediation communications was not meant to include communications by and between a lawyer and client, "irrespective of whether such communications took place in the presence of the mediator or not."[37] The majority explained that extending mediation confidentiality to lawyer-client conversations would render Section 958 a nullity, because then 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."[38] The majority did not think the Legislature intended for "a well-established and recognized privilege and waiver process" to be "thwarted by a nonprivileged statutory scheme designed to protect a wholly different set of disputants."[39]

In the majority's view,

> To expand the mediation privilege to also cover communications between a lawyer and his client 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.[40]

The majority "decline[d] to extend the confidentiality component to a relationship neither envisioned nor contemplated by statute."[41]

The *Porter* opinion was superseded when the California Supreme Court granted review. Rather than addressing Section 958 in *Porter*, however, the Court did so in *Cassel* and then remanded *Porter* for reconsideration in light of *Cassel*.

35. 107 Cal. Rptr. 3d 653 (2010) (formerly published at 183 Cal. App. 4th 949).
36. 51 Cal. 4th 113, 244 P.3d 1080, 119 Cal. Rptr. 3d 437 (2011).
37. *Porter*, 107 Cal. Rptr. 3d at 662.
38. *Id.* at 661.
39. *Id.* at 661-62.
40. *Id.* at 662.
41. *Id.* at 665.

The Majority Opinion in Cassel

In *Cassel*, the California Supreme Court addressed a contention that "the mediation confidentiality statutes, in their role as protectors of frank exchanges between the *parties* to a mediation, were not intended to trump section 958, which eliminates the confidentiality protections otherwise afforded by the *attorney-client privilege* (§ 950 et seq.) in suits between clients and their own lawyers."[42] The Court was unpersuaded. The majority rejected the idea that Section 958 compels recognition of a similar exception to the mediation confidentiality statutes.[43] It pointed out that the mediation confidentiality statutes do not expressly include such an exception, and although "both statutory schemes involve the shielding of confidential communications, they serve separate and unrelated purposes.[44]

The majority further explained that in contrast to the lawyer-client privilege, the 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.[45]

42. *Cassel,* 51 Cal. 4th at 131-32 (emphasis in original).
43. *Id.* at 131-33.
44. *Id.* at 132.
45. *Id.* (emphasis added; citations & footnotes omitted).

The majority did not pass judgment on "the wisdom of the mediation confidentiality statutes," but it did determine that applying the plain terms of those statutes to the case at hand did not produce an absurd result.[46] It gave several reasons for that conclusion:

> 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, … 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.[47]

The Court therefore held that the lawyer-client communications at issue "were confidential, and therefore were neither discoverable nor admissible — even for purposes of proving a claim of legal malpractice — insofar as they were 'for the purpose of, in the course of, or pursuant to, a mediation ….'"[48] It noted, however, 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."[49]

Justice Chin's Concurring Opinion in Cassel

Justice Chin concurred in the *Cassel* result, but "reluctantly."[50] He did not expressly address the contention that the mediation confidentiality statutes could not override Section 958. But he implicitly took the same view as the majority, as

46. *Id.* at 136.
47. *Id.* (emphasis added).
48. *Id.* at 138, *quoting* Evid. Code § 1119(a).
49. *Id.* at 137.
50. *Id.* at 138 (Chin, J., concurring).

he did not challenge their interpretation of the mediation confidentiality statutes. Rather, he wrote separately to draw attention to the "high price" of the statutory approach ("shield[ing] an attorney's actions during mediation … from a malpractice action even if those actions are incompetent or even deceptive") and urge the Legislature to reconsider the matter.[51]

In the course of his opinion, he noted that a court may sometimes "depart from literal statutory language" if a literal interpretation would result in absurd, unintended consequences.[52] He decided, however, that the mediation confidentiality statutes "just barely" failed to meet that standard in *Cassel*.[53] He explained:

> *Plausible policies support a literal interpretation.* Unlike the attorney-client privilege — which the client alone holds and may waive (Evid. Code §§ 953, 954) — *mediation confidentiality implicates interests beyond those of the client*. Other participants in the mediation also have an interest in confidentiality. This interest may extend to private communications between the attorney and the client because those communications themselves will often disclose what others have said during the mediation. Additionally, as the majority notes, *it might "not be fair* to allow a client to support a malpractice claim with excerpts from private discussions with counsel concerning the mediation, while barring attorneys from placing such discussions in context by citing communications within the mediation proceedings themselves."[54]

Implications for the Commission's Study

What are the ramifications, implications, and lessons of Section 958 (the exception to the lawyer-client privilege applicable to a dispute between lawyer and client) in the Commission's study of the relationship between mediation confidentiality and attorney malpractice and other misconduct? The staff sees a number of different possibilities, discussed below.

In describing these possible approaches, we provide some analysis to assist the Commission in starting to think critically about the potential impact of each approach. However, **it probably would be premature for the Commission to make any decisions regarding these approaches at the upcoming meeting.** It may be better to wait until the staff has prepared a memorandum describing the

51. *Id.* (Chin, J., concurring).
52. *Id.* at 139 (Chin, J., concurring).
53. *Id.* (Chin, J., concurring).
54. *Id.* (Chin, J., concurring), *quoting id.* at 136 (emphasis added).

full array of options suggested in this study, not just the ones suggested from our examination of Section 958.

Approach #1: Let Section 958 "Trump" Mediation Confidentiality

An obvious possibility would be to explore the idea that Section 958 should "trump" the mediation confidentiality statutes, such that a mediation communication would be admissible and discoverable in a subsequent dispute between a lawyer and a client whenever the communication is "relevant to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship" (Approach #1). That could be accomplished by amending Evidence Code Section 1119 along the following lines:

> 1119. Except as otherwise provided in this chapter, or when a lawyer-client dispute arises during or after a mediation and Section 958 applies:
>
> (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.

An amendment along these lines would help to ensure that lawyers are accountable to their clients. It would also facilitate just resolution of lawyer-client fee disputes. These positive effects would help to build public confidence in the courts, the State Bar, and the justice system generally.

Such an amendment would also have some negative consequences. In particular, it could result not only in disclosure of mediation communications between the lawyer and client in question, but also in disclosure of mediation communications involving other mediation participants. As Justice Chin pointed

out in *Cassel*, "mediation confidentiality implicates interests beyond those of the client."[55]

In this respect, the mediation context is more complicated than the multi-player situations encountered in applying Section 958 (*McDermott, Solin, Anten,* and *Dietz*), because a mediation typically involves a sizeable group of participants: There are two or more parties, their lawyers, the mediator, and perhaps also other participants, such as an insurance representative, accountant, other type of expert, or spouse. Yet even the Section 958 situations teach that accommodating the interests of all persons affected by a privilege may be difficult. The possibility of disclosure in an opponent's legal malpractice suit (or other lawyer-client dispute) could chill mediation discussions and impede the effectiveness of mediation, depriving the public of its beneficial effects.

Approach #2: Make Mediation Confidentiality Inapplicable to Private Lawyer-Client Communications

A variant on Approach #1 is the concept that the California Supreme Court discussed and rejected (on statutory interpretation grounds, not as a matter of policy) in *Cassel*: Make the mediation confidentiality statutes inapplicable to a private lawyer-client communication ("Approach #2").[56] Under this approach, if Section 958 applied to a private lawyer-client communication, the communication would be admissible and subject to disclosure, even if the communication was made "for the purpose of, in the course of, or pursuant to, a mediation …."

Like Approach #1, this approach might help a client hold a lawyer accountable for legal malpractice or professional misconduct that occurs in the context of a mediation. It might also facilitate resolution of a lawyer-client fee dispute.

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

- It may "not be fair to allow a client to support a malpractice claim with excerpts from private discussions with counsel concerning the mediation, while barring the attorneys from placing such

55. *Id.* at 139 (Chin, J., concurring).

56. Approach #2 is similar, but not identical, to the approach that the court of appeal followed in *Porter*. According to *Porter*, mediation confidentiality is inapplicable to lawyer-client communications "*irrespective* of whether such communications took place in the presence of the mediator or not." 107 Cal. Rptr. 3d at 662 (emphasis added).

discussions in context by citing communications within the mediation proceedings themselves."[57] Due to this uneven treatment, Approach #2 probably would not promote just results and confidence in the justice system to the same extent as Approach #1.

- Private lawyer-client communications "will often disclose what others have said during the mediation."[58] Using a private, mediation-related lawyer-client communication in a later lawyer-client dispute may thus harm the interests of persons who are not involved in that dispute. The possibility of such a disclosure may also chill mediation discussions and impede their effectiveness.
- Ensuring the confidentiality of lawyer-client communications in the mediation context might "facilitat[e] the use of mediation as a means of dispute resolution by allowing frank discussions between a mediation disputant and the disputant's counsel about the strengths and weaknesses of the case, the progress of negotiations, and the terms of a fair settlement, without concern that the things said by either the client or the lawyers will become the subjects of later litigation against either."[59] A contrary approach would not provide such an opportunity.
- A mediation participant might have trouble recalling whether a comment was made in a private lawyer-client conversation, as opposed to a mediation conversation involving other participants. Resolving disputes over this point might prove difficult and time-consuming.
- Even if a mediation participant correctly recalls what occurred in a private lawyer-client conversation and what did not, the participant might accidentally refer to what happened in another phase of the mediation when testifying, which could harm the interests of a mediation participant who is not involved in the lawyer-client dispute.[60]

Approach #3: Allow Use of Mediation Communications in a Subsequent Lawyer-Client Dispute if Section 958 Applies and All Other Mediation Participants Waive Mediation Confidentiality

Still another approach would permit use of mediation communications in a subsequent lawyer-client dispute if Section 958 applies *and* all mediation participants aside from the ones involved in that dispute expressly waive mediation confidentiality in accordance with the existing waiver requirements

57. *Cassel*, 51 Cal. 4th at 136; see also *id.* at 139 (Chin, J., concurring).
58. *Cassel*, 51 Cal. 4th at 139 (Chin, J., concurring).
59. *Cassel*, 51 Cal. 4th at 136.
60. See *Cassel*, 51 Cal. 4th at 136 (Legislature might rationally have determined that inclusion of private attorney-client discussions in currect mediation confidentiality scheme "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.").

("Approach #3").[61] An express waiver from the parties to the lawyer-client dispute would not be necessary: The plaintiff's waiver would be implied from the act of initiating the lawsuit; to promote accountability in the lawyer-client relationship, the defendant would not be given any choice in the matter.

In theory, this approach would provide a means to address lawyer misconduct, while also allowing all participants except the lawyer to preserve the confidentiality of a mediation when warranted. That is an attractive combination.

In practice, however, the staff suspects that the approach would have little impact. The mediation participants whose waivers would be required would have little to no incentive to provide such waivers, and may have good reasons (not just spiteful ones) for declining to do so. Privacy considerations could well be a legitimate concern. Mediation participants may also want to avoid the burden of providing testimony in the lawyer-client dispute. Mediators might be particularly reluctant to waive mediation confidentiality: Even if Evidence Code Section 703.5 continued to protect them from having to testify, they may fear that the act of providing such a waiver and the resulting testimony by others would impinge on their reputations for impartiality and trustworthiness in maintaining confidentiality. In short, the conditions for disclosure under Approach #3 might not be met very often. If so, the approach might complicate the law to some extent, without providing offsetting benefits.

Approach #4: Focus on Ensuring Fairness and Using Judicial Tools to Accommodate the Competing Interests

A fourth possibility (Approach #4) would just embrace two key principles drawn from Section 958 and the case law interpreting it: (1) the fairness doctrine underlying the provision and (2) the careful tailoring urged by the California Supreme Court in *General Dynamics.*

More specifically, Section 958 is intended to ensure fairness, allowing both sides to provide relevant evidence in a lawyer-client dispute.[62] One lesson to take away from examination of the provision may thus be the importance of providing a level playing field with regard to use of mediation communications: If the mediation confidentiality statutes are revised to help ensure lawyer accountability and facilitate resolution of lawyer-client fee disputes, then both lawyer and client should have *an equal opportunity* to present relevant mediation

61. See Evid. Code § 1122.
62. Evid. Code § 958 Comment.

communications. Under this approach, the focus would be on *whether a mediation communication is relevant* to a lawyer-client dispute, *regardless* of whether that communication was in a private lawyer-client conversation or in a conversation involving other mediation participants. In this respect, Approach #4 would be similar to Approach #1.

Unlike Approach #1, however, this approach would not necessarily permit use of *all* mediation communications relevant to a lawyer-client dispute. Rather, it would also embrace another principle espoused in connection with Section 958: the value of creatively using judicial tools such as "sealing and protective orders, limited admissibility of evidence, orders restricting the use of testimony in successive proceedings, and … in camera proceedings" to protect the competing interests involved a multi-player situation, as the California Supreme Court discussed in *General Dynamics*.[63] The approach could, for instance, involve a statutory requirement that a judge conduct an *in camera* hearing before admitting or ordering disclosure of any mediation communications. The statute could provide guidance on what standard the judge should apply at such a hearing, or what factors the judge should consider in attempting to accommodate the competing interests. Perhaps the statute would require the judge to use a least intrusive means approach, seeking to minimize the amount of mediation evidence disclosed while still promoting just resolution of the lawyer-client dispute. There are many different possibilities, and we will not attempt to flesh any of them out here.

The point is simply that one could attempt to creatively accommodate the competing interests to the greatest extent possible, providing a certain amount of statutory guidance (including the fairness principle discussed above), while affording some degree of flexibility to the trial judge to tailor the approach to the circumstances of a particular case using judicial tools as needed.

In the abstract, this concept might have considerable appeal, as a means of protecting mediation confidentiality while also promoting lawyer accountability. A serious challenge in developing such an approach, however, would be to provide sufficient guidance to afford a reasonable degree of predictability, such that mediation participants would feel comfortable relying on the statutory parameters relating to confidentiality.

63. 7 Cal. 4th at 1191.

CONTRACTUAL WAIVERS

The legislative resolution calling for this study specifically directs the Commission to consider "[t]he availability and propriety of contractual waivers." Presumably, this is meant to refer to the possibility of having a mediation participant contractually waive the right to mediation confidentiality under specified circumstances.

In addressing this topic, we begin by reviewing the existing statutory requirements for effectively waiving the mediation confidentiality protections. Next, we describe a court rule that requires an advance agreement to disclosure of mediation communications under certain circumstances. We then explore the possibility of using such agreements more widely.

Existing Requirements for Waiving Mediation Confidentiality

Evidence Code Section 1122(a) is the key provision on waiving California's protections for mediation communications. It provides:

> 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.

As the Commission's Comment explains, paragraph (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)."[64] The Comment further explains that such agreement "must be express, not implied."[65]

64. Evid. Code § 1122 Comment (emphasis added).

65. *Id.*; see also Simmons v. Ghaderi, 44 Cal. 4th 570, 187 P.3d 934, 80 Cal. Rptr. 3d 83 (2008); Eisendrath v. Superior Court, 109 Cal. App. 4th 351, 360-65, 134 Cal. Rptr. 2d 716 (2003). For

Paragraph (a)(2) is a special rule that "facilitates the admissibility and disclosure of unilaterally prepared materials …."[66] It "only applies so long as those materials may be produced in a manner revealing nothing about the mediation discussion."[67]

A lawyer may effectively sign a mediation confidentiality waiver for a client.[68] Similarly, "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."[69]

California Rule of Court 3.860(b)

The California Rules of Court already include a provision that requires an advance agreement to disclosure of mediation communications.[70] Rule 3.860(b), applicable to court mediation programs, states:

> (b) **Agreement to disclosure**
>
> The mediator must agree, in each mediation to which these rules apply under rule 3.851(a), that if an inquiry or a complaint is made about the conduct of the mediator, mediation communications may be disclosed solely for purposes of a complaint procedure conducted pursuant to rule 3.865 to address that complaint or inquiry.

Under this rule, if a mediator wants the privilege of serving on a court panel, the mediator must agree in advance to disclosure of mediation communications for the purpose of resolving any inquiry[71] or complaint[72] about the mediator's conduct. The court rules establish guidelines for handling such inquiries and complaints.[73] The precise complaint procedures for each court are governed by local rule,[74] but they "must occur in private and must be kept confidential"[75] and they "must be designed and conducted in a manner that preserves the

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example, "parties cannot be deemed to have agreed in advance to disclosure merely because they agreed to participate in a particular dispute resolution program." Evid. Code § 1122 Comment.

66. *Id.*
67. *Id.*
68. Stewart v. Preston Pipeline, 134 Cal. App. 4th 1565, 1583, 36 Cal. Rptr. 3d 901 (2005).
69. Evid. Code § 1122 Comment; see Evid. Code § 1122(b).
70. For convenient reference, the Rules of Court on mediation of civil cases (Cal. R. Ct. 3.835-3.898) are attached as Exhibit pp. 1-27.
71. An "inquiry" means "an unwritten communication presented to the court's complaint coordinator indicating that a mediator may have violated a provision of the rules of conduct." Cal. R. Ct. 3.866(3).
72. A "complaint" means "a written communication presented to the court's complaint coordinator indicating that a mediator may have violated a provision of the rules of conduct."
73. See Cal. R. Ct. 3.865-3.8772.
74. Cal. R. Ct. 3.868.
75. Cal. R. Ct. 3.871(c).

confidentiality of mediation communications, including but not limited to, the confidentiality of any communications between the mediator and individual mediation participants or subgroups of mediation participants."[76]

"After the decision on a complaint, the presiding judge, or a person designated by the presiding judge, may authorize the public disclosure of information or records concerning the complaint proceeding *that do not reveal any mediation communications*."[77] "[I]nformation and records that *would* reveal mediation communications may be publicly disclosed only as required by law (e.g., in response to a subpoena or court order) and consistent with the statutes and case law governing mediation confidentiality."[78]

According to the Advisory Committee that drafted the rules, any determination regarding whether a disclosure is legally required should be made by a person "who is knowledgeable about California's mediation confidentiality laws …."[79] In addition, if a disclosure revealing mediation communications appears to be required by law, notice should first be given to "any person whose mediation communications may thereby be revealed."[80]

Rule 3.860 and the other rules governing the mediator complaint procedure described above are "intended to help courts promptly resolve any such complaints in a manner that is respectful and fair to the complainant and the mediator and consistent with the California mediation confidentiality statutes."[81] As the staff understands it, the scheme was designed to provide two possible bases of compliance with the mediation confidentiality statutes.

First, the complaint proceeding is confidential and the persons conducting that proceeding are court personnel whose only role with regard to the mediated dispute is administering the court's mediation program. As such, a court might view them as comparable to a mediation provider like JAMS or AAA, and might conclude that disclosure of a mediation communication to them in a mediator complaint proceeding is not a breach of the mediation confidentiality statutes. There is no case law to that effect, but the viewpoint seems logical and there is no contrary case law directly on point.

An additional means of ensuring compliance with the current mediation confidentiality statutes would be to rely on the mediator's advance waiver of

76. Cal. R. Ct. 3.871(b).
77. Cal. R. Ct. 3.871(d) (emphasis added).
78. Cal. R. Ct. 3.871 Advisory Committee Comment (emphasis in original).
79. *Id*.
80. Cal. R. Ct. 3.871(e).
81. Cal. R. Ct. 3.865(b).

mediation confidentiality and obtain post-mediation waivers from all of the other mediation participants before permitting anyone to disclose a mediation communication in a mediator complaint proceeding. A court rule facilitates this approach by directing court program mediators to "request that all participants in [a] mediation complete an attendance sheet stating their names, mailing addresses, and telephone numbers," which the mediator is to retain for at least two years and submit to the court on request.[82] The attendance sheet would make it possible for a court to contact the mediation participants and obtain information and/or mediation confidentiality waivers from them in the event of a complaint against a court program mediator.[83]

This second approach would entail more effort than the first one, and it could be thwarted if a mediation participant refuses to waive confidentiality. But it would seem to meet the waiver requirements of Section 1122.

Broader Use of Contractual Waivers

Should the approach used in Rule 3.860(b) be extended more broadly? As best the staff can tell, that appears to be the type of issue that the Legislature wanted the Commission to address when it directed the Commission to consider contractual waivers.

In particular, it would be possible to require that before an attorney represents a client in a mediation, the attorney must "expressly agree in writing, or orally in accordance with Section 1118" that if the client or another mediation participant complains to the State Bar about the attorney's mediation conduct, mediation communications may be disclosed solely for purposes of resolving that complaint. In other words, each attorney would be required to contractually waive the right to mediation confidentiality in advance, but only for purposes of resolving a complaint to the State Bar about the attorney's conduct during the mediation. Alternatively, the contractual waiver could encompass a legal malpractice proceeding or other claim for professional misconduct, not just a complaint to the State Bar.

Would such an approach be a good idea? In theory, it might help to ensure that lawyers are accountable for their conduct during a mediation.

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82. Cal. R. Ct. 3.860(a).

83. See Memorandum from Civil & Small Claims Advisory Committee to Members of the Judicial Council on *Alternative Dispute Resolution: Preserving Mediation Confidentiality in Rule 1622 Proceedings,* p. 14 (9/27/05), *available at* http://www.courts.ca.gov/documents/1104itemC2.pdf (hereafter "Report on Proposal SP05-03"). Preparation of the attendance sheet also facilitates the imposition of sanctions on a person who fails to attend a court-ordered mediation.

In practice, however, the approach might not have much impact. Although the contractual waiver would apply to the attorney whose mediation conduct is challenged, it would not, by itself, suffice to permit the use of mediation communications. Rather, a mediation confidentiality waiver under Section 1122 requires the express agreement of *all* mediation participants. As discussed with regard to Approach #3 in the staff's analysis of Section 958, such complete agreement might often be impossible to obtain, rendering the attorney's contractual waiver useless.

Suppose instead, however, that *all* mediation participants were required to contractually waive the right to mediation confidentiality in advance, but only for purposes of resolving a complaint to the State Bar about an attorney's mediation conduct. Would that be effective?

If all of the mediation participants executed the mandatory contractual waivers, and if those waivers were considered valid, then the requirements of Section 1122 would be satisfied and mediation communications could be used for purposes of resolving a complaint to the State Bar about an attorney's mediation conduct. But some mediation participants might be reluctant to execute such a waiver and might decide not to mediate after all. Other participants might execute the required waiver but be less candid during the mediation than they would have been if the waiver had not been required. That might impede the effectiveness of the mediation.

The concept of requiring all mediation participants to execute a contractual waiver of mediation confidentiality would also be quite controversial, even if the waiver was limited to resolution of a complaint to the State Bar about an attorney's mediation conduct. That much is clear from the history of a proposal by the Judicial Council's Civil and Small Claims Advisory Committee relating to complaints against mediators in court-connected mediations.

Among other things, that proposal would have required a mediator to start every court-connected mediation by presenting a form containing certain information, including a request that each participant agree in advance to disclosure of mediation communications for purposes of resolving a complaint against the mediator (similar to the advance agreement that Rule 3.865 currently requires from a mediator).[84] A copy of that form is attached as Exhibit pages 28-

84. See Civil & Small Claims Advisory Committee, *Alternative Dispute Resolution: Preserving Mediation Confidentiality in Rule 1622 Proceedings* (Proposal SP05-03) (2005) (hereafter, "Proposal SP05-03").

29 for the Commission's consideration. The waiver would have been *optional*, not required.[85]

Nonetheless, the proposed form proved so controversial that the committee eliminated it from the proposal; the commentators were most troubled that the form "requested the participants' advance agreement to the disclosure of mediation communications to address a complaint against the mediator."[86] We will provide more information about this matter later in this memorandum,[87] but there is no reason to think that the reaction would be different with regard to a State Bar disciplinary proceeding than with regard to a complaint against a court program mediator.

Another issue that might arise relates to the extent of the waiver. The contemplated approach would require *limited* contractual waivers, ones that would expressly permit use of mediation communications *only* in a State Bar disciplinary proceeding. It is not altogether clear, however, whether courts would uphold such a limitation, or would conclude that the waiver applies across-the-board, to any type of proceeding or context. Similar issues have arisen with regard to the lawyer-client privilege, leading to development of a body of case law on the concept of "selective waiver."[88] The staff can provide further information about this matter if the Commission thinks that would be useful.

Perhaps most importantly, a valid waiver generally requires the *voluntary* relinquishment of a known right.[89] If an advance waiver of mediation confidentiality were required by statute, could it truly be considered a *voluntary* choice? With respect to obtaining a contractual waiver from a party, would the

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85. *Id.* at 5 ("A principal purpose of this requirement and form is to solicit the participants' agreement that mediation communications may be disclosed in any ensuing rule 1622 proceeding … However, the participants' agreement to this provision is optional and would be indicated beside each of their signatures.").

86. Report on Proposal SP05-03, *supra* note 83, at 5.

87. See discussion of "2005 Proposal by the Civil and Small Claims Advisory Committee" *infra*.

88. See, e.g., Pacific Pictures Corp. v. United States District Court, 679 F.3d 1121 (9th Cir. 2012) (rejecting selective waiver doctrine in context of attorney-client privilege); Diversified Industries, Inc. v. Meredith, 572 F.2d 596, 604 n.1 (8th Cir. 1977) ("We would be reluctant to hold that voluntary surrender of privileged material to a governmental agency in obedience to an agency subpoena constitutes a waiver of the privilege for all purposes, including its use in subsequent private litigation in which the material is sought to be used against the party which yielded it to the agency."); see also Regents of University of California v. Superior Court, 165 Cal. App. 4th 672, 81 Cal. Rptr. 3d 186 (holding that corporation's disclosure of privileged communications during government investigation was coerced and thus there was no waiver of attorney-client privilege under Evidence Code Section 912, selective or otherwise).

89. See, e.g., Iskanian v. CLS Transportation Los Angeles, LLC, 59 Cal. 4th 348, 374, 327 P.3d 129, 173 Cal. Rptr. 3d 289 (2014); Evid. Code § 912 (specified evidentiary privileges are "waived with respect to a communication protected by the privilege if any holder of the privilege, *without coercion,* has disclosed a significant part of the communication or has consented to disclosure made by anyone.").

answer be different in a court-mandated mediation than in a purely voluntary mediation? Would an attorney's waiver in any type of mediation be sufficiently voluntary, given the attorney's fiduciary duty to the client and ethical restrictions relating to withdrawing from representation? If an insurance representative with settlement authority was required to participate in a mediation, would a statutorily mandated contractual waiver of mediation confidentiality from the insurer be sufficiently voluntary to be valid?

It is one thing to require a mediator to provide an advance waiver as a condition for serving on a court panel, which will confer prestige, publicity, and respect on the mediator, as well as reflect on the court's reputation. The mediator has a choice about whether to seek such a post. It might not be comparable, however, to require a contractual waiver in some of the other situations described above.

It is difficult to predict precisely how a court would rule on the validity of a statutorily-mandated contractual waiver in each of those scenarios and in other circumstances that might arise. **If the Commission is interested, the staff could research this point further.**

Before we invest more resources, however, it is worth considering whether there would be any advantage to requiring every participant to execute a contractual waiver of mediation confidentiality, instead of creating a statutory exception. At present, the staff does not see a significant difference between those two approaches (aside from waiver validity issues and the more cumbersome and perhaps intimidating nature of the waiver approach), but perhaps we are overlooking some pertinent factor. **Input on this point would be helpful.**

The preceding discussion summarizes the staff's current thoughts on the potential use of contractual waivers of mediation confidentiality. We note, however, that Deborah Blair Porter has urged the Commission to "consider contractual provisions which seek to waive confidentiality, i.e., *specifically those waivers which may be used in the context of disputes involving public agencies where transparency and accountability are at issue*."[90] She says "[t]his was the situation in the mediation and settlement of the litigation underlying *Porter v. Wyner* and was an issue there as at the time many public education agencies were using confidentiality as a means of cloaking the nature and extent of litigation in which such agencies were involved."[91]

90. First Supplement to Memorandum 2013-47, Exhibit pp. 17-18 (emphasis added).
91. *Id.*; see also *id.* at Exhibit p. 21.

The staff recently invited Ms. Porter to provide further information about this matter, and she said she would do so. We will notify the Commission when we hear more from her.

COURT RULES FOR COURT MEDIATION PROGRAMS

Although California does not have a system for licensing mediators, it does have court rules[92] and standards[93] that govern court mediation programs. For convenient reference, the "General Rules Relating to Mediation of Civil Cases" (Cal. R. Ct. 3.835-3.898) are attached as Exhibit pages 1-27. The Commission should have some degree of familiarity with them before it starts making decisions about how to proceed in this study. We therefore describe them below, highlighting aspects that may be of particular interest. Afterwards, we present historical information relating to the development of some of those rules, which appears potentially relevant to this study.

General Rules Relating to Mediation of Civil Cases

The "General Rules Relating to Mediation of Civil Cases" apply to all court mediation programs for general civil cases, unless otherwise specified.[94] These rules were carefully drafted to comply with the Evidence Code provisions on mediation confidentiality.[95] In addition to a few general provisions (Article 1),[96] the rules include:

- A set of rules of conduct for mediators in court-connected mediation programs for civil cases (Article 2).[97]
- Some requirements for handling complaints about court-program mediators (Article 3).[98]
- Some rules applicable to courts that implement the Civil Action Mediation Act,[99] which permits a participating court to order a civil case into mediation if the amount in controversy is $50,000 or less (Article 4).[100]

92. See Cal. R. Ct. 3.835-3.898 (attached as Exhibit pp. 1-27); see also Cal. R. Ct. 10.780-10.783.
93. See Standards of Judicial Administration 10.70-10.72.
94. Cal. R. Ct. 3.835.
95. See, e.g., Cal. R. Ct. 3.845 ("The mediator's completed form ADR-100 must not disclose the terms of any agreement or any other communications or conduct that occurred in the course of the mediation, except as allowed in Evidence Code sections 1115-1128."); Cal. R. Ct. 3.871 Advisory Committee Comment ("Rule 3.871 is not intended to supersede or abrogate the confidentiality of mediation communications established by the Evidence Code.").
96. Cal. R. Ct. 3.835-3.845.
97. Cal. R. Ct. 3.850-3.860.
98. Cal. R. Ct. 3.865-3.872.
99. Code Civ. Proc. §§ 1775-1775.15.
100. Cal. R. Ct. 3.890-3.898.

We briefly describe each of these three articles.

Article 2. Rules of Conduct for Mediators in Court-Connected Mediation Programs for Civil Cases

Article 2, entitled "Rules of Conduct for Mediators in Court-Connected Mediation Programs for Civil Cases," establishes "*minimum* standards of conduct for mediators in court-connected mediation programs for general civil cases."[101] It starts from the premise that if mediation is to be effective, "there must be broad public confidence in the integrity and fairness of the process."[102] Thus, Rule 3.850 says that mediators in court-connected programs "are responsible to the parties, the public, and the courts for conducting themselves in a manner that merits that confidence." The rules of conduct are not intended to "[e]stablish a ceiling on what is considered good practice in mediation or discourage efforts by courts, mediators, or others to educate mediators about best practices …."[103] Nor do those rules create a basis for challenging a mediated settlement agreement or filing a civil cause of action against a mediator.[104]

The rules of conduct include a duty of impartiality, a requirement to disclose matters that "could raise a question about [a mediator's] ability to conduct the proceedings impartially, and related requirements.[105] There are also rules focusing on mediator training and competency,[106] marketing practices,[107] mediator compensation and acceptance of gifts,[108] and various aspects of the mediation process.[109]

Most importantly for purposes of this study, the rules of conduct include certain duties relating to confidentiality: The mediator "must, at all times, comply with the applicable law concerning confidentiality" and "must not use information that is acquired in confidence in the course of a mediation outside of the mediation or for personal gain."[110] The mediator must also provide mediation participants with "a general explanation of the confidentiality of mediation proceedings" at or before the first mediation session.[111] If the mediator

101. Cal. R. Ct. 3.850(a) (emphasis added).
102. *Id.*
103. Cal. R. Ct. 3.850(b)(1).
104. Cal. R. Ct. 3.850(b)(2)-(3).
105. Cal. R. Ct. 3.855.
106. Cal. R. Ct. 3.856.
107. Cal. R. Ct. 3.858.
108. Cal. R. Ct. 3.859.
109. Cal. R. Ct. 3.857, 3.860.
110. Cal. R. Ct. 3.854.
111. *Id.*

conducts separate caucuses, the mediator must "first discuss with all participants the mediator's practice regarding confidentiality for separate communications with the participants."[112] A mediator may not disclose information revealed in confidence in a separate caucus, unless the participant who made the disclosure authorizes the mediator to do so, or the disclosure is required by law.[113] The mediator must also provide the advance waiver of mediation confidentiality discussed earlier in this memorandum.[114]

In addition to the duties relating to confidentiality, the rules of conduct include another set of duties that seem particularly relevant to this study. As the Commission has seen, many of the cases in which a misconduct claim has been thwarted by the mediation confidentiality statutes involve allegations that a party was coerced or otherwise unduly pressured into settling at a mediation.[115] Rule 3.853 is specifically designed to prevent a mediator from engaging in such conduct. It provides:

> **Rule 3.853. Voluntary participation and self-determination**
>
> A mediator must conduct the mediation in a manner that supports the principles of voluntary participation and self-determination by the parties. For this purpose a mediator must:
>
> (1) Inform the parties, at or before the outset of the first mediation session, that any resolution of the dispute in mediation requires a voluntary agreement of the parties;
> (2) Respect the right of each participant to decide the extent of his or her participation in the mediation, including the right to withdraw from the mediation at any time; and

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112. *Id.*
113. *Id.*
114. Cal. R. Ct. 3.860(b). See discussion of "California Rule of Court 3.860(b)" *supra*.
115. See, e.g., Cassel v. Superior Court, 51 Cal. 4th 113, 118, 244 P.3d 1080, 119 Cal. Rptr. 3d 437 (2011) (plaintiff claimed that at 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."); In re Marriage of Woolsey, 220 Cal. App. 4th 881, 900, 163 Cal. Rptr. 3d 551 (2013) (husband contended that mediated settlement agreement was unenforceable because wife and/or mediator engaged in undue influence during mediation); Provost v. Regents of the University of California, 201 Cal. App. 4th 1289, 1302, 135 Cal. Rptr. 3d 591 (2011) (plaintiff claimed that mediated settlement agreement was unenforceable because his counsel, his opponents' counsel, and mediator coerced him into signing it through threats of criminal prosecution). See also Chan v. Lund, 188 Cal. App. 4th 1159, 1164, 116 Cal. Rptr. 3d 122 (2011) (plaintiff contended that court should rescind mediated settlement agreement "because his purported consent was 'wrongfully coerced' through tactics of his … attorney that 'amounted legally to duress, undue influence, fraud, prohibited financial dealing with a client in violation of the [California] Rules of Professional Conduct, and undisclosed dual agency"); Porter v. Wyner, 107 Cal. Rptr. 3d 653, 656 n.5 (formerly published at 183 Cal. App. 4th 949) (plaintiffs alleged that they signed agreement releasing their attorney from liability for tax advice "under duress because they were concerned the [mediated] settlement would unravel if they refused.").

(3) Refrain from coercing any party to make a decision or to continue to participate in the mediation.[116]

According to the accompanying Advisory Committee Comment, "examples of conduct that violate the principles of voluntary participation and self-determination include coercing a party to continue participating in the mediation after the party has told the mediator that he or she wishes to terminate the mediation, providing an opinion or evaluation of the dispute in a coercive manner or over the objection of the parties, using abusive language, and threatening to make a report to the court about a party's conduct at the mediation."[117] If the circumstances require it, a mediator may suspend or terminate a mediation.[118]

In public deliberations during this study, some Commissioners have expressed interest in the possibility of requiring certain disclosures at the outset of a mediation. The rules of conduct in Article 2 already require a mediator in a court-connected mediation program to make a number of disclosures. We mentioned some of these requirements above:

(1) The requirement to disclose matters that "could raise a question about his or her ability to conduct the proceedings impartially.[119]
(2) The requirement to provide "a general explanation of the confidentiality of mediation proceedings" at or before the first mediation session.[120]
(3) The requirement to explain the mediator's practice regarding confidentiality for separate communications with the participants.[121]
(4) The requirement to "[i]nform the parties, at or before the outset of the first mediation session, that any resolution of the dispute in mediation requires a voluntary agreement of the parties.[122]

In addition, the rules of conduct include:

(5) A requirement to provide all participants with a general explanation of the nature of the mediation process, the procedures

116. Cal. R. Ct. 3.857(b) further emphasizes the importance of ensuring voluntary participation and self-determination. It requires a mediation to "conduct the mediation proceedings in a procedurally fair manner," which is defined as "a balanced process in which each party is given an opportunity to participate and make *uncoerced* decisions." (Emphasis added.) "A mediator is not obligated to ensure the substantive fairness of an agreement reached by the parties." *Id.*
117. Cal. R. Ct. 3.853 Advisory Committee Comment.
118. Cal. R. Ct. 3.857 (i)-(j).
119. Cal. R. Ct. 3.855.
120. Cal. R. Ct. 3.854.
121. Cal. R. Ct. 3.854.
122. Cal. R. Ct. 3.853.

to be used, and the roles of the mediator, the parties, and the other participants.[123]

(6) A requirement to "inform all participants, at or before the outset of the first mediation session, that during the mediation he or she will not represent any participant as a lawyer or perform professional services in any capacity other than as an impartial mediator."[124]

These requirements currently apply only to the court-connected mediations governed by the rules of conduct, not to all mediations. At present, the mediation confidentiality statutes (Evidence Code Sections 1115-1128) do not include any exception expressly allowing a mediation participant to use mediation communications to prove or disprove that a mediator complied with these requirements. The procedure for complaining about a court program mediator (see the discussion of Article 3 below) appears to be the most-feasible way to air a concern about lack of compliance, because (1) the mediator will have waived mediation confidentiality in advance and (2) waivers from the other participants might not be necessary, given the confidential nature of the complaint procedure and fact that it is conducted by someone who might be considered an administrator of the court's mediation program (not by an entity or individual distinct from the court's mediation program).

Article 3. Requirements for Addressing Complaints About Court-Program Mediators

Article 3, entitled "Requirements for Addressing Complaints About Court-Program Mediators," consists of rules designed to promote resolution of a complaint alleging that a mediator violated a rule of conduct in Article 2.[125] As explained in an Advisory Committee Comment,

> *Complaints about mediators are relatively rare.* To ensure the quality of court mediation panels and public confidence in the mediation process and the courts, *it is, nevertheless, important* to ensure that any complaints that do arise are resolved through procedures that are consistent with California mediation confidentiality statutes (Evid. Code §§ 703.5 and 1115 et seq.), as well as fair and respectful to the interested parties.[126]

Thus, in each county with a court mediation program for general civil cases, the presiding judge "must designate a person who is knowledgeable about

123. Cal. R. Ct. 3.857(c). "The explanation of the mediation process should include a description of the mediator's style of mediation." Cal. R. Ct. 3.857 Advisory Committee Comment.
124. Cal. R. Ct. 3.857(d).
125. Cal. R. Ct. 3.865(b).
126. Cal. R. Ct. 3.865 Advisory Committee Comment (emphasis added).

mediation to serve as the complaint coordinator."[127] Any inquiry or complaint about a court program mediator "should be submitted or referred to the complaint coordinator," who "must send the complainant a written acknowledgement that the court has received the complaint."[128]

"The complaint coordinator must conduct a preliminary review of all complaints to determine whether the complaint can be informally resolved or closed, or whether the complaint warrants investigation."[129] If a complaint is not resolved or closed through the preliminary review, the mediator must be given notice of the complaint and an opportunity to respond, and an investigation must be made.[130] The investigation must be conducted by an individual who has experience as a mediator, or by a committee that includes such an individual.[131] The entire complaint proceeding (both preliminary review and later phases) is confidential, as already described.[132]

The final decision on the complaint must be made by the presiding judge or someone designated by the presiding judge, who is neither the complaint coordinator nor an individual who helped investigate the complaint.[133] The decision may do one or more of the following:

(1) Direct that no action be taken on the complaint;
(2) Counsel, admonish, or reprimand the mediator;
(3) Impose additional training requirements as a condition of the mediator remaining on the court's panel or list;
(4) Suspend the mediator from the court's panel or list or otherwise temporarily prohibit the mediator from receiving future mediation referrals from the court; or
(5) Remove the mediator from the court's panel or list or otherwise prohibit the mediator from receiving future mediation referrals from the court.[134]

The court must notify the complainant of the final decision.[135] If the court conducted an investigation, the court must also notify the mediator of the final

127. Cal. R. Ct. 3.867.
128. Cal. R. Ct. 3.869.
129. *Id.*
130. *Id.*
131. *Id.* A court with eight or fewer authorized judges may waive this requirement under specified circumstances.
132. See discussion of "California Rule of Court 3.860(b)" *supra.*
133. Cal. R. Ct. 3.869.
134. Cal. R. Ct. 3.870.
135. Cal. R. Ct. 3.869.

decision.[136] Those who helped resolve the complaint are prohibited from subsequently adjudicating "the dispute that was the subject of the underlying mediation or any other dispute that arises from the mediation."[137]

Most other details of the complaint procedure are left to each court to decide by local rule.[138] A set of model local rules, developed by the Administrative Office of the Courts, is available for courts to consider.[139]

Article 4. Civil Action Mediation Program Rules

Article 4 of the "General Rules Relating to Mediation of Civil Cases" contains rules to implement the Civil Action Mediation Act,[140] which authorizes a participating court to require mediation in certain civil cases (generally, any action in which the amount in controversy is $50,000 or less).[141] These rules govern selection of a panel of mediators,[142] the process of choosing a mediator for a particular case,[143] mediation attendance requirements,[144] the use of participant lists and mediation statements,[145] coordination of the mediation process with the Trial Court Delay Reduction Act,[146] and preparation of educational material on alternative dispute resolution programs.[147] There is also a rule requiring a mediator to file a "Statement of Agreement or Nonagreement" after a mediation, using a Judicial Council form.[148] The completed form "must not disclose the terms of any agreement or any other communications or conduct that occurred in the course of the mediation, except as allowed in Evidence Code sections 1115-1128."[149]

2005 Proposal by the Civil and Small Claims Advisory Committee

In 2005, the Judicial Council's Civil and Small Claims Advisory Committee circulated a rules proposal for comment, which concerned how to protect mediation confidentiality in a complaint proceeding against a court program

136. *Id.*
137. Cal. R. Ct. 3.872.
138. Cal. R. Ct. 3.868.
139. See Cal. R. Ct. 3.869 Advisory Committee Comment.
140. Code Civ. Proc. §§ 1775-1775.15.
141. See Code Civ. Proc. § 1775.5; Cal. R. Ct. 3.891(a)(1).
142. Cal. R. Ct. 3.892.
143. Cal. R. Ct. 3.893.
144. Cal. R. Ct. 3.894.
145. *Id.*
146. Cal. R. Ct. 3.896.
147. Cal. R. Ct. 3.898.
148. Cal. R. Ct. 3.895.
149. *Id.*

mediator.[150] The proposal eventually led to the revision and adoption of some of the court rules relating to court program mediations, including the rule providing for confidentiality of a complaint proceeding against a mediator.[151] As previously mentioned,[152] however, the proposal also included a requirement that mediators start every court-connected mediation by presenting a form containing certain information (proposed form ADR-108). For convenient reference, a copy of that form is attached as Exhibit pages 28-29.

The proposed form did not just ask each participant to agree in advance to waive mediation confidentiality for purposes of a complaint against a court program mediator. It was also intended to satisfy a court program mediator's obligations to make the various disclosures previously described.[153]

Public reaction to proposed form ADR-108 was decidedly negative. Almost all of the 37 comments on the 2005 proposal focused on that requirement, and 33 of those comments expressed concerns.[154] The Civil and Small Claims Advisory Committee summarized the reaction as follows:

> The requirement that mediators present ADR-108 to the mediation participants was, by far, the aspect of the proposal that concerned most commentators. Overall, the commentators were particularly troubled that form ADR-108 requested the participants' advance agreement to the disclosure of mediation communications in any potential complaint proceedings against the mediator. Principally, they thought this would undermine trust in the mediator, the mediation process, and the confidentiality of mediation communications, all of which are considered essential to a successful mediation. They were also concerned that presenting and explaining the form would take up mediation time and divert attention from resolving the dispute. In addition, some were concerned about imposing additional administrative burdens on court-program mediators (many of whom serve pro bono) and the possibility that some mediators would no longer be willing to serve in court mediation programs. Finally, a few were concerned that this requirement would cause an increase in the number of complaints against mediators or that parties with "buyer's remorse" would assert defects in the preparation or presentation of the form as a basis for challenging a settlement agreement.
>
> Many commentators challenged the necessity for requesting advance agreements to disclosure of mediation communications in all court-program mediations to address the possibility that there

150. Proposal SP05-03, *supra* note 84.
151. Cal. R. Ct. 3.871.
152. See discussion of "Broader Use of Contractual Waivers" *supra*.
153. See Proposal SP05-03, *supra* note 84, at 5-6.
154. Report on Proposal SP05-03, *supra* note 83, at 5.

> might be a subsequent [complaint against a mediator]. Some suggested that the volume of complaints against mediators (perhaps 50 per year statewide) does not warrant the adoption of procedures that might detrimentally affect all the court program mediations that are conducted (more than 30,000 per year statewide). Some commentators suggested, based on various interpretations of the confidentiality statutes, that the participants' agreement is not required for disclosure and court consideration of mediation communications in some or all types of [mediator complaint] proceedings. Some commentators also suggested that the participants' agreement to disclosure should be requested by the court, rather than the mediator, either before the mediation or only if and when a complaint arises.
>
> Some commentators expressed concerns about other aspects of form ADR-108. Many did not like the length, complexity, or "density" of the form. Some commented that the form would be particularly difficult for self-represented litigants to understand and expressed concerns that mediators would be called upon to answer questions that might be regarded as giving legal advice. Two court ADR administrators thought that represented parties would be unlikely to review the form and that therefore the intended benefits of providing information to them would not be obtained. Some commentators suggested that specific provisions of ADR 108 should be modified if the form were to be adopted.[155]

In light of this negative reaction, the Civil and Small Claims Advisory Committee decided not to recommend adoption of form ADR-108 or the proposed implementing rule. "Based on the public comments received, the committee concluded that the potential negative consequences of requiring the mediator to present such a form in all court-program mediations outweigh[ed] the benefits of obtaining the participants' advance agreement to disclosure of mediation communications in the very small number of court program mediations where there is an inquiry or a complaint about the mediator."[156]

As an alternative approach, the Civil and Small Claims Advisory Committee considered the possibility of proposing legislation that would have specifically allowed the disclosure of mediation communications in a complaint proceeding against a court program mediator and established the confidentiality of such a proceeding.[157] It viewed that approach as a potentially "less administratively burdensome and more comprehensive way of ensuring that mediation communications can be disclosed and considered" in such a proceeding yet kept

155. Report on Proposal SP05-03, *supra* note 83, at 12-13.
156. See Report on Proposal SP05-03, *supra* note 83, at 12-13 (footnotes omitted).
157. *Id.* at 4.

confidential.[158] But the committee was uncertain whether such a reform could be achieved.[159] Thus, instead of recommending the enactment of legislation, it dropped proposed form ADR-108 from its rules proposal and recommended that the Judicial Council proceed with the remaining rule changes (including the requirement that a court program mediator must agree in advance to disclosure of mediation communications for the purpose of resolving any complaint about the mediator's conduct). The Judicial Council followed that recommendation.

If the Commission decides to pursue the possibility of requiring some disclosures at the start of a mediation, **it should bear in mind the Judicial Council's experience with proposed form ADR-108.** It is difficult to predict the reaction to a simpler, less ambitious form. In all likelihood, the public response would depend on the specific content of the form, but interested persons probably would be more open to a concise form than to a complex one.

MEDIATOR IMMUNITY

Mediator immunity is a distinct concept from mediation confidentiality. The latter topic focuses on the rules governing the admissibility and disclosure of mediation communications,[160] and the competency of a mediator to testify regarding a mediation that the mediator conducted.[161] In contrast, the topic of mediator immunity focuses on the extent to which persons can sue a mediator for malfeasance in conducting a mediation.

Although the two topics are distinct, the rules relating to mediator immunity might have ramifications that the Commission should consider in conducting this study. We therefore describe that body of law below, starting with the leading case on the topic: *Howard v. Drapkin*.[162]

Howard v. Drapkin

There is no California Supreme Court decision on mediator immunity, and relatively little California case law, particularly published opinions. Unquestionably, *Howard v. Drapkin* is the leading decision in the area.

That case began with a dispute between a divorced couple over custody and visitation rights. Before the court conducted a hearing on those issues, the couple

158. *Id.* at 4-5.
159. *Id.* at 5.
160. See, e.g., Evid. Code §§ 1115-1128.
161. See, e.g., Evid. Code § 703.5.
162. 222 Cal. App. 3d 843, 271 Cal. Rptr. 893 (1990).

entered into a stipulation providing that they would hire a particular psychologist to "evaluate the facts and circumstances and render nonbinding findings and recommendations."[163] The court approved the stipulation and converted it into an order. Pursuant to its terms, the psychologist was authorized to provide written reports, but only to the couple, not to the court. The ex-husband or ex-wife could call the psychologist to testify in the custody hearings, but the court could not.

After the psychologist conducted her evaluation, the ex-wife sued the psychologist for misconduct in performing that task. In particular, the ex-wife claimed that the psychologist was abusive in a session with the ex-wife, the psychologist's report included material misstatements and omissions, and the psychologist failed to properly disclose conflicts of interest and her level of experience.

The psychologist demurred to the complaint on two grounds: (1) she was entitled to common law immunity as a quasi-judicial officer participating in the judicial process, and (2) she was entitled to invoke the litigation privilege under Civil Code Section 47(2) for a publication in a judicial proceeding. The trial court sustained the demurrer without leave to amend and dismissed the ex-wife's lawsuit. The ex-wife appealed.

In a 2-1 decision, the court of appeal affirmed the dismissal. The majority concluded that the psychologist, "acting in the capacity of a neutral third person engaged in efforts to effect a resolution of a family law dispute, [was] entitled to the protection of quasi-judicial immunity for the conduct of such dispute resolution services."[164] The majority further concluded that "the litigation privilege provided for in section 47(2) applie[d] to the facts of th[e] case."[165]

With regard to quasi-judicial immunity, the majority provided an extensive historical and policy analysis, which began by describing the concept of judicial (as opposed to quasi-judicial) immunity:

> The concept of judicial immunity is long-standing and absolute, with its roots in English common law. It bars civil actions against judges for acts performed in the exercise of their judicial functions and it applies to all judicial determinations, including those rendered in excess of the judge's jurisdiction, no matter how erroneous or even malicious or corrupt they may be. The judge is immune unless "he has acted in the clear absence of all jurisdiction.

163. *Id.* at 894.
164. *Id.*
165. *Id.*

> Beyond doubt, the doctrine of "civil immunity of the judiciary in the performance of judicial functions is deeply rooted in California law."[166]

The majority explained that judicial immunity serves two key purposes: It protects the finality of judgments, discouraging inappropriate collateral attacks; it also protects judicial independence by insulating judges from vexatious claims brought by disgruntled litigants.[167]

The majority discussed the latter point in detail. Among other things, the majority noted that a lack of immunity would lead to judicial intimidation:

> "If judges were personally liable for erroneous decisions, the resulting avalanche of suits, most of them frivolous but vexatious, would provide powerful incentives for judges to avoid rendering decisions likely to provoke such suits.… The resulting timidity would be hard to detect or control, and it would manifestly detract from independent and impartial adjudication."[168]

Due to that danger, and the burden and risk inherent in facing trial, the majority said that judicial immunity "must be absolute, even to the malicious or corrupt judge."[169] The consequence of judicial immunity is thus that "the action against the judicial officer must be dismissed."[170]

With that background on judicial immunity, the majority turned to quasi-judicial immunity, explaining that "[u]nder the concept of 'quasi-judicial immunity,' California courts have extended absolute judicial immunity to persons other than judges if those persons act in a judicial or quasi-judicial capacity."[171] The majority gave the same rationale for quasi-judicial immunity as for judicial immunity: "to promote uninhibited and independent decisionmaking."[172]

The majority then explained that in determining whether to apply quasi-judicial immunity, the nature of the duty performed is critical, not the name, employer, or classification of the person who performs it.[173] According to the majority, the key considerations are "the *importance to the judicial system*" of the

166. *Id.* at 851 (citations omitted).
167. *Id.*
168. *Id.* at 852, *quoting* Forrester v. White, 484 U.S. 219, 226-27 (1988).
169. *Howard,* 222 Cal. App. 3d at 852.
170. *Id*.
171. *Id*. at 852-53.
172. *Id*. at 853.
173. *Id*.

duty performed,[174] and whether the function is normally performed by a judge, as opposed to an advocate.[175]

Applying those criteria, the court "h[e]ld that absolute quasi-judicial immunity is properly extended to … neutral third parties for their conduct in performing dispute resolution services which are connected to the judicial process and involve either (1) the making of binding decisions, (2) the making of findings or recommendations to the court or (3) the arbitration, *mediation*, conciliation, evaluation, or other similar resolution of pending disputes."[176] The majority further found that the psychologist's duties fell into the third category and she was thus "entitled to the protection of such quasi-judicial immunity,"[177] even though she was privately employed and "function[ed] apart from the courts."[178]

In reaching those conclusions, the majority emphasized the importance of alternative dispute resolution to the effective functioning of the judicial system:

> [I]n this day of excessively crowded courts and long delays in bringing civil cases to trial, more reliance is being placed by both parties and the courts on alternative methods of dispute resolution.…
>
> … [Among other options], the parties can choose a mediator or neutral fact finder with the expertise to facilitate a resolution of their particular dispute.… [M]ediation is traditionally a nonbinding dispute resolution alternative. While most mediation is voluntary, some is compulsory ….
>
> Besides relieving court congestion and speeding up the conclusion of cases, these less-traditional alternative dispute resolution procedures are often less expensive and less stressful than seeing a case through its normal trial path. *Like the more formal dispute resolution procedures, they are critical to the proper functioning of our increasingly congested trial courts*.[179]

The majority specifically explained that mediation was an activity deserving of quasi-judicial immunity:

> [T]he psychologist who is mediating a child custody dispute, whether by court appointment or not, is not an advocate for either parent, even if paid by them. The job of third parties such as mediators, conciliators and evaluators involves impartiality and neutrality, as does that of a judge, commissioner or referee; *hence,*

174. *Id*. at 855 (emphasis in original).
175. See *id*. at 854, 859.
176. *Id*. at 860 (emphasis added).
177. *Id*.
178. *Id*. at 855.
179. *Id*. at 858 (emphasis added).

> *there should be entitlement to the same immunity given others who function as neutrals in an attempt to resolve disputes*. In a sense, those persons are similar to a judge who is handling a voluntary or mandatory settlement conference, no matter whether they are (1) making binding decisions …, (2) making recommendations to the court …, or (3) privately attempting to settle disputes, such as the defendant here.[180]

The majority further explained that "[i]n order to best protect the ability of neutral third parties to aggressively mediate or resolve disputes, a dismissal at the very earliest stage of the proceedings is critical to the proper functioning and continued availability of those services."[181]

Justice Danielson concurred in the result, but wrote separately to "emphatically dissent and disassociate [himself] from the reasoning and the holding of the majority opinion which would create, by judicial legislation, a 'quasi-judicial immunity' in persons whom it vaguely designates as 'neutral third party participants in the judicial process.'"[182] In his view, the creation of immunity is a legislative function, not the proper province of the judiciary.[183] As he put it, "[l]aws should be created by legislation, not by litigation."[184]

Other Case Law on Mediator Immunity in California

Aside from *Howard,* there is not much case law on mediator immunity in California, but the case law that exists is quite uniform. The majority opinion in *Howard* has received wide support, mostly in cases concerning the availability of quasi-judicial immunity to persons other than mediators.[185] As Judge Vaughn Walker put it in an unpublished federal decision issued in 2005, "*Howard* has been binding California precedent for over 14 years and a search of subsequent treatment of *Howard* by California courts does not reveal a *single* instance of

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180. *Id*. at 859-60 (emphasis added, citation omitted).
181. *Id*. at 859-60 (emphasis added, citation omitted).
182. *Id*. at 864.
183. *Id*. at 867 (Danielson, J., concurring & dissenting).
184. *Id*. at 868 (Danielson, J., concurring & dissenting).
185. For example, in *Susan A. v. County of Sonoma,* 2 Cal. App. 4th 88, 98, 3 Cal. Rptr. 2d 27 (1991), Justice Chin (then sitting on the First District Court of Appeal) said:

> The [*Howard*] court reasoned that the availability of the immunity turns on whether the person is functioning as an advocate or a nonadvocate. [*Howard,* 222 Cal. App. 3d at 859.] Thus, immunity is available to a psychologist who is mediating a child custody dispute and who is not an advocate for either parent. [*Id.*] Conversely, public defenders by virtue of their status as advocates for the defendant, have no such immunity. (*Ibid.*) Here, the public defender … retained Podboy … in order to assist the defense, not on behalf of the court as a neutral party.… Podboy is not entitled to quasi-judicial immunity.

negative treatment among the 22 cases which have cited it."[186] Judge Walker also firmly rejected an argument that *Howard*'s discussion of quasi-judicial immunity was dictum:

> Far from being "unnecessary dictum" or "double dicta," *Howard*'s holding that "nonjudicial persons who fulfill quasi-judicial function[s] … should be given absolute quasi-judicial immunity" was the court's *ratio decidendi*. In fact, the court devoted thirteen of the opinion's seventeen pages to the discussion of quasi-judicial immunity.[187]

Bergeron v. Boyd,[188] a recent published decision by the First Appellate District, is similar to *Howard*: It involved the application of quasi-judicial immunity to a psychologist who served as a child custody evaluator. The court of appeal reiterated much of the reasoning of *Howard* and reached the same result, upholding the trial court's dismissal of the claims against the psychologist.[189]

In so doing, the court made clear that a person is not deprived of quasi-judicial immunity because the person's action was erroneous, done maliciously, or without authority. Rather, it explained that quasi-judicial immunity is absolute unless the person acted in a *clear absence* of jurisdiction.[190]

Other cases make the same point. For example, an unpublished court of appeal opinion involving a family law mediator (*Goad v. Ervin*[191]) states:

> Ms. Ervin's memo to the judge was part of her work as a family law mediator. The observations that constituted the written remarks were made while attempting to conduct a family law mediation, a quasi-judicial function. Since judicial immunity is absolute and not qualified, *all that need be shown is that the actions complained [of] occurred within the scope of immunity*. Since the complained of conduct occurred within the scope of her employment as a court mediator, the immunity is absolute.[192]

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186. Vedatech, Inc. v. St. Paul Fire & Marine Ins. Co., 2005 U.S. Dist. LEXIS 45095, *40 (2005) (emphasis in original), *aff'd*, 245 Fed. Appx. 588 (2007).
187. *Id*.
188. 223 Cal. App. 4th 877, 164 Cal. Rptr. 3d 426 (2014).
189. See *id.* at 884-89.
190. *Id.* at 889.
191. 2003 Cal. App. Unpub. LEXIS 10888 (2003).
192. *Id.* at *8; see also Meyers v. Contra Costa County Dep't of Social Services, 812 F.2d 1154, 1158-59 (9th Cir. 1987) (applying quasi-judicial immunity to Family Conciliation Court counselors whose duties under California law included "mediation of custody and visitation disputes, investigating matters pertaining to such disputes, and providing reports to the courts," because they were performing judicial functions at the direction of the court, not acting completely outside of their jurisdiction).

Another unpublished court of appeal decision (*Simpson v. JAMS/Endispute, LLC*[193]) applied quasi-judicial immunity to JAMS/Endispute, LLC ("JAMS"), a mediation organization that provided a mediator to conduct a court-ordered mediation. The court explained that quasi-judicial immunity extends to mediators and neutral fact-finders, as well as "organizations such as JAMS that provide the neutrals or sponsor the mediation."[194] The *Simpson* court also specifically rejected the plaintiff's argument that the doctrine of quasi-judicial immunity should not apply to a mandatory mediation:

> Simpson asserts that he was "forced" into mediation by the court. *Whether the mediation was pursuant to private agreement and without court order or part of one of a variety of programs for court ordered mediation, the immunity would still apply.* Indeed, where the court has ordered mediation, the neutral's services were even more clearly rendered "in the shadow of pending litigation" to attempt to effect a resolution of the dispute, than in circumstances where the neutral's services were performed pursuant to a purely private agreement. (Cf. *Howard* …)[195]

Relying on published precedents relating to arbitration, the court further explained that quasi-judicial immunity applies to anything short of *complete nonperformance* of a mediator's duties.[196] According to the court, to decide otherwise "would be contrary to the court's recognition of the importance that quasi-judicial immunity plays in protecting … the facilitation of settlement in the context of mediation."[197] Because the mediator in *Simpson* had not "completely fail[ed] to do his job," but simply "did not conduct the mediation in the fashion that Simpson expected or wished to occur," the court held that the mediator's acts were protected by quasi-judicial immunity.[198]

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193. 2006 Cal. App. Unpub. LEXIS 6480 (2006).
194. *Id.* at *9; see also Stasz v. Schwab, 121 Cal. App. 4th 420, 433, 17 Cal. Rptr. 3d 116 (2004) (explaining that as practical matter, grant of immunity to arbitrator must be accompanied by a grant of same immunity to AAA, which is as indispensable to arbitrator's job of arbitrating as courts are to judge's job of judging).
195. *Simpson*, 2006 Cal. App. Unpub. LEXIS 6480, at *14-*15. Because the court of appeal decided *Simpson* on the basis of quasi-judicial immunity, it did not have to reach JAMS' argument that dismissal of the suit was also required "because the evidentiary privilege of Evidence Code section 703.5 renders the mediator incompetent to testify regarding the mediation proceeding and therefore prevents JAMS from defending itself." *Id.* at *18. In raising that argument, JAMS apparently relied on the *McDermott* case discussed earlier in this memorandum in connection with Evidence Code Section 958. See *id.*
196. *Id.* at *12.
197. *Id.*
198. *Id.* at *13.

In addition to *Simpson* and the other cases discussed above, the staff found a few more unpublished decisions discussing the application of quasi-judicial immunity to a mediator under California law. These include:

- *St. Paul Fire & Marine Ins. Co. v. Vedatech Int'l, Inc.*, a Ninth Circuit decision holding that under California law, quasi-judicial immunity applies to a mediator who fulfills a quasi-judicial function intimately related to the judicial process.[199]
- *Pagtakhan v. Doe,*[200] a federal district court decision applying quasi-judicial immunity to court-appointed psychologists who evaluated a litigant's competency. In discussing the doctrine of quasi-judicial immunity, the court noted that "[a]bsolute quasi-judicial immunity … has been held by California courts to exist for … a court-appointed mediator."[201] The court cited *Goad* in support of that assertion.[202]
- *Morgan Phillips v. JAMS*,[203] a court of appeal decision extending quasi-judicial immunity to a mediator-arbitrator who withdrew in the middle of resolving a dispute and said he could not be impartial. The court of appeal did not consider it necessary to "resolve whether the dispute resolution proceedings involved here constituted an arbitration or a mediation."[204] It explained that "[a]ll functions integral to the dispute resolution process are shielded by absolute immunity," so the court could not "entertain a civil suit for damages arising out of a neutral third parties' attempts to arbitrate, mediate, or otherwise resolve a dispute."[205]

There is thus considerable case law recognizing the existence of quasi-judicial immunity for mediators under California law. As previously noted, the rules governing court mediation programs also make clear that they are not intended to "[c]reate a basis for a civil cause of action against a mediator."[206]

Nonetheless, one cannot say that the area is fully settled. A measure of uncertainty still remains, because there is no California Supreme Court decision on the point, there are few published cases, and those cases involved only certain types of mediation activities (although their reasoning extends to a broader range of mediation situations).

199. 245 Fed. Appx. 588, *592 (9th Cir. 2007).
200. 2013 U.S. Dist. LEXIS 166630 (2013).
201. *Id.* at * 14.
202. See *id.*
203. 2010 Cal. App. Unpub. LEXIS 689 (2010).
204. *Id.* at *42-*43.
205. *Id.* at *45.
206. Cal. R. Ct. 3.850(b)(3).

Implications for the Commission's Study

Unquestionably, the mediation community in California cares deeply about the existence of quasi-judicial immunity for mediators. In all likelihood, any legislative attempt to weaken the level of protection would be explosive and would meet with stiff resistance.

Importantly, the legislative resolution calling for this study does *not* ask the Commission to study or make any recommendations relating to mediator immunity. Instead, the resolution instructs the Commission to analyze "the relationship under current law between mediation *confidentiality* and attorney malpractice and other misconduct …."[207]

It is not altogether clear whether the Commission is to focus solely on the relationship between mediation confidentiality and attorney misconduct, as opposed to other types of misconduct, including perhaps mediator misconduct. The staff will address that point in a future memorandum, so that the Commission can decide the matter.

The resolution also gives the Commission some leeway, permitting it to consider any issues it "deems relevant" to "the relationship between mediation confidentiality and attorney malpractice and other misconduct," and to "make any recommendations that it deems appropriate for the revision of California law to balance the competing interests between confidentiality and accountability."[208] But nowhere does the resolution even refer to mediator *immunity*, much less require the Commission to address that topic.

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

PROCEDURE FOR A STATE BAR DISCIPLINARY COMPLAINT

Another aspect of California law pertinent to this study is the procedure for handling a complaint to the State Bar about an attorney's professional conduct. At this stage of the Commission's study, it does not seem necessary to provide a

207. 2012 Cal. Stat. res. ch. 108 (ACR 98 (Wagner)) (emphasis added).
208. *Id.*

detailed description of that procedure. But some basic background information might be useful.

Overview of the Disciplinary Process

"California is the only state in the nation with independent professional judges dedicated to ruling on attorney discipline cases."[209] The State Bar website[210] explains how a client or other aggrieved person can obtain and submit a form to complain about an attorney's professional conduct. There is no fee for filing such a complaint and the complainant does not need to be a U.S. citizen.

The State Bar website also includes a pamphlet[211] that provides the following description of what will happen to such a complaint:

- You will be notified by mail after the State Bar has received your complaint.
- An experienced State Bar lawyer will review the complaint.
- If the complaint does not involve an ethical violation or provide information supporting such a violation, the file will be closed and you will be notified by mail. (You can, at this point, request in writing that the file be reviewed by the State Bar's Audit and Review Department.)
- If the file is not closed, a State Bar complaint analyst (supervised by a State Bar attorney) will typically write to the lawyer named in the complaint and ask for his or her side of the story. Also, additional documents may be needed to determine whether the matter should be investigated further.
- If there isn't enough evidence to prove a serious ethical violation, the bar may issue a warning to the lawyer. Or the bar could issue an Agreement in Lieu of Discipline in which the lawyer agrees to take corrective action. (Such an agreement is not considered discipline.)
- If the State Bar attorney who reviews the complaint sees evidence of a serious violation, a full investigation will be launched.[212]

The pamphlet further explains what will happen if the State Bar files charges against an attorney:

> If the lawyer continues to deny the misconduct, there will be a hearing in the independent State Bar Court:
>
> - Testimony and documents will be presented to a judge.

209. http://www.statebarcourt.ca.gov/Home.aspx.
210. http://www.calbar.ca.gov.
211. State Bar of California, *What Can I Do If I Have a Problem With My Lawyer?*, *available at* http://calbar.ca.gov/Public/Pamphlets/ProblemwithaLawyer.aspx.
212. *Id*. (Question #14: What will happen to my complaint?).

- The State Bar Court hearing judge can dismiss the case, issue a private or public reproval, or recommend that the lawyer be suspended or disbarred.
- The hearing judge's decision can be appealed to the State Bar Court's Review Department by either the lawyer or the State Bar prosecutors. A review panel of three lawyers — appointed by the California Supreme Court — can accept or change the hearing judge's recommendation.

Another appeal can be made to the California Supreme Court. (However, the Supreme Court does not have to review the case.) And even if no one appeals, the Supreme Court can review any State Bar Court decision. In most cases, however, the court adopts the recommendation for suspension or disbarment.[213]

Extent of Confidentiality of the Disciplinary Process

For purposes of the Commission's study, it might be important to know how much of the State Bar's disciplinary procedure is public, not private and confidential.

"All disciplinary investigations are confidential until the time that formal charges are filed …."[214] Once formal charges are filed against an attorney in the State Bar Court, the proceeding becomes public.[215]

Although the early stages of a disciplinary investigation are confidential, the attorney whose conduct is being investigated may waive that confidentiality.[216] In addition, the Chief Trial Counsel or President of the State Bar may waive the confidentiality, "but only when warranted for protection of the public."[217] Under specified circumstances, the Chief Trial Counsel (or designee) is also permitted, and in some instances required, to disclose information from an investigation *in confidence* to an agency responsible for enforcing civil or criminal laws, an out-of-

213. *Id.* (Question #15: What happens when the State Bar files charges against an attorney?).
214. Bus. & Prof. Code § 6086.1(b); see also State Bar R. Proc. 2302.
215. Bus. & Prof. Code § 6086.1(a); see also State Bar R. Proc. 5.9. As the State Bar website explains:

> When can the State Bar reveal that someone has lodged a complaint against a particular attorney?
> State Bar investigations and inquiries are, by statute, confidential. The complaint becomes public when disciplinary charges are filed against an attorney in State Bar Court. By law, however, any other pending investigations involving the same lawyer must remain confidential at that point. If it is determined that public protection is seriously at stake in a particular case, the Chief Trial Counsel does have the authority to publicly reveal a pending investigation.

http://www.calbar.ca.gov/Attorneys/LawyerRegulation/FAQ.aspx.
216. Bus. & Prof. Code § 6086.1(b)(1); see also State Bar R. Proc. 2302(b)-(c).
217. Bus. & Prof. Code § 6086.1(b)(2); see also State Bar R. Proc. 2302(d).

state disciplinary agency, an agency responsible for professional licensing, or the Judicial Nominees Evaluation Commission.[218]

Similarly, there is a little flexibility to the rule that the proceedings become public once formal charges are filed in the State Bar Court: A party may move for an order sealing part of the record, including a hearing, testimony, exhibit, pleading, or other document.[219] "The motion must be supported by specific facts showing that a statutory privilege or constitutionally protected interest exists that outweighs the public interest in the proceeding."[220] If the State Bar Court seals the material, it may be disclosed only to the parties to the disciplinary proceeding, their counsel, Supreme Court personnel, State Bar Court personnel, independent audiotape transcribers, and Office of Probation personnel (when necessary for their official duties).[221]

Monetary Relief Available to a Client Through State Bar Processes

The Commission might also be interested in knowing the extent to which a client can obtain monetary relief through State Bar processes (other than fee arbitrations or mediations), as opposed to a legal malpractice claim.

When circumstances warrant it, State Bar discipline may include a requirement of restitution.[222] The State Bar may also condition a particular result (e.g., probation or reinstatement) on the making of restitution,[223] or take the act of making, or failing to make, restitution into account in determining the appropriate discipline for an attorney.[224]

In addition, all California lawyers contribute through their annual dues to the Client Security Fund, which is used to reimburse clients for "dishonest conduct" of attorneys. "Dishonest conduct" is defined as:

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

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218. Bus. & Prof. Code §§ 6044.5, 6086.1(b)(3); see also State Bar R. Proc. 2302(e).
219. See State Bar R. Proc. 5.12; B. Witkin, California Procedure, *Attorneys* § 568, p. 698 (5th ed. 2008).
220. State Bar R. Proc. 5.12(B).
221. State Bar R. Proc. 5.12(D).
222. See, e.g., Bernstein v. State Bar, 50 Cal. 3d 221, 232, 786 P.2d 352, 266 Cal. Rptr. 625 (1990) ("[W]e have ourselves added the requirement of restitution to an attorney's discipline to protect the public and maintain high standards of professional conduct …, and have consistently recognized and approved the State Bar's recommendation of such discipline").
223. See, e.g., State Bar R. Proc. 1.4 (conditions attached to reproval or probation may require attorney to "make specific restitution").
224. See, e.g., State Bar R. Proc. 1.5(i) (aggravating circumstances may include failure to make restitution), 1.6 (mitigating circumstances may include making restitution "without threat or force of administrative, disciplinary, civil or criminal proceedings").

> (B) Failure to refund unearned fees received in advance for services when the attorney performed an insignificant portion of the services or none at all. Such a failure constitutes a wrongful taking or conversion. All other instances of an attorney's failure to return an unearned fee or the disputed portion of a fee are outside the scope of this provision and not reimbursable under these rules.
>
> (C) Borrowing money from a client without the intention or reasonable ability, present or prospective, of repaying it.
>
> (D) Obtaining money or property from a client for an investment that was not in fact made. Failure of an investment to perform as represented to or anticipated by a client is not dishonest conduct under these rules.
>
> (E) An act of intentional dishonesty or deceit that proximately leads to the loss of money or property.[225]

The client must not only establish that the attorney engaged in dishonest conduct, but must also show that the attorney has (1) been disbarred, disciplined, or voluntarily resigned from the State Bar, (2) died or been adjudicated mentally incompetent, or (3) because of the dishonest conduct become a judgment debtor of the client in a contested proceeding or been convicted of a crime.[226] Other requirements and restrictions also apply.

Moreover, disbursements from the Client Security Fund are discretionary; no one has a right to reimbursement.[227] The fund is administered by the Client Security Fund Commission and an aggrieved client must file a special application to obtain reimbursement from the fund (a discipline complaint is not enough).

The maximum reimbursement from the Client Security Fund is $50,000 per client for losses sustained before January 1, 2009, and $100,000 per client for losses sustained thereafter.[228] Certain types of losses are not reimbursable.[229]

The Client Security Fund "represents one of the State Bar's major efforts to achieve its public protection goals."[230] It has "reimbursed more than $20,000,000 since January 1995."[231]

225. State Bar R. Proc. 3.431, 3.430(d).
226. State Bar R. Proc. 3.432.
227. State Bar R. Proc. 3.420.
228. State Bar R. Proc. 3.434.
229. *Id.*
230. http://www.calbar.ca.gov/Attorneys/LawyerRegulation/FAQ.aspx ("What is the Client Security Fund and how does it work?).
231. *Id.*

Application of the Mediation Confidentiality Statutes in a State Bar Disciplinary Proceeding

At the April meeting, a number of people raised questions about the extent to which the mediation confidentiality statutes (Evidence Code Sections 1115-1128) are being applied to restrict the admissibility or disclosure of mediation communications in State Bar disciplinary proceedings. Presumably, the State Bar Court has taken a position on the point in the course of its work. The Commission was interested in knowing the State Bar's practice:

- Does the State Bar exclude evidence or restrict discovery in its disciplinary proceedings due to the mediation confidentiality statutes?
- Does it instead decline to apply the mediation confidentiality statutes, because those statutes are inapplicable to a criminal case,[232] and a State Bar proceeding is a quasi-criminal matter?[233]
- Does the State Bar take some other position on this point?

The staff passed these questions along to Saul Bercovitch at the State Bar, who alerted the staff to *In re Bolanos*,[234] an opinion issued by the Hearing Department of the State Bar Court in late 2013. *Bolanos* was a disciplinary proceeding involving multiple charges of misconduct: (1) representing multiple clients with potential conflicts, (2) failing to notify a client of receipt of funds, (3) failing to maintain client funds in a trust account, (4) failing to release a client file, (5) committing an act of moral turpitude by misappropriating client funds, and (6) failing to pay client funds promptly.

Among other things, the matter involved a dispute over modification of a lawyer-client fee agreement, which apparently occurred during a mediation that the lawyer handled for the client. A footnote in the court's opinion makes clear that the court *did* apply the mediation confidentiality statutes to exclude evidence in the disciplinary proceeding. The footnote says:

> 7/ This court, relying on *Cassel v. Superior Court* (2011) 51 Cal. 4th 570, made a ruling that mediation confidentiality applied to preclude the discussion and the exact terms of the modification. At the same time, the court did allow evidence that there was a modification and why respondent did not think the modification was valid.

232. See, e.g., Cassel v. Superior Court, 51 Cal. 4th 113, 135 n.11, 244 P.3d 1080, 119 Cal. Rptr. 3d 437 (2011).
233. See generally B. Witkin, *supra* note 219, at *Attorneys* §§ 559-560, pp. 689-91 (comparing and contrasting State Bar disciplinary proceeding with criminal case).
234. No. 12-0-12167-PEM (Sept. 16, 2013).

This evidentiary ruling does not appear to have had a big impact on the disposition of the case. The court found against the lawyer on Charges #1-#4 described above, but not on Charges #5 and #6. As best the staff can tell from the reasoning in the opinion, the results of Charges #5 and #6 were not affected by the evidentiary ruling. Of course, a similar mediation confidentiality ruling might have greater impact in a disciplinary proceeding with a different set of facts.

The decision in *Bolanos* is not final; the matter is currently pending before the Review Department of the State Bar Court. A ruling is expected soon and we will notify the Commission when that occurs.

Respectfully submitted,

Barbara Gaal
Chief Deputy Counsel

CALIFORNIA RULES OF COURT 3.835-3.898

Chapter 3. General Rules Relating to Mediation of Civil Cases

Article 1. Procedures for All Court Mediation Programs

Division 8, Alternative Dispute Resolution—Chapter 3, General Rules Relating to Mediation of Civil Cases—Article 1, Procedures for All Court Mediation Programs; adopted effective July 1, 2011.

Rule 3.835. Application

The rules in this article apply to all court mediation programs for general civil cases, as defined in rule 1.6, unless otherwise specified.

Rule 3.835 adopted effective July 1, 2012.

Rule 3.845. Form of mediator statements and reports

If a mediator is required to submit a statement or report to the court concerning the status or result of the mediation, the statement or report must be submitted on the Judicial Council *Statement of Agreement or Nonagreement* (form ADR-100). The mediator's completed form ADR-100 must not disclose the terms of any agreement or any other communications or conduct that occurred in the course of the mediation, except as allowed in Evidence Code sections 1115–1128.

Rule 3.845 adopted effective July 1, 2012.

Advisory Committee Comment

This rule does not preclude courts from asking mediators to provide other information about court-program mediations on separate forms or surveys that do not request any information that will allow identification of a specific case or mediation participant and that will not become part of the court's case file.

Article 2. Rules of Conduct for Mediators in Court-Connected Mediation Programs for Civil Cases

Rule 3.850. Purpose and function

(a) Standards of conduct

The rules in this article establish the minimum standards of conduct for mediators in court-connected mediation programs for general civil cases. These rules are intended to guide the conduct of mediators in these programs, to inform and protect participants in these mediation programs, and to promote public confidence in the mediation process and the courts. For mediation to be effective, there must be broad public confidence in the integrity and fairness of the process. Mediators in court-connected programs are responsible to the parties, the public, and the courts for conducting themselves in a manner that merits that confidence.

(Subd (a) amended effective January 1, 2007.)

(b) Scope and limitations

These rules are not intended to:

(1) Establish a ceiling on what is considered good practice in mediation or discourage efforts by courts, mediators, or others to educate mediators about best practices;

(2) Create a basis for challenging a settlement agreement reached in connection with mediation; or

(3) Create a basis for a civil cause of action against a mediator.

(Subd (b) amended effective January 1, 2007.)

Rule 3.850 amended and renumbered effective January 1, 2007; adopted as rule 1620 effective January 1, 2003.

Rule 3.851. Application

(a) Circumstances applicable

The rules in this article apply to mediations in which a mediator:

(1) Has agreed to be included on a superior court's list or panel of mediators for general civil cases and is notified by the court or the parties that he or she has been selected to mediate a case within that court's mediation program; or

(2) Has agreed to mediate a general civil case pending in a superior court after being notified by the court or the parties that he or she was recommended, selected, or appointed by that court or will be compensated by that court to mediate a case within that court's mediation program. A mediator who is not on a superior court list or panel and who is selected by the parties is not "recommended, selected, or appointed" by the court within the meaning of this subdivision simply because the court approves the parties' agreement to use this mediator or memorializes the parties' selection in a court order.

(Subd (a) amended effective January 1, 2010; previously amended effective January 1, 2007, and January 1, 2009.)

(b) Application to listed firms

If a court's panel or list includes firms that provide mediation services, all mediators affiliated with a listed firm are required to comply with the rules in this article when they are notified by the court or the parties that the firm was selected from the court list to mediate a general civil case within that court's mediation program.

(Subd (b) amended effective July 1, 2007; previously amended effective January 1, 2007.)

(c) Time of applicability

Except as otherwise provided in these rules, the rules in this article apply from the time the mediator agrees to mediate a case until the end of the mediation in that case.

(Subd (c) amended effective January 1, 2007.)

(d) Inapplicability to judges

The rules in this article do not apply to judges or other judicial officers while they are serving in a capacity in which they are governed by the Code of Judicial Ethics.

(Subd (d) amended effective January 1, 2007.)

(e) Inapplicability to settlement conferences

The rules in this article do not apply to settlement conferences conducted under rule 3.1380.

(Subd (e) amended effective January 1, 2007.)

Rule 3.851 amended effective January 1, 2010; adopted as rule 1620.1 effective January 1, 2003; previously amended and renumbered effective January 1, 2007; previously amended effective July 1, 2007, and January 1, 2009.

Advisory Committee Comment

Subdivision (d). Although these rules do not apply to them, judicial officers who serve as mediators in their courts' mediation programs are nevertheless encouraged to be familiar with and observe these rules when mediating, particularly the rules concerning subjects not covered in the Code of Judicial Ethics such as voluntary participation and self-determination.

Rule 3.852. Definitions

As used in this article, unless the context or subject matter requires otherwise:

(1) "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.

(2) "Mediator" means a neutral person who conducts a mediation.

(3) "Participant" means any individual, entity, or group, other than the mediator taking part in a mediation, including but not limited to attorneys for the parties.

(4) "Party" means any individual, entity, or group taking part in a mediation that is a plaintiff, a defendant, a cross-complainant, a cross-defendant, a petitioner, a respondent, or an intervenor in the case.

Rule 3.852 amended and renumbered effective January 1, 2007; adopted as rule 1620.2 effective January 1, 2003.

Advisory Committee Comment

The definition of "mediator" in this rule departs from the definition in Evidence Code section 1115(b) in that it does not include persons designated by the mediator to assist in the mediation or to communicate with a participant in preparation for the mediation. However, these definitions are applicable only to these rules of conduct and do not limit or expand mediation confidentiality under the Evidence Code or other law.

The definition of "participant" includes insurance adjusters, experts, and consultants as well as the parties and their attorneys.

Rule 3.853. Voluntary participation and self-determination

A mediator must conduct the mediation in a manner that supports the principles of voluntary participation and self-determination by the parties. For this purpose a mediator must:

(1) Inform the parties, at or before the outset of the first mediation session, that any resolution of the dispute in mediation requires a voluntary agreement of the parties;

(2) Respect the right of each participant to decide the extent of his or her participation in the mediation, including the right to withdraw from the mediation at any time; and

(3) Refrain from coercing any party to make a decision or to continue to participate in the mediation.

Rule 3.853 amended and renumbered effective January 1, 2007; adopted as rule 1620.3 effective January 1, 2003.

Advisory Committee Comment

Voluntary participation and self-determination are fundamental principles of mediation that apply both to mediations in which the parties voluntarily elect to mediate and to those in which the parties are required to go to mediation in a mandatory court mediation program or by court order. Although the court may order participants to attend mediation, a mediator may not mandate the extent of their participation in the mediation process or coerce any party to settle the case.

After informing the parties of their choices and the consequences of those choices, a mediator can invoke a broad range of approaches to assist the parties in reaching an agreement without offending the principles of voluntary participation and self-determination, including (1) encouraging the parties to continue participating in the mediation when it reasonably appears to the mediator that the possibility of reaching an uncoerced, consensual agreement has not been exhausted and (2) suggesting that a party consider obtaining professional advice (for example, informing an unrepresented party that he or she may consider obtaining legal advice). Conversely, examples of conduct that violate the principles of voluntary participation and self-determination include coercing a party to continue participating in the mediation after the party has told the mediator that he or she wishes to terminate the mediation, providing an opinion or evaluation of the dispute in a coercive manner or over the objection of the parties, using abusive language, and threatening to make a report to the court about a party's conduct at the mediation.

Rule 3.854. Confidentiality

(a) Compliance with confidentiality law

A mediator must, at all times, comply with the applicable law concerning confidentiality.

(b) Informing participants of confidentiality

At or before the outset of the first mediation session, a mediator must provide the participants with a general explanation of the confidentiality of mediation proceedings.

(c) Confidentiality of separate communications; caucuses

If, after all the parties have agreed to participate in the mediation process and the mediator has agreed to mediate the case, a mediator speaks separately with one or more participants out of the presence of the other participants, the mediator must first discuss with all participants the mediator's practice regarding confidentiality for separate communications with the participants. Except as required by law, a mediator must not disclose information revealed in confidence during such separate communications unless authorized to do so by the participant or participants who revealed the information.

(d) Use of confidential information

A mediator must not use information that is acquired in confidence in the course of a mediation outside the mediation or for personal gain.

Rule 3.854 renumbered effective January 1, 2007; adopted as rule 1620.4 effective January 1, 2003.

Advisory Committee Comment

Subdivision (a). The general law concerning mediation confidentiality is found in Evidence Code sections 703.5 and 1115–1128 and in cases interpreting those sections. (See, e.g., *Foxgate Homeowners' Association, Inc. v. Bramalea California, Inc.* (2001) 26 Cal.4th 1; *Rinaker v. Superior Court* (1998) 62 Cal.App.4th 155; and *Gilbert v. National Corp. for Housing Partnerships* (1999) 71 Cal.App.4th 1240.)

Rule 3.855. Impartiality, conflicts of interest, disclosure, and withdrawal

(a) Impartiality

A mediator must maintain impartiality toward all participants in the mediation process at all times.

(b) Disclosure of matters potentially affecting impartiality

(1) A mediator must make reasonable efforts to keep informed about matters that reasonably could raise a question about his or her ability to conduct the proceedings impartially, and must disclose these matters to the parties. These matters include:

(A) Past, present, and currently expected interests, relationships, and affiliations of a personal, professional, or financial nature; and

(B) The existence of any grounds for disqualification of a judge specified in Code of Civil Procedure section 170.1.

(2) A mediator's duty to disclose is a continuing obligation, from the inception of the mediation process through its completion. Disclosures required by this rule must be made as soon as practicable after a mediator becomes aware of a matter that must be disclosed. To the extent possible, such disclosures should be made before the first mediation session, but in any event they must be made within the time required by applicable court rules or statutes.

(Subd (b) amended effective January 1, 2007.)

(c) Proceeding if there are no objections or questions concerning impartiality

Except as provided in (f), if, after a mediator makes disclosures, no party objects to the mediator and no participant raises any question or concern about the mediator's ability to conduct the mediation impartially, the mediator may proceed.

(Subd (c) amended effective January 1, 2007.)

(d) Responding to questions or concerns concerning impartiality

If, after a mediator makes disclosures or at any other point in the mediation process, a participant raises a question or concern about the mediator's ability to conduct the mediation impartially, the mediator must address the question or concern with the participants. Except as provided in (f), if, after the question or concern is addressed, no party objects to the mediator, the mediator may proceed.

(Subd (d) amended effective January 1, 2007.)

(e) Withdrawal or continuation upon party objection concerning impartiality

In a two-party mediation, if any party objects to the mediator after the mediator makes disclosures or discusses a participant's question or concern regarding the mediator's ability to conduct the mediation impartially, the mediator must withdraw. In a mediation in which there are more than two parties, the mediator may continue the mediation with the nonobjecting parties, provided that doing so would not violate any other provision of these rules, any law, or any local court rule or program guideline.

(f) Circumstances requiring mediator recusal despite party consent

Regardless of the consent of the parties, a mediator either must decline to serve as mediator or, if already serving, must withdraw from the mediation if:

(1) The mediator cannot maintain impartiality toward all participants in the mediation process; or

(2) Proceeding with the mediation would jeopardize the integrity of the court or of the mediation process.

Rule 3.855 amended and renumbered effective January 1, 2007; adopted as rule 1620.5 effective January 1, 2003.

Advisory Committee Comment

Subdivision (b). This subdivision is intended to provide parties with information they need to help them determine whether a mediator can conduct the mediation impartially. A mediator's overarching duty under this subdivision is to make a "reasonable effort" to identify matters that, in the eyes of a reasonable person, could raise a question about the mediator's ability to conduct the mediation impartially, and to inform the parties about those matters. What constitutes a "reasonable effort" to identify such matters varies depending on the circumstances, including whether the case is scheduled in advance or received on the spot, and the information about the participants and the subject matter that is provided to the mediator by the court and the parties.

The interests, relationships, and affiliations that a mediator may need to disclose under (b)(1)(A) include: (1) prior, current, or currently expected service as a mediator in another mediation involving any of the participants in the present mediation; (2) prior, current, or currently expected business relationships or transactions between the mediator and any of the participants; and (3) the mediator's ownership of stock

or any other significant financial interest involving any participant in the mediation. Currently expected interests, relationships, and affiliations may include, for example, an intention to form a partnership or to enter into a future business relationship with one of the participants in the mediation.

Although (b)(1) specifies interests, relationships, affiliations, and matters that are grounds for disqualification of a judge under Code of Civil Procedure section 170.1, these are only examples of common matters that reasonably could raise a question about a mediator's ability to conduct the mediation impartially and, thus, must be disclosed. The absence of particular interests, relationships, affiliations, and section 170.1 matters does not necessarily mean that there is no matter that could reasonably raise a question about the mediator's ability to conduct the mediation impartially. A mediator must make determinations concerning disclosure on a case-by-case basis, applying the general criteria for disclosure under (b)(1).

Attorney mediators should be aware that under the section 170.1 standard, they may need to make disclosures when an attorney in their firm is serving or has served as a lawyer for any of the parties in the mediation. Section 170.1 does not specifically address whether a mediator must disclose when another member of the mediator's dispute resolution services firm is providing or has provided services to any of the parties in the mediation. Therefore, a mediator must evaluate such circumstances under the general criteria for disclosure under (b)(1)—that is, is it a matter that, in the eyes of a reasonable person, could raise a question about the mediator's ability to conduct the mediation impartially?

If there is a conflict between the mediator's obligation to maintain confidentiality and the mediator's obligation to make a disclosure, the mediator must determine whether he or she can make a general disclosure of the circumstance without revealing any confidential information, or must decline to serve.

Rule 3.856. Competence

(a) Compliance with court qualifications

A mediator must comply with experience, training, educational, and other requirements established by the court for appointment and retention.

(b) Truthful representation of background

A mediator has a continuing obligation to truthfully represent his or her background to the court and participants. Upon a request by any party, a mediator must provide truthful information regarding his or her experience, training, and education.

(c) Informing court of public discipline and other matters

A mediator must also inform the court if:

(1) Public discipline has been imposed on the mediator by any public disciplinary or professional licensing agency;

(2) The mediator has resigned his or her membership in the State Bar or another professional licensing agency while disciplinary or criminal charges were pending;

(3) A felony charge is pending against the mediator;

(4) The mediator has been convicted of a felony or of a misdemeanor involving moral turpitude; or

(5) There has been an entry of judgment against the mediator in any civil action for actual fraud or punitive damages.

(d) Assessment of skills; withdrawal

A mediator has a continuing obligation to assess whether or not his or her level of skill, knowledge, and ability is sufficient to conduct the mediation effectively. A mediator must decline to serve or withdraw from the mediation if the mediator determines that he or she does not have the level of skill, knowledge, or ability necessary to conduct the mediation effectively.

Rule 3.856 renumbered effective January 1, 2007; adopted as rule 1620.6 effective January 1, 2003.

Advisory Committee Comment

Subdivision (d). No particular advanced academic degree or technical or professional experience is a prerequisite for competence as a mediator. Core mediation skills include communicating clearly, listening effectively, facilitating communication among all participants, promoting exploration of mutually acceptable settlement options, and conducting oneself in a neutral manner.

A mediator must consider and weigh a variety of issues in order to assess whether his or her level of skill, knowledge, and ability is sufficient to make him or her effective in a particular mediation. Issues include whether the parties (1) were involved or had input in the selection of the mediator; (2) had access to information about the mediator's background or level of skill, knowledge, and ability; (3) have a specific expectation or perception regarding the mediator's level of skill, knowledge, and ability; (4) have expressed a preference regarding the style of mediation they would like or expect; or (5) have expressed a desire to discuss legal or other professional information, to hear a personal evaluation of or opinion on a set of facts as presented, or to be made aware of the interests of persons who are not represented in mediation.

Rule 3.857. Quality of mediation process

(a) Diligence

A mediator must make reasonable efforts to advance the mediation in a timely manner. If a mediator schedules a mediation for a specific time period, he or she must keep that time period free of other commitments.

(b) Procedural fairness

A mediator must conduct the mediation proceedings in a procedurally fair manner. "Procedural fairness" means a balanced process in which each party is given an

opportunity to participate and make uncoerced decisions. A mediator is not obligated to ensure the substantive fairness of an agreement reached by the parties.

(c) Explanation of process

In addition to the requirements of rule 3.853 (voluntary participation and self-determination), rule 3.854(a) (confidentiality), and (d) of this rule (representation and other professional services), at or before the outset of the mediation the mediator must provide all participants with a general explanation of:

(1) The nature of the mediation process;

(2) The procedures to be used; and

(3) The roles of the mediator, the parties, and the other participants.

(Subd (c) amended effective January 1, 2007.)

(d) Representation and other professional services

A mediator must inform all participants, at or before the outset of the first mediation session, that during the mediation he or she will not represent any participant as a lawyer or perform professional services in any capacity other than as an impartial mediator. Subject to the principles of impartiality and self-determination, a mediator may provide information or opinions that he or she is qualified by training or experience to provide.

(e) Recommending other services

A mediator may recommend the use of other services in connection with a mediation and may recommend particular providers of other services. However, a mediator must disclose any related personal or financial interests if recommending the services of specific individuals or organizations.

(f) Nonparticipants' interests

A mediator may bring to the attention of the parties the interests of others who are not participating in the mediation but who may be affected by agreements reached as a result of the mediation.

(g) Combining mediation with other ADR processes

A mediator must exercise caution in combining mediation with other alternative dispute resolution (ADR) processes and may do so only with the informed consent of the parties and in a manner consistent with any applicable law or court order. The mediator must inform the parties of the general natures of the different processes and the consequences of revealing information during any one process that might be used for decision making in another process, and must give the parties the opportunity to select another neutral for the

subsequent process. If the parties consent to a combination of processes, the mediator must clearly inform the participants when the transition from one process to another is occurring.

(h) Settlement agreements

Consistent with (d), a mediator may present possible settlement options and terms for discussion. A mediator may also assist the parties in preparing a written settlement agreement, provided that in doing so the mediator confines the assistance to stating the settlement as determined by the parties.

(Subd (h) amended effective January 1, 2007.)

(i) Discretionary termination and withdrawal

A mediator may suspend or terminate the mediation or withdraw as mediator when he or she reasonably believes the circumstances require it, including when he or she suspects that:

(1) The mediation is being used to further illegal conduct;

(2) A participant is unable to participate meaningfully in negotiations; or

(3) Continuation of the process would cause significant harm to any participant or a third party.

(j) Manner of withdrawal

When a mediator determines that it is necessary to suspend or terminate a mediation or to withdraw, the mediator must do so without violating the obligation of confidentiality and in a manner that will cause the least possible harm to the participants.

Rule 3.857 amended and renumbered effective January 1, 2007; adopted as rule 1620.7 effective January 1, 2003.

Advisory Committee Comment

Subdivision (c). The explanation of the mediation process should include a description of the mediator's style of mediation.

Subdivision (d). Subject to the principles of impartiality and self-determination, and if qualified to do so, a mediator may (1) discuss a party's options, including a range of possible outcomes in an adjudicative process; (2) offer a personal evaluation of or opinion on a set of facts as presented, which should be clearly identified as a personal evaluation or opinion; or (3) communicate the mediator's opinion or view of what the law is or how it applies to the subject of the mediation, provided that the mediator does not also advise any participant about how to adhere to the law or on what position the participant should take in light of that opinion.

One question that frequently arises is whether a mediator's assessment of claims, defenses, or possible litigation outcomes constitutes legal advice or the practice of law. Similar questions may arise when accounting, architecture, construction, counseling, medicine, real estate, or other licensed professions are relevant to a mediation. This rule does not determine what constitutes the practice of law or any other licensed profession. A mediator should be cautious when providing any information or opinion related to any field for which a professional license is required, in order to avoid doing so in a manner that may constitute the practice of a profession for which the mediator is not licensed, or in a manner that may violate the regulations of a profession that the mediator is licensed to practice. A mediator should exercise particular caution when discussing the law with unrepresented parties and should inform such parties that they may seek independent advice from a lawyer.

Subdivision (i). Subdivision (i)(2) is not intended to establish any new responsibility or diminish any existing responsibilities that a mediator may have, under the Americans With Disabilities Act or other similar law, to attempt to accommodate physical or mental disabilities of a participant in mediation.

Rule 3.858. Marketing

(a) Truthfulness

A mediator must be truthful and accurate in marketing his or her mediation services. A mediator is responsible for ensuring that both his or her own marketing activities and any marketing activities carried out on his or her behalf by others comply with this rule.

(b) Representations concerning court approval

A mediator may indicate in his or her marketing materials that he or she is a member of a particular court's panel or list but, unless specifically permitted by the court, must not indicate that he or she is approved, endorsed, certified, or licensed by the court.

(c) Promises, guarantees, and implications of favoritism

In marketing his or her mediation services, a mediator must not:

(1) Promise or guarantee results; or

(2) Make any statement that directly or indirectly implies bias in favor of one party or participant over another.

(d) Solicitation of business

A mediator must not solicit business from a participant in a mediation proceeding while that mediation is pending.

Rule 3.858 renumbered effective January 1, 2007; adopted as rule 1620.8 effective January 1, 2003.

Advisory Committee Comment

Subdivision (d). This rule is not intended to prohibit a mediator from accepting other employment from a participant while a mediation is pending, provided that there was no express solicitation of this business by the mediator and that accepting that employment does not contravene any other provision of these rules, including the obligations to maintain impartiality, confidentiality, and the integrity of the process. If other employment is accepted from a participant while a mediation is pending, however, the mediator may be required to disclose this to the parties under rule 3.855.

This rule also is not intended to prohibit a mediator from engaging in general marketing activities. General marketing activities include, but are not limited to, running an advertisement in a newspaper and sending out a general mailing (either of which may be directed to a particular industry or market).

Rule 3.859. Compensation and gifts

(a) Compliance with law

A mediator must comply with any applicable requirements concerning compensation established by statute or the court.

(b) Disclosure of and compliance with compensation terms

Before commencing the mediation, the mediator must disclose to the parties in writing any fees, costs, or charges to be paid to the mediator by the parties. A mediator must abide by any agreement that is reached concerning compensation.

(c) Contingent fees

The amount or nature of a mediator's fee must not be made contingent on the outcome of the mediation.

(Subd (c) amended effective January 1, 2007.)

(d) Gifts and favors

A mediator must not at any time solicit or accept from or give to any participant or affiliate of a participant any gift, bequest, or favor that might reasonably raise a question concerning the mediator's impartiality.

Rule 3.859 amended and renumbered effective January 1, 2007; adopted as rule 1620.9 effective January 1, 2003.

Advisory Committee Comment

Subdivision (b). It is good practice to put mediation fee agreements in writing, and mediators are strongly encouraged to do so; however, nothing in this rule is intended to preclude enforcement of a compensation agreement for mediation services that is not in writing.

Subdivision (d). Whether a gift, bequest, or favor "might reasonably raise a question concerning the mediator's impartiality" must be determined on a case-by-case basis. This subdivision is not intended to

prohibit a mediator from accepting other employment from any of the participants, consistent with rule 3.858(d).

Rule 3.860. Attendance sheet and agreement to disclosure

(a) Attendance sheet

In each mediation to which these rules apply under rule 3.851(a), the mediator must request that all participants in the mediation complete an attendance sheet stating their names, mailing addresses, and telephone numbers; retain the attendance sheet for at least two years; and submit it to the court on request.

(Subd (a) amended effective January 1, 2007.)

(b) Agreement to disclosure

The mediator must agree, in each mediation to which these rules apply under rule 3.851(a), that if an inquiry or a complaint is made about the conduct of the mediator, mediation communications may be disclosed solely for purposes of a complaint procedure conducted pursuant to rule 3.865 to address that complaint or inquiry.

(Subd (b) amended effective January 1, 2011; previously amended effective January 1, 2007.)

Rule 3.860 amended effective January 1, 2011; adopted as rule 1621 effective January 1, 2006; previously amended and renumbered effective January 1, 2007.

Article 3. Requirements for Addressing Complaints About Court-Program Mediators

Division 8, Alternative Dispute Resolution—Chapter 3, General Rules Relating to Mediation of Civil Cases—Article 3, Requirements for Addressing Complaints About Court-Program Mediators; adopted effective July 1, 2009, effective date extended to January 1, 2010.

Rule 3.865. Application and purpose

(a) Application

The rules in this article apply to each superior court that makes a list of mediators available to litigants in general civil cases or that recommends, selects, appoints, or compensates a mediator to mediate any general civil case pending in that court. A court that approves the parties' agreement to use a mediator who is selected by the parties and who is not on the court's list of mediators or that memorializes the parties' agreement in a court order has not thereby recommended, selected, or appointed that mediator within the meaning of this rule.

(Subd (a) amended and lettered effective January 1, 2010; previously adopted as part of unlettered subd effective July 1, 2009; effective date extended to January 1, 2010.)

(b) Purpose

These rules are intended to promote the resolution of complaints that mediators in court-connected mediation programs for civil cases may have violated a provision of the rules of conduct for such mediators in article 2. They are intended to help courts promptly resolve any such complaints in a manner that is respectful and fair to the complainant and the mediator and consistent with the California mediation confidentiality statutes.

(Subd (b) lettered effective January 1, 2010; previously adopted as part of unlettered subd effective July 1, 2009; effective date extended to January 1, 2010.)

Rule 3.865 amended effective January 1, 2010; adopted effective July 1, 2009, effective date extended to January 1, 2010.

Advisory Committee Comment

As used in this article, complaint means a written communication presented to a court's complaint coordinator indicating that a mediator may have violated a provision of the rules of conduct for mediators in article 2.

Complaints about mediators are relatively rare. To ensure the quality of court mediation panels and public confidence in the mediation process and the courts, it is, nevertheless, important to ensure that any complaints that do arise are resolved through procedures that are consistent with California mediation confidentiality statutes (Evid. Code, §§ 703.5 and 1115 et seq.), as well as fair and respectful to the interested parties.

The requirements and procedures in this article do not abrogate or limit a court's inherent or other authority, in its sole and absolute discretion, to determine who may be included on or removed from a court list of mediators; to approve or revoke a mediator's eligibility to be recommended, selected, appointed, or compensated by the court; or to follow other procedures or take other actions to ensure the quality of mediators who serve in the court's mediation program in contexts other than when addressing a complaint. The failure to follow a requirement or procedure in this article will not invalidate any action taken by the court in addressing a complaint.

Rule 3.866. Definitions

As used in this article, unless the context or subject matter requires otherwise:

(1) "The rules of conduct" means rules 3.850–3.860 of the California Rules of Court in article 2.

(2) "Court-program mediator" means a person subject to the rules of conduct under rule 3.851.

(3) "Inquiry" means an unwritten communication presented to the court's complaint coordinator indicating that a mediator may have violated a provision of the rules of conduct.

(4) "Complaint" means a written communication presented to the court's complaint coordinator indicating that a mediator may have violated a provision of the rules of conduct.

(5) "Complainant" means the person who makes or presents a complaint.

(6) "Complaint coordinator" means the person designated by the presiding judge under rule 3.867(a) to receive complaints and inquiries about the conduct of mediators.

(7) "Complaint committee" means a committee designated or appointed to investigate and make recommendations concerning complaints under rule 3.869(d)(2).

(8) "Complaint procedure" means a procedure for presenting, receiving, reviewing, responding to, investigating, and acting on any inquiry or complaint.

(9) "Complaint proceeding" means all of the proceedings that take place as part of a complaint procedure concerning a specific inquiry or complaint.

(10) "Mediation communication" means any statement that is made or any writing that is prepared for the purpose of, in the course of, or pursuant to a mediation or a mediation consultation, as defined in Evidence Code section 1115, and includes any communications, negotiations, and settlement discussions between participants in the course of a mediation or a mediation consultation.

Rule 3.866 adopted effective July 1, 2009, effective date extended to January 1, 2010.

Advisory Committee Comment

Paragraph (2). Under rule 3.851, the rules of conduct apply when a mediator, or a firm with which a mediator is affiliated, has agreed to be included on a superior court's list or panel of mediators for general civil cases and is notified by the court or the parties that he or she has been selected to mediate a case within that court's mediation program or when a mediator has agreed to mediate a general civil case after being notified that he or she was recommended, selected, or appointed by a court, or will be compensated by a court, to mediate a case within a court's mediation program.

Paragraphs (3) and (4). The distinction between "inquiries" and "complaints" is significant because some provisions of this article apply only to complaints (i.e., written communications presented to the

court's complaint coordinator indicating that a mediator may have violated a provision of the rules of conduct) and not to inquiries.

Rule 3.867. Complaint coordinator

(a) Designation of the complaint coordinator

The presiding judge must designate a person who is knowledgeable about mediation to serve as the complaint coordinator.

(Subd (a) amended and lettered effective July 1, 2009, effective date extended to January 1, 2010; adopted as unlettered subd effective January 1, 2006.)

(b) Identification of the complaint coordinator

The court must make the complaint coordinator's identity and contact information readily accessible to litigants and the public.

(Subd (b) adopted effective July 1, 2009, effective date extended to January 1, 2010.)

Rule 3.867 amended and renumbered effective July 1, 2009, effective date extended to January 1, 2010; adopted as rule 1622.1 effective January 1, 2006; previously amended and renumbered as rule 3.866 effective January 1, 2007.

Advisory Committee Comment

The alternative dispute resolution program administrator appointed under rule 10.783(a) may also be appointed as the complaint coordinator if that person is knowledgeable about mediation.

Rule 3.868. Complaint procedure required

Each court to which this article applies under rule 3.865 must establish a complaint procedure by local rule of court that is consistent with this article.

Rule 3.868 amended and renumbered effective July 1, 2009, effective date extended to January 1, 2010; adopted as rule 1622 effective January 1, 2003; previously amended effective January 1, 2006; previously amended and renumbered as rule 3.865 effective January 1, 2007.

Rule 3.869. General requirements for complaint procedures and complaint proceedings

(a) Submission and referral of inquiries and complaints to the complaint coordinator

All inquiries and complaints should be submitted or referred to the complaint coordinator.

(b) Acknowledgment of complaint

The complaint coordinator must send the complainant a written acknowledgment that the court has received the complaint.

(c) Preliminary review and disposition of complaints

The complaint coordinator must conduct a preliminary review of all complaints to determine whether the complaint can be informally resolved or closed, or whether the complaint warrants investigation.

(d) Procedure for complaints not resolved through the preliminary review

The following procedures are required only if a complaint is not resolved or closed through the preliminary review.

(1) *Mediator's notice and opportunity to respond*

The mediator must be given notice of the complaint and an opportunity to respond.

(2) *Investigation and recommendation*

(A) Except as provided in (B), the complaint must be investigated and a recommendation concerning court action on the complaint must be made by either an individual who has experience as a mediator and who is familiar with the rules of conduct stated in article 2 or a complaint committee that has at least one such individual as a member.

(B) A court with eight or fewer authorized judges may waive the requirement in (A) for participation by an individual who has experience as a mediator in conducting the investigation and making the recommendation if the court cannot find a suitable qualified individual to perform the functions described in (A) or for other grounds of hardship.

(3) *Final decision*

The final decision on the complaint must be made by the presiding judge or his or her designee, who must not be the complaint coordinator or an individual who investigated the complaint before its submission for final decision.

(e) Notice of final action

(1) The court must send the complainant notice of the final action taken by the court on the complaint.

(2) If the complaint was not closed during the preliminary review, the court must send notice of the final action to the mediator.

(f) Promptness

The court must process complaints promptly at all stages.

(g) Records of complaints

The court should maintain sufficient information about each complaint and its disposition to identify any history or patterns of complaints submitted under these rules.

Rule 3.869 adopted effective July 1, 2009, effective date extended to January 1, 2010.

Advisory Committee Comment

The Administrative Office of the Courts has developed model local rules that satisfy the requirements of this rule. These model local rules were developed with input from judicial officers, court administrators, alternative dispute resolution (ADR) program administrators, court-program mediators, and public commentators and are designed so that they can be readily adapted to the circumstances of individual courts and specific complaints. Courts are encouraged to adopt rules that follow the model rules, to the extent feasible. Courts can obtain copies of these model rules from civil ADR program staff at the Administrative Office of the Courts.

Subdivision (a). Coordination of inquiries and complaints by a person knowledgeable about mediation is important to help ensure that the requirements of this article are followed and that mediation confidentiality is preserved.

Subdivision (c). Courts are encouraged to resolve inquiries and complaints about mediators using the simplest, least formal procedures that are appropriate under the circumstances, provided that they meet the requirements stated in this article.

Most complaints can be appropriately resolved during the preliminary review stage of the complaint process, through informal discussions between or among the complaint coordinator, the complainant, and the mediator. Although complaint coordinators are not required to communicate with the mediator during the preliminary review, they are encouraged to consider doing so. For example, some complaints may arise from a misunderstanding of the mediator's role or from behavior that would not violate the standards of conduct. These types of complaints might appropriately be addressed by providing the complainant with additional information or by informing the mediator that certain behavior was upsetting to a mediation participant.

The circumstances under which a complaint coordinator might informally resolve or close a complaint include, for example, when (1) the complaint is withdrawn; (2) no violation of the rules of conduct appears to have occurred; (3) the alleged violation of the rules of conduct is very minor and the mediator has provided an acceptable explanation or response; and (4) the complainant, the mediator, and the complaint coordinator have agreed on a resolution. In determining whether to close a complaint, the complaint coordinator might also consider whether there are or have been other complaints about the mediator.

Subdivision (d). At the investigation and recommendation stage, all courts are encouraged to consider using a complaint committee comprised of members with a variety of backgrounds, including at least one person with experience as a mediator, to investigate and make recommendations concerning those rare complaints that are not resolved during the preliminary review.

Courts are also encouraged to have a judicial officer who is knowledgeable about mediation, or a committee that includes another person who is knowledgeable about mediation, make the final decision on complaints that are not resolved through the preliminary review.

Rule 3.870. Permissible court actions on complaints

After an investigation has been conducted, the presiding judge or his or her designee may do one or more of the following:

(1) Direct that no action be taken on the complaint;

(2) Counsel, admonish, or reprimand the mediator;

(3) Impose additional training requirements as a condition of the mediator remaining on the court's panel or list;

(4) Suspend the mediator from the court's panel or list or otherwise temporarily prohibit the mediator from receiving future mediation referrals from the court; or

(5) Remove the mediator from the court's panel or list or otherwise prohibit the mediator from receiving future mediation referrals from the court.

Rule 3.870 adopted effective July 1, 2009, effective date extended to January 1, 2010.

Advisory Committee Comment

This rule does not abrogate or limit any existing legal right or duty of the court to take other actions, including interim suspension of a mediator pending final action by the court on a complaint.

Rule 3.871. Confidentiality of complaint proceedings, information, and records

(a) Intent

This rule is intended to:

(1) Preserve the confidentiality of mediation communications as required by Evidence Code sections 1115–1128;

(2) Promote cooperation in the reporting, investigation, and resolution of complaints about court-program mediators; and

(3) Protect mediators against damage to their reputations that might result from the disclosure of unfounded complaints against them.

(Subd (a) amended effective July 1, 2009, effective date extended to January 1, 2010; previously amended effective January 1, 2007.)

(b) Preserving the confidentiality of mediation communications

All complaint procedures and complaint proceedings must be designed and conducted in a manner that preserves the confidentiality of mediation communications, including but not limited to the confidentiality of any communications between the mediator and individual mediation participants or subgroups of mediation participants.

(Subd (b) amended effective July 1, 2009, effective date extended to January 1, 2010.)

(c) Confidentiality of complaint proceedings

All complaint proceedings must occur in private and must be kept confidential. No information or records concerning the receipt, investigation, or resolution of an inquiry or a complaint may be open to the public or disclosed outside the course of the complaint proceeding except as provided in (d) or as otherwise required by law.

(Subd (c) amended effective July 1, 2009, effective date extended to January 1, 2010; previously amended effective January 1, 2007.)

(d) Authorized disclosures

After the decision on a complaint, the presiding judge, or a person whom the presiding judge designates to do so, may authorize the public disclosure of information or records concerning the complaint proceeding that do not reveal any mediation communications. The disclosures that may be authorized under this subdivision include the name of a mediator against whom action has been taken under rule 3.870, the action taken, and the general basis on which the action was taken. In determining whether to authorize the disclosure of information or records under this subdivision, the presiding judge or the designee should consider the purposes of the confidentiality of complaint proceedings stated in (a)(2) and (a)(3).

(Subd (d) amended effective July 1, 2009, effective date extended to January 1, 2010; previously amended effective January 1, 2007.)

(e) Disclosures required by law

In determining whether the disclosure of information or records concerning a complaint proceeding is required by law, courts should consider the purposes of the confidentiality of complaint proceedings stated in (a). If it appears that the disclosure of information or records concerning a complaint proceeding that would reveal mediation communications is required by law, before the information or records are disclosed, notice should be given to any person whose mediation communications may thereby be revealed.

(Subd (e) amended effective July 1, 2009, effective date extended to January 1, 2010; previously amended effective January 1, 2007.)

Rule 3.871 amended and renumbered effective July 1, 2009, effective date extended to January 1, 2010; adopted as rule 1622.2 effective January 1, 2006; previously amended and renumbered as rule 3.867 effective January 1, 2007.

Advisory Committee Comment

Under rule 3.866(9), the complaint proceedings covered by this rule include proceedings to address inquiries as well as complaints (i.e., to unwritten as well as written communications indicating that a mediator may have violated a provision of the rules of conduct).

Subdivision (a). See Evidence Code sections 1115 and 1119 concerning the scope and types of mediation communications protected by mediation confidentiality. Rule 3.871 is intended to supplement the confidentiality of mediation communications established by the Evidence Code by ensuring that disclosure of information or records about a complaint proceeding does not reveal confidential mediation communications. Rule 3.871 is not intended to supersede or abrogate the confidentiality of mediation communications established by the Evidence Code.

Subdivision (b). Private meetings, or "caucuses," between a mediator and subgroups of participants are common in court-connected mediations, and it is frequently understood that these communications will not be disclosed to other participants in the mediation. (See Cal. Rules of Court, rule 3.854(c).) It is important to protect the confidentiality of these communications in complaint proceedings so that one participant in the mediation does not learn what another participant discussed in confidence with the mediator without the consent of the participants in the caucus communication.

Subdivisions (c)–(e). The provisions of (c)–(e) that authorize the disclosure of information and records related to complaint proceedings do not create any new exceptions to mediation confidentiality. Although public disclosure of information and records about complaint proceedings that do not reveal mediation communications may be authorized under (d), information and records that *would* reveal mediation communications may be publicly disclosed only as required by law (e.g., in response to a subpoena or court order) and consistent with the statutes and case law governing mediation confidentiality. A person who is knowledgeable about California's mediation confidentiality laws should determine whether the disclosure of mediation communications is required by law.

Evidence Code sections 915 and 1040 establish procedures and criteria for deciding whether information acquired in confidence by a public employee in the course of his or her duty is subject to disclosure. These sections may be applicable or helpful in determining whether the disclosure of information or records acquired by judicial officers, court staff, and other persons in the course of a complaint proceeding is required by law or should be authorized in the discretion of the presiding judge.

Rule 3.872. Disqualification from subsequently serving as an adjudicator

A person who has participated in a complaint proceeding or otherwise received information about the substance of a complaint, other than information that is publicly disclosed under rule 3.871(d), must not subsequently hear or determine any contested issue of law, fact, or procedure concerning the dispute that was the subject of the underlying mediation or any other dispute that arises from the mediation as a judge, an arbitrator, a referee, or a juror, or in any other adjudicative capacity, in any court action or proceeding.

Rule 3.872 amended and renumbered effective July 1, 2009, effective date extended to January 1, 2010; adopted as rule 1622.3 effective January 1, 2006; previously amended and renumbered as rule 3.868 effective January 1, 2007.

Advisory Committee Comment

Persons who participated in a complaint proceeding are prohibited from subsequently adjudicating the dispute that was the subject of the underlying mediation or any other dispute that arises from the mediation because they may have learned of confidential mediation communications that were disclosed in the complaint proceeding or may have been influenced by what transpired in that proceeding. Because the information that can be disclosed publicly under rule 3.871(d) is limited and excludes mediation communications, it is unnecessary to disqualify persons who received only publicly disclosed information from subsequently adjudicating the dispute.

Chapter 4. Civil Action Mediation Program Rules

Rule 3.890. Application

The rules in this chapter implement the Civil Action Mediation Act, Code of Civil Procedure section 1775 et seq. Under section 1775.2, they apply in the Superior Court of California, County of Los Angeles and in other courts that elect to apply the act.

Rule 3.890 renumbered effective July 1, 2009; adopted as rule 1630 effective March 1, 1994; previously amended and renumbered as rule 3.870 effective January 1, 2007.

Rule 3.891. Actions subject to mediation

(a) Actions that may be submitted to mediation

The following actions may be submitted to mediation under these provisions:

(1) *By court order*

Any action in which the amount in controversy, independent of the merits of liability, defenses, or comparative negligence, does not exceed $50,000 for each plaintiff. The court must determine the amount in controversy under Code of Civil Procedure section 1775.5. Determinations to send a case to mediation must be made

by the court after consideration of the expressed views of the parties on the amenability of the case to mediation. The court must not require the parties or their counsel to personally appear in court for a conference held solely to determine whether to send their case to mediation.

(2) *By stipulation*

Any other action, regardless of the amount of controversy, in which all parties stipulate to such mediation. The stipulation must be filed not later than 90 days before trial unless the court permits a later time.

(Subd (a) amended effective January 1, 2007.)

(b) Case-by-case determination

Amenability of a particular action for mediation must be determined on a case-by-case basis, rather than categorically.

(Subd (b) amended effective January 1, 2007.)

Rule 3.891 renumbered effective July 1, 2009; adopted as rule 1631 effective March 1, 1994; previously amended and renumbered as rule 3.871 effective January 1, 2007.

Rule 3.892. Panels of mediators

Each court, in consultation with local bar associations, ADR providers, and associations of providers, must identify persons who may be appointed as mediators. The court must consider the criteria in standard 10.72 of the Standards of Judicial Administration and California Code of Regulations, title 16, section 3622, relating to the Dispute Resolution Program Act.

Rule 3.892 renumbered effective July 1, 2009; adopted as rule 1632 effective March 1, 1994; previously amended and renumbered as rule 3.872 effective January 1, 2007.

Rule 3.893. Selection of mediators

The parties may stipulate to any mediator, whether or not the person selected is among those identified under rule 3.892, within 15 days of the date an action is submitted to mediation. If the parties do not stipulate to a mediator, the court must promptly assign a mediator to the action from those identified under rule 3.892.

Rule 3.893 amended effective January 1, 2011; adopted as rule 1633 effective March 1, 1994; previously amended and renumbered as rule 3.873 effective January 1, 2007; previously renumbered effective July 1, 2009.

Rule 3.894. Attendance, participant lists, and mediation statements

(a) Attendance

(1) All parties and attorneys of record must attend all mediation sessions in person unless excused or permitted to attend by telephone as provided in (3). If a party is not a natural person, a representative of that party with authority to resolve the dispute or, in the case of a governmental entity that requires an agreement to be approved by an elected official or a legislative body, a representative with authority to recommend such agreement, must attend all mediation sessions in person, unless excused or permitted to attend by telephone as provided in (3).

(2) If any party is insured under a policy of insurance that provides or may provide coverage for a claim that is a subject of the action, a representative of the insurer with authority to settle or recommend settlement of the claim must attend all mediation sessions in person, unless excused or permitted to attend by telephone as provided in (3).

(3) The mediator may excuse a party, attorney, or representative from the requirement to attend a mediation session under (1) or (2) or permit attendance by telephone. The party, attorney, or representative who is excused or permitted to attend by telephone must promptly send a letter or an electronic communication to the mediator and to all parties confirming the excuse or permission.

(4) Each party may have counsel present at all mediation sessions that concern the party.

(Subd (a) amended effective January 1, 2007; adopted as untitled subd effective March 1, 1994.)

(b) Participant lists and mediation statements

(1) At least five court days before the first mediation session, each party must serve a list of its mediation participants on the mediator and all other parties. The list must include the names of all parties, attorneys, representatives of a party that is not a natural person, insurance representatives, and other persons who will attend the mediation with or on behalf of that party. A party must promptly serve a supplemental list if the party subsequently determines that other persons will attend the mediation with or on behalf of the party.

(2) The mediator may request that each party submit a short mediation statement providing information about the issues in dispute and possible resolutions of those issues and other information or documents that may appear helpful to resolve the dispute.

(Subd (b) adopted effective January 1, 2007.)

Rule 3.894 renumbered effective July 1, 2009; adopted as rule 1634 effective March 1, 1994; previously amended and renumbered as rule 3.874 effective January 1, 2007; previously amended effective January 1, 2007.

Rule 3.895. Filing of *Statement of Agreement or Nonagreement* by mediator

Within 10 days after conclusion of the mediation, or by another date set by the court, the mediator must complete, serve on all parties, and file a *Statement of Agreement or Nonagreement* (form ADR-100). If the mediation has not ended when the report is filed, the mediator must file a supplemental form ADR-100 within 10 days after the mediation is concluded or by another date set by the court. The completed form ADR-100 must not disclose the terms of any agreement or any other communications or conduct that occurred in the course of the mediation, except as allowed in Evidence Code sections 1115–1128.

Rule 3.895 amended effective July 1, 2012; adopted as rule 1635 effective March 1, 1994; previously amended and renumbered as rule 3.875 effective January 1, 2007; previously renumbered effective July 1, 2009.

Rule 3.896. Coordination with Trial Court Delay Reduction Act

(a) Effect of mediation on time standards

Submission of an action to mediation under the rules in this chapter does not affect time periods specified in the Trial Court Delay Reduction Act (Gov. Code, § 68600 et seq.), except as provided in this rule.

(Subd (a) amended effective January 1, 2007.)

(b) Exception to delay reduction time standards

On written stipulation of the parties filed with the court, the court may order an exception of up to 90 days to the delay reduction time standards to permit mediation of an action. The court must coordinate the timing of the exception period with its delay reduction calendar.

(Subd (b) amended effective January 1, 2007.)

(c) Time for completion of mediation

Mediation must be completed within 60 days of a reference to a mediator, but that period may be extended by the court for up to 30 days on a showing of good cause.

(Subd (c) amended and lettered effective January 1, 2007; adopted as part of subd (b) effective March 1, 1994.)

(d) Restraint in discovery

The parties should exercise restraint in discovery while a case is in mediation. In appropriate cases to accommodate that objective, the court may issue a protective order under Code of Civil Procedure section 2017(c) and related provisions.

(Subd (d) amended and lettered effective January 1, 2007; adopted as part of subd (b) effective March 1, 1994.)

Rule 3.896 renumbered effective July 1, 2009; adopted as rule 1637 effective March 1, 1994; previously amended and renumbered as rule 3.876 effective January 1, 2007.

Rule 3.898. Educational material

Each court must make available educational material, adopted by the Judicial Council, or from other sources, describing available ADR processes in the community.

Rule 3.898 renumbered effective July 1, 2009; adopted as rule 1639 effective March 1, 1994; previously amended and renumbered as rule 3.878 effective January 1, 2007.

INFORMATION AND AGREEMENT FOR COURT- PROGRAM MEDIATION OF CIVIL CASE

SUPERIOR COURT OF CALIFORNIA, COUNTY OF

MEDIATOR:

PLAINTIFF/PETITIONER:

DEFENDANT/RESPONDENT:

CASE NUMBER:

1. **Agreement.** The parties, mediator, and other participants agree that the mediation in the above-described case will be conducted as provided below.
2. **Nature of the mediation process and roles of the participants.** Mediation is a process in which a neutral person or persons ("the mediator") facilitate communication between the parties to a dispute to help them reach a mutually acceptable agreement.
   a. **Decision making.** Any resolution of a dispute in mediation requires a voluntary agreement of the parties. The mediator does not decide whether or how the dispute is to be resolved.
   b. **Mediation procedures.** Mediators use a variety of techniques and procedures to help the parties reach an agreement. These may include joint sessions with all participants and private, or "caucus" sessions between the mediator and individual participants or groups of participants. In these sessions, the participants discuss their views of the dispute and possible resolutions with each other and the mediator. The mediator may sometimes suggest settlement options or terms for discussion or communicate his or her evaluation, opinion, or assessment of the parties' claims, defenses, or positions. However, it remains the parties' responsibility to decide whether and on what terms to settle. If a settlement is reached, the mediator may sometimes help the parties prepare a written settlement agreement.
   c. **Legal and other professional advice.** During the mediation the mediator will not represent any participant as a lawyer or perform professional services in any capacity other than as an impartial mediator. If any parties are represented by attorneys at the mediation, it is the attorneys' role to provide legal advice to their clients. If any parties are not represented by attorneys at the mediation, they may seek independent advice from lawyers before concluding an agreement.
3. **Mediator impartiality.** The mediator will maintain impartiality toward all participants in the mediation at all times. If the mediator cannot maintain impartiality, he or she will withdraw from the mediation. The mediator will also disclose any matters that reasonably could raise a question about his or her ability to conduct the proceedings impartially and that are now known or that become known to the mediator during the mediation. *(Check a or check and complete b.)*
   a. ☐ On the date of this agreement, the mediator does not know of any matters that reasonably could raise a question about his or her ability to conduct the mediation impartially.
   b. ☐ The mediator discloses the following matters, and no party objects to the mediator conducting the mediation for these reasons. *(State the known matters that reasonably may raise a question about the mediator's ability to impartially conduct the proceedings, below or in Attachment 3b.)*
4. **General rule of mediation confidentiality.** To promote communication in mediation, California Evidence Code sections 703.5 and 1115–1128 establish the confidentiality and limit the disclosure, admissibility, and court's consideration of communications, writings, and conduct in connection with a mediation. In general, they provide:
   a. All communications, negotiations, or settlement offers in the course of a mediation must remain confidential;
   b. Statements made and writings prepared in connection with a mediation are not admissible or subject to discovery or compelled disclosure in noncriminal proceedings;
   c. A mediator's report, opinion, recommendation, or finding about what occurred in a mediation may not be submitted to or considered by a court or another adjudicative body; and
   d. A mediator cannot testify in any subsequent civil proceeding about any communication or conduct occurring at or in connection with a mediation.
5. **Confidentiality of separate communications.** *(Check and complete a or b.)*
   a. ☐ The mediator will not communicate about the dispute privately or in caucus with any mediation participant.
   b. ☐ If the mediator communicates separately or in caucus with one or more participants outside the presence of other participants *(check one):*
      (1) ☐ The mediator may disclose any caucus communications to other participants in the mediation.
      (2) ☐ The mediator may disclose any caucus communications to other participants in the mediation unless a participant in the caucus expressly requests (verbally or in writing) that the communication not be disclosed.
      (3) ☐ The mediator may not disclose any caucus communications to other participants in the mediation without the express (verbal or written) permission of the caucus participants.

Form Adopted for Mandatory Use
Judicial Council of California
ADR-108 [New January 1, 2006]

Evidence Code, § 1115 et seq;
Cal. Rules of Court, rule 1620 et seq.
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PLAINTIFF/PETITIONER: DEFENDANT/RESPONDENT:	CASE NUMBER:

6. **General exceptions to mediation confidentiality.** Mediation communications, writings, and mediator reports may be disclosed if all participants in the mediation agree to this in writing. Mediation communications, conduct, and mediator reports may also be disclosed, discovered, considered, or admitted in evidence, and a mediator may be compelled to testify, in criminal proceedings. In a few cases, courts have determined that mediators were also required to testify about mediation communications or conduct in noncriminal proceedings when the court determined that the reasons for mediation confidentiality were outweighed by constitutional or other important considerations.

7. **Agreed-on exceptions to mediation confidentiality.**
   a. **Rule 1622 proceedings.** Rule 1622 of the California Rules of Court requires courts to have procedures for addressing complaints against mediators who are on their lists or panels or whom they recommend, select, appoint, or compensate. Rules 1622.1 and 1622.2 establish the confidentiality of these complaint procedures. If the mediation participants do not agree that mediation communications may be disclosed in a rule 1622 proceeding, the court's ability to address questions or complaints about the mediator's conduct, and the mediator's ability to respond to questions or complaints, may be limited by the mediation confidentiality statutes.

   The mediators and the participants who sign below indicating their agreement to item 7 agree that, in the event a complaint or inquiry is made about the conduct of the mediator, mediation communications may be disclosed solely for the purpose of enabling the court to investigate or resolve the complaint.

   b. ☐ **Other agreed-on exceptions.** The participants agree that mediation communications, writings, and conduct also may be disclosed in the following situations *(describe below or in Attachment 7b):*

8. **Mediator compensation.** Mediator's fees, costs, and other charges to the parties
   a. ☐ have previously been disclosed to the parties in writing.
   b. ☐ are set forth on Attachment 8b.
   c. ☐ are as follows *(state fees, costs, and other charges):*

9. ☐ **Additional provisions.** The mediator and mediation participants also acknowledge or agree to the additional provisions set forth in Attachment 9. *(If applicable, set forth additional matters in Attachment 9.)*

THE COURT REQUESTS, BUT DOES NOT REQUIRE, THAT ALL MEDIATION PARTICIPANTS SIGN BELOW, ACKNOWLEDGING THE INFORMATION ABOVE AND AGREEING TO THE DISCLOSURE OF MEDIATION COMMUNICATIONS SET FORTH IN ITEM 7A .

(TYPE OR PRINT NAME OF PARTICIPANT)	I acknowledge the information above and ☐ agree ☐ do not agree to item 7a. ▶	(SIGNATURE)
(TYPE OR PRINT NAME OF PARTICIPANT)	I acknowledge the information above and ☐ agree ☐ do not agree to item 7a. ▶	(SIGNATURE)
(TYPE OR PRINT NAME OF PARTICIPANT)	I acknowledge the information above and ☐ agree ☐ do not agree to item 7a. ▶	(SIGNATURE)
(TYPE OR PRINT NAME OF PARTICIPANT)	I acknowledge the information above and ☐ agree ☐ do not agree to item 7a. ▶	(SIGNATURE)
(TYPE OR PRINT NAME OF PARTICIPANT)	I acknowledge the information above and ☐ agree ☐ do not agree to item 7a. ▶	(SIGNATURE)

10. ☐ **Additional signatures.** Additional signatures are attached.

11. **Mediator agreement and statement.** The mediator agrees to the above provisions, including the disclosure of mediation communications set forth in item 7a. The mediator also affirms that he or she has presented this information and agreement form to all participants in the mediation and that *(check one)*
    a. ☐ all participants have signed this form or a signature attachment.
    b. ☐ not all participants have signed this form or a signature attachment.

Date:

(TYPE OR PRINT NAME OF MEDIATOR)	▶ (SIGNATURE OF MEDIATOR)